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AND INDIAN TERRITORY.

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WITH TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE
COURT OF CIVIL APPEALS.

A TABLE OF STATUTES CONSTRUED IS GIVEN
IN THE INDEX.

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COURT RULES.

SUPREME COURT OF MISSOURI.

Adopted at the April Term, 1891.

CHIEF JUSTICE, HIS DUTY.

Rule 1. The Chief Justice shall superintend matters of order in the court room.

MOTIONS TO BE WRITTEN, SIGNED AND FILED.

Rule 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

ARGUMENT OF MOTIONS.

Rule 3. No motion shall be argued unless by the direction of the court.

DIMINUTION OF RECORD, SUGGESTION AFTER JOINDER IN ERROR.

Rule 4. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

APPLICATION FOR CERTIORARI.

Rule 5. Whenever a certiorari may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

REVIEWING INSTRUCTIONS.

Rule 6. For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

BILL OF EXCEPTIONS IN EQUITY CASES.

Rule 7. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dis-

pute as to the admissibility or legal effect thereof; and provided further that parol evidence may be reduced to a narrative form, where this can be done and at the same time preserve full force and effect of the evidence.

PRESUMPTION IN SUPPORT OF BILL OF EXCEPTIONS.

Rule 8. The only purpose of a statement, in a bill of exceptions, that it set out all the evidence in the cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

MAKING UP TRANSCRIPTS.

Rule 9. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading or part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

WORDS "APPELLANT" AND "RESPONDENT," WHAT THEY INCLUDE.

Rule 10. Whenever the words "appellant" and "respondent" appear in these rules they shall be taken to mean and include plaintiff

and defendant in error and other parties occupying like positions in a cause.

ABSTRACTS IN LIEU OF TRANSCRIPT, WHEN FILED AND SERVED.

Rule 11. In those cases where the appellant shall, under the provisions of section 2253, Rev. St. 1889, file in the court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time. (As amended February 28, 1895.)

ABSTRACTS, WHEN FILED AND SERVED.

Rule 12. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file ten copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

ABSTRACTS, WHAT THEY SHALL CONTAIN.

Rule 13. The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence,

the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

PRINTED TRANSCRIPTS.

Rule 14. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record; and in all cases ten printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

BRIEFS, WHAT TO CONTAIN AND WHEN SERVED.

Rule 15. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain, separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the pages where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

FAILURE TO COMPLY WITH RULES 11, 12, 13 AND 15.

Rule 16. If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at the option of the respondent continue the cause at the cost of the party in default.

COSTS, WHEN ALLOWED FOR PRINTING ABSTRACTS AND RECORDS.

Rule 17. Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Rev. St. 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order, or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record in lieu of an abstract, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as prima facie evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

SERVICE OF ABSTRACTS AND BRIEFS.

Rule 18. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

SERVICE OF ABSTRACTS AND BRIEFS, IN CRIMINAL CASES.

Rule 19. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the Supreme Court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the Attorney General, and, thereupon the Attorney General shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed

thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney General his brief and statement five days before the hearing.

TAKING RECORD FROM CLERK'S OFFICE.

Rule 20. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court; provided any enrolled attorney may withdraw the record in any cause in which he is counsel for the purpose of having the same printed in full by filing with the clerk of this court the written consent of the adverse party or his attorney and also a receipt, agreeing to return such record within the time to be named therein.

MOTIONS FOR REHEARING.

Rule 21. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, either in division or in banc, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

EXTENSION OF TIME.

Rule 22. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

NOTICE TO ADVERSE PARTY.

Rule 23. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such

motion, satisfy the court that such notice has been given.

Rule 24. A motion to transfer a cause under the provisions of the constitution from either division to court in banc must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in rule 22.

RETURN OF ORIGINAL WRITS.

Rule 25. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the court in banc as such division or judge in vacation may order.

ASSIGNMENT OF MOTIONS IN CIVIL CAUSES.

Rule 26. All motions and matters in civil cases which have not been assigned by the court in banc to a division for final determination, upon the record, shall be presented to, heard and determined by the court in banc. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

ASSIGNMENT OF CRIMINAL CAUSES.

Rule 27. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

WHEN APPEAL IS RETURNABLE—CERTIFICATE OF JUDGMENT—TRANSCRIPT.

Rule 28. In all cases where appeals shall be taken or writs of error sued out to this court after January 1, 1902, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof a certificate of judgment, as provided by section 813, Rev. St. 1899, within the time by said section provided, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Rev. St. 1899. (Adopted at October sitting, 1901.)

Rule 29. All rules not included in the foregoing enumeration are hereby rescinded.

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WRITS OF ERROR

WERE DENIED BY THE

SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE

COURT OF CIVIL APPEALS

PRIOR TO JUNE 8, 1903.

[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

FIRST DISTRICT.

Thweatt v. Houston, E. & W. T. R. Co., 71 S. W. 976.

SECOND DISTRICT.

Barber v. Geer, 71 S. W. 792.
Deleshaw v. Edelen, 72 S. W. 413.

THIRD DISTRICT.

St. Louis S. W. Ry. Co. of Texas v. McArthur, 70 S. W. 317.
Southern Cotton Oil Co. v. State, 72 S. W. 1135.

FOURTH DISTRICT.

Galveston, H. & S. A. R. Co. v. Baumgarten, 72 S. W. 78.
Moor v. Moor, 71 S. W. 794.

THE SOUTHWESTERN REPORTER.

VOLUME 73.

MOORE v. ROGAN, Land Com'r.

(Supreme Court of Texas. March 30, 1903.)
PUBLIC LANDS—CANCELLATION OF AWARD—
SUFFICIENCY OF PETITION.

1. A petition for mandamus against the Commissioner of the General Land Office to command him to rescind his action in canceling a purchase of public land, made under Act Feb. 23, 1900, p. 32, c. 11, § 6, providing for the sale of public school fund land out of tracts of 2,560 acres or less, which fails to show that the land sought to be purchased was out of a tract of 2,560 acres or less, is insufficient.

2. When the Commissioner of the General Land Office has inadvertently accepted an application for the purchase of land not authorized to be sold, he has a right to cancel an award made under the application.

Application for mandamus, on relation of G. T. Moore, against Chas. Rogan, Commissioner of the General Land Office. Application denied.

Ashby S. James, E. H. Yeiser, and A. C. Wilmoth, for relator. O. K. Bell, Atty. Gen., T. S. Reese, Asst. Atty. Gen., West & Cochran, and E. Cartledge, for respondent.

BROWN, J. Moore instituted this proceeding in this court to secure a writ of mandamus against Charles Rogan, Commissioner of the General Land Office, commanding him to rescind his action in canceling a purchase made by relator of two sections of land described in the petition, and to reinstate the contract of purchase, and to notify the Treasurer of the State of Texas of his action in the premises, so that the relator might make his payments according to his obligations and as required by law.

The petition alleges, in substance, that on the 1st day of March, 1901, the relator, a citizen of Borden county, Tex., made application to the district surveyor of Howard county land district to survey for him certain public domain situated in Borden county. This application was made under the provision of chapter 11 of the General Laws of the First Called Session of the Twenty-Sixth Legislature, p. 29. A deputy surveyor of said district, in compliance with said application, surveyed two tracts, one being No. 4, in block T, containing 640 acres, classified by him as dry agricultural land, the other

being No. 6 in the same block, containing 341 acres, classified as dry grazing. The surveyor certified and recorded the field notes and plats of the surveys, and on the 25th day of March, 1901, returned the application of the relator for the survey and the field notes of the two tracts surveyed thereunder to the Commissioner of the General Land Office at Austin. On the 18th day of January, 1902, the Commissioner of the General Land Office approved the surveys, classified No. 4 as dry agricultural land valued at \$1.50 per acre, and No. 6 as dry grazing land valued at \$1 per acre, and notified Moore that he was entitled to purchase the land, whereupon Moore forwarded his application to purchase section 4, upon which he was then residing as an actual settler, and another application to purchase section 6, which was within a radius of five miles of section 4, as land in addition to his home section. Moore was an actual settler in good faith upon section 4, and complied with the law in making his application, in executing his obligation, and in making payment upon each tract sought to be purchased. The Commissioner of the General Land Office accepted the applications for the purchase of each of said sections, and awarded the land to Moore. On March 6, 1902, the said Commissioner canceled the award that had been made to Moore, caused the Treasurer of the State to cancel the same on his records, and rejected the applications to purchase the land, assigning as a reason that it had been previously leased and was still subject to the lease, which was in force and in good standing. Before the applications were made by Moore, the land had been leased to O. T. Boyd for a term to expire August 12, 1902. Moore was the first to make application for the purchase of the land, and no one had a preference right to purchase the same. The petition does not allege that the tract of land out of which the surveys were made contained 2,560 acres or less, nor what number of acres it embraced. Relator claims in his petition that the provision of the law which created the absolute lease district, in which the land in question lies, did not apply to public domain, and that the lease constituted no legal barrier to his

purchase. It is also alleged that if that law did apply to the land, then the act of 1900, under which the purchase was made, authorized the sale of the land notwithstanding the lease.

Charles Rogan's term of office expired after the petition was filed, and J. J. Terrell, having been elected and qualified as his successor, filed his answer in this cause, in which he demurs generally to the relator's petition, and, specially excepting to the said petition, says "that it is insufficient, since it does not appear by the allegation of the petition that the surveys or sections of land referred to were out of a tract containing 2,500 acres or less, nor does it appear what was the size of the tract of land out of which the tracts applied for by relator were surveyed." The respondent pleads specially that the tract of land out of which it was sought to purchase the land in question contained more than 2,500 acres, which is not denied.

The allegations of the relator's petition show that the land in question was a part of the public domain, which was transferred to the public free school fund by an act of the First Called Session of the Twenty-Sixth Legislature, entitled "An act to define the public school fund," etc., approved February 23, 1900 (Laws 1900, p. 29, c. 11). The petition shows that the land was not subject to sale by the Commissioner of the General Land Office by the proceeding which the relator adopted, unless it was embraced in the provisions of the following section of the above-recited act:

"Sec. 6. Any person desiring to purchase any portion of the land herein appropriated to the public school fund out of a tract containing 2500 acres, or less, shall first make to the surveyor of the county or district in which the land, or a part thereof, is situated, written application, signed and sworn to by the said applicant, giving his postoffice address, and designating the land he desires to purchase by metes and bounds, as near as practicable, and stating that he desires to have said lands surveyed with the intention of purchasing the same, and that he is not acting in collusion with or attempting to acquire said land for any other person, stating therein whether or not he is claiming any preference right to purchase, and the nature of such preference right. It shall be the duty of the surveyor to file and record such application, and, within sixty days of the filing thereof, to survey said land in accordance with the direction of the Commissioner of the General Land Office, into a section or sections, of one mile square each, whenever practicable, in case one or more sections are applied for; and in all cases such land shall be surveyed in a square or rectangular shape whenever practicable, and within thirty days of the date of said survey the surveyor shall certify to, record and plat the field notes of the same, and return same

and the application to the General Land Office, and he shall state whether or not the land is agricultural, grazing or timbered, and if timbered the probable value of the land. The applicant shall pay to the surveyor one dollar for filing and recording said application, and shall pay such other fees as are now or may be provided by law for surveying lands. If the Commissioner of the General Land Office finds that the field notes are correct, and that the survey has been made according to law, he shall at once approve and file said field notes, and classify and value the land as the law requires, and notify, by mail, the applicant that the land is on the market for sale, stating the classification and the value thereof; and within sixty days of the mailing of said notice the applicant shall make application and affidavit to purchase said land, describe said land sought to be purchased in accordance with field notes approved by the Commissioner of the General Land Office and make first payment to the State Treasurer, and execute his obligation for the unpaid purchase money in the manner provided by law for surveyed school lands; provided, if the lands sought to be purchased is detached lands, as defined in section 5 of this act, the affidavit shall not be required to state that he desires the same for a home or that he is actually settled thereon." Laws 2d Called Sess. 26th Leg. p. 32, c. 11.

The allegations of the petition do not show that the land sought to be purchased was a part of a tract embracing 2,500 acres or less, and, having failed to allege that the land was embraced in the terms of section 6, above quoted, the relator shows no right in himself to purchase, nor power in the Commissioner to sell, the land.

The validity of the lease to Boyd is immaterial, since the relator must fail for want of a right in himself to buy. The Commissioner, having inadvertently exercised authority over the land which the law did not give him, had the right to cancel the void contract which he made with the relator.

The application for writ of mandamus is denied, and the cost of this proceeding will be taxed against the relator.

ROBERSON v. STERRETT.

(Supreme Court of Texas. March 30, 1903.)
SCHOOL LANDS—ADDITIONAL—FORFEITURE—RESIDENCE.

1. The forfeiture provided by Batts' Ann. Civ. St. art. 4218ff, where a purchaser of school lands buys additional lands, and sells any of the tracts before the three years residence is completed, if the vendee does not reside thereon till completion of the three years' occupancy, does not apply to a purchaser under article 4218ff, providing that an owner of and resident on any other lands contiguous to said lands may buy any of the aforesaid lands, but in such case a failure to reside on his other lands or on the additional lands so purchased by him, so as to make his ownership and occu-

pancy thereof continuous for three years, shall work a forfeiture of such additional lands, unless he shall have sold his land to another, who may and does complete three years' ownership and occupancy of and residence on his said lands; but under the latter article the purchaser's residence for three years on his original land is enough, without residence by any one on the additional land, though he sells the additional land before completion of the three years' residence.

Additional opinion.

For former opinion, see 71 S. W. 385.

GAINES, C. J. Our opinion in this case was written upon a motion for a rehearing of an application for a writ of error. The labors of the court are such as to preclude our writing opinions upon the refusal of writs of error, except upon rare occasions. Upon such occasions we have time only to make such remarks as are necessary to prevent a misconception of our ruling. Such opinions are therefore brief. Our purpose in writing the opinion in this case was merely to distinguish it from another which had been very recently decided by this court, and which was cited and relied upon to sustain the motion for a rehearing. However, we have been led to believe that our opinion has given rise to some perplexity in the minds of those charged with the administration of the laws for the sale of the public school and asylum lands, and, therefore, we consider it appropriate to state more fully the grounds upon which it was based.

The act of May 7, 1897, which provides for the sale and lease of the public free school and asylum lands, contains two sections which are incorporated in Batts' Annotated Revised Civil Statutes as articles 4218ff and 4218fff. They read as follows:

"Art. 4218ff. When any purchaser buys and settles upon a section or part of a section of school lands, and buys, either at the same time or subsequently, other lands in addition thereto, a forfeiture for any legal cause of the part on which he resides, at any time before the three years residence has been completed, shall work a forfeiture of the entire purchase, except such part thereof as he may have previously sold to another. But after the three years residence has been completed, a forfeiture of the home tract shall not of itself work a forfeiture of the other tract or tracts. In case of sale of any of said tracts before the three years residence has been completed, the vendee must reside thereon until he has completed the three years occupancy from the date of the original purchase, and a failure to do so shall subject his land to forfeiture; but in case of sale of any of said tracts after the completion of the three years residence, the vendee shall be exempt from the condition of settlement and occupancy.

"Art. 4218fff. Any actual, bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the afore-

said lands, but in such case a failure to reside upon either his other lands or upon a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years, shall work a forfeiture of such additional lands so bought from the state, unless he shall have sold his land to another who may and does complete a three years continuous ownership and occupancy of and residence upon his said lands as above stated and as is herein required of actual settlers."

It is obvious that the first of these articles applies to those who have purchased a section or a part of a section of school lands, and who have subsequently or at the same time bought an additional section; and that the second applies only to those who have bought additional lands as the owners of lands other than school lands.

Sterrett, in whose favor the judgment was rendered in the Court of Civil Appeals, bought the section in controversy in this suit under the latter article. He bought the additional section, not as a purchaser of school lands, but as the owner of "other lands." Article 4218fff clearly contemplates that such purchaser may perfect his title to the additional lands purchased by him by the continued residence for three years upon his original land or upon the lands so purchased; and it would seem that he is allowed to tack his occupancy of the purchased land to that of the land originally owned by him in order to make up the designated period, provided there is no lapse between the two. In the event he fails to make such continued residence and occupancy, the law provides that his purchase shall work a forfeiture, and this is the only forfeiture prescribed in that article. The language, "unless he shall have sold his land to another who may and does complete a three years continuous ownership and occupancy of and residence upon his said lands as above stated and as is herein acquired of actual settlers," seems to have been intended to give the purchaser the privilege of selling at least his original lands and abandoning his occupancy without the forfeiture of any right, provided his vendee should complete the occupancy in his place. This very clearly implies that, sale or no sale, there shall be no forfeiture, in case either the original purchaser or his vendee shall continue and complete the three years residence either upon the land originally owned or upon that purchased from the state. This article does not contain the provision found in the next preceding one, which applies to purchasers of school lands who have bought, either at the time of their original purchase or subsequently, additional lands. In regard to the sale of such additional lands by such purchasers, that article provides: "In case of sale of any of said tracts before the three years residence has been completed, the vendee must reside thereon until he has completed the three years occupancy from the date

of the original purchase, and a failure to do so shall subject his land to forfeiture," etc. That is an express provision that, in case of a sale by the original purchaser of lands purchased as additional to a purchase of a home section of school lands, the failure of his vendee to occupy and continue to reside upon the land so purchased by him shall subject his land to forfeiture to the state. Article 4218fff contains no such provision, and that omission indicates, to our minds, that it was not the intention that such rule should apply to a sale of additional lands purchased from the state by one as the owner of lands other than school lands, as provided for in that article. It precludes us from deducing such construction from the purpose and spirit of the entire article. However difficult it may be to assign a satisfactory reason why a different rule should be laid down in the two classes of cases, still it is apparent a different rule is provided, and it is not proper for the courts to declare that a forfeiture has been suffered where it is provided for neither by express words nor by clear implication.

Article 4218k contains this provision: "Purchasers may also sell their lands, or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this chapter, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by this chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon." This was a section of the act of 1895, to which articles 4218ff and 4218fff were added as amendatory thereof. Whether it should be construed to apply to a purchaser under article 4218fff, we need not determine in this case. It may be that when Sterrett sold to Lazarus, the latter had the right under this section to make the affidavit and substitute his obligations for those of his vendor, and that in such a case the land

so purchased would have been forfeited by his failure to occupy and reside upon it. But he did not place himself in the position of an original purchaser.

Our former opinion in this case intimates, at least, that, as between Sterrett and Lazarus, no title passed by the attempted sale. The determination of that point was not necessary to a decision of the case. Sterrett never abandoned his original land, but continued his residence upon it for more than three years after he purchased the section of school land in controversy. Therefore, under article 4218fff, by virtue of which he made his purchase, no forfeiture accrued, although his deed to Lazarus may have been effectual to transfer his right in the land attempted to be conveyed.

It is ordered that this opinion be filed as an addendum to our former opinion.

BETTS v. JOHNSON et al.

(Supreme Court of Texas. March 30, 1903.)

MANDAMUS—JURISDICTION OF SUPREME COURT—SCHOOL OFFICERS.

1. Rev. St. 1895, art. 946, providing that the Supreme Court may issue writs of mandamus against any officer of the state government except the Governor, being article 1012 of Act April 13, 1892 (Laws 1892, p. 21, c. 14), which provides for the organization of the Supreme Court under the amendment of Const. art. 5, and carefully limits the jurisdiction thereof, does not empower the Supreme Court to issue a writ of mandamus against the Board of Eclectic Medical Examiners, they not being state officers within the meaning of the act.

Motion to file petition for mandamus, on relation of W. H. Betts, against G. W. Johnson and others. Motion overruled.

See 71 S. W. 1134.

Hill, Dobney & Carlton, for the motion.

GAINES, C. J. This is a motion to file a petition for a writ of mandamus to compel respondents, as constituting the Board of Eclectic Medical Examiners for the state of Texas, to issue to him a license to practice medicine.

We are of the opinion that we cannot lawfully grant a writ of mandamus in such a case. Our jurisdiction to grant writs of mandamus is defined by statute in the following terms: "The Supreme Court, or any justice thereof, shall have power to issue writs of habeas corpus as may be prescribed by law; and the said court, or the justices thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court; and in term time or vacation may issue writs of quo warranto or mandamus against any district judge or officer of the state government, except the Governor of the state." Rev. St. 1895, art. 946. The words "officers of the state government" are of a very indefinite meaning. All county and district officers are officers of the state government in a general sense, but

we have held that they are not such within the meaning of the statute in question. *Travis County v. Jourdan*, 91 Tex. 217, 42 S. W. 543. Whether every officer of the state whose functions are not confined to a political subdivision of the state comes within the meaning of the terms, we have never decided. It would seem, however, that it was the purpose of the Legislature to include only such state officers as are charged with the general administration of state affairs, namely, the heads of the state departments. At the time the act under consideration was passed, there was a statute in force which prohibited suits for mandamus against the head of departments of the state government; and in the case of *McKenzie v. Baker*, 88 Tex. 669, 32 S. W. 1038, it was held that, notwithstanding this law, article 946 of the Revised Statutes of 1895 conferred jurisdiction upon this court to issue such writs against such officers. This suggests the thought that it was a main purpose of the article to supply the deficiency, and to authorize the Supreme Court to issue the writ only in cases in which the district courts had no power to issue it. Incidentally, it was provided that this court might issue the writ to a district judge—probably for the reason that it was thought that one such judge should not issue the writ to another judge of the same dignity. It is true, as argued, that if such had been the intention it would have been easy to have said simply, "head of departments of the state government," instead of "officer of the state government"; yet the latter words, to our minds, are strongly suggestive that they were intended to have the same meaning.

Article 946 of the Revised Statutes of 1895, now in force, is article 1012 of the act of April 13, 1892 (Laws 1892, p. 21, c. 14), which provided for the organization of the Supreme Court, and defined its jurisdiction under amended article 5 of the Constitution. Before the amendment of that article and the passage of that act, the Supreme Court, with the aid of two commissions, had been unable to dispose of the appeals which were brought to it. The purpose of the amendment was to correct this evil by providing for a sufficient number of courts of civil appeals to dispose of the business in the first instance. So as to avoid the very evil which it was the object of the amendment to correct, the act of April 13, 1892, very carefully limited the jurisdiction of the Supreme Court. It would seem, therefore, that the Legislature did not intend to confer original jurisdiction upon this court except in cases where there existed some special reason for its exercise. We can see a reason why the court should have been empowered to grant writs of mandamus against the heads of the departments of the state government. These officers must reside, and their offices must be kept, at the seat of the state government, and their official functions are to be performed there. A

mandamus proceeding against the head of a department, as a rule, involves questions which are of general public interest and call for a speedy determination. That they are of far more importance than those ordinarily arising in mandamus suits against other officers, whether of the state, or of a district, or a county, is, as we think, obvious.

We fail to see any very good and sufficient reason why the Legislature should have deemed it appropriate to confer original jurisdiction upon this court to grant a writ of mandamus against executive officers, other than those intrusted with the general administration of state affairs and who exercise general governmental functions. Others are officers in a certain sense, but in another sense they are mere agents charged with the performance of special functions. The district courts have jurisdiction to issue the writ of mandamus to all other officers except heads of departments, and, as in other cases, appeals are allowable for the correction of the errors of those tribunals. Therefore we think the Legislature might have well considered that it was neither necessary nor proper to give the Supreme Court jurisdiction to issue the writ of mandamus against such officers.

But the writ applied for in this case is against a board of officers, and not against an officer. It seems that, if it had been the purpose to empower this court to issue the writ as well against a board of officers as against a single officer, the language would have been, "any officer or board of officers of the state government."

For these reasons, the motion to file the petition for the writ of mandamus is overruled.

MAGNOLIA PARK CO. et al. v. TINSLEY et al.

(Supreme Court of Texas. March 26, 1903.)

APPEAL—DECISION ON FORMER APPEAL—TRUSTS—INNOCENT PURCHASER.

1. The decision of a question of law on a former appeal, on which a judgment declaring the rights of the parties was not rendered, is not binding on a second appeal.

2. Shares of stock and other articles of property were conveyed in trust; the trustee being authorized to manage, rent, lease, or sell any of the property; the rents and proceeds of sale of any or all of it to be divided by her among the cestuis que trustent. *Held*, that the trustee, by securing partition of the land of the company in which were the shares of stock, whereby the interest of the trustor was allotted to her, converted the stock into real estate, and held the land under the same trust that attached to the stock, with power to sell and convey it.

3. An innocent purchaser from one holding land on a secret trust is protected against it.

Certified questions from Court of Civil Appeals of First Supreme Judicial District.

Action by Charles Tinsley and others against the Magnolia Park Company and others. Judgment for plaintiffs. Defendants ap-

pealed to the Court of Civil Appeals, which certifies questions. Questions answered.

Ewing & Ring, for appellants. Jacob C. Baldwin and Rowe & Rowe, for appellees.

BROWN, J. Certified questions from the Court of Civil Appeals for the First District, as follows:

"This was an action by Charles Tinsley and others against the Magnolia Park Company for the recovery of an undivided interest in 109 acres of land situated in Harris county. The plaintiffs pleaded the facts constituting their title to the land, and prayed, in the alternative, if they could not recover against the Magnolia Park Company, who claimed to be an innocent purchaser thereof, for judgment against the devisees of John T. Brady, who was the remote vendor of said company, and whose devisees had been made parties to the suit. The cause was submitted to a jury upon special issues, and, upon the answers of the jury, judgment was entered in favor of the plaintiffs for an undivided interest of 64 $\frac{1}{2}$ acres in the land, and commissioners were appointed to partition the same. This is the second appeal in this case. The first was from a judgment in favor of the defendants, when the cause was transferred by the Supreme Court from this court to the Court of Civil Appeals for the Third District, at Austin. That court reversed the judgment of the court below, with an opinion which will be found reported in 59 S. W. 629.

"(1) By deed of April 18, 1866, Robert Lockhart and others conveyed to John T. Brady 2,000 acres of land, of which that in controversy is a part. One-half of the purchase money was paid in cash, and the balance was evidenced by several promissory notes, for the payment of which a vendor's lien was reserved in the deed.

"(2) By instrument of date December 27, 1866, Brady conveyed said tract of land above mentioned to W. P. Hamblen. The purpose of this deed is shown by the following extracts from it:

"Now be it known that this conveyance is made in trust for the objects and purposes set forth as follows, viz.:

"Whereas the said I. T. Tinsley and associates, for himself and for such other persons as he may associate with him as stockholders in the stock company hereafter described, have purchased said lands and premises hereafter described for the purpose of laying off and subdividing same into blocks, lots and squares, avenues and roads, at his and their option, in such manner as to be suitable for a town site to be called and known by the name of New Houston, to be owned and enjoyed as such or any other purpose by the said Tinsley, his associates, successors or assigns, in the manner and form of a stock company on the following basis:

"First, the name and style of said com-

pany shall be the New Houston City Company.

"Second, the capital stock of the said company shall be one million (\$1,000,000) dollars, divided into shares of one hundred (\$100) dollars each; all stock certificates shall be signed by the president and countersigned by the secretary of said company, which shall be transferable by assignment made by the owner of the same or by his authority, in such manner as the by-laws of the said company may provide.

"Third, that the business of said company and the affairs thereof shall be managed and controlled by a board of not less than three (3) nor more than seven (7) directors who shall be elected by the stockholders. * * * The said W. P. Hamblen, as trustee aforesaid, shall hold and convey the hereinbefore described land for the uses and benefits of the stockholders of said company, and to that end the said trustee is authorized and empowered, for the said use and benefit, to sell, lease and mortgage all or any part of said land and premises. * * *

"This instrument was filed for record January 3, 1867.

"(3) After the conveyance to Hamblen, and the record thereof, suit was brought by the holders of the vendor's lien notes—some of the notes having passed into the hands of third parties—against J. T. Brady for recovery thereon, with foreclosure of lien. Brady alone was made defendant, and neither Hamblen nor I. T. Tinsley and associates, nor any of the beneficiaries in the trust, were parties to the suit. Judgment was rendered against J. T. Brady for the amount of the notes and foreclosing the lien on November 28, 1868, in the district court of Harris county, in favor of the holders thereof; two of them being vendors of the land, and the others parties to whom notes had been transferred. The land was sold by virtue of an order of sale issued upon said judgment, and was bought by the Young Men's Mutual Real Estate & Building Association for the sum of \$19,500, and the deed from the sheriff to said association was duly executed and recorded.

"(4) Suit was brought in the circuit court of the United States by Isaac T. Tinsley and other stockholders of the New Houston Company against the Young Men's Mutual Real Estate & Building Association to set aside the sale and the sheriff's deed. This suit was compromised September 9, 1873, by each party taking an undivided one-half interest in the land, and deeds were exchanged. The deed executed by the Young Men's Mutual Real Estate & Building Association to the stockholders of the New Houston City Company contained the following:

"Whereas the said compromise and settlement was made evident by a certain decree entered in said cause, the said appeal being first withdrawn, and also by a certain agreement and conveyance of this date between Isaac T. Tinsley, William Brady, John

T. Brady, Simon Mussina, William P. Hamblen, John Duncan, George Williams and N. P. Turner as stockholders in said New Houston City Company, and O. K. King & Co., complainant, and W. C. Watts as intervener in said suit: Now therefore, in consideration of said compromise and settlement so made and evidenced by said decree and by said agreement and conveyance, each of which are to be taken as part of this deed for explanation, the Young Men's Mutual Real Estate & Building Association, acting through its proper officers and under its corporate seal, has granted, bargained, sold, aliened and conveyed, and by this instrument doth grant, bargain, sell, alien and convey unto the said stockholders of the said New Houston City Company, and to their respective heirs and assigns, the following described land and premises, to wit: One-half of that certain tract of land,' etc., * * * known as New Houston and so mapped and recorded * * * to have and to hold one undivided one-half of said land until the same is hereafter partitioned and divided in the manner pointed out in said decree and in said agreement and conveyance hereinbefore referred to, and made a part hereof, the said Y. M. M. R. E. & B. Association retaining the other undivided one-half of said land until the same is divided * * * to have and to hold the same unto the said stockholders of the New Houston City Company, their heirs and assigns, to their own proper use and behalf.'

"(5) On March 18, 1874, Isaac T. Tinsley died, leaving surviving him his wife, Mary A. Tinsley, and their seven children, Joseph M., Charles A., Samuel P., Isaac Henderson, and William E. Tinsley, and Callie T., wife of John T. Brady, and Annie, wife of Thos. H. Westall, but who, after the death of her then husband, became the wife of Abraham Cross. Isaac T. Tinsley was the owner of a large estate, including 1,700 shares of the stock of the New Houston City Company. On the day before his death he settled with his wife for her community interest in this estate, and, dividing his part thereof, he conveyed to each of his children a portion. This disposed of all but a small part, including the above-mentioned stock, and in disposing of this remainder he executed the following instrument:

"'State of Texas, County of Brazoria. Know all men by these presents, that I, Isaac T. Tinsley, for and in consideration of a natural love and affection I have for my wife, Mary A. Tinsley, and my children, viz.: Joseph M. Tinsley, Charles A. Tinsley, Samuel P. Tinsley, Isaac H. Tinsley, Callie T. Brady, wife of J. T. Brady, Annie E. Westall, wife of Thomas H. Westall, and William E. Tinsley, do grant, bargain, and sell, release and convey, and by these presents have granted, sold, released and conveyed unto the said Mary A. Tinsley the following described property, viz.: The eastern

half of lot 7, in block 16, in the city of Houston, with the building and improvements thereon, the same fronting twenty-five feet on Commerce street and running back 100 feet. One share of stock standing in my name in the Young Men's Real Estate and Building Association. And twenty-one shares of stock in my name in the Houston Gaslight Company. Also 1,700 shares of stock in the New Houston City Company. To have and to hold the above mentioned and described property unto my said wife, Mary A. Tinsley, her heirs and assigns forever, in trust, however, for my said children. The said Mary A. Tinsley is hereby authorized to manage, rent, lease and sell any or all of said property, the rents, reserves and proceeds of sale of any or all of said property to be divided by her equally among my said children. Given under my hand this, the 18th day of March, 1874. I. T. Tinsley. Witnesses: J. T. Brady, T. H. Westall.'

"This instrument was proved for record by J. T. Brady, as a subscribing witness, on March 21, 1874, and was duly recorded May 5, 1874, in vol. 13, p. 263, of the Records of Deeds of Harris County.

"(6) On March 18, 1874, by a deed reciting a consideration of \$1,500, J. M. Tinsley, one of the seven children of Isaac T. Tinsley, conveyed to his mother, Mary A. Tinsley, all of his interest in 'all the property mentioned and described in the deed executed by Isaac T. Tinsley to Mary A. Tinsley, in trust for certain purposes therein mentioned, and dated March 18, 1874, and recorded in Harris County Record of Deeds, vol. 13, page 263.'

"(7) In 1880 John T. Brady, as attorney for Mary A. Tinsley, brought a suit in the district court of Harris county, styled, 'No. 10,189. Mary A. Tinsley v. Young Men's Mutual Real Estate and Building Association et al.' for partition of the land of the New Houston City Company. The suit was brought against the Young Men's Mutual Real Estate & Building Association and unknown owners, and E. P. Hamblen, Esq., was appointed by the court to represent the latter as attorney ad litem. C. W. Watts, E. D. Butler, J. T. and Wm. Brady, W. P. Hamblen, N. P. Turner, and John Duncan either intervened or were brought in as parties. On April 10, 1880, a decree of partition was rendered, which recited that the unknown defendants were represented by E. P. Hamblen, Esq., 'an attorney of this court appointed by the court at a former day to represent the unknown owners.' The decree adjudged the interests of the several parties in the land, giving to Mary A. Tinsley a share thereof amounting to 209 acres, and a share thereof amounting to 267 acres was adjudged to the unknown defendants. Commissioners were appointed to make partition, and their report was confirmed by the court. The decree of confirmation recited that the commissioners were appointed to partition the land in controversy among the parties to the

suit and the unknown defendants, and, among other things, adjudged 'that the part or parcels so set apart to each of said parties respectively in said report be vested in said party to whom it is so set apart, and be divested out of all the other parties to this suit, including the unknown defendants, and the part or portions so set aside to the unknown defendants, or the owners of the unknown shares or certificates of stock in the New Houston City Company, is vested in such unknown parties, and divested out of the other parties to this suit.' In making the partition the share of Mary A. Tinsley was set apart to her in two tracts, one containing 100 acres and the other containing 109 acres.

"(8) The partition suit was brought at the instance of, and with the knowledge and approbation of, the beneficiaries in the trust deed; and, in bringing the suit, Mary A. Tinsley represented them. Within a short time after the decree of partition had been confirmed, the children of Isaac T. Tinsley and their mother, Mary A. Tinsley, who owned the share of Joseph M. Tinsley, agreed on a partition between themselves of the two tracts of land set apart by the decree to Mary A. Tinsley. John T. Brady was present and participated in this partition. By this partition S. P. Tinsley, William E. Tinsley, and Annie Cross (formerly Westall) were each to receive specific shares of 28 acres out of the 100-acre tract as their shares, and Mary A. Tinsley was to get the remaining 16 acres thereof, as a part of the share conveyed to her by Joseph M. Tinsley. The remaining 12 acres of her share she was to receive out of the 109-acre tract, as an undivided interest thereof. Charles A. Tinsley, Isaac Henderson Tinsley, and John T. Brady, Jr. (he being the only surviving heir of his mother, Callie T. Brady, who died January 23, 1879) were each to have their undivided equal interests in the remainder of the 109-acre tract, being $32\frac{1}{3}$ acres each. The specific interests of the parties in the 100-acre tract were conveyed by Mary A. Tinsley, as agreed, by deeds executed in 1881, which were duly acknowledged and recorded; and she conveyed in the same year to George Herman the 16 acres reserved for herself, by a deed duly acknowledged and recorded. By a deed dated October 21, 1881, recorded November 5, 1881, Mary A. Tinsley conveyed to John T. Brady, as trustee for his son John T. Brady, Jr., a specific tract of 28 acres out of the 109-acre tract, described by metes and bounds; and on the same day, by deed, recorded, also, November 5, 1881, she also conveyed to John T. Brady all of the remainder of said tract of 109 acres of land for a recited consideration of \$730. It thus appears that Charles Tinsley and Isaac Henderson Tinsley were the only ones of the seven children whose shares in the land were not specifically conveyed and set apart to them. The partition deeds referred by recitals to the original deed of trust. The

fair market value of the land at the date of the sale to John T. Brady was \$10 an acre, but there was no evidence, except the recital in the deed, that Brady ever paid the purchase money, \$730. At the time of the conveyance Isaac Henderson Tinsley was of unsound mind, but was not so when the partition was agreed on. The jury found that Mary A. Tinsley intended to convey the interests of Charles A. Tinsley and Isaac Henderson Tinsley in the land to John T. Brady in trust for them, and did so to protect the interest of Charles A. Tinsley from his creditors, who were threatening it.

"(9) By mesne conveyances from John T. Brady the Magnolia Park Company is the purchaser of the land in controversy, and paid therefor a valuable consideration, without notice other than such constructive notice as it may have had by reason of the facts above recited.

"(10) In deciding the case upon the former appeal the Court of Civil Appeals for the Third District, as will appear from the opinion of said court, which is hereby referred to, held that the authority of Mary A. Tinsley as trustee in the conveyance from Isaac T. Tinsley to her was terminated by the partition suit in which land was set apart to her; that the legal title to the land was vested in the heirs of Isaac T. Tinsley, who held the senior recorded title; that the Magnolia Park Company bought with constructive notice of such title; that the plaintiffs' claim was not barred by laches or limitation; and that they were entitled to recover the land; and the judgment was reversed. Because the jury had not found the number of acres to which the plaintiffs were entitled, the cause was remanded for another trial in accordance with the opinion of the court. The appellee did not make a motion for rehearing or apply for a writ of error.

"The following questions are certified to the Supreme Court for decision:

"(1) Were the defendants estopped by the judgment of the Court of Civil Appeals on the former appeal?

"(2) If the Supreme Court should be of the opinion that the defendants were not so estopped, the following additional questions are certified:

"First. Whether, upon the facts appearing, there was not vested in Mary A. Tinsley, at the time of her deed in evidence to John T. Brady, such legal title to the land thereby conveyed, or at least such character of title, as enabled a remote purchaser, such as Magnolia Park Company, for valuable consideration, in good faith, and without actual notice, to invoke protection as an innocent purchaser?

"Second. Whether, upon the facts appearing, the trust power of sale vested in Mary A. Tinsley was terminated as to the land interests of the beneficiaries, Charles Tinsley and Isaac Henderson Tinsley, or remained in force and was validly exercised by her deed

of sale in evidence to John T. Brady; she intending thereby to sell and convey such interests, as found by the jury's special verdict?

"Third. Whether, upon the facts appearing, the plaintiffs below were precluded of relief, through their laches, on account of the staleness of their claim or by reason of limitation—either or both?"

We answer the first question in the negative. Upon the former appeal the Court of Civil Appeals for the Third Supreme Judicial District did not render judgment declaring the rights of the parties, but said, "The record is not in such condition as will authorize this court to render judgment." That court decided a question of law which is involved in this appeal, but the decision does not bind the Court of Civil Appeals or this court on this appeal. *Kempner v. Huddleston*, 90 Tex. 184, 37 S. W. 1068.

To the question No. 1, based upon the answer to the previous question we reply, Mary A. Tinsley had authority to sell the land, and her deed to Brady passed the title thereto. The shares of stock in the joint-stock association called the New Houston City Company represented the interest of Isaac T. Tinsley in the land owned by the company. By securing partition of the company's land, by which the interest of I. T. Tinsley was allotted to her, Mary A. Tinsley converted the stock into real estate, and held the land under the same trust that attached to the stock. She had the same authority over the land that she had over the shares of stock, the land in her hands being charged with the trust that attached to the stock under the deed to her from Isaac T. Tinsley. *Mortgage Co. v. Massie*, 94 Tex. 342, 60 S. W. 544; *Durkee v. Stringham*, 8 Wis. 124.

To the second question we answer, the legal title to the land, with the power of disposition, being vested in Mary A. Tinsley, her deed to Brady was within the scope of her authority as trustee, and a subsequent purchaser in good faith for value, without notice, would be protected against the secret trust in favor of Charles A. and Isaac Henderson Tinsley.

Having answered that the sale of the land by Mary A. Tinsley passed the title, the question as to stale demand and limitation propounded in the third question becomes immaterial, and will not be answered.

HILL v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

BURGLARY—EVIDENCE—COMMISSION OF DIFFERENT OFFENSE.

1. In a prosecution for burglary it was error to permit the state to prove another burglary by defendant on the same night, and immediately before the commission of the alleged burglary for which he was on trial.

Appeal from District Court, Lampasas County; John M. Furman, Judge.

Vernon Hill was convicted of burglary, and appeals. Reversed.

W. H. Browning and Walter Acker, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, the penalty assessed being two years' confinement in the penitentiary.

By the first bill of exceptions it is made to appear that the accomplice, Engram Murray, was permitted to testify that on the night of the 4th of August, 1902, he went to the saloon of J. A. Tillman, and by appointment found appellant there, and remained until 1 o'clock. That afterwards he and defendant went to a chile stand, waked up the Mexican, ate a plate of chile and a watermelon. Subsequently witness and defendant proceeded to the saloon occupied by Tillman, and witness broke a pane of glass out of the window, removed the stick from top of window, and witness and defendant entered the saloon, with the intention of taking the money they might find; and before they had time to take anything from the saloon they heard some one ride up to the back of the saloon, whom they recognized as City Marshal King. King called to them to come out. That witness pulled off his shoes, and told defendant to do likewise, and started to the front door, and, hearing noises at the front door on the outside, they broke open a door on the inside of the saloon, leading upstairs; and finally witness and defendant got out on the tin roof of an adjoining building, and then got off the building, and witness told defendant to crawl under the house, and witness did crawl under the house, and saw no more of defendant. When defendant was last seen by witness he was in the alley between the two buildings, one of which witness crawled under, where witness was captured about daybreak, and placed in jail. That after said witness Murray had testified as detailed the state, over the objections of appellant, was permitted to prove by witness Murray the following: That, after having left the saloon of Tillman at the time it was closed up, a few minutes after 1 o'clock, and before witness and defendant had wakened the Mexican at the chile stand, witness and defendant went down East Third street to Polsgrove's corner, turned to the right between Lampasas Hotel and Mrs. Rugeley's boarding house, and went out and stopped under a mesquite tree; and from there proceeded in the direction of a lumber yard, and turned up an alley, went to the rear of W. M. Patton's saloon, which fronts on the public square of Lampasas, and a distance of 50 yards from J. A. Tillman's saloon, which defendant is charged with burglarizing in the case on trial; that when they reached the rear of Patton's saloon defendant took

¶1. See Criminal Law, vol. 14, Cent. Dig. § 822.

a rock and broke a pane of glass in the window, raised it, and both witness and defendant entered Patton's saloon; that witness had worked in the saloon prior to that time, and knew the location of the money drawer; that they did not strike a light, but went behind the bar, and witness found and pulled open the money drawer, and got therefrom \$2.10 in money in quarters, dimes, and nickels; that defendant said, "I will get a bottle of whisky;" that witness did not want whisky, and does not know whether defendant got any whisky." Witness then details the whereabouts of himself and defendant after the burglary of the Patton saloon. Appellant objected to said testimony in so far as the same tended to show and did show the burglary of the Patton saloon, because immaterial, inadmissible, and threw no light upon the burglary of Tillman's saloon, for which defendant was on trial; and because it clearly appeared that the burglary of Patton's saloon and the burglary of Tillman's saloon were separate and distinct offenses committed at different times and places; and because the burglary of Patton's saloon had been fully completed before any attempt was made to burglarize Tillman's; and because the burglary of Tillman's saloon was not contemplated between the parties until after the burglary of Patton's saloon, and the burglary of the Patton saloon did not in any manner identify the two offenses; it did not tend to show the intent which the parties may have had in burglarizing Tillman's saloon; and the admission of the burglary of Patton's saloon was calculated to prejudice the jury against defendant, was no part of the *res gestæ* of the burglary of Tillman's saloon, and did not tend to show system in the commission of said offense. And this bill further discloses that appellant objected to the introduction of the testimony of R. M. King to the effect: "On the morning after Engram Murray had been arrested for the burglary of Tillman's saloon, I went to the rear of Patton's saloon, which fronts on the public square, and is 75 or 100 yards distant from Tillman's saloon, and found a pane of glass gone out of the window, a rock lying on the ground just under the window. After Murray was arrested, I took from him \$1.90 in money—seven quarters, a dime, and a nickel. I found 35 cents on the roof of the building on the morning after Tillman's saloon had been broken into. Murray was arrested before daybreak, and was captured under the Polsgrove building, on the same block as the Tillman saloon. Defendant was brought to me by Bob Higdon between 9 and 10 o'clock the same morning, and I took from him twenty-five cents. And I gave the money taken from Murray and that found on the roof to Patton, and gave the money taken from defendant back to him." Appellant also insists the court erred in permitting the witness Patton to testify that he left

his saloon about 8 o'clock p. m. on the night Tillman's saloon was burglarized, leaving Lee Frazier in charge, and when witness came back about daybreak next morning he found the pane of glass broken, and the stick down from the window, and a rock lying beneath the window. City Marshal King gave him \$2.25 in money. Don't know whether there was any money in the drawer that night, and cannot identify the money as his. Witness Young testified substantially as did the other witnesses about the condition of the buildings. Appellant further objects to this testimony because it tended in no way to connect defendant with the breaking of the Tillman saloon; nor was it in corroboration of the accomplice, Murray, as to the breaking of Patton's saloon, as it showed only the commission of the offense, and did not tend to connect defendant therewith, except by accomplice's testimony.

It will be noted from the objections above detailed that the main insistence urged by appellant is that the proof of the burglarizing of the Patton saloon was not germane to the trial of the charge of burglarizing the Tillman saloon. Appellant's contention is correct, and we hold the grounds urged were legitimate and proper objections to the admission of said testimony. In the able brief filed by appellant the following cases are cited: *Welhausen v. State* (App.) 18 S. W. 300; *Marshall v. State* (Cr. App.) 22 S. W. 878; *Williams v. State* (Cr. App.) 41 S. W. 647; *Unsell v. State* (Cr. App.) 45 S. W. 1023; *Long v. State* (Cr. App.) 47 S. W. 363; *James v. State* (Cr. App.) 49 S. W. 401; *McIver v. State* (Cr. App.) 60 S. W. 50; *Denton v. State* (Cr. App.) 60 S. W. 672; *Scott v. State* (Cr. App.) 68 S. W. 680. In *Kelley v. State*, 31 Tex. Cr. B. 211, 20 S. W. 365, *Hamilton v. State* (Cr. App.) 24 S. W. 32, and *Fielder v. State* (Cr. App.) 49 S. W. 376, we held that burglaries committed contemporaneously with the one on trial were admissible, but in the opinion of the writer said cases to that extent should be overruled. It is not admissible to prove one crime, and then prove independent and distinct crimes other than the one on trial, for any purpose, unless it be part of the *res gestæ*, serve to identify defendant, or to prove system of sales, as in local option cases. The fact that appellant commits one crime is not legal evidence of the fact that he committed another. It could only serve, as appellant says, to prejudice the jury against him, could throw no light upon the transaction, does not serve to show criminal intent; nor does the fact that he burglarized one house render it probable, in contemplation of law, that he burglarized another, unless it be upon the theory of proving his character, and thereby render probable the commission of the crime on trial. This is not permissible under any rule of law.

For the reasons stated, the judgment is reversed, and the cause remanded.

DAVIDSON, P. J., and HENDERSON, J. We agree to reversal, but not to overruling Kelley, Fielder, and Hamilton Cases. We do not think it necessary to enter into a discussion of those cases in this case, for under those cases this judgment is reversible.

TEEL v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

SECOND-DEGREE MURDER—EVIDENCE—SUFFICIENCY—SELF-DEFENSE—INSTRUCTION—NEGLIGENT HOMICIDE.

1. On a prosecution for homicide, defendant claiming to have shot deceased unintentionally while attempting to strike him with his pistol to avoid being shot himself, evidence examined, and held sufficient to justify a verdict of murder in the second degree.

2. Instruction as to self-defense examined, and held not objectionable, as limiting defendant's right of self-defense to real danger of being shot or killed by deceased.

3. Where defendant claimed to have shot deceased unintentionally, while attempting to strike him with his pistol to avoid being shot himself, there was no question of negligent homicide.

Appeal from District Court, Val Verde County; J. M. Goggin, Judge.

Ezra Teel was convicted of murder in the second degree, and appeals. Affirmed.

T. J. Hefner and Walter Gillis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, the penalty assessed being 15 years' confinement in the penitentiary.

He assigns error in the action of the court charging the law applicable to murder in the second degree, because there was no evidence adduced authorizing such charge. The statement of facts discloses that appellant and deceased had been personal friends up to the time of the difficulty which terminated in the homicide. Deceased was a bartender in the saloon owned by Sandherr. On the evening of the homicide John and Tom Valentine and Rafael Scott, with defendant, were in a little room cut off from the main room of the saloon, "playing cards for the drinks." Tom Valentine and appellant, who were partners, won. While John Valentine and Rafael Scott were playing to determine which one of them would pay for the drinks, Tom Valentine and appellant, accompanied by deceased, left this room, and went into the saloon room proper. As to what occurred in the saloon there is a slight conflict in the testimony. Appellant testified that on entering the saloon from the card room Tom Valentine undertook to trip him, and this brought about a friendly scuffle between them, and while they were in the scuffle they approached the front door, where there

were two chairs; that in scuffling one of the chairs was thrown from the front door, and appellant kicked or threw the other one out of the door, and, as he did so, remarked to deceased, "It looks like you would keep the chairs out of the door so people could get in." This angered deceased, and he began cursing and abusing appellant. Appellant replied that he did not think deceased ought to get mad at what he had done; that he intended no offense, and that if he had injured the chairs in any way he was ready to pay for the injury; and took out his pocket-book, walked up to the end of the bar, where deceased was standing, and said to deceased that he ought not to get mad, and offered to pay any damage done the chairs. Deceased replied, "You are a God damn liar; you won't pay for anything;" reached down, got a mineral water bottle about half filled with water, raised it, and struck appellant on the head, breaking the bottle to pieces. Deceased then reached the pistol lying behind the bar on the drain-board, and brought it up as if to shoot, and appellant, believing it was the intention of deceased to shoot, pulled his pistol, with the intention of striking deceased, in order to prevent being shot, but not intending himself to shoot. That as he struck at deceased, deceased jumped back out of reach, and in striking his pistol was accidentally discharged. That it was not his intention to shoot, but simply to strike deceased, in order to avoid himself being shot. This is the substance of appellant's testimony. Valentine, a witness for appellant, in substance stated, after detailing the matters with reference to the card game and the departure of Tom Valentine, appellant, and deceased from the card room, that he and Scott remained seated at the card table to see which should pay for the drinks. That defendant, Tom Valentine, and deceased had been gone a short time when witness heard cursing and quarreling in the barroom. The first thing he heard was defendant saying to deceased, "You called me a damn liar." Witness immediately got up and went into the barroom to stop the difficulty. He reached the barroom, and heard defendant again say to deceased, "You called me a damn liar." To this deceased made no reply; at least none heard by witness. Defendant pulled out his pocketbook, addressed deceased, saying: "I don't think you ought to get mad at what I did. I didn't intend to offend you, and I will pay you for the chairs, if I have done any damage to them." Deceased then walked around defendant, passing in behind the bar at the north end, defendant following him, who again said to deceased, "You called me a damn liar," and deceased said, "Yes, I did call you a damn liar," and reached down and got a mineral water bottle, and raised it as if to strike defendant. At this time deceased was behind the bar three or four feet, and defendant was about the end of

the bar, just about the inside corner of it. Witness was behind defendant. As deceased raised the bottle, witness dodged, as he said, to avoid being struck, and as he dodged the bottle was broken to pieces, some fragments of the glass striking him in the face. Almost immediately after the bottle was broken the shot was fired, and deceased fell behind the bar. Witness did not see the pistol, but heard the shot, and does not know when defendant drew the pistol. Witness does not know whether deceased had a pistol; did not see any. After the shot was fired defendant turned around and remarked, "Dog gone the luck;" that was all that he said. Richardson, for the state, testified that Rafael Scott came out of the saloon about half a minute after the shooting, and started in the direction of the courthouse. After going a short distance he turned, and came to where witness and Crosby were sitting. When he came up, witness asked him what that shot meant, and he replied, "Ezra Teel has accidentally killed the barkeeper up there;" and while Scott was talking defendant came up, in a short distance of where they were, and remarked, "You need not put yourself to a damn bit of trouble," or words to that effect, and passed on in the direction of Adams' saloon. Scott testified to the matters and circumstances attending the card game, and the fact that he remained in the room to finish the game with John Valentine. Just after the parties left the room where he and John Valentine were playing he heard a noise as if some one kicking and throwing chairs out of the saloon, and heard deceased say, "Don't hurrah the house." Defendant replied, "Come out from behind the bar, if you want to fight." He and Valentine immediately went into the room where the difficulty was in progress. Just as witness entered the saloon at the east end of the screen which stood in front of the door going in the card room he heard a bottle break, saw glass flying, but did not see whence it came, and merely saw appellant bring up his pistol and fire, and deceased sank down. On cross-examination this witness stated that immediately after the shooting he looked over the bar, and remarked, "He has killed him." Defendant said, "God damn it, I didn't aim to shoot him." And witness corroborates Richardson as to the remark he made to Richardson and Crosby that "Ezra Teel had accidentally killed the bartender up there."

These are the salient features of the testimony bearing upon the question of murder in the second degree. We are of opinion that there is evidence which justified the court in charging upon murder in the second degree, and warrants the verdict.

Error is assigned upon the ninth paragraph of the charge with reference to self-defense, in that it "improperly limits, restricts, and prejudices defendant's right to defend himself against apparent danger

at the hands of the deceased, and requires the jury to find that defendant shot and killed deceased to avoid being shot by deceased before they would be authorized to acquit defendant, and therefore limits defendant's right of self-defense to real danger of being shot or killed by deceased." The charge complained of is as follows: "You are instructed that a reasonable apprehension or fear of death or serious bodily injury will excuse a person for using all necessary force to protect himself; and it is not necessary that there should be actual danger of death or serious bodily injury, provided he acted upon a reasonable apprehension of danger as it appeared to him, viewed from his standpoint at the time; and in such case the party acting upon such real or apparent danger is not bound to retreat in order to avoid the necessity of killing his assailant. If, therefore, you believe from the evidence that the said Ezra Teel intentionally shot and killed the said Ople F. Brady, but further believe that at the time of so doing the deceased was in the act of making or about to make an attack upon him, which from the manner and character of it, together with the weapon used or attempted to be used, if any, caused the defendant to have a reasonable expectation or fear of death or serious bodily injury at the hands of deceased, and acting under such reasonable expectation or fear of death or serious bodily injury he intentionally shot and killed the said Brady, then you will acquit him, or, if there is in your minds a reasonable doubt thereof, you will acquit him, and so say by your verdict. And in this connection, and in connection with the succeeding charge on self-defense, you are instructed further that if the deceased was armed at the time he was killed, and that he made an attack upon defendant with a weapon, and if the weapon used or attempted to be used by deceased in making said attack, if any, and the manner of its use or attempted use were such as were reasonably calculated to produce death or serious bodily injury, then and in that event the law presumes it was the intention of the deceased to kill defendant or inflict serious bodily injury upon him. If you believe from the evidence that at the time deceased was shot and killed he had made an assault upon defendant with a bottle, and that immediately thereafter he seized or attempted to seize a pistol, or that he seized a pistol and was in the act of bringing it up, and that from the acts and conduct of deceased as they reasonably appeared to defendant, or viewed from his standpoint at the time, and under all the facts and circumstances in evidence in this case, that he was in danger of being killed by deceased, or of receiving serious bodily injury at the hands of deceased, and that thereupon he intentionally shot and killed deceased to avoid being shot by deceased, then and in that event such killing would,

under the law, be justifiable, as being done by defendant in his own proper self-defense; and if you so believe the facts to so have been, or have a reasonable doubt thereof, you will acquit defendant. If you believe from the evidence that defendant intentionally shot and killed the said deceased, Bradley, but further believe that at the time deceased was attempting to shoot or was in the act of shooting defendant with a pistol, or was drawing or attempting to draw a pistol upon defendant, and that defendant thereupon intentionally shot and killed deceased, to save himself from death or serious bodily injury at the hands of deceased, then, and in that event, you will acquit defendant, or if you have a reasonable doubt of such being the fact you will acquit him."

We do not believe the charge is subject to the criticism. In fact, we are of opinion it is a favorable presentation of the law of self-defense, and does not in any way restrict the right of appellant to defend as against apparent danger. It may be well enough to state in this connection, as bearing upon the question of self-defense, that appellant testified, in addition to what has already been stated, that deceased struck him on the head with a mineral water bottle, which broke to pieces by force of the blow, and immediately reached for the pistol, and was "bringing it up," as he believed, for the purpose of shooting him, and it was at this juncture he fired the shot which killed deceased; that he did not intend to kill him, as before stated, but his pistol went off accidentally. There was no bruise on appellant's head, and no external evidence of violence shown as the result of this blow. Without repeating the details of the testimony, there is a possibility, if not a probability, that the bottle was either broken on the "cork-puller," adjusted to the bar, or by striking appellant's pistol. But we do not consider this material one way or the other. We have made this additional statement as bearing upon the question of self-defense, as also upon the further proposition contended for by appellant, that negligent homicide was an issue in the case. We are not cited to any authorities sustaining the latter contention. It was not a question of negligence. Appellant's theory was that he struck in self-defense, not intending to kill, and the pistol was accidentally discharged. But it was an intentional striking, and if he fired the shot unintentionally the question of negligent homicide is not suggested. If fired unintentionally, that is brought about by the force of the blow, or from any other accidental cause, it was done while he was attempting to inflict a battery upon appellant by means of the pistol; and so every theory eliminates any idea of negligence. The court charged fully on accidental homicide. We have carefully reviewed this record, and, in our opinion, appellant has had a fair trial, and the court has sub-

mitted every issue suggested by the testimony favorably to appellant.

The judgment is affirmed.

HENDERSON, J., absent.

GARDNER v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

HOMICIDE—MANSLAUGHTER—INSTRUCTIONS—CAUSE OF DEATH—INCURABLE DISEASE.

1. In a prosecution for murder, evidence on behalf of defense tended to show that deceased was the assailant; that he shoved defendant with a show case, called him vile names, and was in the act of rushing on him, when the fatal shot was fired. *Held*, that it was error to refuse to charge on manslaughter.

2. In a prosecution for murder, evidence showed that deceased was in the last stages of Bright's disease. The pistol shot broke his elbow, rendering a surgical operation and the use of chloroform necessary, from the effects of which the kidneys were paralyzed, and death was caused by uric acid thrown back upon the system. An instruction was given in accordance with Pen. Code 1895, art. 652, providing that homicide must be complete by the act of defendant, but, though the injury causing death might not have proven fatal under other circumstances, yet if said injury were the cause of death, without it appearing that there has been gross neglect or improper treatment of the person injured, it is homicide. *Held*, that a further instruction that if the wound inflicted was not necessarily fatal, and deceased died from a disease not connected with or caused by the shot, he should be acquitted, was properly refused.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Peter Gardner was convicted of murder in the first degree, and appeals. Reversed.

Marsene Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

There are no bills of exception, and the case will be treated from the standpoint of the motion for new trial. The special charge requested by appellant on manslaughter was refused, and the court did not give a charge on this subject. This is assigned as error. Appellant took the stand in his own behalf, and among other things states that, as he was passing a bakery en route home from his work at the close of the day, he bought a nickel's worth of cakes, and began eating them. He heard the baker order him to move away from the place where he was standing—he was leaning against a glass show case outside the building. He replied that he was not going to steal anything. Directly afterwards deceased, Boenig, came out of the shop, and shoved appellant with the show case, and appellant asked him not to shove the show case on top of him, and he (Boenig) called appellant "a son of a bitch." Appellant replied in similar language. Boenig then

ran toward appellant, and Goettloeb (the owner of the bakery) ran out, and both caught hold of appellant, and had him bent down, and pushed him down on the sidewalk and across the sidewalk towards Cook's store. Appellant requested them to let him loose, and drew his pistol. They both had hold of appellant so he could not secure his release, and it was then that he fired his pistol. He had never before seen deceased, and had no ill feeling toward him. He had not used any profane language toward deceased until he called him a "son of a bitch" in reply to Boenig's similar epithet applied to him. Deceased was a much larger and stronger man than appellant. Garrison testified that he was sitting at his store, which is across the street from the difficulty, and heard some words between appellant and deceased, but could not distinguish what was said; that he saw deceased push defendant from him towards the edge of the sidewalk, and saw defendant reach back and get a pistol. Deceased ran on defendant, and just as he did the gun fired. Williams testified that he was in Cook's store, and saw three or four men fighting on the sidewalk, and fall in the doorway about 20 feet away, and after they were down heard a pistol shot, and thought they were all white men until he saw appellant being taken to jail; that the shot was not fired until the man had fallen in one of Cook's doorways. To the same effect was the testimony of Daniels and Victoria Thomas. We have stated enough of the evidence to make it apparent that manslaughter was decidedly an issue in this case.

The court gave an instruction to the effect that the destruction of life must be complete by the acts, agency, procurement, or culpable omission on the part of appellant, in accord with article 652, Pen. Code 1895. Appellant asked in this connection an instruction to the effect that if deceased was shot, but the wound thereby inflicted was not necessarily fatal, and the wounded party was suffering from or afflicted with a disease not connected with or superinduced by the shot, and died therefrom, then appellant should be acquitted altogether of any grade of homicide. This charge was refused. In regard to this matter Dr. Ruhl testified that appellant died in Galveston county, on Monday, December 22, 1902, about 4:30 o'clock p. m., in St. Mary's Hospital; that he died from uræmia, acute nephritis, which, being interpreted into ordinary English, means Bright's disease in its last stages; deceased was shot in the right arm, breaking the elbow, and it became necessary to amputate the arm, which was done shortly after the patient reached the hospital, late Saturday evening; that he lived about 45 hours after the operation; that the operation was necessary, and it was further necessary in performing this operation to administer chloroform; that the effect of chloroform was to paralyze the kid-

neys, and to render it impossible for them to perform their natural functions and throw off the impurities of the urine, and failing to do that these impurities got into the blood and poisoned the system; there was no autopsy performed on the body after death; that the patient died of "acute nephritis." He further testifies: "I first noticed the symptoms on the day after I had operated on his arm. The patient developed no symptoms of coma until Sunday evening, and from that time until his death, which occurred Monday evening, about 4:30, he was in a comatose condition." Dr. Starley testified that the patient was placed under the influence of chloroform, which was necessary in order to perform the surgical operation to remove portions of the elbow joint. The investigation in regard to the condition of deceased's urine did not occur until Sunday evening, after the operation on Saturday evening. So it may be conceded that the immediate cause of the death was Bright's disease. Briefly summed up, this testimony showed that deceased was in the last stages of Bright's disease; his elbow broken by a pistol shot; chloroform administered for the purpose of surgical operation; the kidneys, paralyzed by means of the chloroform, and failing to perform their functions, threw uric acid back upon the system by poisoning the blood, thereby causing death. The physicians also testified, in this connection, that this was the proper treatment under the peculiar circumstances, and that the operation was a necessity. Whether the life of deceased could have been saved by some other means than the operation, or whether there was negligence in this connection or improper treatment in not investigating the condition of appellant's kidneys prior to the operation, does not seem to have entered into the testimony. A charge was given, as before stated, in accordance with article 652, Pen. Code 1895, as to negligence or improper treatment of others than appellant in bringing about the death of deceased. So we have, as presented by the failure of the court to give the requested instruction, the proposition that, if appellant was suffering from or afflicted with a disease not connected with or superinduced by the shot, appellant would not be guilty of the homicide, if such disease produced death. We do not believe this charge is correct. If deceased was suffering from a disease or a wound, and appellant's shot hastened the death of deceased, he would be guilty of the homicide. If deceased would have shortly died from Bright's disease, and it was an incurable malady, yet if appellant's shot assisted in bringing about the death, he would be guilty of the homicide. An accused cannot speculate as to how long his victim may live with an incurable malady when he inflicts a shot or a wound that hastens the death or the action of the fatal disease. The court did not err in refusing the special instruction.

For the error discussed in failing to charge on manslaughter, the judgment is reversed, and the cause remanded.

CONNER v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

CRIMINAL COURT OF APPEALS—JURISDICTION—AMOUNT OF FINE.

1. An appeal to the criminal court of appeals from a conviction in the county court on appeal from a justice will not lie where the punishment is a fine of less than \$100.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

S. S. Conner was convicted of a misdemeanor, and appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed a motion to dismiss this appeal on the ground that the record shows appellant was convicted in the justice court, appealed to the county court, where the case was tried de novo, and his punishment assessed at a fine of \$20, and the fine being for less than \$100, under such circumstances, this court is without jurisdiction. The motion is sustained. *Nelson v. State*, 33 Tex. Cr. R. 379, 26 S. W. 623.

HENDERSON, J., absent.

JOHNSON v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

CRIMINAL LAW—APPEAL—RECORD—SUFFICIENCY.

1. Where nothing was shown in the record, outside of the bill of exceptions, in regard to a plea of former jeopardy by defendant, demurrer thereto by the state, and order of court sustaining the demurrer, the action of the court on the demurrer could not be reviewed.

Appeal from Limestone County Court; James Kimbell, Judge.

Dave Johnson was convicted of gaming, and appeals. Affirmed.

A. B. Rennolds, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming, and fined \$10. When the case was called for trial, appellant interposed a plea of jeopardy, based upon the statement that he had been previously convicted of the same offense in the corporation court. A demurrer to this plea was interposed by the state, and sustained by the court. A bill of exceptions was reserved, and the reason assigned in the bill for sustaining the demurrer is that the act of the Legislature which created said corporation court was unconstitutional and void, and the conviction in said

court is therefore a nullity. This matter is brought up only by bill of exceptions. The record does not contain the judgment of the court on the demurrer, and nothing is shown in the record, outside the bill of exceptions, in regard to the matter of the plea, demurrer, or order of court. Judgments of the court cannot be perpetuated by bill of exceptions; and judgment entered of record, showing the action of the court, is necessary to preserve such rulings and to present the matter for revision on appeal. It cannot be done alone by bill of exceptions. This matter was fully discussed in *Rust v. State*, 31 Tex. Cr. R. 75, 19 S. W. 703. This is the only question presented for revision. As the matter cannot be revised in the manner presented, the judgment is affirmed.

HENDERSON, J., absent.

RIPPEY v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

CONSTITUTIONAL LAW—LOCAL OPTION LAW—PRIVILEGES OR IMMUNITIES—CLASS LEGISLATION—DUE PROCESS OF LAW.

1. The local option law, Rev. St. 1895, tit. 69, especially articles 3384-3399, and Pen. Code, art. 402, prescribing a penalty against any person who shall sell intoxicating liquor in any county, justice precinct, city, or town in which the sale of intoxicating liquor has been prohibited, does not contravene the provisions of the federal constitution against abridging the privileges and immunities of citizens of the United States.

2. The law is not unconstitutional as depriving citizens of liberty and property without due process of law.

3. The law is not unconstitutional as denying to citizens the equal protection of the laws.

4. The law is not unconstitutional as class legislation.

Appeal from Grayson County Court; G. P. Webb, Judge.

Granville Rippey was convicted of crime, and appeals. Affirmed.

Etheridge & Baker, Moseley & Eppstein, and Clark & Bolinger, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law, the punishment assessed being the minimum.

Appellant suggests but one question for decision, to wit: "That the local option law of this state, as embraced in title 69 of the Revised Statutes of 1895, and especially articles 3384-3399 of said Statutes, and article 402 of the Penal Code, prescribing a penalty against any person who shall sell intoxicating liquor in any county, justice precinct, city, or town in which the sale of intoxicating liquor had been prohibited, are invalid, null and void, in that said enactment of the Legislature contravened the provisions of the Constitution of the United States, for this: that said en-

actment abridged the privileges and immunities of citizens of the United States, and deprived a large number of said citizenship, and especially appellant, of liberty and property without due process of law, and deny to a large class of citizenship of the state of Texas, including appellant, the equal protection of the laws, and such legislation constituted class legislation, within the meaning of the law."

This case was before us under the writ of habeas corpus at the Austin term, 1902, where these questions were at issue and decided adversely to appellant's contention. Ex parte Rippey (Tex. Cr. App.) 68 S. W. 687. Practically the same questions were involved in Ex parte Fields, 39 Tex. Cr. R. 50, 46 S. W. 1127. In that case the questions were also decided adversely to appellant. We see no reason for changing the views heretofore expressed in those opinions, and upon the authority of those cases the judgment in this case is affirmed.

HENDERSON, J., absent.

BOTTOMS v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—GIFT OF INTOXICANTS—EVIDENCE.

1. A conviction of violating the local option law cannot be sustained where the evidence fails to show that the law was in force in the county where the conviction was had.

2. A conviction cannot be had on evidence of a gift of intoxicants, though made for the purpose of evading the law.

Appeal from Jack County Court; R. S. Blair, Judge.

W. F. Bottoms was convicted of violating the local option law, and appeals. Reversed.

Nicholson & Fitzgerald, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, the penalty assessed being a fine of \$25 and 20 days' confinement in the county jail.

The statement of facts fails to show that local option was in effect, and for this reason the judgment must be reversed.

The first clause of the charge of the court instructed the jury, if they believed defendant sold to Mitchell intoxicating liquors in Jack county, after an election had been held, etc., it would be their duty to convict. If the charge had been concluded, it would have been correct; but in the second clause the jury are instructed, if they should find from the evidence that defendant did not sell intoxicating liquors to Mitchell, but they should believe beyond a reasonable doubt that on the day and date set out defendant did give to said Mitchell intoxicating liquors, with the intent and for the purpose of evading the lo-

cal option law of said Jack county, then it would be their duty to find him guilty, and assess his punishment at a fine and imprisonment as heretofore stated. In the fifth subdivision of the charge the jury were instructed that if defendant did give Mitchell the intoxicating liquors, but that said liquor was given without the intent and purpose of evading the local option law, they should acquit. The charges authorized the conviction of appellant without warrant of law. It is the sale, and not the gift, of intoxicants in local option territory that is prohibited, and the Legislature has no authority, nor has the court, to prescribe a punishment or inflict a penalty upon a party who sees proper to give away intoxicants in a local option territory. This question was thoroughly discussed in Holley v. State, 14 Tex. App. 505.

For the errors indicated, the judgment is reversed and the cause remanded.

HENDERSON, J., absent.

WILSON v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—SUFFICIENCY.

1. Evidence held to support a conviction for an assault with intent to rape a girl under 15.

Appeal from District Court, Anderson County; John Young Gooch, Judge.

George Wilson was convicted of assault with intent to rape, and he appeals. Affirmed.

H. W. Moore, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with an assault to rape by force, threats, and fraud on a girl under 15 years of age, and his punishment was assessed at five years' confinement in the penitentiary.

While there are several matters urged for reversal, they are all summed up in appellant's contention that the evidence is insufficient to support the conviction. The record discloses the assaulted girl, about nine years of age, was at home by herself; and, while standing at the gate, appellant, in passing, asked her for a drink of water. She immediately went into the house and into the room to obtain the water, and appellant followed her. While in there he seized and kissed her, pulled up her clothes, took off her drawers, unbuttoned his pants, and undertook to have carnal intercourse with her, and in doing so lifted her from the floor into his arms, and in this attitude did the acts complained of in the testimony. She screamed and fought, and finally got out of his arms, and ran off to a neighbor's house. A neighbor, hearing the screams, went to the house, and as she approached the room appellant went under the bed, and

afterwards escaped. The little girl made outcry, and informed her mother of it immediately. Defendant was arrested, and when first brought into her presence she failed to recognize him, but this arose from the fact that immediately after the trouble ended defendant shaved his mustache and changed his clothes. A physician examined the girl, and testified that her private parts were red, as if there had been friction, and were somewhat swollen, but without laceration. Appellant denied the whole incident, even knowledge of the prosecutrix; but admitted he had shaved his mustache and changed his clothing. He attributed the shaving to the reason "that I had been monkeying with a woman and got crab lice in my mustache, and had gotten my clothes soiled cleaning up the saloon that morning." We are of opinion this evidence is sufficient to support a conviction of assault to rape.

The judgment is affirmed.

HENDERSON, J., absent.

BEARDEN v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

HOMICIDE—CONTINUANCE—ABSENT WITNESS—EXPERT TESTIMONY—IMPEACHING WITNESS—ADMISSION OF EVIDENCE—INSTRUCTIONS—APPEAL—PRESUMPTION OF INJURY.

1. Where defendant asking a continuance for an absent witness had other witnesses at the trial, who testified substantially as it was alleged the absent witness would testify, and the state did not attempt to controvert this testimony, it was not error to refuse the continuance.

2. A witness in a murder trial testified that he had used his father's muzzle-loading shotgun some, and had afterwards owned one of his own for five years; that he had often shot at trees to get the range, had hunted at odd times, had owned two shotguns, and hunted with borrowed guns some, but had never practiced at targets to see to what extent shot would scatter, and had not used a muzzle loader for 12 years. *Held*, that he had qualified to testify as to the distance at which decedent had been fired on by a muzzle-loading shotgun, judging from the extent the shot had scattered.

3. Expert testimony is admissible to show to what extent shot from a muzzle-loading shotgun will scatter at various distances.

4. For the purpose of attacking the credibility of defendant in a murder trial, who has taken the stand in his own defense, it was proper to show that he had at one time been indicted for cattle stealing.

5. In a prosecution for murder, the state proved the general good reputation of deceased by a witness, who, on cross-examination, testified to some difficulties deceased had been involved in at one time, but was not permitted to testify as to whether he had been prosecuted therefor. *Held*, that the court did not err in excluding this testimony.

6. Under the statute making assault and battery adequate cause to reduce a homicide from murder to manslaughter, it is not necessary to define "assault and battery" in a charge on manslaughter.

7. A charge in a prosecution for murder that

certain threats and overt acts by deceased, on which defendant did not rely as a defense, would be adequate cause to reduce the homicide from murder to manslaughter, could not be complained of by defendant as erroneous and on the weight of the evidence, since it was favorable to him.

8. If defendant rented the premises on which the homicide occurred, and deceased went thereon without defendant's consent and in spite of his remonstrances, and was approaching defendant at the time of the homicide, and it reasonably appeared to defendant that his life was in danger or that he might receive bodily injury, and while such danger was imminent and pending he shot and killed deceased, defendant must be acquitted.

9. If deceased was in the act of forcibly ejecting defendant from the premises, and defendant shot him in order to avoid being ejected, after having exhausted all other means, except retreating, to prevent deceased from driving him off, he must be acquitted.

10. Defendant requested a charge that if defendant was suffering such bodily injury or mental anguish, inflicted by deceased, as incapacitated him for any reflection whatever, when he fired the second shot (the evidence tending to show that the second shot was the one that proved fatal), the jury should acquit him, even though the deceased had desisted from further attack. The court refused this charge, but told the jury that if the shot was fired in a sudden transport of passion, aroused by adequate cause, defendant would be guilty of manslaughter. *Held*, that defendant could not complain.

11. Defendant's guilt depends on his criminal intent at the time he fired the fatal shot (the second one), and it is immaterial whether his resolution to fire both shots was formed at the same time, and while he believed his life in imminent danger and peril, and whether he had any opportunity for reflection between the firing of the shots.

12. Where the record does not disclose that defendant's case was in any way injured by a conversation which is alleged to have taken place between one of the witnesses for the state and a juror, defendant's conviction for murder will not be reversed on appeal.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

J. S. Bearden was convicted of murder, and appeals. Affirmed.

J. T. Ranspot, Gibbs & Gibbs, and Stevenson & Ritchie, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of seven years.

Appellant sought a continuance for want of the testimony of J. T. Ranspot, alleging: That he was one of the attorneys in the case, and under contract to be present at the trial, and, relying on which contract, defendant did not cause process to be issued for him. "That defendant is informed and believes that said witness is now at home, sick with the mumps, and not physically able to attend the court. Defendant expects to prove by said witness that one of the defenses in this case will be that deceased was advancing on him at the time of the fatal shots, coming through a barbed wire fence and throwing rocks at defendant at the time the

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1322.

fatal shots were fired. That said witness Ranspot will testify that two or three days after the homicide he (witness) viewed the ground where the same occurred, saw a rock about four pounds in weight lying on the edge of a pool of blood where deceased is charged to have fallen at the first shot; that he saw said rock placed in a cavity exactly fitting in the ground, about 20 feet from the pool of blood, and the direction from which deceased is alleged to have been advancing at the time of the shooting. Witness will also testify that he found a bit of red cloth corresponding to the handkerchief around deceased's neck, which was clinging to the fence where defendant claims deceased came through in advancing on him. That said witness will also testify that he saw said rock in the pool of blood, which he afterwards saw fitted in said cavity, in the ground, on the day of the homicide on the occasion of the inquest." The substance of the testimony discloses that appellant killed his brother about 10 o'clock, and that after killing him he hitched up his wagon and hauled posts to a certain place on the farm, where the fences needed repairing, and also went to the village of Santo, about two miles from the scene of the killing, and hauled a load of posts to the farm, passing in each instance near the prostrate body of his brother; that about 2 or 3 o'clock in the evening, after finishing the work detailed, he took out one of the horses, went to Santo, and surrendered, stating to the parties that he killed deceased in self-defense. This statement he subsequently repeated at the inquest trial, and testified on this trial that deceased was advancing upon him and throwing and hitting him with rocks at the time he fired the fatal shots. Two witnesses testify that they saw the absent witness, Ranspot, pick up the piece of handkerchief, not on the fence, but near the fence. The defense established by two witnesses—one of the attorneys and a physician living at Santo—that they saw the rock described by the absent witness, and that said rock fitted into a hole in the ground about 20 feet from where it was found. The facts testified to by said witnesses were not controverted by the state, but, on the contrary, all the witnesses who mentioned the matter state that the rock was there, so it is not a material matter in this case. If it is material, the same is not controverted. Hence it was not error for the court to refuse to continue this case for want of the testimony of said Ranspot, even conceding diligence.

Bill No. 2 complains that the state offered Reuben Bearden as an expert witness, who testified on direct and cross examination as to his qualifications as an expert in the use of shotguns as follows: "I am fifty-one years old, and an uncle of defendant. I helped wash and dress the body of deceased, Lovey Bearden, on the day he was killed. I examined his body for wounds. I found

scattering shot marks on his left hand, and also on his face, and one or two shot marks in his left eye. The shot marks on his face ranged from the temple down to the chin. Those in his hand ranged from the wrist out, and numbered 8 or 10. I found, also, a shot hole in the head, just above and behind the left ear, about as big as the end of a man's three fingers. Can't say whether the hole had smooth or rough edges, or from what direction the shot which made this hole came. The hair around this hole appeared to be singed, and his face was covered with blood. I have had experience in the use of a shotgun. I have owned shotguns, and my father had one. Have loaded and fired shotguns a great deal. The deceased, Lovey Bearden, was killed with a double-barreled muzzle loader, which was loaded with squirrel shot. It has been 12 years since I used a muzzle loader. My father had a gun which I used some prior to the year 1870. I bought a muzzle loader myself in 1879, and kept it for five years, and sold it and bought a breech loader. Have had a good deal of experience in the use of a shotgun, but never made hunting a business. Before coming to Palo Pinto county I lived in Young county. While I lived up there I was a farmer and stone worker. I hunted at odd times. I never practiced at targets with squirrel shot. Never shot anything but squirrels with them. I have often shot at trees with shotguns, in order to get the range of the gun, and at different distances. Have never shot at trees 5, 10, 15, or 20 paces. I have owned two shotguns myself. Have hunted with borrowed guns some. Have never practiced at targets, boards, or anything of the kind, to see how shot would scatter." Appellant objected to said testimony on the ground that witness had not shown himself to be an expert in the use of muzzle-loading shotguns, which was overruled by the court. Thereupon witness testified as follows: "From what I know about shotguns, and the way shotguns scatter, I would say that the shot which struck deceased in the face was fired from a distance of about 20 steps. And from the size of the hole in the side of his head, I would say that the shot which made that hole was fired from a distance of about ten inches. At a distance of eighty yards a charge of shot from an ordinary shotgun will scatter over a surface of about two feet; and at a distance of 25 or 30 yards, some 8, 10, or 12 inches." The court did not err in holding witness had qualified himself in the use of firearms, nor was any error committed in admitting said testimony. *Head v. State* (Tex. Cr. App.) 50 S. W. 352; *Morton v. State* (Tex. Cr. App.) 71 S. W. 281.

Bill No. 3 complains that the court erred in permitting the state's attorney to ask appellant, while on the stand, if he had been formerly indicted in Palo Pinto county for theft of cattle, to which witness replied in the affirmative. Appellant objects because imma-

terial, irrelevant, improper, and calculated to prejudice the jury against defendant, and further because, defendant being on trial for murder, his character for peace or violence only was in issue, and not for theft, and the trait of character involved in said prosecution for theft will throw no light upon this case or upon defendant's credibility as a witness. We have repeatedly held that when defendant takes the stand he is subject to the same rules on cross-examination as other witnesses, and any question can be asked which goes to discredit his testimony. If defendant had been indicted and convicted of theft, this is a circumstance to be considered by the jury in passing on his credibility, which was one of the issues in this case. Without discussing the matter further, we refer to the cases of *Carroll v. State*, 32 Tex. Cr. R. 434, 24 S. W. 100, 40 Am. St. Rep. 786; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428; *Woodson v. State*, 24 Tex. App. 162, 6 S. W. 184; *Payne v. State*, 40 Tex. Cr. R. 290, 50 S. W. 363; *Ware v. State*, 36 Tex. Cr. R. 597, 38 S. W. 198.

The fourth bill complains that, while the state's witness Jim Watson was on the stand, the district attorney asked said witness if he did not know the general reputation of deceased, Lovey Bearden, in the community in which he lived prior to his death, and that it was good, to which witness answered that it was good, whereupon, on cross-examination, appellant's counsel asked witness if he had not heard of deceased being in a great many quarrels and fights, and especially with Jim Lanham and old man Lanham, and whether he (witness) did not know deceased was prosecuted for an assault on Jim Lanham and for using abusive language to old man Lanham. The state objected to this testimony. The court approves the bill, with the following qualification: "Witness was permitted to testify and did testify that he had heard of deceased's trouble with the Lanhams, but was not permitted to testify that deceased was prosecuted therefor." In this there was no error. *Darter v. State*, 39 Tex. Cr. R. 44, 44 S. W. 850.

The fifth ground of the motion for new trial complains that the court erred in its charge on manslaughter, wherein the jury are instructed that an assault and battery is adequate cause, in that he failed to define an assault and battery. We do not think this was necessary. The statute makes an assault and battery adequate cause to reduce a homicide from murder to manslaughter, and it is sufficient for the court to give the statute, and under these conditions it is not necessary to define assault and battery. In this connection, however, we recall the argument of appellant's counsel, insisting that in assaults with intent to rape and murder it is necessary for the court to define an assault, and we have so held. This is true. But in such cases assault is an element of the offense on

trial, and hence it becomes necessary to define the same to the jury. In the statute under consideration, an assault and battery being adequate cause to reduce murder to manslaughter, the bare statement of the fact carries with it an intelligent conception of the proposition announced, without a definition of assault and battery. There was no error in the court's charge.

Appellant also contends that the court erred in that part of the charge in which the attention of the jury is directed to the acts of deceased shown to have occurred long prior to the date of the killing—that of battering defendant's tub, whipping defendant's child, tearing down defendant's fence, threatening to shoot a hole through defendant, etc.—insisting that it was on the weight of the evidence, because the undisputed facts disclose that said acts and words were looked upon lightly by defendant, did not disturb him in the least, and were not treated seriously by defendant, and were not relied on by defendant in the trial as constituting adequate cause, and could not, in legal contemplation of the statute, constitute adequate cause. The charge presenting this matter is quite lengthy, but suffice it to say that the court charges these things as being adequate cause to reduce the homicide from murder to manslaughter; and even if there be error in the charge, as appellant insists, or that same is upon the weight of evidence, it is in favor of appellant, and he cannot be heard to complain of said charge.

The court charged the jury, as follows: "If you believe from the evidence that defendant had the premises rented, on which the homicide occurred, and that deceased went into the inclosure on said premises without the consent of defendant, and after defendant had requested him not to come into said inclosure, and that he (deceased) continued to go into said inclosure and onto said premises after defendant had remonstrated with deceased against coming into said field and inclosure, and if you further believe from the evidence that such verbal remonstrances, if any, were of no avail, and that deceased on the occasion of the homicide went into said inclosure, and was approaching defendant in said inclosure, and from the acts of deceased, or from his words coupled with his acts, it reasonably appeared to defendant that his life was in danger or that he was in danger of serious bodily injury at the hands of deceased, and that while such danger, if any, was imminent and pending, defendant shot and killed deceased, then you will acquit defendant." And again: "So, also, if deceased was in the act of forcibly ejecting defendant from said premises, and defendant, to avoid being driven off of said premises by force, shot and killed deceased, he was justifiable in so doing, provided he resorted to all other means to prevent being driven from said premises before killing, except that he was not bound to retreat in any

event." Both of these charges are the law applicable to the facts of this case.

Appellant insists that the court erred in refusing his requested charge No. 2, which is as follows: "If you believe from the evidence that defendant, Sing Bearden, was suffering from bodily pain and mental anguish, caused by wounds and bruises on his body produced by deceased, by means of rocks or missiles of any kind, such as would reasonably incapacitate defendant for any reflection whatever at the instant of his firing the second shot, if any such shot was fired, or if you have a reasonable doubt as to defendant's capacity for such reflection, caused by the acts and conduct of deceased as above stated, you will find defendant not guilty, even though you should find and believe from the evidence that deceased, Lovey Bearden, desisted from further attack upon defendant at the firing of the first shot, if any such shot was fired." The court properly told the jury if he fired the shot in a sudden transport of passion, aroused by an adequate cause, he would be guilty of manslaughter. The charge in this respect is as full as appellant could expect.

Appellant strenuously insists that the court erred in refusing the following charge: "If you believe from the evidence that defendant, J. S. Bearden, believed, and had good reason to believe, his life was in danger, or that he was in danger of serious bodily injury, at the hands of deceased, Lovey Bearden, and that the danger was imminent and pending, and that, in order to defend himself against such danger, he resolved to fire both shots, before firing either, and did, after the firing of the first shot, if such shot was fired, and before reflection or opportunity for reflection by him (defendant), fire the second shot, if such shot was fired, then and in that event the firing of both shots would constitute one act, in which event the killing would be justifiable homicide, and you will acquit defendant." There was no error in the refusal of the court to give this charge.

The charge of the court on self-defense is in strict accord with the decisions of this court, and presents every possible phase of self-defense made by the evidence. It is immaterial whether appellant resolved to fire both shots, or one shot; his intent must be judged from the shot or shots fired; and the court properly applied the law to this state of facts. Appellant may be innocent in the firing of the first shot, and guilty of murder in the firing of the second shot, or, under some circumstances, he might be guilty of murder in the first shot and manslaughter in the second shot. In other words, his guilt depends, not upon the number of shots, but his criminal intent and motive at the time of the shooting. The fact that he resolves to shoot has nothing to do with the question. The question is, what was his intent at the time he shot?

Appellant insists that the verdict of the jury, and charge of the court thereunder, are

contrary to the law and not supported by the evidence, because the evidence shows that defendant acted in self-defense. We do not agree with this, but are of opinion that the record before us shows a cruel, dastardly, and almost fiendish murder by appellant of his brother, whose lifeless body he permitted to lie upon the ground while he worked around it, for two or three hours after killing him. It is true, he insists that he did the killing in self-defense, but we do not think the record supports his testimony.

Appellant also insists that the court should have granted him a new trial because one Joe French, a deputy sheriff, who was a material witness against defendant on the trial and took considerable interest in the prosecution, after the judge of the court instructed the sheriff not to allow said French to be in charge of the jury or to communicate with them, in violation of such instructions, did communicate with and have a private conversation with W. C. Bray, one of the jurors who tried this case, which conversation was had away from and out of the hearing of the balance of said jury, and the sheriff not in charge of him. Defendant says that, while he cannot state the nature of said conversation between French and the juror, he charges, on account of the feeling of French against him in this case, the same was prejudicial to his interest. While it is improper for deputy sheriffs to converse with jurors under such circumstances, this record does not show that appellant was injured in any way by the conversation, and we cannot indulge presumptions.

No error appearing in the record, the judgment is affirmed.

HENDERSON, J., absent.

BOTTOMS v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—LOCAL OPTION LAW—EVIDENCE—SUFFICIENCY.

1. A conviction of violating the local option law cannot be sustained where the evidence does not show that the local option law was in force in the county where conviction was had.

Appeal from Jack County Court; R. S. Blair, Judge.

W. F. Bottoms was convicted of violating the local option law, and appeals. Reversed.

Nicholson & Fitzgerald, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating what is termed the "Local Option Law," and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

Appellant insists the evidence is insufficient

to support the conviction, for the reason that it is not shown that local option was in force and effect in Jack county, where this conviction occurred. An examination of the statement of facts shows his contention to be correct, inasmuch as there is an utter lack of evidence on this point. Because the evidence does not show local option was in force in Jack county, the judgment is reversed and the cause remanded.

HILL et al. v. HALLIBURTON et al.
(Court of Civil Appeals of Texas. March 27, 1903.)

APPEAL—BOND—APPROVAL BY CLERK—POWERS OF JUDGE.

1. A judge of the district court has no power to question an appeal bond approved by the clerk, or entertain a motion to expunge the clerk's approval therefrom.

Application for an injunction by George A. Hill and others against Jennie Halliburton and others. Injunction granted.

O'Brien, John & O'Brien, for applicants.
E. C. McLean, for respondents.

GARRETT, C. J. George A. Hill and others have filed in this court an application for an injunction against the Honorable W. H. Pope, judge of the Fifty-Eighth Judicial District, B. Boykin, the clerk of said district court, and J. A. Paulhamus, who had been appointed by said judge as receiver of certain property involved in a suit in said court by an interlocutory order entered therein, from disregarding the appeal of the applicants from said order and interfering with said property. Applicants averred that they had excepted to the order appointing the receiver, and had perfected an appeal therefrom, and superseded the same by filing a bond in an amount fixed by the judge, and that upon a motion filed by the plaintiffs in the court below the judge was about to order the approval of the district clerk erased from said bond, and to declare the same annulled and of no effect. A preliminary writ was granted, and the respondents were cited to show cause why it should not be made final. The application for the restraining order of this court and the answers of the respondents, so far as need be stated for the purpose of disposing of the matter before the court, show that the respondents brought suit in said district court against the applicants for the conversion of certain petroleum oil described in the petition and for an injunction restraining them from disposing of the same and for the appointment of a receiver; that on January 12, 1903, the district judge granted a preliminary injunction as prayed for, and notice was ordered to the defendants to appear before the judge in chambers at a time fixed, and show cause why the injunction should not be made permanent, and a receiver appointed, as prayed for in the petition. Upon

the hearing in accordance with said notice the judge finally entered an order appointing the respondent J. A. Paulhamus as receiver of said property, and said Paulhamus at once qualified by executing a bond in the amount fixed by the court, and taking the oath prescribed by law. Possession of the property was at once surrendered to him by the defendants. The defendants excepted to said order of the court appointing a receiver, and gave notice of appeal therefrom. The judge fixed the amount of a supersedeas bond at the sum of \$100,000. The defendants presented a bond to the clerk, which was accepted and approved and filed by him. It is shown by the answer of the Honorable W. H. Pope that the amount of the supersedeas bond was fixed by the court on hearing of a motion filed by the defendants to have the same fixed; and that when the same was granted and the amount fixed it was further ordered that the bond should be presented to the court for its approval, and that the receiver should have five days or other reasonable time to be thereafter fixed by the court in which to make an accurate measurement and inventory of the petroleum oil in his possession. The original order made by the court does not contain the direction that the bond should be presented to the judge for approval, or that the receiver should be allowed time to measure the oil. It appears that the original order was drawn with blanks left for the name of the receiver and the amount of his bond and for the amount of the supersedeas bond, and these were filled in when afterwards the judge settled these points. The announcement was made orally, and the blanks were filled, and the defendants executed two bonds for supersedeas—one a general supersedeas bond, and the other as for the possession of property—and presented the same to the clerk, who accepted and approved them, and issued the writ of supersedeas. The judge, in his answer, states that he announced orally that the bond should be presented to him for approval, and that he would not approve it until a measurement of the oil could be made. After the bonds had been approved and filed, an order of the court was entered on the minutes containing these provisions. A motion was thereupon made by the plaintiffs requesting the court to direct the clerk to expunge his approval of the appeal bond, and to annul the writ of supersedeas that had been issued by him, and to direct the receiver to retain possession of said property until he had completed an inventory according to the order of the court, and until he should be lawfully directed to relinquish such possession after the approval by the judge of a supersedeas bond. It was to prevent action on this motion that this court was applied to for its writ.

The appeal by the applicants from the order of the court appointing the receiver suspended operation thereof. Rev. St. 1895, art. 1383; Carter v. Carter (Tex. Civ. App.) 40

S. W. 1030; People's Cemetery Association v. Oakhurst Cemetery Company (Tex. Civ. App.) 60 S. W. 679. It was proper and necessary for the court to fix the amount of the bond in the case, as there is no way by which the clerk could fix it; but in all cases where an appeal bond is necessary it must be presented to the clerk of the court for his approval, and this is the uniform practice in the courts of record in this state. In no instance do the statutes provide for the approval of an appeal bond by the judge. The bond for certiorari must be fixed by the judge and approved by the clerk. Rev. St. 1895, art. 347. Bonds for the issuance of writs ordered by the judge are subject to the approval of the clerk of the court, though issued in vacation—as the bond for an injunction. Rev. St. 1895, art. 2097. It was not within the power of the judge to suspend the appeal by an order directing the bond to be presented to him for approval, or that it should be held up until the receiver could make an inventory of the property, for when the steps to perfect the appeal were complied with the jurisdiction of the district court ceased, and that of this court attached; and when the order was made it was the right of the defendants to perfect the appeal at once. The district court has no power to inquire into the sufficiency of the appeal bond, or to entertain a motion to expunge the approval of the district clerk. Power to inquire into matters of fact affecting their jurisdiction belongs to the Courts of Civil Appeals. Rev. St. 1895, art. 998; Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537.

The order heretofore granted on this application is made final.

SMITH v. MISSOURI, K. & T. RY. CO.*

(Court of Civil Appeals of Texas. March 18, 1903.)

RAILROADS—FIRES—EQUIPMENT OF ENGINE— NEGLECT—PROOF—PRIMA FACIE CASE—REBUTTAL

1. Where defendant proved that the only two locomotives that could have emitted sparks alleged to have fired plaintiff's building were equipped with the most highly approved spark arresters, and were operated in a skillful manner, such evidence rebutted the prima facie case made by proof of the fire having been communicated by sparks from defendant's engine.

2. Where, in an action for the loss of a building by fire alleged to have been communicated from defendant's engine, the prima facie case made by proof that the fire was so communicated was rebutted, plaintiff could not recover without further proof, by a preponderance of the evidence, that defendant had been guilty of negligence.

Appeal from Hunt County Court; R. D. Thompson, Judge.

Action by K. S. Smith against the Missouri, Kansas & Texas Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

*Writ of error denied by Supreme Court April 2, 1903.

T. D. Montrose and Wm. Pierson, for appellant. Perkins & Craddock and W. C. Jones, for appellee.

FLY, J. This is an action for damages alleged to have resulted by the destruction by fire of houses belonging to appellant, the fire having been communicated to the buildings through the negligence of appellee.

An investigation of the record raises grave doubts as to whether the fire was communicated to the houses through sparks from appellee's locomotive, but if it was, and a prima facie case thereby made for appellant, the proof was satisfactory and uncontroverted that the most highly approved spark arresters were used on the only two locomotives that could have emitted the sparks, and that they were operated in a skillful and careful manner. That evidence completely rebutted the prima facie case made by proof of the fire having been communicated by sparks from the engines of appellee.

The prima facie case having been fully met by appellee, in order to justify a finding for appellant it devolved upon appellant to show that appellee had been guilty of negligence by a preponderance of the evidence, and the court did not err in so informing the jury.

The verdict is fully sustained by the facts. No other verdict would have been responsive to the facts. The judgment is affirmed.

CITY OF GEORGETOWN v. JONES.

(Court of Civil Appeals of Texas. March 18, 1903.)

TAXES—PAYMENT—DEFAULTING COLLECTOR— SUIT BY CITY—ADMISSIBILITY OF EVIDENCE.

1. A property owner paid \$24 taxes to the tax collector by giving him \$12 in cash and crediting him with the \$12 balance on his private debt, and received a tax receipt. The collector reported \$24 as paid, and attached to the report was a receipt of the city treasurer acknowledging receipt of the money. In a suit for the \$12 balance, the city offered to prove that the collector, who was a defaulter, had reported \$300 taxes as collected, which had in fact been paid by credits on his personal debts; that he was under indictment and totally insolvent; and that he had collected \$521 in cash, and had not reported it. Held, that the evidence was admissible to rebut the documentary evidence of payment, as tending to show that the collector had not himself paid the \$12 balance to the city.

Appeal from District Court, Williamson County; F. G. Morris, Judge.

Action by the city of Georgetown against W. T. Jones. Judgment for defendant, and plaintiff appeals. Reversed.

H. N. Graves and E. A. Strickland, for appellant. Chessher & Wilcox, for appellee.

KEY, J. The city of Georgetown, a municipal corporation, brought this suit to recover from W. T. Jones the sum of \$12, al-

leged to be owing as taxes, and to foreclose a lien on certain real estate. There was a nonjury trial, resulting in a judgment for defendant, and the plaintiff has appealed.

The undisputed testimony shows that on January 13, 1902, the defendant was due the plaintiff the sum of \$24 for taxes for the year 1901, on the real estate described in the plaintiff's petition. On that day he paid J. S. Harlee, the plaintiff's assessor and collector of taxes, the sum of \$12 in current money, and that officer, being indebted to him in the sum of \$12, delivered to the defendant a tax receipt for \$24, in due form, and duly and officially signed by Harlee. The consideration for the tax receipt was the \$12 owing by Harlee to the defendant, and the \$12 paid by the defendant to Harlee as tax collector.

On February 6, 1902, Harlee, the tax collector, made his report to the city council of Georgetown, showing an itemized statement of taxes collected by him during the month of January, 1902, on the tax rolls of 1901, amounting in the aggregate to \$3,707.20, which report included \$24 as paid by the defendant. Attached to the report was the receipt of the treasurer of said city, showing that the collector had paid to the treasurer the sum of \$3,707.20, in current money, to cover the amount collected, as shown by the report, including the \$24 reported as paid by the defendant. The report referred to was received by the city council, and ordered filed on February 13, 1902, but the council took no further action thereon.

By the witnesses Strange and Brown the plaintiff proved that Harlee, the tax assessor and collector, was a defaulter, and owed the plaintiff on the rolls of 1901 the sum of \$932, \$590 thereof being cash collected, and \$342 being tax receipts, with which Harlee had paid his private debts. It was also shown that \$215.68 of the cash defalcation was collected during the month of January, 1902, and not included in the collector's report. There was no proof as to when the remainder of the \$590 cash defalcation was collected, nor when the \$342 worth of tax receipts were issued, nor whether they were included in the collector's report.

The plaintiff offered to prove that Harlee, the tax collector, was under indictment for embezzling funds of the plaintiff, being taxes collected on the rolls of 1901; that he was notoriously insolvent, and that certain taxpayers on the rolls of 1901 had paid their taxes to the collector during the month of January, 1902, amounting in the aggregate to \$521, which the collector had not reported in his report referred to above. The plaintiff also offered to prove by certain other witnesses that during the month of January they paid to Harlee, the collector, taxes amounting in the aggregate to over \$300 in debts that said Harlee was owing them, he handing them receipts for their taxes in consideration of their discharging him for a like

amount of his indebtedness to them, and that in each instance he had reported these amounts as collected by him during the month of January, 1902, in the report above referred to. All this testimony was excluded by the court upon the ground that it would not tend to show, if admitted, that Harlee had not paid out of his own private funds the \$12 which the plaintiff sought to recover from the defendant.

This ruling is assigned as error, and we sustain the assignment. If it be conceded that the tax collector's report, together with the receipt of the city treasurer, constituted prima facie proof that the defendant's taxes had been duly and properly paid, nevertheless the plaintiff had the right to rebut such proof by circumstantial as well as direct evidence. The tax receipt, which, like the collector's report, was an official document in writing, stated that the defendant had paid the full amount of his taxes, amounting to \$24, yet the plaintiff had the right to show and did show that the statement so made was untrue, and that the defendant had paid only \$12. The monthly report made by the collector was of no higher dignity nor more binding force than the tax receipt, and, conceding that it was prima facie evidence of the fact that the collector had paid \$12 of the defendant's taxes out of his own private funds, the plaintiff had the right to show, if it could, that the payment referred to was made with funds belonging to the plaintiff, and not to the collector.

In determining the admissibility of the excluded testimony, it should be borne in mind that the collector reported over \$300 as collected by him during the month of January, 1902, which in fact had not been collected; and the question is not merely whether he paid the \$12 out of his private funds, but whether he so paid over \$300. Now, on that issue, the plaintiff offered to show that he was notoriously insolvent, which would be a circumstance tending to show that he had no considerable sum of private means.

The plaintiff also offered to prove that he collected over \$500 during the same month, which he failed to report, which would have established the fact that he held in his possession funds belonging to the city which he could have used to cover the \$300 reported by him as collected which in fact he had not received. Furthermore, if he was a defaulter, as clearly shown, it is highly probable that if he had private means of his own, or could have obtained them from relatives or friends to pay to the treasurer the \$300 referred to, he would have been able to settle his entire account with the plaintiff, and not have been indicted for embezzlement.

We are of the opinion that the excluded testimony tended to show that \$12 of the defendant's taxes had never in fact been paid, and that funds belonging to the plaintiff were used by the collector when he made the payment to the city treasurer covering the taxes

reported as collected from the defendant and from others who did not in fact pay their taxes when they obtained their tax receipts.

For the error indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

ENGLAND v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. March 18, 1903.)

CARRIERS—EXCURSION TICKETS—LIMITATION TO PARTICULAR TRAINS—EJECTION.

1. A carrier is entitled to limit the use of an excursion ticket sold at a reduced rate to any particular train or trains.

2. Where a passenger held an excursion ticket, sold at a reduced rate, which recited that it was not good on a particular train, and, though he did not read the ticket before boarding such train, he was apprised that it did not entitle him to travel thereon, he was not entitled to recover damages for his ejection, accompanied by no unnecessary force.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by J. F. England against the International & Great Northern Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

John Dowell, for appellant. S. R. Fisher and J. H. Tallichet, for appellee.

KEY, J. Appellant brought this suit against appellee to recover damages for the alleged wrongful ejection of appellant from one of appellee's passenger trains. After hearing the testimony, the court directed a verdict for the defendant, and the plaintiff has appealed.

The plaintiff introduced the following testimony:

J. F. England, the plaintiff, testified as follows: "My name is J. F. England, and I am plaintiff in this case. The International & Great Northern Railroad runs between Austin and San Antonio, passing through Kyle. I was in Kyle on August 3, 1902, and I got on the north-bound train there that night. I was coming to Austin, and my father and I went to the depot. Mr. Sledge, the agent, was there, and I told him I was going home that night if he could stop the train; and he said, 'John, I can't stop the train, but I think there's some boys going to get off it, and you can get on it if it stops.' I said, 'Well, that's all right.' After that I was lying down on the gallery, with my coat under my head, and my father and I were talking, and Linden Sledge, who was the porter and night agent, came out, and said: 'John, I am sorry I can't stop the train for you, but if it stops you can get on it. I think it will stop, and, if it does stop, it's all right.' About that time we saw the south-bound train coming over the hill from Austin, and Sledge said: 'Well, there is No. 1. It will stop, and you can get on

the other train.' No. 1 pulled in on the main track, and the 'High Flyer,' the train I got on, pulled in on the siding, and Linden Sledge said: 'You need not go down there. You can get on right here. It's going to stop right in front of the depot;' and he said, 'You are sure lucky, John, ain't you?' and I said, 'Yes, I am lucky, and I am glad for it to stop.' Well, I got on the train, and went about three-quarters of a mile, and the conductor, Jim Seamonds, came through. He took my ticket, looked at it, and said: 'Why, hell! I can't carry you through on this ticket.' I said: 'Well, the agent told me to get on.' He said: 'Damn the agent. He ain't running this train; I'm running this train.' I said: 'That don't make any difference. I got on the train in good faith. I wouldn't have got on unless he told me to.' He said: 'Well, damn the agent! He ain't running the train. I'm running it, and you get off,' and he sorter taken me by the arm; and I wouldn't let him push me off, and I got off, and he waved his lantern, and the train went on, and I footed it back to Kyle. I don't know exactly how far I rode on the train, but I think between one-half and three-quarters of a mile, and I had to walk that distance back. This occurred about 10 o'clock, or a little after 10, at night. The conductor did not put me off at any station. He put me off between stations. The next station north of Kyle is Buda, and the next one is Manchaca, and then Austin. I could not say that the ticket handed me is the one I had that night, as the tickets all look so much alike, and I never read a ticket from start to finish; but the ticket I had was something like this one. It was an excursion ticket to New Braunfels and back to Austin. Kyle is a station between Austin and New Braunfels. As to exactly what occurred on the train, I was sitting in the car, and the conductor came in, and I handed him my ticket. He said: 'Why, hell! I can't carry you on that ticket. You're on the wrong train;' and he reached up for the bell cord, and he said: 'Get off! get off! What do you mean getting on here?' I said: 'The agent told me to get on. I got on here to go to Austin. I don't want to get off here. This isn't Austin.' He said: 'Well, never mind; I haven't got time to fool with you. The agent ain't running this train.' I didn't want to raise any Cain or rough house with him, and just stepped off, and the whole car was sitting there watching me, too. I told the conductor that the agent told me to get on the train, and the ticket was good, and he said: 'Damn the agent! He ain't running this train. I'm running it, and you get off!' and I got off. When I got off the train I pulled my coat off, and put it on my shoulder, and hit the middle of the track back to Kyle. I don't know exactly what time I got back there, but it took me at least 10 or 15 or 20 minutes, perhaps longer, to walk back. I went to the Kyle Hotel,

and sat down to wait for the next train. I was coming to Austin, which is my home. I had to wait about an hour and 10 or 15 minutes for the next train, and came on to Austin on it. The conductor's conduct towards me made me feel very bad. I didn't feel good at all. No one would feel good getting put off a train out on the bald prairie in the dark, and the people in the car sitting there looking at him. The train I got on first was right in front of the depot when I got on it, and the porter and conductor were both off the train at the time. This was on Sunday, August 3d. I earned from \$85 to \$100 a month. I am a barber, and the time of my employment is from Monday morning at 7 o'clock until 11 o'clock on Saturday night. Before getting on the train, I showed Mr. Sledge my ticket, and he said, 'That is all right, John, if it stops.' I applied to him for proper and correct information, and I would not have gotten on that train if I had thought I was going to be put off out in the prairie. That is a settled fact. My father, Miss Rosa Kyle, and the agent were present when the agent told me to get on that train. Mr. Sledge was the night agent and operator. He meets all trains that come through there after 6 o'clock in the evening. I thought whatever Linden Sledge said was all right. He had been working there a good while. There was no other agent there at that time. I have known Sledge always. We were raised together, and I thought whatever he said to do was all right. That is the reason I showed him the ticket and asked him about it. He just looked at it, and said, 'Well, if the train stops, it's all right, John, you get on it; but if it don't stop, of course you can't.'" Cross-examination: "When I first went to Linden Sledge, I asked him to flag the train for me. I said, 'Linden, is the train going to stop?' He said, 'No, I don't think it will, John.' I then said, 'Can't you flag it?' He said, 'No, I can't flag it any more for that ticket, John.' He had flagged it the Sunday night before for me. Mr. Sledge did not read a telegram to me. He came outside, and had a telegram, but it was too dark to read it, and I said, 'I will take your word.' He said the telegram was that he could not flag the train any more for those excursion tickets. Mr. Sledge did not tell me distinctly that excursion tickets were not good on that train, because he said: 'I expect some of the boys will be in on this train from New Braunfels. They went over there this evening, and I expect it will stop.' I don't know that the ticket I had said, 'Not good on train No. 8,' and it is not a fact that the conductor pointed it out to me before he put me off the train. He just held it up this way, and looked at it, and remarked to me: 'Hell! This ticket isn't good on this train. What are you doing on this train?' This ticket contains these words: 'Not good on train No. 8. International & Great Northern Rail-

road. Excursion Ticket. Returning Coupon. No stop-over will be allowed on this ticket. One first-class passage New Braunfels, Texas, to Austin, Texas. Good only until and including train leaving August 3rd, 1902.' But I came up on the same train the Sunday night before that. When I was put off the train I did not measure the distance nor count the number of telegraph poles between the places, as I was too mad. I was raised there, and ought to know how far it is from where I was put off back to the station. I have gone over that ground maybe two hundred times. Where I was put off the train was between one-half and three-fourths of a mile this side of the depot. I cannot state that the place where I was put off was not about six feet from the north end of a little bridge, about 400 steps this side of the depot at Kyle. When the train stopped, Linden Sledge said, 'John, you are lucky, you're going to get home on the first train,' and hollered 'Good-by.' As previously stated, he said that if the train stopped I could get on it, and go home on it, but he said he could not flag it. He said, 'I expect some of the boys will be in from New Braunfels, and I expect they will stop,' and I showed him my ticket. My father and I were on the gallery, and Miss Rosa Kyle was on the inside of the office. I was lying down with my coat under my head, and when Sledge had the telegram I said, 'You need not show me that telegram, I'll take your word for it.' Regarding the telegram he said, 'I got a telegram not to flag this train for any excursion tickets, but there is some boys coming in from New Braunfels, and the train will stop, I expect, and if it does you can go on to Austin on this train,' and we changed the subject, and were talking about different things, and he looked up and said, 'Yonder comes No. 1; I expect these trains will meet here,' and it pulled in on the main track above the depot, and the other train came in on the side track right in front of the depot, and stopped. Sledge said, 'Well, John, you are lucky sure.' I said, 'Yes,' and he waived his hand and said 'Good-by.' Sledge had my ticket in his hand, and told me to get on; it was all right. If he hadn't told me to get on the train, I certainly would not have got on it. I bought my ticket at Austin, right down here at the depot. I gave six bits for it. It was a ticket to New Braunfels and return, but I did not go to New Braunfels. I got off at Kyle. I do not know the regular fare from Austin to New Braunfels. Kyle is on this side of New Braunfels, and the regular fare from Austin to Kyle is 65 cents, I believe, and the round trip would be double that, or \$1.30. I got my ticket to New Braunfels and return at a less rate than the straight fare from here to Kyle and return would have been. When the conductor approached me, I was seated in the car, and the train was in motion, having left the depot."

J. R. England, for the plaintiff, testified as follows: "My name is James R. England. I am the father of the plaintiff. I reside in Kyle, Texas, and am night watchman, employed by the people of Kyle. I was at the depot in Kyle on the night of August 3d last. My son and Linden Sledge were also there. Mr. Sledge is porter there at the depot, and sells tickets. He was representing the railway company there that night. Miss Itosa Kyle was also there that night. I heard a conversation between my son, J. F. England, and Mr. Sledge regarding my son's getting on the train. Mr. Sledge said: 'This first train that is due here, No. 8, I can't flag that train, because it won't stop here. I have orders not to flag that train, special orders this morning;' and he went and showed John his authority. He had orders not to flag that train for the ticket he had, and Sledge told him he would have to wait for No. 6, which was the last train due coming north, and John told him, 'All right;' but while we were waiting, No. 1, from the north, ran in about the time that No. 8 from the south ran in. No. 8 went in on the switch, and Mr. Sledge said to my son, 'You are lucky, No. 8 is going to stop,' and told him to go down to the switch, but the train stopped a little farther up, and he told him to go up farther. John went on up, and boarded the train, and the next thing I knew I went to the hotel in making my rounds, and my son was there, and he said they put him off the train. During the conversation before the arrival of the train, Sledge told my son he could get on the train if it stopped, but he said he had a telegram not to stop the train, and showed him the telegram. I could not say whether my son showed his ticket to Mr. Sledge or not. I was not present all the time they talked. It was talked about my son's having an excursion ticket, but I didn't see it. When the train came up and stopped, Mr. Sledge said, 'You are lucky, John,' and told him to go down to the switch, and get on it; but it went farther up, and Sledge told him to go on, and get on it up there. The train came up very near to the depot, and stopped, and Sledge told him to get on. There was no other person than Mr. Sledge representing the railroad company that night in selling tickets and directing passengers. The time I saw my son at the hotel was somewhere inside of an hour after he got on that train at the depot. I don't know how he came back. He was sitting there at the hotel when I found him." Cross-examination: "Mr. Johnson is the regular station agent at Kyle. Mr. Sledge is operator and assistant agent. I said that Mr. Sledge told my son that he had a telegram not to flag No. 8, and those excursion tickets were not good on No. 8, and I understood that my son had an excursion ticket, but did not see it. Mr. Sledge said it was not good on No. 8, and No. 8 was the first train in. It is what is called the 'Santa

Fé Flyer.' The second train, the one my son finally went off on, is called 'No. 6 Local.' It came through about an hour after No. 8. When No. 8 came in, Mr. Sledge remarked, 'You are lucky, John,' but before that he had showed John a telegram that he had no authority to stop the train, and that that ticket was not good on that train. He just said he was lucky, and told him to go down to the switch, and then it stopped, and he told him to go up there. The train was not moving when John got on it." Redirect examination: "My son had no other business there with that agent than to get on the train and come to Austin. When Sledge told John to go up there, and get on the train, John went and got on it. In the conversation before the train arrived Mr. Sledge said it might be that the train might stop to let some of the boys from New Braunfels get off the train. Mr. Sledge knew that John had an excursion ticket."

Among other matters, the defendant put in evidence a fac simile of the ticket on which the plaintiff attempted to ride, which contained a stipulation stating that it was not good on train No. 8.

In our opinion, the court ruled correctly in instructing a verdict for the defendant. A carrier has the right to limit the use of an excursion ticket sold at a reduced rate to any particular train or trains. *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. 321, and the cases there cited. In the case at bar the testimony submitted by the plaintiff shows that, while he had not read the ticket, he was apprised of the fact that it did not entitle him to travel on train No. 8, and also of the fact that the train in question and upon which he attempted to travel was train No. 8. Such being the case, we think he took the chances of not being permitted to travel on that train, and, as his ejection was not accompanied by unnecessary force, he had no cause of action, and was not entitled to recover. *Ry. Co. v. Powell* (Tex. Civ. App.) 35 S. W. 841; *Ry. Co. v. Demille* (Tex. Civ. App.) 41 S. W. 147.

No error has been shown, and the judgment is affirmed. Affirmed.

ROBINSON v. NATIONAL SURETY CO.

(Court of Civil Appeals of Texas. March 18, 1903.)

PLEADING AND PROOF—VARIANCE—ACTION FOR PENALTY—SURETY COMPANIES.

1. Where in an action under Acts 1897, p. 247, c. 165, § 10, giving a right to recover a penalty of a surety company where it withdraws from a bond which it has made, or, having once become surety, refuses to do so again, and in either case fails to give its reasons therefor, the petition predicates right of recovery on the first ground, recovery cannot be had on proof of the other ground.

Error from Millam County Court; R. B. Pool, Judge.

Action by J. T. Robinson against the National Surety Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Hefley, McBride and Watson, for plaintiff in error. Henderson, Freeman & Fowler and Baker, Botts, Baker & Loyett, for defendant in error.

COCHRAN, Special Judge. This is a proceeding by plaintiff in error to recover from the defendant in error, as a penalty, \$500, for failure to furnish a statement in writing of the facts constituting the basis of its alleged refusal to become surety for his fidelity as an employé of the Gulf, Colorado & Santa Fé Railway Company. The case was tried by the court without a jury, and judgment rendered for defendant, from which the plaintiff sued out a writ of error, and a reversal of the judgment is sought on the admission of certain papers in evidence, by which the defendant proved that, upon plaintiff's application, it became his surety, and so remained for about three months, when it was released by its own request.

The plaintiff in error assigns no error as to the legal effect of the papers, and we find that the papers do show that defendant in error became surety for plaintiff in error upon his application, and did not refuse to do so, as alleged in his petition. The contention of the plaintiff in error is that there was no proof of the execution by defendant in error of the documents constituting the bond to the railway company, and that these papers were improperly admitted in evidence. Without narrating the circumstances connected with the production of these instruments, we are of opinion, and so find, that the testimony of the agent of the railway company from whose custody the papers were produced was sufficient to establish their execution. The bond consisted of four separate papers, the first being what is denominated a "blanket" or "schedule" bond, No. 3,447, dated January 5, 1898, which provides for its continuance by renewal from year to year, by notice of a desire on the part of the railway company so to do, without the execution of another instrument. This instrument contains a list of the employés whose fidelity was guaranteed, and provides for its extension to new employés upon notice of their employment, and for withdrawal by the surety company upon notice to the railway company. The second instrument is a certificate renewing the said bond for the year 1901, reciting its number and date, and providing for the guaranty of employés working under joint employment with other railroads. The third paper is the notice by the railway company to the surety company of the plaintiff in error's employment; and the fourth is the acknowledgment of receipt of this notice by the defendant in error, dated June 8, 1901. Each of these papers refer

to the above schedule bond by number. The record shows that the witness was permitted to testify that the employés of the railway company were, in the main, bonded by the defendant in error, and, after producing the papers to which objection is made, states that the blanket or schedule bond was "executed by the defendant, National Surety Company." He then states that the second paper "is a renewal of said bond for the year 1901," and, referring to the other papers, states that these "are the notices sent out and received from the defendant by the Gulf, Colorado & Santa Fé Railway Company with reference to the bonding of plaintiff and to his discharge." The third paper the witness wrote, and the fourth—being the reply—his testimony shows he personally received as its proper custodian.

The plaintiff in error fails to show that this witness did not have personal knowledge of the execution of the bond and the certificate of renewal, even if it be conceded that the execution of these papers was not sufficiently shown by circumstances; hence we conclude that the record discloses a case of withdrawal from a bond after execution, and not a refusal to make the bond, as alleged.

Conclusions of Law.

The statutory right to recover a penalty against a surety company is given where the company withdraws from a bond which it has made, or, having once become surety for the fidelity of the complainant, refuses to do so again, and in either case fails to state its reasons for so doing within 30 days after request therefor. Acts 1897, p. 247, c. 165, § 10. The plaintiff in error predicates his suit upon the second ground named in the statute, and, the right of recovery being of penal nature, not founded upon any actual injury; the burden is upon the plaintiff to bring his case clearly within the law. *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. 1014.

It is not necessary that we should consider the constitutionality of the law which seeks, under penalty, to compel a disclosure from the surety company of its reasons for refusing to make or continue bound upon a contract between private parties; or to consider whether a suit may be maintained for the penalty alone, as is attempted in this case, without showing actual injury and claiming the penalty by way of punitive damages, as is indicated in the statute by the words "shall be liable to such person injured in the sum of five hundred dollars, in addition to all other damages caused thereby." It is sufficient that we hold, as we do, that the plaintiff claims the penalty for refusal to make bond for him on his application therefor, when the evidence properly admitted shows that the bond was made, and that defendant in error subsequently withdrew its suretyship, and that plaintiff in error is not

entitled to the aid of the courts in recovering the penalty on a different ground from that laid in his petition.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. GREGORY.

(Court of Civil Appeals of Texas. March 18, 1908.)

CARRIERS — INJURIES TO PASSENGERS — INFANTS — DAMAGES TO PARENTS — MENTAL PAIN AND ANGUISH—MEDICAL SERVICES.

1. In an action against a carrier for injuries inflicted on an infant, the parent is entitled to recover only for such injuries as incapacitate the infant to render services, and cannot recover for physical or mental pain and suffering by such infant.

2. Where an infant was injured by reason of a carrier's negligence, its parent was entitled to recover for the reasonable value of medical services and necessary expenses in the care and treatment of the child.

3. The fact that such medical services were rendered by the parent, who was a physician, and not by a stranger, was immaterial.

4. Where plaintiff's wife and child were injured by reason of a carrier's negligence, and plaintiff, who was a physician, treated and cared for them, he was not entitled to recover for loss of patronage in his business as a physician while detained at home on account of the illness of such wife and child.

5. Where an infant was injured by reason of a carrier's negligence, his father was not entitled to recover for alleged anguish suffered by either plaintiff or his wife by reason of the child's illness.

Appeal from Upshur County Court; M. P. Mell, Judge.

Action by J. W. Gregory against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This suit was brought by appellee, J. W. Gregory, against appellant, in the county court of Upshur county, to recover damages for sickness, physical and mental suffering, fright, and humiliation caused his wife, Ella Gregory, and his three year old child, Barney Gregory, while detained in its waiting room at Pittsburg, Tex., awaiting to take passage upon its train to Big Sandy.

It is alleged that plaintiff's wife and child were forced to remain in defendant's waiting room for several hours awaiting the arrival of the train upon which they became passengers; that the weather was cold; that the window lights were out; and that the stove was out of repair—on account of which they were made sick, and endured physical and mental pain and suffering.

It is further alleged that during their stay in said waiting room it was frequented by drunken and boisterous negroes, who were cursing, dancing, and playing upon musical instruments, which frightened and humiliated his wife.

The petition prayed that plaintiff be awarded damages for the sickness and physical

and mental pain of his wife and child caused as aforesaid, fright and humiliation of his wife caused by the conduct as aforesaid, the anxiety he and his wife endured during and on account of the child's sickness, plaintiff's loss of patronage as a practicing physician while detained at home on account of the sickness of his wife and child, and all other trouble and damages caused by defendant's negligence.

The appellant specially excepted to the following parts of the petition which alleged and asked damages: (1) For the sickness and physical and mental pain of his child; (2) that which alleges and asks for damages on account of the anxiety he and his wife endured on account of his child's sickness; (3) where damages are alleged and prayed for on account of his loss of patronage as a practicing physician while detained at home on account of the sickness of his wife and child; and (4) that which asks damages for all other trouble caused by defendant's negligence.

The exceptions being submitted to the court and overruled, the case was tried before a jury, and the trial resulted in a judgment in favor of the appellee for \$300, from which this appeal is taken.

E. B. Perkins and Marsh, McIlwaine & Fitzgerald, for appellant. Briggs & Briggs, for appellee.

NEILL, J. (after stating the facts). The action of the court in overruling each of the exceptions referred to in our statement of the case is assigned as error. Each exception should have been sustained.

Physical or mental pain suffered by an infant, by reason of personal injury or wrong inflicted by the negligence of another, is not an element of damages which the parent is entitled to recover, but the right to recover damages for such pain is personally of the infant. *Railroad Co. v. Reichhart*, 87 Tex. 539, 29 S. W. 1040; *Goodhart v. Penn. Ry. Co.*, 177 Pa. 10, 35 Atl. 191, 55 Am. St. Rep. 705; *Woeckner v. Erie Elec. Motor Co.*, 182 Pa. 182, 37 Atl. 936. If, however, the pain which the child suffers is such as to incapacitate him for services to his parent, the latter will be entitled to recover damages, not for the pain, but as compensation for the loss of services caused by the pain to the child. *Walker v. Second Ave. R. R. Co.* (Super. Ct.) 6 N. Y. Supp. 536.

Though an infant be injured, there is no right to recover by the parent therefor, unless the injury be such as to cause loss of services, or require, at the hands of the parent, some expenses or outlay that otherwise would not have been made necessary. *Ry. v. Miller*, 49 Tex. 322; *Ry. v. Edwards* (Tex. Civ. App.) 32 S. W. 815.

Medical services, and all necessary expenses of the care and treatment of a child whose injury or sickness is caused by the negligent or wrongful act of another, are

¶ 2. See *Damages*, vol. 15, Cent. Dig. § 228.

elements of damages arising from such negligence. *S. A. St. Ry. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752. It is not necessary that the parent engage a stranger to administer medical treatment to the child, if, as in this case, the parent himself is a physician competent to perform such medical services. If he performs such services, he is entitled to recover from the wrongdoer a reasonable compensation therefor, for such wrongdoer has made it necessary because of his tort. But the recovery by the parent should not exceed the value of the services performed. He cannot recover, as was sought to be done in this case, for the loss of patronage as a practicing physician while detained at home on account of the sickness of either his wife or child. Such damages are too remote. *Rodgers, Domestic Relations*, § 547. Nor was the alleged anxiety and mental anguish suffered by appellant and his wife, or either of them, by reason of the child's sickness, proper elements of damages. *Pullman Pal. Car Co. v. Trimble*, 8 Tex. Civ. App. 335, 28 S. W. 96; *Ry. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *Ry. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

For reason of the errors indicated, the judgment of the county court is reversed, and the cause remanded.

THOMPSON et al. v. FT. WORTH & R. G. RY. CO.

(Court of Civil Appeals of Texas. March 11, 1903.)

CARRIERS — INJURIES TO PASSENGERS — EQUITY PERPETUATION OF TESTIMONY — STIPULATIONS — CONSTRUCTION — INTRODUCTION OF HEARSAY TESTIMONY — POWERS OF ATTORNEY — PUBLIC POLICY.

1. Where, prior to the death of a passenger from injuries sustained, a suit was brought to perpetuate his testimony, and the carrier's general attorney, before the passenger's deposition was taken, agreed with plaintiff and such passenger that if he would not give his deposition until after the physician advised that he would die, or if anything should happen that he did not so testify, evidence might be given in any suit thereafter brought by plaintiff or others as to what such passenger said was the cause, character, and extent of his injuries, and the deposition was then abandoned, such agreement was within the scope of the attorney's authority.

2. It was no objection to the enforcement of such stipulation that it was not in writing.

3. An agreement that, in consideration of the abandonment of a proceeding to perpetuate a witness' testimony, hearsay evidence thereof might be offered, was not invalid as contravening public policy.

4. Where, in consideration of the abandonment of a proceeding to perpetuate decedent's testimony, defendant's general attorney stipulated that plaintiff might testify in any suit thereafter brought as to what the decedent said was the cause, character, and extent of his injuries, the stipulation was sufficiently broad to justify evidence that decedent stated on returning home that he was a passenger on defendant's freight train, on which certain of

his cattle were being transported, and that near a certain station the trainmen caused the car in which he was riding to give a sudden, violent jerk, which threw him from his seat against the door casing of the car, causing injuries to his head, shoulder, back, and side.

Appeal from District Court, Brown County; John W. Goodwin, Judge.

Action by N. O. Thompson and others against the Ft. Worth & Rio Grande Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Arch Grinnan and E. S. J. Whitehead, for appellants. West, Chapman & West, for appellee.

KEY, J. This is a suit for damages brought by the surviving wife and children of R. K. Thompson, they alleging that Thompson's death was caused by the negligence of the defendant railway company. After hearing the testimony, the trial court instructed a verdict for the defendant upon the ground that there was no sufficient evidence that R. K. Thompson was injured while a passenger on the defendant's road, and by its negligence.

Overruling all other assignments of error, we sustain the third, which complains of the ruling of the court in excluding certain testimony. The testimony and ruling referred to are disclosed by bill of exception No. 2, which reads as follows: "Be it remembered that on the trial of the above-entitled cause the plaintiffs offered to prove by Mrs. N. O. Thompson, wife of R. K. Thompson, deceased, that, when said R. K. Thompson returned home in his injured condition, he told her that on December 26, 1898, he was a passenger on defendant's freight train, and had some cattle on the same train, bringing them to Brownwood, and that at or near Stephenville, Texas, the trainmen caused the car in which he was riding to give a sudden, violent, and unusual jar, jerk, and jolt, which threw him from his seat against the door facing of said car, and caused the injuries to his head, shoulder, back, and side. The defendant objected to said evidence because the same is hearsay, which objections were sustained by the court, and the plaintiffs excepted to the ruling of the court, and the plaintiffs then offered said evidence in connection with the following other evidence, viz., the petition of R. K. Thompson and all the plaintiffs in this suit, which was filed in the district court of Brown county, Texas, on February 10, 1898, to perpetuate the testimony of said R. K. Thompson, to be used in a suit to be brought by them, or either of them, in said court, for damages sustained by them by reason of the violence and injuries inflicted upon said R. K. Thompson. In this connection plaintiffs offered in evidence the direct and cross interrogatories, and the commission issued thereon to take the deposition of said R. K. Thompson in accordance with said petition. Said interroga-

tories had indorsed thereon the following agreement: 'I hereby waive service, notice and copy and agree that commission may issue authorizing any officer properly qualified to take the answer of the witness R. K. Thompson to the foregoing direct and cross interrogatories, which answers of said witness may be used by R. K. Thompson or any or all of his heirs at law in any proceeding instituted by him or them against the Ft. Worth & Rio Grande Railway Co., to recover damages on account of personal injuries claimed by him to have been sustained while a passenger on one of said railway's freight trains on the 28th day of December, 1898. This 14th day of February, A. D. 1899. [Signed] N. H. Lassiter, Atty. for Deft. Ry. Co.' And in this connection plaintiffs further offered to prove by Mrs. N. O. Thompson that, while said depositions of R. K. Thompson were about to be taken to said interrogatories, N. H. Lassiter, defendant's general attorney, was at said Thompson's home, trying to make a settlement with said R. K. Thompson for his said injuries, and the said N. H. Lassiter then agreed with plaintiffs and R. K. Thompson that if he would not give his depositions until the doctor advised him that he should die, or anything should happen that he did not give them, that Mrs. N. O. Thompson, the doctor, and any of the grown children of R. K. Thompson could go on the stand in any suit thereafter brought by them and testify as to what said R. K. Thompson said was the cause, character, and extent of his injuries. Then defendant objected to all of this evidence because the same was hearsay, and because the same is a contract relating to evidence in trials, and seeking to vary and change the rules of evidence fixed by law, and is against public policy. Defendant further objected to said evidence because the agreement, if any, was made in another and different case, and not in the case at bar, and because the agreement, if any, related to the demand that was settled, and not to this action, and because there was no suit then pending to which said alleged agreement related; that the agreement, if any, was not one which this court could or should enforce, and was not made between parties outside of the court, and not relating to a case then pending; that the agreement, if it was made, had reference to the suit then pending to perpetuate the evidence of R. K. Thompson, and not to this suit; that the matters in contemplation at that time was not the condition of the affairs we have here now. And further, that an attorney would not have authority to bind his client by such an agreement; that hearsay evidence cannot be made competent that way; that the alleged agreement, if any, was made prior to the bringing of this suit, and does not relate to this suit, or the cause of action there set up, but relates to the suit then pending to perpetuate Thompson's evidence, and the

cause or causes of action, if any, to which said suit relates, and not to the cause of action here sued upon. Because the agreement, if any, relates to the cause of action, if any, that was settled during the lifetime of R. K. Thompson. Which objections were by the court sustained, and said evidence excluded, and not allowed to be considered by the jury, to which action of the court the plaintiffs then and there, and in open court, excepted, and tender this bill of exception to the court for approval."

In our opinion, Lassiter, if general attorney for the defendant, as the plaintiffs offered to prove, had the power to make the agreement referred to. And while the agreement was not in writing, we think, under the circumstances referred to, it should have been enforced. It is highly probable that on account of that agreement R. K. Thompson's testimony was not perpetuated in such manner as to have rendered it available in this suit; and, such being the case, it would be unjust to the plaintiffs, and equivalent to a fraud upon them, not to enforce the agreement. We know of no rule of public policy that the agreement contravenes, and we think its terms are broad enough to cover the evidence offered and excluded.

Judgment reversed and cause remanded.

OLLIS v. HOUSTON, E. & W. T. RY. CO.*
(Court of Civil Appeals of Texas. March 13, 1903.)

RAILROADS—INJURY TO INFANT—PRESUMPTION OF CONTRIBUTORY NEGLIGENCE—DUTY TO DISCOVER TRESPASSERS.

1. A child six years of age is too young to be guilty of negligence contributing to his injury, received while at play on cars in a railroad yard, which the children in the neighborhood habitually used as their playground.

2. Where children are in the habit of playing about the switchyard of a railroad and the cars therein, and do so with the knowledge and acquiescence of the company, its agents and employes, the company owes them the duty of using ordinary care to discover their presence in the yard and on the cars, and to avoid injury to them.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by George C. Ollis, a minor, by his next friend, against the Houston, East & West Texas Railway Company. A demurrer to the petition was sustained, and a judgment for defendant was rendered. Plaintiff appeals. Reversed.

Jno. G. Tod and Ewing & Ring, for appellant. Baker, Botts, Baker & Lovett and J. S. McEachin, for appellee.

GARRETT, C. J. This action was brought in the district court of Harris county for the Eleventh Judicial District, by George C. Ollis, a minor, by his father, Tolmin T. Ollis, as next friend, to recover damages of the

*1. See Negligence, vol. 37, Cent. Dig. § 134.

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

Houston, East & West Texas Railway Company for personal injuries. A general demurrer to the petition was sustained by the trial court, and judgment was rendered in favor of the defendant, from which the plaintiff has appealed.

It appeared from the petition that the plaintiff was a minor, six years of age, and that while he was at play with other children upon the cars of the defendant in its switchyard at Houston the defendant caused other cars to be run into the yard and struck a car upon which the plaintiff was playing, and plaintiff was thrown off and received injuries which resulted in the loss of his right arm. It was alleged that at the time of the casualty, and for several months before the happening thereof, the defendant had kept cars, both loaded and empty, on its switch tracks and right of way. The petition also alleged: "That said right of way and premises, at the time of the casualty, and during the period aforesaid, were in a thickly settled and populous neighborhood, practically a part of the city, though out of its limits, and in such neighborhood there were numerous children; and during the period aforesaid the children, generally, of said neighborhood, habitually, constantly, and notoriously made their playground on said right of way and premises, and in, about, and on said cars so left standing thereon as aforesaid, without objection from said defendant or its agents or employes in that behalf, and with its and their knowledge and acquiescence, as also with its and their permission, and under circumstances reasonably justifying and calculated to induce such children in believing, and acting on the belief, that their presence on such premises aforesaid was permitted by defendant, as well as its agents and servants in that behalf." The petition showed by proper allegations that, if the defendant owed the plaintiff the duty of lookout to discover his presence, the cars were run against and struck under such circumstances as to show negligence on the part of the defendant's employes.

This case does not come within the principle of the turntable cases, by which there is an implied invitation by the defendant to the injured person to come upon the premises, nor does it come strictly within the rule showing that the plaintiff was upon the premises of the defendant as a licensee. But, taking the allegations in the petition as true, the switchyard was commonly used by the children of the neighborhood as a playground, and they were constantly in and about the cars standing on the tracks, without objection from the defendant or its agents or employes, and with their knowledge and acquiescence. Such being the case, it was the duty of the employes of the defendant to use ordinary care to discover the presence of the children, and to avoid inflicting injury upon them. *G., O. & S. F. Ry. Co. v. Smith*, 87 Tex. 348, 28 S. W. 520; *Railway v. Crosnoe*,

72 Tex. 79, 10 S. W. 342; *St. Louis & S. W. Ry. Co. v. Shifflet* (Tex. Civ. App.) 56 S. W. 698; *St. Louis S. W. Ry. Co. v. Shifflet*, 94 Tex. 131, 58 S. W. 945; *Railway v. Watkins*, 88 Tex. 20, 29 S. W. 232.

The facts alleged in the petition show that the plaintiff cannot be charged with negligence for being on the car in the switchyard of the defendant. If not there as a licensee, he was too young to know the danger of his position. It is not necessary, in order to hold the defendant liable for negligence in injuring the plaintiff, that the facts should show that he was on the premises under a license from the defendant, although, as we think, they are sufficient. The defendant's liability may be rested on the broader ground—that it was its duty to use ordinary care to discover the presence of the plaintiff upon the car, facts having been alleged that tend to show that its employes knew of his probable presence. *Railway v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; *Railway v. Shifflet*, supra. If the plaintiff had entered the yard, and gone upon a car, and turned a brake, and started the car, and got hurt, the doctrine of the turntable cases would have been presented; but such was not the case alleged. The facts stated in the petition show that he was in the yard and on the car with the knowledge on the part of the defendant's employes that he was probably there, and that, knowing his probable presence, they ran an engine in upon the track and struck the car upon which he was without using any care to ascertain whether or not he was present. The cases make a distinction between mere passive negligence and liability therefor arising out of a condition and active negligence in doing a present act without the exercise of due care. We deem it unnecessary to say more, or to cite further authorities.

We commend the briefs of counsel on both sides of this case for an able discussion of the question and a full citation of the cases relied on by them. The plaintiff's petition shows a cause of action, and the court below erred in sustaining the defendant's demurrer. The judgment will be reversed, and the cause remanded.

Reversed and remanded.

On Motion for Rehearing.

(April 2, 1903.)

The defendant's motion for a rehearing will be overruled. In the opinion it was stated that the case does not "come strictly within the rule showing that the plaintiff was upon the premises of the defendant as a licensee," while it was also stated "it is not necessary, in order to hold defendant liable for negligence in injuring the plaintiff, that the facts should show he was on the premises under a license from the defendant, although we think they are sufficient." There is, perhaps, some discrepancy in these statements. The court is of the opinion that the facts alleged

in the petition are sufficient to show an implied license to the plaintiff to be on the premises. The petition, as quoted in the opinion, not only alleged that "the children, generally, of said neighborhood, habitually, constantly, and notoriously made their playground on said right of way and premises, and in, about, and on said cars so left standing thereon as aforesaid, without objection from said defendant or its agents or employees in that behalf, and with its and their knowledge and acquiescence," but continued, "as also with its and their permission, and under circumstances reasonably justifying and calculated to induce such children in believing, and acting on the belief, that their presence on such premises aforesaid was permitted by defendant, as well as its agents and servants in that behalf." We are of the opinion, however, that, even if the petition should not bring the plaintiff clearly within the rule of a licensee upon the premises, still it shows that he was there with the knowledge on the part of the defendant of such circumstances as would create the duty on its part to look out, and discover his presence, and avoid injuring him.

Overruled.

HALL et al. v. CITY OF AUSTIN.

(Court of Civil Appeals of Texas. March 18, 1903.)

DISMISSAL—WANT OF PROSECUTION—ABUSE OF DISCRETION.

1. Plaintiff reached the courtroom about 10 o'clock. While waiting for her case to be called, she was compelled to go downstairs to attend an infant child, and on returning, in 15 minutes, was told that the case had been called and dismissed. Plaintiff had not been called by the sheriff at the courthouse door. Plaintiff's attorney reached his office at 9 o'clock, and 15 minutes before 10 started for the courthouse, and was detained at a bank on business "he could not neglect," and reached the courtroom some 25 minutes after 10, and was informed that plaintiff's case had been dismissed. *Held*, that the presumption against an abuse of the trial court's discretion was not overcome; the hour when court convened not appearing, nor that the case had not been called more than once, and the attorney's absence not being adequately excused.

Error to District Court, Travis County; F. G. Morris, Judge.

Action by Amelia Hall and husband against the city of Austin. Order dismissing plaintiffs' suit, and they bring error. Affirmed.

John Dowell, for plaintiffs in error.

KEY, J. In the court below this case was dismissed for the want of prosecution. On the day following the order of dismissal, the plaintiffs filed a motion asking to have that order set aside and the case reinstated. In support of the motion the plaintiffs made an affidavit stating, in substance, that they resided about nine miles from the courthouse in the city of Austin; that the plaintiff

Amelia Hall reached the courtroom at about 10 o'clock a. m. on the day the suit was dismissed; that, while waiting for the case to be called, it became necessary for her to go downstairs to give attention to her infant child; that when she returned she learned from her son Edward Hall that the case had been dismissed; that she would not have left the courtroom, had it not been for her child, and did not leave the courthouse building; that, if she was called at the courthouse door by the sheriff, she did not hear the call; that she was not gone from the courtroom more than 10 or 15 minutes; and that the plaintiffs had a just and meritorious case. Edward Hall filed an affidavit corroborating Mrs. Hall's statement, except that he stated that the case was called while his mother was absent, but he did not know what disposition the court made of it. The plaintiffs' attorney filed an affidavit stating that he reached his office about 9 o'clock a. m. on the day that the case was dismissed, and found the plaintiffs there ready for trial; that about 15 minutes before 10 o'clock he instructed them to go to the courthouse and be on hand, and that he would follow them at once; that his office was about four or five hundred yards from the courthouse; that he left his office immediately after the plaintiffs did, and went by the First National Bank of Austin; that he was detained by the officers of the bank on important business, that "he could not neglect"; that he left the bank for the courthouse a few minutes before 10 o'clock, and went direct to the courtroom; that he inquired if the docket had been called, and was informed that it had, and that the case at bar had been dismissed about 15 minutes before that time; that it was then about 20 or 25 minutes after 10 o'clock; that he informed the court that the plaintiffs were ready for trial, and the court declined to call the case; that his absence was not intentional; and that he tried to be there when the court opened. The deputy sheriff who waited on the court made affidavit that when the case was dismissed he did not call the plaintiffs, Amelia Hall and Sidney Hall, as he was not ordered to do so. The court below overruled the motion to reinstate, and the plaintiffs have brought the case to this court by writ of error.

In the absence of a statutory prohibition, every court has the power to dismiss a suit for the want of prosecution; and, unless it be shown that the exercise of that power has been abused, such action is not subject to revision on appeal. Another rule equally as well settled is that, when an appealing litigant charges a trial judge with an arbitrary and unjust exercise of discretionary power, the burden rests upon such litigant to fully develop the transaction, and affirmatively show such abuse of discretion. In other words, the presumption is that the action of the trial court in this case was just and proper, and, unless the facts es-

tablished by the testimony referred to show the contrary, the plaintiffs in error are not entitled to relief in this court. After carefully considering the record, and analysing the testimony submitted in support of the motion, our conclusion is that plaintiffs in error have failed to show an abuse of judicial discretion on the part of the trial judge.

In the first place, neither the testimony, nor anything else in the record, shows at what hour the court convened on the day that the case was dismissed. For aught that appears in the record, the court may have met at 9 o'clock, called the case five minutes thereafter, passed it, and called it again at 10 o'clock. Except the deputy sheriff, none of the witnesses who testified was present in the courtroom until about 10 o'clock, and therefore they could have no actual knowledge as to what occurred before they arrived. Neither the order of dismissal, nor the affidavit of the deputy sheriff, states at what particular time of the day the case was called, nor whether it was called more than once, nor the particular time of day when the order of dismissal was entered. The plaintiffs' counsel states in his affidavit that about 20 or 25 minutes after 10 o'clock the court informed him that the case had been dismissed about 15 minutes before. Therefore, conceding all the facts stated in the affidavits to be true, it may nevertheless be a fact that the court waited an hour or more on the plaintiffs' counsel; and, if it did, it certainly cannot be held to have abused its discretion, in refusing to wait longer, and dismissing the case for want of prosecution. However, in saying this, we do not wish to be understood as holding that any court should wait an hour for litigants or attorneys to appear when their cases are called. Each case must be controlled by its own conditions, and whether the court should permit any delay at all, and the extent of such delay, must depend upon the peculiar circumstances of the particular case.

In the second place, an inspection of the pleadings satisfies us that Mrs. Hall could not have tried the case in person, and that it was necessary to the prosecution of her case that her counsel should be present. Therefore, if it be conceded that she sufficiently excused her own absence, the question remains as to whether or not the excuse offered for the absence of her counsel was sufficient. It is necessary, in order to properly dispatch the business of courts, and it is also a duty resting upon attorneys, that the latter be present when their cases are called; and a strong showing ought to be made, to excuse the absence of an attorney on such an occasion. In the case at bar the affidavit of the plaintiffs' attorney shows that he reached his office about 9 o'clock in the morning. It does not show that he was otherwise engaged until he started for the courthouse, which was at least 45 minutes after 9 o'clock. For aught that ap-

pears in his affidavit, the business at the bank could have been easily attended to within that 45 minutes, thereby enabling him to reach the courtroom at or before 10 o'clock. Furthermore, it is not shown that the nature of the business at the bank was such that it could not have been postponed. The affidavit states that the business was important, and such as counsel could not neglect, but it is not always the case that important business is neglected by being postponed. The business may have been of such a character that it could have been attended to at the noon recess or on some other day equally as well as at the time it was attended to.

In reference to the contention that before dismissing the case the plaintiffs and their counsel should have been called at the courthouse door, it is sufficient to say that we know of no statute or other rule of law requiring such action. In some courts it may be customary to pursue that course, but it is not shown that any such custom prevailed in the court from which this writ of error is prosecuted. Furthermore, while it is shown that the plaintiffs were not called at the courthouse door, no such showing was made as to their counsel. It was of more importance that he should be there, than any one else on the plaintiffs' side, and, for aught that appears, he may have been duly called before the case was dismissed.

For the reasons stated, our conclusion is that no reversible error is shown, and the judgment is affirmed. Affirmed.

IRWIN & SANDERS v. MAYES.*

(Court of Civil Appeals of Texas. March 4, 1908.)

SCHOOL LANDS—LEASE—FAILURE TO RECORD—FORFEITURE—ACTS OF COMMISSIONER—PRESUMPTION IN FAVOR OF VALIDITY—EVIDENCE—BURDEN OF PROOF—CERTIFICATE OF CLERK—SUFFICIENCY.

1. Acts 1897, p. 186, c. 129 (Rev. St. art. 4218s), which provided that unrecorded leases of school lands should be filed for record within three months after the act took effect, and, if not recorded within that time, the Commissioner of the General Land Office should disregard such lease, recognized, and thus far validated, leases which were void for want of record under Acts 1895, p. 69, c. 47 (Rev. St. art. 4218r), which provided that such leases should not take effect until duly filed for record in the clerk's office of the proper county.

2. The presumption indulged in favor of the regularity of official acts will not be extended to acts involving the forfeiture of an individual's rights, and proof of the bestowal of such rights on another will not render proof of the legality of the forfeiture unnecessary.

3. Under Rev. St. art. 4218s, providing that leases of school lands, if not recorded within three months, should be disregarded, and a new lease issued by the commissioner to an applicant, accompanying his application with a certificate of the county clerk that "no lease" of such land was of record, a certificate stating that there was no lease "then in force" of

*Rehearing denied April 1, 1908.

such lands, of record in said county, did not comply with the statute.

4. It is incumbent on one who seeks to establish a forfeiture of leased school lands, for failure to record the lease as provided in Rev. St. art. 4218s, to prove the certificate required by the statute, showing that no such lease was of record.

5. Rev. St. art. 4218s, providing that the commissioner of the land office shall disregard leases of school lands when not recorded, and award the land to any other applicant, accompanying his application with a certificate of the clerk that no lease of said land is of record, requires strict construction; and the commissioner has no power to disregard an existing lease, and award a new one to an applicant, on any other evidence than the certificate provided for in the statute.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by John T. Mayes against Irwin & Sanders. From a judgment for plaintiff, defendants appeal. Reversed.

A. R. Burges and J. W. Hill, for appellants.
L. W. Ainsworth and Wright & Wynn, for appellee.

STREETMAN, J. Appellee brought this suit on September 24, 1900, in the district court of Menard county, for the recovery of three sections of school land in Schleicher county, Tex. By agreement the venue was changed to Tom Green county, and on May 16, 1902, upon a trial without a jury, the district court of that county rendered judgment for appellee for said lands and \$222 damages, from which judgment this appeal is prosecuted.

Appellee's petition was in the ordinary form of an action of trespass to try title and for damages. Appellants' answer contained a plea of not guilty, a special pleading in which they claimed a valid lien on the premises for a period of five years from January 14, 1897, and further special pleadings setting up improvements in good faith, and asking for judgment for their value in case of a recovery by appellee, and, in case such judgment should be refused, that they be allowed a reasonable time after final judgment in which to remove said improvements from the premises. The appellant Sanders further pleaded in reconvention against appellee in the form of trespass to try title, and asked for judgment for title and possession of said premises. Upon special exceptions of appellee, the pleadings relating to improvements were stricken out.

We find the following facts: (1) On February 3, 1897, A. J. Baker, Commissioner of the General Land Office, executed to appellants, Irwin & Sanders, a lease of the land in controversy, being sections 10, 12, and 14, block No. 8, T. W. N. G. Railway Company, lands in Schleicher county, Tex., for a term of five years from January 14, 1897, for the annual rental of \$57.60, which rental was paid annually in advance for each of the five years of said term; the last annual payment having been returned to said Irwin & San-

ders after the execution of the lease herein-after mentioned to John T. Mayes. (2) Said lease was not filed for record in Menard county, to which Schleicher county was attached for judicial purposes, until February 23, 1900; but on that date it was filed for record in said county, and a proper abstract of the same entered on the same day in the record of Schleicher county leased lands in the office of the county clerk of Menard county. (3) Said Irwin & Sanders have had continuous possession of said property over since the beginning of the term of said lease. (4) On January 30, 1900, appellee, John T. Mayes, made application to lease said sections of land, together with sections 22 and 34 of the same block, for a term of 10 years, which application was received in the General Land Office February 2, 1900; and at the same time Mayes paid in advance to the State Treasurer the annual rental for the first year, \$57.60, and has since said time paid annually in advance the rentals for the second and third years of said term. There is no evidence in the record to show that this application was accompanied with the certificate of the county clerk of Menard county that no lease of said land was of record in his office. (5) On February 23, 1900, Charles Rogan, Commissioner of the General Land Office, upon said application, executed a lease contract to said John T. Mayes of the lands in suit, for a term of 10 years from February 2, 1900, which was filed with the county clerk of Menard county February 27, 1900, and a proper abstract thereof entered in the proper records of said county.

Upon these facts the district court rendered judgment for appellee, evidently upon the theory that the lease issued to appellants was invalid because of the failure to have same recorded, and that the lease to appellee was valid. Appellants insist that this was error, and the question raised involves the construction of the acts of 1895 and 1897.

Section 17 of the act of 1895 (page 69, c. 47) which is article 4218r of the Revised Statutes, provides: "All leases shall be executed under the hand and seal of the land commissioner and delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rental is paid, and such lease thereof duly filed for record in the clerk's office of the proper county." Under this act the contract was made with appellee on February 3, 1897. All other provisions of the law were complied with, except that the lease was not filed for record in Menard county until February 23, 1900. The act of 1897 added to the Revised Statutes article 4218s (Gen. Laws 25th Leg. p. 186, c. 129), which contains the following provision: "All lease contracts heretofore made, and not recorded, shall be filed for record with the clerk of the proper county, within three months after this act takes effect, and if any lessee shall fail to have his unrecorded lease so filed for record within

said time, the Commissioner of the General Land Office shall disregard said lease, and award the land to any other applicant accompanying his application with the certificate of the clerk that no lease of said land is of record in his office."

This act was evidently remedial, in so far as it afforded relief, to persons in the attitude of appellants, who held lease contracts formerly made, and not recorded. Under the act of 1895, the record of such leases appears to be a condition precedent, and the lease contract did not take effect until this condition was performed. By the act of 1897, however, the state not only waives the condition up to the time of the passage of the act, but recognizes the leases as valid, and extends the time within which said leases might be recorded for three months after the time said act took effect. Under the act of 1895, there might have been considerable force in the contention that the lessee had no rights whatever in the premises until he had performed the condition precedent which the law imposed upon his contract; and in that case it might not have amounted to a forfeiture of any of his rights to have disregarded his lease, and awarded the lands to another applicant. We think it clear, however, that his attitude was materially changed by the act of 1897. After the passage of that act he had for three months, at least, a perfectly valid leasehold estate, whether his lease was recorded or not; and by the terms of that act the failure to record the lease was changed from a condition precedent, which would prevent the lease from taking effect at all, into a condition subsequent, for the breach of which his leasehold might be forfeited. To deprive him of his leasehold after that time would be a forfeiture.

But it is contended that the remaining provisions of the act of 1897, providing that after the expiration of three months the commissioner may disregard the lease, and award the land to any other applicant accompanying his application with the certificate of the clerk that no lease of said land is of record in his office, are merely directory, and if the lease is actually not recorded, and the commissioner does award the land to another applicant, such lease will be valid, although there may be no evidence in the record that the application was accompanied with the certificate prescribed. In this connection it is first insisted that, in the absence of evidence, it will be presumed that the commissioner did not act without a proper certificate, under the general presumption indulged in favor of the regularity of official acts. We concede the force of this rule in a proper case, but we think it has never been extended to hold that where an officer is authorized in a certain manner to forfeit rights in one person, and bestow them upon another, the mere proof that he has attempted to confer the rights upon such other person will

render unnecessary any proof that he has enforced the forfeiture in a legal manner. Jones on Ev. vol. 1, § 40. If we were to apply this doctrine in the forfeiture of sales of these lands for failure to pay interest, it would only be necessary to prove that the interest was unpaid, and that the commissioner had awarded the land to a subsequent applicant, and it would be unnecessary to prove that a forfeiture of the original sale had been made in the manner provided by law. If there were any such presumption, it would be weakened in this case by the fact that upon the trial the appellee offered in evidence a certified copy from the land office of a certificate made by the county clerk of Menard county, bearing the same date and filed in the land office at the same time as appellee's application to lease. This certificate, however, did not state that there was no lease of said lands of record in said office, but that there was no lease then in force of said lands of record in said county. The court, as we believe, properly refused to admit this certificate in evidence. It did not certify that no lease was of record, but, rather, left it to be inferred that there were other leases of record, which, in the judgment of the clerk, were not in force. If there had been another certificate made by the clerk, it would have been of record in the land office; and the fact that this certificate, and no other, was offered by appellee, to our minds, renders it very probable that there was no other certificate than this. Independent of these considerations, however, we are of opinion that, if such a certificate was necessary, it was the duty of appellee to prove it.

We then come to consider this provision of the act of 1897, and to determine whether the filing of such certificate was essential to the validity of appellee's lease. The language is, "If any lessee shall fail to have his unrecorded lease so filed for record within said time, the Commissioner of the General Land Office shall disregard said lease, and award the land to any other applicant accompanying his application with the certificate of the clerk that no lease of said land is of record in his office." The contention of appellee, in effect, is that the commissioner may disregard the lease, and award the land to any other applicant, whether he accompanies his application with such certificate or not; that the commissioner need not act solely on the evidence prescribed by law, but upon any other evidence which may be satisfactory to him. We are unable to agree with this contention. In our opinion, the provisions quoted provide for a forfeiture of the rights of the original lessee, and prescribe a method by which said forfeiture should be effected. Viewed in this light, it is legislation which requires strict construction. If it was intended that the commissioner might act upon any other evidence satisfactory to him, in determining whether

the lease had been recorded, we can see no reason for the clause providing for this certificate. We are loath to construe a positive provision of the statute as merely directory, when it forms a part of the method prescribed by law for enforcing a forfeiture of a valuable right. It is the settled policy of the courts to require in such cases a substantial, if not a literal, compliance with the method of forfeiture prescribed by law. *Bank v. Dowlearn*, 1 Tex. Ct. Rep. 575, 60 S. W. 754; *Brightman v. Comanche Co.*, 2 Tex. Ct. Rep. 965, 63 S. W. 857.

We therefore conclude that the lease of appellee, under the evidence, was invalid, because there was no evidence that his application was accompanied with the certificate of the clerk required by law, without which the commissioner was not authorized to disregard appellants' lease. This conclusion results in a reversal of so much of the judgment as awards the land and damages to appellee, and makes it proper that we here render judgment that appellee take nothing by his suit, which will be done.

The evidence upon which appellant Sanders claimed title to the land, aside from the lease, was excluded by the court, and for that reason we cannot here render judgment on his plea in reconvention, and the case will be remanded for a trial on that issue.

There are other questions presented in the briefs of the parties, but we think the conclusions we have stated will render a decision of them unnecessary.

Reversed and rendered in part, and in part reversed and remanded.

CHICAGO, R. I. & T. RY. CO. v. HENDERSON et al.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

CARRIERS—INJURY TO STOCK IN TRANSIT—INSTRUCTIONS—CONNECTING ROADS—LIABILITY FOR OVERCHARGE—JOINT PLAINTIFFS—VERDICT—SUFFICIENCY.

1. In an action against a railroad company for negligent injury to cattle shipped over its line, where the contract of shipment limited the liability of the carrier to damages sustained on its own line, it appeared that at a station where the defendant's line connected with another railroad company, extending to the destination of the cattle, the stock was not changed to a train belonging to the other railroad company, but was transported by defendant's train without any change either in the train or crew operating it. The charge restricted a recovery against defendant to the damages sustained by the cattle while in its possession, and the evidence did not disclose that any damage was done to them while being transported from the junction to the destination. *Held*, that the charge was not objectionable as allowing a recovery for damages done while the cattle were in possession of the company owning the track between the junction and the point of destination.

2. In a joint action by two plaintiffs the verdict read, "We, the jury, find for plaintiff, H., against defendant," etc. There was no issue

raised as to the joint ownership by plaintiffs of the property for injury to which the action was brought. *Held* sufficient to support a judgment in favor of both plaintiffs.

3. In an action against a railroad company to recover an alleged overcharge of freight, it appeared that defendant had contracted to transport the goods for a certain sum, but that, when the goods arrived at their point of destination, the connecting carrier refused to deliver them, except on the payment of additional freight, but there was no showing that defendant received any part of the sum so collected. *Held*, that a judgment against defendant for the overcharge exacted by the connecting carrier was unauthorized.

Appeal from Grayson County Court; J. D. Wood, Judge.

Action by W. P. Henderson and another against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiffs, defendant Chicago, Rock Island & Texas Railway Company appeals. Reformed and affirmed.

N. H. Lassiter and Robert Harrison, for appellant. J. W. Finley, for appellees.

BOOKHOUT, J. This suit was brought in the county court of Grayson county, Tex., on December 24, 1901, against the Missouri, Kansas & Texas Railway Company of Texas and the Chicago, Rock Island & Texas Railway Company, to recover damages for injuries to a car of 28 head of cattle shipped from Sherman, Tex., to Duncan, Ind. T., on August 27, 1901, and for overcharge in freight. The case was tried, and judgment rendered in favor of plaintiffs against the Missouri, Kansas & Texas Railway Company of Texas for the sum of \$140 and against the Chicago, Rock Island & Texas Railway Company for the sum of \$360 damages and \$30 overcharge on freight. The defendant the Chicago, Rock Island & Texas Railway Company has appealed the case and perfected its appeal.

Conclusions of Fact.

W. P. Henderson and O. G. Gattis were the owners of 28 head of cattle, said cattle being at Sherman, Grayson county, Texas, and which the owners desired to have shipped and transported to Duncan, Ind. T. Some of the cattle were milk cows fresh with calf. The cattle were loaded on one of defendant's cars at Sherman. There was also loaded in the car a cook stove, small buggy, and boxes of household goods, the same being partitioned off from the cattle. The agent of the Missouri, Kansas & Texas Railway Company at Sherman gave plaintiffs a rate of \$40 for transporting the car to Duncan. After the car was loaded, the agent of the Missouri, Kansas & Texas Railway Company presented a written contract to Henderson, to be signed, which he did, by the terms of which contract the carrier's liability for damages was limited to the road upon which the damages occurred. Henderson accompanied the shipment. The cattle left Sherman over the track of the Missouri,

*Rehearing denied March 28, 1903.

Kansas & Texas Railway Company, and reached Denison in the evening of August 27, 1901. They were unloaded, watered, fed, and milked. The next morning they were again loaded, and transported over said defendant's tracks to Ray's yards, where there was some switching done, and from thence to Whitesboro, where they arrived about noon, and from there to Gainesville, which they reached about 2 o'clock. Here a train was made up, and there was much switching and rough handling of the car, and some of the cattle were thrown down in the car. From Gainesville they were transported to Ringgold, reaching there about 7 o'clock in the evening, where they were transferred from the Missouri, Kansas & Texas Railway to the Chicago, Rock Island & Texas Railway. Henderson reported to the agent of the last-named company that he had a car of cattle for Duncan, Ind. T., and asked him when he could get out. The agent told him between 1 and 2 o'clock, and, after telegraphing to Ft. Worth, told him that the train was on time. This train came in, but did not stop at Ringgold. Henderson again went to the agent, and asked him about getting out, and was told there would be another train through between 3 and 4 o'clock, which would take him out. Henderson waited for this train, and it came, and passed through Ringgold without stopping. He then called on the agent, and asked him to unload the cattle, so that he could water, feed, and milk them. The agent replied that he did not have anything to do with that, and could not unload the cattle without getting orders to do so. He further stated that he was doing all he could to help him out, and did not know why the trains did not stop. No opportunity was given Henderson to unload the cattle and have them watered, fed, and milked at Ringgold. The next morning the car left Ringgold about 8 o'clock, and was transported by the agents of the Chicago, Rock Island & Texas Railway Company to Duncan, where it arrived a little after noon. The cattle were injured by negligent and rough handling and switching the car during the time they were being transported, and by the failure to unload the cattle to be fed and watered and furnish an opportunity to have them milked. The jury found the amount of damages done to the cattle while in the possession of and being transported by appellant company was \$360, and, in deference to their verdict, we so find.

Conclusions of Law.

Appellant presents various assignments of error assailing the charge of the court. We have carefully examined these several assignments of error, and are of the opinion that they are without merit. The complaint that the charge authorized a recovery by plaintiff for damages to the cattle while in the possession of the Chicago, Rock Island & Pacific Railway Company is not supported

by the record. The cattle were transported by the Missouri, Kansas & Texas Railway Company of Texas to Ringgold, and there transferred to the Chicago, Rock Island & Texas Railway. The Chicago, Rock Island & Texas Railway Company owns the track from Ringgold to Terral, Ind. T., where it connects with the Chicago, Rock Island & Pacific Railway, which last-named road extends north through Duncan. After the car was placed in possession of the Chicago, Rock Island & Texas Railway Company at Ringgold, it was made a part of one of defendant's trains, and transported to Duncan without any change at Terral, Ind. T., either in the train or crew operating the train. The charge of the court restricted a recovery against appellant to the damages sustained by the cattle while in its possession. The evidence does not disclose that any damage was done to the cattle while being transported by the Chicago, Rock Island & Pacific Railway Company from Terral to Duncan, which was done in about two hours. The charge of the court fairly submitted the issues to the jury, and there was no error in refusing the special charge requested by the appellant.

Complaint is made of the verdict of the jury as not being sufficient to support the judgment. The verdict reads thus: "We, the jury, find for the plaintiff W. P. Henderson against the Missouri, Kansas & Texas Railway Company of Texas the sum of \$140 damages, and further find for the plaintiff W. P. Henderson against the Chicago, Rock Island & Texas Railway Company of Texas the sum of \$360 damages. We further find for the plaintiff W. P. Henderson against the Chicago, Rock Island & Texas Railroad of Texas the sum of \$30 for overcharges on car. [Signed] G. G. French, Foreman." Upon this verdict a judgment was rendered in favor of both plaintiffs and against the Missouri, Kansas & Texas Railway Company of Texas and appellant for the respective amounts found against them. The suit was by W. P. Henderson and O. G. Gattis as plaintiffs, it being alleged that they were the owners of the cattle. The evidence supports this allegation. There was no issue raised as to the joint ownership by plaintiffs of the cattle. We are of opinion that the verdict settled the issues between the parties, and in the light of the pleadings it possessed the essential requisites of certainty and intelligibility. Rev. St. 1895, arts. 1265, 3268; Cook v. Garza, 9 Tex. 360.

Complaint is made of that part of the judgment allowing plaintiffs \$30 for overcharge in freight. When the car reached Duncan, Ind. T., the agent of the Chicago, Rock Island & Pacific Railway Company at that place would not deliver the car unless plaintiff paid \$70 freight, insisting that the household goods contained in the car, under the usual rates, made the freight charges amount

to that sum. The plaintiff paid the \$70 under protest, and sought to recover back \$30, the difference between the amount paid and the rate given him by the agent of the Missouri, Kansas & Texas Railway Company at Sherman. The jury found for plaintiff in this amount against the Chicago, Rock Island & Texas Railway Company. This was error. The said sum was not collected by that company, and the record fails to show that it received any part of the same.

The judgment will be reformed, and here rendered against appellant for the sum of \$360, with interest at 6 per cent. per annum from September 12, 1902. As reformed, the same is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. HARRISON.*

(Court of Civil Appeals of Texas. March 7, 1903.)

CARRIERS—INJURIES TO PASSENGERS—PREMATURE START—NEGLIGENCE—INSTRUCTIONS—OMISSION—NECESSITY OF REQUEST.

1. In an action for injuries to a passenger, an instruction that negligence when applied to carriers means a failure in the performance of duty imposed by law, for the protection of others, to exercise that high degree of care which very competent and prudent persons would usually exercise under the same or similar circumstances, was correct.

2. In an action for injuries to a passenger, alleged to have been caused by a premature start, an instruction that it was the carrier's duty to stop its train at the station a reasonably sufficient length of time to enable plaintiff's wife to alight therefrom in safety, and that a failure to use that high degree of care in the discharge of such duty which very prudent persons would usually have exercised under the circumstances would be negligence, for which defendant would be liable, if it was the proximate cause of the injuries to plaintiff's wife, and she was not guilty of contributory negligence, was not erroneous, as charging, as a matter of law, that the failure to use such care to stop the train a reasonably sufficient length of time to enable plaintiff's wife to alight in safety was negligence.

3. In an action for injuries to a passenger while attempting to alight, a requested instruction that if defendant's conductor gave the signal for the train to move under the belief that the passenger had departed from the train, and if, in doing so, he acted as a reasonably prudent person would have acted under the same circumstances, was erroneous, as making the question of negligence depend on the conductor's belief, and as requiring only ordinary care, instead of the care required of carriers of passengers.

4. An instruction referring the jury to the petition to ascertain the acts of negligence charged was not error, in the absence of a request for a more specific charge.

Appeal from District Court, Henderson county; John Young Goorb, Judge.

Action by J. W. Harrison against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Frost, Neblitt & Blanding, for appellant. Richardson & Watkins, for appellee.

BOOKHOUT, J. This suit was instituted by J. W. Harrison against appellant to recover damages for personal injuries sustained by his wife, J. V. Harrison, while a passenger on one of appellant's trains going from Tyler to Brownsboro, Tex., in attempting to alight from said train. A trial resulted in a verdict and judgment for plaintiff, and defendant has appealed.

Conclusions of fact: In the month of February, 1901, J. V. Harrison, wife of appellee, purchased a ticket at Tyler, Tex., for passage over appellant's road to Brownsboro, Tex. She boarded the train, and took a seat in the back end of the rear coach. When the train reached Brownsboro, and as soon as it stopped, Mrs. Harrison started, with her five-months old baby in her arms, to get off the car at the rear end thereof. While attempting to alight, and just as she had reached the bottom step of the car, the train started up, and while it was in motion Mrs. Harrison jumped from the car. She testified that when the train started she saw she was going to fall, and this was the reason she jumped. She fell, and was injured. The train did not stop at Brownsboro a reasonable length of time to permit passengers to disembark therefrom in safety, and in this respect the servants and agents of appellant operating the train were negligent. They were also negligent in putting the train in motion before parties desiring to leave same had time to do so. In deference to the verdict, we find that Mrs. Harrison was not guilty of negligence in attempting to alight from the train while it was in motion, and that she sustained injuries whereby appellee has been damaged in the amount found by the jury.

Appellant complains of the following clause of the court's charge: "Negligence, when applied to carriers of passengers, means a failure in the performance of duty imposed by law, for the protection of others, to exercise that high degree of care in acting and refraining from acting which very competent and prudent persons would usually exercise under the same or similar circumstances." The contention is without merit. The charge correctly defines the duty owed by the carrier to a passenger, and the degree of care imposed by law upon the carrier in the performance of such duty.

In a subsequent clause of the charge the court instructed the jury as follows: "It was the duty of the defendant company to stop its train at Brownsboro station, on the occasion in question, a reasonably sufficient length of time to enable plaintiff's wife to alight therefrom in safety, and a failure on the part of defendant's employees in charge of its train to use that high degree of care to discharge such duty which very prudent

*Rehearing denied March 23, 1903, and writ of error denied by Supreme Court.

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1037.

and competent persons would usually have exercised under the circumstances would be negligence of the defendant company, for which it would be liable to the plaintiff for any injuries to his wife as the evidence may show was the approximate and direct result of such negligence, provided that plaintiff's wife was at such time not herself guilty of contributory negligence." This charge is also complained of as being erroneous, in that it informs the jury, as a matter of law, that the failure to use that high degree of care to stop the train a reasonably sufficient length of time to enable plaintiff's wife to alight in safety was negligence. The charge is not subject to the criticism made. It correctly defines the appellant's duty, and states the circumstances under which the carrier would be liable, and leaves it for the jury to determine whether the circumstances existed. The appellant's duty to Mrs. Harrison did not terminate until she had alighted from the train. *Railway v. Miller*, 79 Tex. 79, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308.

Complaint is made of the action of the court in refusing the following special charge requested by appellant: "If you believe from the evidence that the conductor in control of the train gave the signal to put the train in motion under the belief that the wife of plaintiff had departed from the train, and you further believe from the evidence in so doing, if he did so, he acted as a reasonably prudent person would have acted under the same circumstances, then you will find for the defendant." This charge made the question of negligence on the part of the railway company depend on the belief of the conductor, and in this respect it does not announce a correct proposition. It was also erroneous in requiring of the conductor only ordinary care, which is not the care owed by a carrier to its passengers. The court's charge fairly submitted the issues involved, and there was no error in refusing the special charge.

Under appellant's fifth and sixth specifications of error, which are grouped, it is contended that the charge of the court is erroneous because it refers the jury to the petition to ascertain the acts of negligence charged. The charge did not state the various acts of negligence set up by plaintiff, but referred the jury to the acts of negligence charged in plaintiff's petition, and authorized a recovery if they found such negligence to exist. The charge was not erroneous in this respect. If the appellant desired a more specific charge as to the acts of negligence, he should have asked a charge covering this omission.

It is insisted that the verdict of the jury is excessive, and that for this reason the court should have granted appellant's motion for a new trial based upon that ground. The verdict is for \$412.50, and, while it is large, yet there is evidence which, in our opinion, justified the jury in their finding; and, in

deference to their verdict, we conclude that the contention is without merit.

Finding no error in the record, the judgment is affirmed.

JERNIGAN et al. v. LAUDERDALE et al.*
(Court of Civil Appeals of Texas. March 4, 1903.)

DESCENT AND DISTRIBUTION — STATUTES —
COLLATERAL HEIRS—DESCENT
PER STIRPES.

1. Rev. St. 1895, art. 1688, § 4, relative to descent of intestate estates, enacts that, if there be no children, father or mother, or husband or wife, the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, and that, if there be no surviving grandfather or grandmother, "the whole estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants." Article 1695 provides that when the intestate's children or brothers and sisters, uncles and aunts, "or any other relations of the deceased standing in the first and same degree alone come into the partition, they shall take per capita," and when a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall inherit such portion as the parent through whom they inherit would be entitled to if alive. *Held* that, where an intestate's only heirs were aunts and their descendants on the maternal side and cousins on the paternal side, section 1695 did not apply, and the paternal heirs took per stirpes.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Partition suit by Mrs. E. K. Jernigan and others against Diana Witherspoon and another. From a judgment of the district court setting aside the judgment rendered in the county court, certain of the plaintiffs appeal. Reversed.

W. P. Finley and Crane, Greer & Wharton, for appellants. Taylor & Coombes, for appellees.

NEILL, J. This suit originated on motion filed by appellants and other heirs of the estate of S. P. Emerson, deceased, in the county court sitting for probate purposes, against Diana Witherspoon and Z. E. Wheeler, to partition seven-twelfths of the estate of S. P. Emerson, deceased, among them, plaintiffs as well as defendants. The contention of plaintiffs was that such part of the estate should be partitioned and distributed upon a per stirpes basis. The defendants, Diana Witherspoon and Z. E. Wheeler, answered, admitting the facts pleaded by plaintiffs, which are recited in our conclusions of fact, but contended for partition and distribution upon a per capita basis. In the county court judgment was rendered in accordance with plaintiffs' contention, which, upon appeal to the district court, was set aside, and judgment there entered in consonance with the contention of the defendants. From this judgment M. B. Wheeler,

*Rehearing denied April 1, 1903, and writ of error denied by Supreme Court.

D. A. Emerson, John C. Emerson, Mary E. Butler and her husband, B. F. Butler, Jas. C. Emerson, W. R. Emerson, Ida Wilson and her husband, Geo. Wilson, Mattie Kinslow, and John Emerson have appealed.

Conclusions of Fact.

"When S. P. Emerson died on the 16th day of October, A. D. 1900, he did not leave surviving him a wife or child or children or their descendants, or brothers or sisters or their descendants, or father or mother, or grandfather or grandmother. He did, however, leave surviving him one aunt and the descendants of two other aunts on the maternal side, and the children or descendants of three aunts on the paternal side. In any event, then, the seven-twelfths of the estate of S. P. Emerson, deceased, to which his heirs at law were entitled, would be divided into two moieties, the maternal moiety and the paternal moiety. With respect to the maternal moiety the facts of kinship were as follows: The mother of S. P. Emerson, deceased, namely, Oney Randle Emerson, had three sisters, Mrs. E. K. Jernigan, Mrs. Tabitha Walters, and Mrs. Lucy Travis. Mrs. E. K. Jernigan is still living, and participated in the partition and distribution of the said estate. Mrs. Tabitha Walters is dead, but left surviving her a daughter, Mrs. Elizabeth Irion. Mrs. Elizabeth Irion is dead, but left surviving her one son and four daughters, J. W. Irion, Iva Harris, May Aden, Pearl Irion, and Bessie Irion. Mrs. Lucy Travis is dead, but left surviving her three children, Lyttleton W. Travis, Joe Travis, and Lucy Harris. Lyttleton W. Travis is still living. Joe Travis is dead, but left surviving him a daughter, Mrs. Anna McElwrath. Mrs. Lucy Harris is dead, but left surviving her a daughter, Mrs. Emma Walker. Mrs. Emma Walker is dead, but left surviving her three children, W. L. Walker, A. H. Walker, and Lucy Walker. In the case, then, of the maternal moiety of the said portion of the said estate, when S. P. Emerson died he left surviving him one aunt, Mrs. E. K. Jernigan; one first cousin, Lyttleton W. Travis; and nine second cousins, J. W. Irion, Iva Harris, May Aden, Pearl Irion, Bessie Irion, Anna McElwrath, W. L. Walker, A. H. Walker, and Lucy Walker. With respect to the paternal moiety, the facts of kinship were as follows: The father of S. P. Emerson, deceased, namely, Pleas Emerson, had three sisters, Mrs. Mary Wheeler, Mrs. Julia Wheeler, and Mrs. Susan Emerson. They are each dead. Mrs. Mary Wheeler left surviving her a son, M. B. Wheeler. Mrs. Julia Wheeler left surviving her five children, Mrs. Susie Bostic, Diana Witherspoon, Z. E. Wheeler, J. H. Wheeler, and Tom Wheeler. Mrs. Susie Bostic is dead, but left surviving her four children, Lizzie Carter, Nannie Carter, W. T. Bostic, and L. F. Stinnett. Mrs. Susan Emerson is dead, but left surviving her two sons, William Emerson and Joe Emerson.

William Emerson is dead, but left surviving him six children, D. A. Emerson, John C. Emerson, Mary E. Button, James C. Emerson, W. R. Emerson, and Ida Wilson. Joe Emerson is dead, but left surviving him two children, Mattie Kinslow and John Emerson."

It will be observed from these facts that the heirs of the deceased on the paternal side are five first cousins and twelve second cousins.

Conclusions of Law.

It is conceded by both parties that the portion of the estate to be distributed should be divided into two moieties, the one to go to the paternal and the other to the maternal kindred. The question is, are the moieties to be divided per capita or per stirpes as between the heirs to the moiety of the estate? The contention of appellants is that in fixing and determining the fractional interest of each heir the estate should not be divided into two separate estates, but should be divided into two halves or moieties, one-half to go to the maternal kindred and one-half to the paternal; and that the partition and distribution of each moiety among the maternal and paternal kindred, respectively, should not be made upon a per capita basis, but upon a per stirpes basis. That is to say, each heir, except Mrs. E. K. Jernigan, should take his or her part from or through his or her respective ancestor. On the other hand, the contention of appellees is that the seven-twelfths interest of the estate of decedent should be (as it was by the district court) divided into two moieties, one to go to the paternal and the other to the maternal kindred; thus constituting two separate and distinct estates, the basis of distribution in the one no way affecting the basis of distribution in the other.

Under either contention the result in the distribution among the heirs on the maternal side would be the same. In fact, there is no difference in the distribution of the maternal moiety in the district court from that made in the county court. And as none of the parties complain of the decree of partition as to that half, it may be considered as properly distributed, and, except incidentally, no further notice need be taken of it. Practically, the real contention is in regard to the partition among the paternal kindred. As stated by the trial judge, "the contention upon the part of appellants is that the basis of the partition of the moiety of the estate to which the paternal kindred are entitled should be the number of the paternal aunts from whom the surviving kindred are descended, and that, therefore, the descendants of each aunt are entitled to one-third of this moiety, and should divide this one-third among themselves per stirpes." That "the contention of appellees is that the basis of the partition of this moiety should be the number of paternal cousins, and that, therefore, each of the five surviving paternal first cousins is entitled

to one-eighth, and the descendants of each of the three deceased cousins are entitled to one-eighth, and should divide this one-eighth among themselves per stirpes." In support of their contention the appellants claim that the last sentence in section 4, art. 1688, Rev. St. 1895, is applicable to and governs the descent and distribution of the estate, and that article 1695 is inapplicable thereto. On the contrary, the appellees maintain that article 1695 is applicable, and should govern and control in the distribution of the estate among the paternal heirs.

Section 4 of article 1688 is as follows: "If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, in the following course, that is to say: To the grandfather and grandmother in equal portions, but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor, and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants."

Article 1695, Rev. St. 1895, is as follows: "When the intestate's children, or brothers and sisters, uncles and aunts, or any other relations of the deceased standing in the first and same degree alone come into the partition, they shall take per capita—that is to say, by persons; and when a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive."

"Relations of the deceased," whatever may be the degree of relationship, can only come into partition of a decedent's separate estate by inheritance either under article 1688 or article 1690, Rev. St. 1895; the former providing for cases where the intestate leaves no husband or wife, the latter for cases where the intestate leaves a husband or wife. The former statute, and only so much of it as we have quoted, is, of the two, the only one applicable in this case. When they come into partition of an estate inherited under either statute, article 1695 provides who shall take per capita. "They are the intestate's children or brothers or sisters, uncles and aunts, or any other relations of the deceased standing in the first and same degree alone." Conceding that the seven-twelfths of S. P. Emerson's estate should have been divided into two moieties, one to go to his maternal the other to his paternal

heirs, it would seem, as the intestate left surviving him an aunt and the descendants of two other aunts on the maternal side, that the distribution of the maternal moiety might be governed by the provisions of this article; but as the result as to the distribution in this case would, without regard to it, be the same as under article 1688, it is not necessary for us to pass upon the question. If the estate were not divided into moieties, and no distinction as to its distribution made between the maternal and paternal heirs, there being one aunt and the descendants of five others, and article 1695 were to control the distribution, the result in this particular case would be the same as it would be if the method of distribution contended for by the appellants were adopted. But as it is conceded by the parties—and, we think, correctly—that the estate was properly divided into moieties, this is a matter of no pertinency to the question under consideration.

When we come to the question as to how the paternal moiety should be distributed among those who come into its partition, we can see no application whatever of article 1695 to its distribution. Here we have neither children, nor brothers and sisters, nor uncles and aunts, nor any other relations of the deceased standing in the first and same degree alone. It is idle for us to speculate as to the purpose of the Legislature in amending article 1652, Rev. St. 1879, which, up to March 25, 1887, had been the law from March 18, 1848 (Oldham & W. Dig. art. 350; Pasch. Dig. art. 3425), and, we might say, in effect, the law since December 18, 1837 (Hart. Dig. art. 583). Sometimes the ways of the Legislature, like those of the Supreme Lawgiver, "are inscrutable, and past finding out." It is sufficient for us to know that the amendment was made, and by it the law changed. It would be equally futile for us to attempt to interpret the full scope and meaning of the clause, "or any other relations of the deceased standing in the first and same degree alone," occurring in the statute as amended. However, we cannot, as did the district judge, eliminate certain words, so as to give it the same meaning the article had before it was amended. The amendment would have never been made had the Legislature contemplated no change in the law. If the clause is meaningless, or surplusage, then the article provided only for a partition when the intestate's children, or his brothers or sisters, or his uncles and aunts, come into partition. It is easier to tell what the clause does not mean than what it does. It certainly does not mean that first cousins of the deceased stand in the first degree of kinship to him. In reckoning degrees of collateral kindred, the canon law, adopted by the common law, reckons from the common ancestor down to the more remote party. Thus brothers are related, by the canon law mode of computation, in the first degree, first cousins in the second, second and third

cousins in the third, and fourth cousins in the fourth. Minor's Inst., book 2, p. 524; Bl. Com. book 2, p. 206. If, as is asserted by the Supreme Court in *Powers v. Morrison*, 88 Tex. 137, 30 S. W. 851, 28 L. R. A. 521, 53 Am. St. Rep. 738, "the sole purpose of the article [article 1695] was to declare under what circumstances those entitled to the inheritance should take per capita and under what contingencies they should take per stirpes," it is evident from the facts in this case that the article does not apply nor furnish the rule for the distribution of the moiety among the paternal heirs of S. P. Emerson, for none of them come within the classes or degree of relationship enumerated and designated in said article. Then, there being no surviving grandfather or grandmother, this moiety of the estate must "go to their descendants, and so on without end, passing in like manner to their nearest lineal ancestors, and their descendants," as is contended by appellants.

Therefore the judgment of the district court is reversed, and judgment will be here rendered fixing and determining the interest of each of the heirs, named in our conclusions of fact, of S. P. Emerson, deceased, in the seven-twelfths of his estate by dividing it into two moieties, one to go to the paternal kindred, the other to the maternal. And the distribution of each moiety among the paternal and maternal kindred is made upon a per stirpes basis; that is to say, each heir, except Mrs. Jernigan, inheriting his or her part through his or her respective ancestor. Which judgment here rendered will be the same as that rendered in the county court.

Reversed and rendered.

TEXAS & P. RY. CO. v. SMISSEN et al.*
(Court of Civil Appeals of Texas. March 7, 1903.)

CARRIERS—DELAY IN TRANSPORTATION—CATTLE—DAMAGES—ACT OF GOD—PARTNERSHIP—SHARING PROFITS—INTEREST.

1. Where, in an action for damages to cattle by delay in transportation, the court charged that what would be an unreasonable delay in forwarding and transporting said cattle was a question of fact for the jury, and that the railroad company was obligated to transport them within a reasonable time, the refusal to charge that, in determining the question of reasonableness of time, the jury should consider all the incidents of the service, was not error, as being sufficiently covered by the instruction given.

2. Where, in an action against a carrier for damages to cattle, the plaintiff was by the instructions restricted in his recovery to damages resulting from the delays in transportation and a collision, and the jury were not authorized to consider the matter of delay in loading and reloading, though there was testimony that such work was performed by the carrier, the refusal to instruct the jury to disregard any evidence as to any delay in loading and reloading the cattle was not error.

3. Where a railroad company transporting cattle from Texas to Illinois unnecessarily de-

layed them on the route so that they were exposed to severe cold and snow in Missouri, such weather in December was not an "act of God" which excused the carrier from liability.

4. Where a cattle owner agreed with one who assisted in shipping cattle that he should receive one-half the profits on a certain number, in lieu of wages for his services, such contract did not constitute a partnership.

5. In an action against a carrier for damages to cattle resulting from delay in transportation and a collision, interest is recoverable as a part of the damages.

Appeal from District Court, Mitchell County; W. R. Smith, Judge.

Action by M. Z. Smissen against the Texas & Pacific Railway Company and another. From a judgment in favor of plaintiff, defendant Texas & Pacific Railway Company appeals. Affirmed.

B. G. Bidwell and H. O. Shropshire, for appellant. Cowan & Burney, for appellees.

SPEER, J. Appellee M. Z. Smissen sued the Texas & Pacific Railway Company and the St. Louis & San Francisco Railway Company to recover damages in the sum of \$3,560 for injuries to 328 head of cattle shipped by him, under a contract with said railway companies, from Big Springs, Tex., to National Stock Yards, Illinois. The negligence alleged consisted of delays, rough handling, collision, etc., and the injuries resulting, of shrinkage and loss of weight, depreciation in condition and value, and decline in market value of said cattle. There was judgment for \$2,000, two-thirds of which by the verdict of the jury was apportioned against the appellant, and the remainder against the St. Louis & San Francisco Railway Company. The Texas & Pacific Company alone appeals.

The first ground for a reversal urged before us is that the verdict against appellant is excessive. The evidence shows that appellee Smissen was damaged in an amount in excess of the verdict of the jury, and that the negligence of appellant occasioned the greater part of these damages. We cannot say the apportionment was wrong. We think it warranted by the evidence.

It was unnecessary, if it would not have been error, for the court to instruct the jury that "in determining the question of the reasonableness of the time, under the foregoing instructions, you will take into consideration all the incidents of the service, such as the probable breaking of machinery, the place and the character of the shipment," etc., because the court, in the main charge, had already sufficiently covered this question, by telling the jury that "what would be an unreasonable delay in forwarding and transporting said cattle, or what would be a reasonable time within which said cattle should have been transported, are purely questions of fact for your exclusive determination from all the facts and circumstances in evidence before you." The jury were further instruct-

*Rehearing denied March 23, 1903, and writ of error denied by Supreme Court April 23, 1903.

¶ 4. See Partnership, vol. 23, Cent. Dig. §§ 23, 43.

ed at the instance of the appellant that the contracts provided that said cattle were not to be transported within any specific time, nor delivered at any particular hour, nor in season for any particular market, but that the railway company were obligated to transport said cattle within a reasonable time. There was no error in refusing the special charge.

Nor was it error for the court to refuse to instruct the jury to disregard and not consider any evidence whatever with regard to any delay or damages occasioned by any delay in loading and reloading the cattle. The plaintiff alleged and the testimony showed that the work of loading and reloading was undertaken and performed by the railway companies. *Mexican National Ry. Co. v. Savage* (Tex. Civ. App.) 41 S. W. 663. But aside from this, the charge of the court did not authorize the jury to consider this matter at all. The plaintiff was restricted in his recovery to the damages resulting from the delays in transportation, and the collision which occurred at Baird, Tex., on the line of appellant.

The evidence shows that the cattle were exposed en route to a very severe spell of cold weather, in consequence of which they were more or less injured, and appellant complains that it should not be held liable for this injury, inasmuch as the cold weather was the act of God. It is probably a sufficient answer to say that no such exemption from liability was pleaded; but, however that may be, we cannot hold that a snowstorm in Missouri in the winter season is an "act of God," in the sense in which that term is used. *Pruitt v. H. & St. J. R. Co.*, 62 Mo. 527. It ought to have been reasonably foreseen that a shipment of cattle in the month of December, if unnecessarily delayed en route to Illinois, would probably be injured by reason of exposure to severe or cold weather. If the appellant's negligence resulted in exposing the cattle to the cold, or in exposing them for an unnecessary length of time, it would be liable. The principles announced in the *Bergman* (Tex. Civ. App.; 64 S. W. 999) and *Darby* (Tex. Civ. App.; 67 S. W. 129) Cases have no application here. The case of *Gillett v. M., K. & T. Ry. Co.* (Tex. Civ. App.) 68 S. W. 61, is also easily distinguishable. In the case last mentioned the shippers of a car of cabbages directed the company to keep the vent in the end of the car open to the point of destination. It was in the month of February, and some of the vegetables froze. The company was held not liable, because there was no negligence upon its part. It was not the duty of the carrier to disregard the consignor's instructions, and close the vent, which they directed to be left open. In this case Smissen is presumed to have known his cattle would probably be exposed to cold weather en route to Illinois at the season of the year his shipment was made, and to have assumed the risk of all necessary exposure; but the company was

chargeable with a like knowledge of the probable condition of the weather, and is liable for all unnecessary exposure occasioned by its negligent delays.

The fact that A. C. Pearson bought 61 head of this shipment under an agreement with Smissen that he should receive one-half of the profits as his compensation for services connected with the shipment does not constitute him a partner to the extent of that number of the cattle. He bought them for Smissen, with Smissen's money, and at no time owned any interest whatever in them. He was to share the profits in lieu of wages. This does not constitute a partnership between them. *Buzard v. Bank of Greenville*, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7; *Goode v. McCartney*, 10 Tex. 193; *Cothran v. Marmaduke*, 60 Tex. 370; *Stevens v. Gainesville National Bank*, 62 Tex. 499; *Brown v. Watson*, 72 Tex. 216, 10 S. W. 395.

It is too well settled to require citation of authorities that interest, so called, may be recovered in a case like this as a part of the damages. It was specially asked for in the petition, and the court correctly instructed the jury to allow it.

All assignments are overruled, and the judgment is affirmed.

ADKINSON v. PORTER.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

PUBLIC LANDS—LEASES—ASSIGNMENT—PREFERENCE RIGHT TO PURCHASE—ERRORS IN JUDGMENT—CORRECTION.

1. The privilege of a lessee of state lands to purchase the lands within 60 days after the expiration of the lease, in preference to other purchasers, is a personal privilege, destroyed by his transferring the lease to another.

2. This privilege is not revived by the assignee of the lease quitclaiming his interest in the lands to the lessee after the expiration of the lease.

3. Rev. St. art. 3250, which prohibits a tenant from subleasing the premises without the landlord's consent, preventing an assignment of a lease as well as an underlease, applies to tenants under leases granted by the state, in the absence of statutory provisions in the laws for the leasing of public lands.

4. In an action by an applicant for the purchase of lands from the state, the petition and the evidence described the lands as section 43, certificate No. 1423. The judgment, as copied in the record, described the lands as section 432, certificate No. 4222. *Held*, that the error could be corrected by the pleadings and evidence, and would not necessitate a reversal.

Appeal from District Court, Schleicher County; J. W. Timmins, Judge.

Suit by M. M. Porter against J. R. Adkinson. From a judgment for plaintiff, defendant appeals. Affirmed.

L. H. Brightman and Ball & Ingram, for appellant. N. A. Brown, for appellee.

FLY, J. This suit was instituted by appellee to recover sections 41, 51, 53, and 57,

*Writ of error denied by Supreme Court.

consisting each of 640 acres of land. Appellant answered by general denial and plea of not guilty. A trial by the court without a jury resulted in a judgment for appellee.

It is disclosed by the facts that on August 17, 1900, the state of Texas leased to appellant for one year section 43, and on August 23, 1900, sections 41, 51, and 57 were also leased by the state to appellant for one year. On April 29, 1901, appellant transferred his leases on said sections of land; the lease to section 43 being transferred to E. H. Hogan, who transferred it to S. D. Hogan. The other sections were transferred to Louis Althous. On August 17, 1901, at 12:11 o'clock a. m., appellee applied for the purchase of section 43 in the legal manner, making the necessary payment. Again, on August 24, 1901, appellee made another application for the purchase of section 43, and also applied for the purchase of sections 41, 51, and 57, as additional sections to her home section, No. 43; the law being followed in all respects. After applications of appellee had been filed, Louis Althous and S. D. Hogan also applied to purchase the aforesaid lands, but their applications were rejected on the ground that J. R. Adkinson had the preference right to purchase the land for 60 days after the expiration of the lease. On October 1, 1901, Althous and Hogan transferred and quitclaimed to J. R. Adkinson all of their right, title, and interest in and to the lands in controversy; and he on October 12, 1901, applied to purchase section 43 as his home section, and the other sections as additional sections, and the Commissioner of the General Land Office awarded the lands to him, and rejected the applications of appellee. The lands had been duly classed as dry grazing land, appraised at \$1 an acre, and placed on the market. Appellee was an actual settler in good faith on section 43 at the time she filed her applications for the purchase of the land, and complied with every requirement of the law. We find that appellant was not an actual settler in good faith on any part of the land at the time he applied to purchase it. Appellee was dispossessed of the land in June, 1902.

Whatever may be said as to the first application for purchase of section 43 being premature and before the lease expired, it is clear that her second application, on August 24th, was made after the expiration of both leases, and her applications were made several weeks before appellant applied to purchase the land. His claim must rest, therefore, on his superior right to purchase the land at any time within 60 days after the expiration of his leases. The prior right upon the part of the lessee to purchase lands as an actual settler within 60 days after expiration of his lease is a personal privilege granted to the lessee; and while a lessee is not, in terms, prohibited by the statute from underleasing or transferring his lease, it is held that he cannot transfer the right to

purchase given by the statute. *Hazlewood v. Rogan* (Tex. Sup.) 67 S. W. 80. The effect of the transfer of the lease, if at all permissible, was to destroy the privilege granted to the lessee, and placed him on the same footing with any other person desiring to purchase. The right of the lessee under the statute, having been destroyed by his own act, could not be revived by any act of those to whom the lease was transferred. After the expiration of the lease they possessed no right in connection with the land. It was never contemplated by the law that a lessee could transfer his lease to others, and after the expiration of the lease, when it became apparent that an actual settler on the land had applied in good faith to purchase the land, and the claims of the sublessees to purchase would not be recognized, the original lessee could oust a prior purchaser by getting a transfer from the sublessees, or by any right to purchase that remained in the lessee in spite of his transfer of his lease. Article 3250 of the Revised Statutes denies to a tenant the right to rent or lease lands or tenements to any other person without the consent of the landlord, and, in the absence of such right being specially granted in the laws providing for the lease of public lands by the state, it is reasonable that the general statute would apply to the state's tenants as well as to all others. It has been held that an assignment of a lease is within the contemplation of the statute, as well as an underlease. *Railway v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481. It is intimated, although not directly decided, in the *Settegast* Case, above cited, that a subletting or transfer of the lease by a tenant would cause a forfeiture of the lease; and it would follow that, if article 3250 applies to rental contracts made by the state, there was a forfeiture of the contract by the transfer of the lease to another by appellant without the consent of the state. The facts disclose, in this case, that the appellant parted with his lease, and showed no desire whatever to purchase the lands until after he saw that appellee was an actual settler in good faith, and would defeat the claim of his sublessees. He then made his application, but there is sufficient evidence to establish that he was not an actual settler in good faith on the land at the time he filed his application, nor for some time thereafter.

In the judgment, as copied in the record, one of the sections of land is described as section 432, certificate No. 4222, which is evidently a misdescription of section 43, certificate No. 1422, which was one of the sections sued for. It is insisted that there is a fatal variance between the land sued for and that described in the judgment, and such variance is a fundamental error, for which the judgment should be reversed. The land was correctly described in the petition, and all the evidence established that the

home section was No. 43, certificate 1422. The mistake can be readily corrected by the pleadings and evidence, and does not necessitate a reversal.

The judgment will be corrected so as to give the correct description of section 43, certificate 1422, and, as corrected, will be affirmed.

On Motion for Rehearing.

(April 1, 1903.)

The evidence fails to show a settlement upon the land by appellant at the time he applied for its purchase, and it can be reasonably inferred that appellant made his application simply to defeat the application of appellee, and to obtain the land in the interest of Althous and Hogan. He did not, therefore, act in good faith.

Since writing our former opinion a writ of certiorari to correct the misdescription of section 43 has been applied for and granted, and the certified judgment of the clerk of the district court of Schleicher county shows that the land was correctly described therein as "section No. 43, Cert. No. 1422," and that the misdescription is in the record. The variance in the description of section 43 is the main ground upon which appellant bases his application for rehearing, and, there being no variance, it is apparent that it is without merit and should be overruled.

That part of our former opinion correcting the judgment will be eliminated, and the judgment as rendered in the district court is affirmed.

BOND v. CARTER.*

(Court of Civil Appeals of Texas. March 4, 1903.)

JUDGMENT—ASSIGNMENT—RIGHTS OF ASSIGNEE—LANDLORD'S LIEN—WAIVER—RES JUDICATA.

1. The assignee of a judgment alone has the right to control it and sue on it.

2. In a suit by a landlord against the tenant for advances made to enable the tenant to get out a crop, a distress warrant was obtained, but there was no seizure thereunder, and the judgment in favor of the landlord was a personal one against the tenant, and did not foreclose the landlord's lien. *Held*, that the failure to foreclose the lien was a waiver thereof.

3. The judgment was *res judicata* of the question of the lien, and binding on plaintiff and his assignee of the judgment.

Appeal from Hill County Court; L. C. Hale, Judge.

Action by S. E. Carter, for the use and benefit of E. Quickenstedt, against T. E. Bond. From a judgment for plaintiff, defendant appeals. Reversed.

J. A. McFadden and Spell & Phillips, for appellant. Vaughan & Works and A. P. McKinnon, for appellee.

FLY, J. This is a suit brought by S. E. Carter for the use and benefit of E. Quickenstedt to recover damages for the conversion of six bales of cotton. He obtained the judgment against appellant as sought by him. The facts indicate that M. C. Cook was a tenant of S. E. Carter, and owed him for advances made to enable the tenant to make a crop in 1896. Carter obtained a judgment against Cook for the amount of his indebtedness, but there was no foreclosure of the landlord's lien, although one had been set up in the suit against the tenant. The judgment was transferred by Carter to E. Quickenstedt. Before the judgment was obtained against the tenant, he had sold six bales of cotton raised on the rented premises to appellant, who had converted the same to his own use and benefit. This suit was instituted by S. E. Carter for the use and benefit of E. Quickenstedt, and the suit must be viewed as though prosecuted by the latter. He is the real party, and Carter is not supposed to be present in court in person or by attorney. *McFadin v. MacGreal*, 25 Tex. 73. As the assignee of the judgment, Quickenstedt alone had the right to control it, and to sue upon it.

The evidence shows that the judgment did not foreclose the lien granted by the statute to the landlord, and a transfer of the judgment did not carry any lien with it, unless a mere transfer of the debt held by the landlord against the tenant carries with it the statutory lien. This has been held to be the case by the Court of Civil Appeals of the Third Supreme Judicial District. *Hatchett v. Miller*, 53 S. W. 357. If the decision above cited be correct, still the transfer of the judgment, if the landlord had by his act waived or forfeited the lien before the transfer, would not carry with it any lien. In the suit between the landlord and the tenant it was alleged that the defendant was a tenant on plaintiff's farm, and that the amount sued for was for advances made to enable the defendant to make a crop, and a distress warrant was applied for and obtained. The return showed six bales of cotton grown on the farm had been converted by F. B. Bond, the appellant herein. Bond was not made a party to that suit, and a personal judgment was taken against the tenant, the question of a lien not being referred to in it. A suit may be maintained on a note secured by a lien without enforcement of the lien, and afterwards another suit to foreclose the lien may be prosecuted and maintained. *McAlpin v. Burnett*, 19 Tex. 500; *Ball v. Hill*, 48 Tex. 634; *Kempner v. Comer*, 73 Tex. 196, 11 S. W. 194. But where a suit is brought on a debt and to foreclose a lien by which it is secured, and a personal judgment is taken for the debt and the lien is ignored, a different case is presented, and such action may amount to a waiver of the lien. *Cook v. Love*, 83 Tex. 487; *Gentry v. Lockett*, 37 Tex. 503; *Toland v. Swearingen*, 39 Tex.

*Rehearing denied April 1, 1903.

447; *Wise v. Old*, 57 Tex. 514. In the last-cited case a distress warrant had been sued out and levied on certain property, but the lien was not foreclosed in the judgment, and it was held that a landlord waives his lien on property seized on a distress warrant, when he proceeds to take a personal judgment without foreclosing his lien on the property. That case is like this, except that no property was seized under and by virtue of the distress warrant in this case, and it is the contention of appellee that the lien held by the landlord could not be foreclosed because the property was not seized. The statutory lien given to the landlord is not dependent upon the issuance of a distress warrant, but can be foreclosed on the property furnished by the landlord and the crop raised on the rented premises, regardless of any seizure of such property. It is evident from the statement of facts that the distress warrant was issued to be levied on the six bales of cotton purchased by Bond, and when the return on the writ showed that the cotton had been converted by Bond the statutory lien could have been foreclosed against it as well as though it had been seized by the sheriff. Had that course been pursued, a transfer of the judgment would undoubtedly have carried the lien with it. But the lien was not foreclosed, and we are of the opinion that a failure to foreclose the lien was a waiver of it, and that it ceased to exist.

The pleadings in the justice's court between the landlord and tenant set up facts that showed a lien existed on the crops raised on the rented premises. The foreclosure of that lien was involved in the suit, and as a means to bring the property within reach of a foreclosure a distress warrant was issued. The foreclosure of the landlord's lien was directly involved in the suit, and yet the justice of the peace failed or refused to foreclose the lien, and only rendered a personal judgment against the tenant. That judgment is *res adjudicata* of the question of the lien, and is binding on the landlord and his assignees. In the case of *Johnson v. Murphy's Adm'rs*, 17 Tex. 216, it was said: "We have no doubt that the judgment of a court of competent jurisdiction is a bar to any suit for the same subject-matter put in litigation in the former suit, and the presumption is that every matter that could have been adjudicated in the former suit was before it, and is concluded by the judgment." In that case a suit had been brought on a note, and to foreclose a mortgage, and a judgment was rendered for the debt, but there was no decree of foreclosure; and when a suit was afterwards brought to foreclose the mortgage it was held that the former judgment was *res adjudicata* of the matter. In the case of *Roberts v. Johnson*, 48 Tex. 133, a former suit had been brought, and judgment recovered on certain notes. In that suit the pleadings had alleged a vendor's

lien, and the matter had been submitted to the jury, but a verdict for the debt only was returned. The court held that the former judgment was *res adjudicata* of the vendor's lien, and the suit to foreclose the lien could not be maintained. When Carter had set up the facts showing the statutory lien, and it was ignored by the justice of the peace in his judgment, it was equivalent to a finding that there was no lien, and it will be taken as having adjudicated that matter. *Handel v. Elliott*, 60 Tex. 145. It is the rule in this state that the holder of a lien can sue for a conversion of the property on which the lien exists. *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770. But in this case appellee is not a lienholder, but has lost the lien he held against the property, and therefore has no grounds upon which to base his suit for conversion.

The judgment of the county court is reversed, and judgment here rendered that S. E. Carter, "for the use and benefit of E. Quickenstedt," take nothing by his suit, and that appellant recover all costs of this court and the lower court in this behalf expended.

McCOWEN v. GULF, C. & S. F. RY. CO.*
(Court of Civil Appeals of Texas. March 4, 1903.)

RAILROADS—TRESPASSER ON BRIDGE—INJURY—DUTIES AND LIABILITIES—INSTRUCTIONS—EVIDENCE—RES GESTÆ—REPUTATION FOR VERACITY.

1. A railroad owes no duty to a trespasser on one of its bridges except to use all available means to prevent injury to him when his presence on the bridge is discovered, and it is not required to keep a lookout on the bridge to discover him.

2. An instruction that, "if you should believe from the evidence that said railway bridge was not commonly used for persons to pass on foot thereover, and that people were not accustomed to pass over such bridge with the knowledge of defendant company, * * * or if it was so used that such use was not such as to put a reasonably prudent person engaged in operating an engine or train of cars while approaching said bridge on inquiry whether persons might be on said bridge, then, under such circumstances, it would not be the duty of the defendant company * * * to keep a lookout for persons who might be upon such bridge," etc., is not on the weight of evidence.

3. Error in an instruction, in an action for injuries to a trespasser on a railroad bridge caused by his being knocked off the bridge by a train, in permitting a verdict for defendant, even though plaintiff's peril was discovered and no effort was made to prevent the injury, was not cured by a subsequent correct charge given at plaintiff's request.

4. The error was harmless where there was no evidence that defendant's employes discovered plaintiff's presence on the bridge before the accident.

5. Plaintiff testified that he had been knocked off a bridge by a train and injured. It was shown that he had said he was thrown from the bridge by robbers. Held, that plaintiff's statement to a witness, made several hours after the accident, that he was knocked off the

*Rehearing denied April 1, 1903.

bridge by a train, was inadmissible to support his testimony.

6. Statements made by plaintiff, several hours after he was knocked off a bridge by a railroad train and injured, as to the cause of his injury, are not part of the *res gestæ*.

7. Where the reputation of a party to an action for truth has not been attacked on the trial, he should not be allowed to prove that he has a good reputation simply because there were circumstances tending to cast doubts on some of his statements before the court.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Action by A. D. McCowen against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Plummer & Green, for appellant. Ramsey & Odell and J. W. Terry, for appellee.

FLY, J. Appellant sued appellee to recover damages alleged to have been received by his being run against and knocked off a bridge which he was crossing. The case was tried by jury, and resulted in a verdict and judgment for appellee.

The alleged negligence consisted in a failure to give a signal of approach of the train to the bridge, which by long use and the acquiescence of appellee had become a public crossing which was daily used by the public as a foot crossing over Buffalo Creek, and that appellant's peril was discovered, or by the exercise of ordinary care could have been discovered, in time to have stopped the train.

We find from the facts that, if appellant was run against and knocked off the bridge by a train, it was while he was in a state of intoxication on the bridge at night, and that his injuries were caused by his contributory negligence. The evidence did not show that appellant's presence was discovered by appellee, and it was not shown that the bridge was used by the public as a foot crossing over the creek, and it was not a custom or a duty on the part of appellee to give any signal in approaching the bridge. The bridge was not customarily used by pedestrians in crossing the creek, the evidence showing that years before, occasionally, young people would wander to and sometimes across the bridge. It was not shown that appellee had any knowledge of such occasional use of the bridge or acquiesced in it. Such bridge not being a place where the public resorted with the knowledge and implied consent of appellee, it owed no duty to appellant except to use all available means to prevent injuring him when discovered on the bridge. The railroad company owed no duty to appellant to keep a lookout on the bridge, and the court did not err in so instructing the jury. *Sanches v. Railway*, 88 Tex. 117, 30 S. W. 131.

The court gave the following instruction: "On the other hand, if you should believe

from the evidence that said railway bridge was not commonly used for persons to pass on foot thereover, and that people were not accustomed to pass over such bridge with the knowledge of defendant company, its agents and employes engaged in operating its trains, or if it was so used that such use was not such as to put a reasonably prudent person engaged in operating an engine or train of cars while approaching said bridge on inquiry whether persons might be on said bridge, then, under such circumstances, it would not be the duty of the defendant company, its agents and employes operating its engines and trains across said bridge, to keep a lookout for persons who might be upon such bridge, nor to signal the approach of said engines or trains thereto, and, if the plaintiff was injured under such circumstances, the defendant would not be responsible therefor, and you should find for the defendant." The charge was not upon the weight of the evidence, but predicated a verdict for appellee upon the finding of the different circumstances enumerated.

If there had been any evidence tending to show that appellant had been discovered by the employes of appellee before he was injured, the foregoing would have been error, because it permitted a verdict for appellee even though his peril was discovered and no effort made to prevent the injury. It is true that a charge requested by appellant was given, in which the duty of appellee to appellant, if his peril was discovered, was set forth, but that charge was in conflict with the one given by the court, and the error was not, therefore, cured thereby. This error could not avail appellant, however, in the absence of any circumstance tending to show that the employes of appellee saw him before he was struck and knocked off the bridge. Proof tending to establish that they might have seen him, had a lookout been kept, is not evidence that they discovered him, and, without such evidence, appellee could not be held liable under the facts of this case. *Railway v. Bredow*, 90 Tex. 28, 36 S. W. 410.

It appears from a bill of exceptions that appellant desired to prove by a witness that on the morning after the accident, and several hours thereafter, appellant had told witness that he had been knocked off the bridge by a train, which evidence was objected to by appellee and rejected by the court. It is contended by appellant the statement should have been admitted as tending to support the testimony of appellant, who had been shown to have told one White that he had been thrown from the bridge by two robbers, and also that it was a part of the *res gestæ*. The evidence was not permissible on either of the grounds named, nor on any other ground.

The court did not err in rejecting testimony to the effect that appellant's reputation for truth and veracity was good in the com-

munity in which he lived. The reputation of appellant for truth had not been attacked, and he should not be allowed to prove that he had a good one simply because there were circumstances tending to cast doubts on some of his statements before the court. *Railway v. Raney*, 86 Tex. 363, 25 S. W. 11.

The judgment is affirmed.

JEFFRIES v. SMITH et al.

(Court of Civil Appeals of Texas. March 11, 1903.)

GARNISHMENT—APPLICATION — ALLEGATIONS — SUFFICIENCY—JUDICIAL NOTICE.

1. Since garnishment proceedings are ancillary to the main suit in which judgment was rendered, the court must take judicial notice of the existence and provisions of the judgment.

2. An application for a writ of garnishment against a garnishee indebted to one of several defendants against whom the original judgment was rendered, which identifies the original judgment rendered by the same court, is sufficient without specifically averring that judgment was rendered against the person to whom the garnishee is alleged to be indebted.

Error from Bell County Court; G. M. Felts, Judge.

Garnishment proceedings by F. M. Jeffries against F. M. Smith and others. From a judgment quashing the application and writ of garnishment, plaintiff brings error. Reversed.

John B. Durrett, for plaintiff in error. D. L. Russell and A. M. Monteith, for defendants in error.

KEY, J. We hold that the court erred in sustaining the demurrers and motion to quash the application and writ of garnishment. The garnishment proceeding was ancillary to the main suit in which judgment had been rendered, and the court was required to take judicial knowledge of the existence and terms of the original judgment. *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 330; *Simon v. Greer* (Tex. Civ. App.) 34 S. W. 343.

The writ of garnishment was sought on the ground that the garnishee was indebted to William Thatcher, one of the defendants, against whom the original judgment had been rendered. It is true that in the original suit there were other defendants, and it is also true that the application for writ of garnishment does not specifically state that judgment had been rendered against Thatcher. However, it properly describes the suit, and states that on the 5th day of May, 1899, a judgment was rendered for the applicant for \$538.50, and that nothing had been paid or collected on that judgment. We hold that this was sufficient. It sufficiently identified a judgment previously rendered by the same court, and the garnishment proceeding being ancillary to the main suit, and the court

taking judicial knowledge of the terms of the judgment previously rendered, it was unnecessary for the application to specifically state that the judgment was rendered against Thatcher.

Reversed and remanded.

SELLMAN v. SELLMAN.

(Court of Civil Appeals of Texas. March 13, 1903.)

SURVEYS—BOUNDARIES—MISTAKE.

1. It being necessary to disregard one or the other set of calls in the field notes of office surveys, calls found to have been made under a mistake as to the relative position of the surveys may be disregarded, and effect given to the real intention of the person who made the field notes.

Appeal from District Court, McCulloch County; John W. Goodwin, Judge.

Action by Richard Sellman against W. B. Sellman. Judgment for plaintiff. Defendant appeals. Affirmed.

Maurusund & Maurusund, for appellant. F. M. Newman, for appellee.

STREETMAN, J. Appellee, Richard Sellman, brought this suit in form of trespass to try title for the recovery of six sections of land in McCulloch county, Tex. The pleadings and agreement as to title converted the suit into a question of boundary, involving the location of three sections of the land sued for. The surveys really in controversy were office surveys, and were never located upon the ground, and the question to be determined by the court was, what lands were intended to be included within the surveys?

There is no necessity for setting out the evidence, in which there is no conflict. We conclude that the court properly found that the official map was incorrect, and that the surveys claimed by appellee were located with reference to the tier of surveys on the west one mile further north than shown upon said map, and that the land appearing on said map to be covered by the Wilhelm Peter surveys was not, in fact, covered by any of the lands owned by appellee, and properly awarded judgment for said land to appellant.

We also conclude that the court was correct in holding that the intention in making the surveys of section 306 and the half sections 313-1 and 313-2 was to appropriate the land left vacant when the Broesche, Kuhlman, and Peter surveys were located, and not to appropriate the land already covered by said surveys. It is true that this construction renders it necessary to discard the calls for the surveys on the west; but it is also true that under appellant's contention it would be necessary to disregard the calls for the Broesche and Peter surveys. It being necessary to disregard one or the other set of calls in the field notes, and the court hav-

¶ 1. See Evidence, vol. 20, Cent. Dig. § 63.

ing found that the calls on the west were made under a mistake as to the relative position of said surveys, it was authorized to disregard said calls, and give effect to the real intention of the person who made the field notes.

There being no error in the judgment, it is affirmed. Affirmed.

BROWN v. JOHNSON.*

(Court of Civil Appeals of Texas. March 4, 1903.)

BOUNDARIES—AGREEMENT—FENCES—REMOVAL—HEDGES.

1. Where adjoining landowners agree that a certain hedge is the boundary line, such agreement settles all questions between them as to the extent of their ownership.

2. Where, in trespass by a landowner against an adjoining owner, the issue was as to the location of the boundary line, and the jury found that a certain hedge was the agreed boundary, any error committed as to limitations was immaterial; the finding of the jury being based on the agreement, and not on limitations.

3. Where, in trespass by a landowner against an adjoining owner, the issue was the location of the boundary, and it was admitted on the trial that defendant owned the land on one side of a certain hedge, and plaintiff on the other, an instruction to such effect could not be complained of.

4. A "hedge" is not a "fence," within Rev. St. 1895, art. 2502, which enacts that any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person shall have the right to withdraw or separate his fence, or part of fence, after having given certain notice to the other party.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Action by Mrs. Josephine Johnson against Joe Brown. From a judgment for plaintiff, defendant appeals. Affirmed.

E. A. Rice and J. M. Moore, for appellant. S. C. Padelford, for appellee.

FLY, J. This suit was instituted by appellee to establish a boundary line between her land and that of appellant, and restrain him from cutting down and destroying a hedge of bois d'arc trees alleged to be on her land. A trial resulted in a verdict and judgment in favor of appellee, establishing the hedge as the boundary, and restraining appellant from interference with the hedge. The verdict finding the hedge of bois d'arc trees to be the boundary line between the two tracts is fully sustained by the statement of facts. There was evidence that tended to establish that the boundary line had been agreed on by the owners of the two tracts, and the court did not err in submitting that issue to the jury.

The jury returned the following verdict: "We, the jury, find for the plaintiff, that the

injunction was properly sued out. We further find that the hedge running practically north and south is the agreed boundary line between the tracts of land in controversy, owned by the defendant, Brown, and the plaintiff, Josephine Johnson." This finding of the jury, which is supported by the facts, disposed of all questions as to the ownership of the land on either side of the hedge, for it is clear that an agreement to make the hedge the boundary line settled all questions between the owners of the respective tracts as to the ownership of the land on each side of the hedge. It follows that any error that may have been committed by the court as to limitations did not have any effect upon the jury, for the finding was not based on limitation, but on an agreement that fixed the hedge as the boundary between the two tracts. *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843; *Parker v. Chancellor*, 78 Tex. 524, 15 S. W. 157.

It was admitted in the trial court "that the plaintiff owned the 107 acres described in plaintiff's petition, and lying east of the hedge, and that defendant owned 61 acres lying west of the hedge, described in defendant's answer, and that the hedge in dispute in this case is as to the western boundary line of the 107 acres owned by the plaintiff, and the eastern boundary line of the 61 acres owned by the defendant." The agreement eliminated almost if not every question from the case, for if one party owned the land east of the hedge, and the other west of the hedge, the hedge would seem to be necessarily the boundary line. At any rate, after making that agreement, appellant is in no position to complain that the court instructed the jury that he owned the land west of the hedge, and Josephine Johnson the land east of the hedge.

The testimony of the surveyor showed conclusively that, in fixing the boundary line at the hedge, appellant received 5 or 6 acres of land more than he was entitled to. The surveyor's testimony showed that the northwest corner of the original Brown survey, of 200 acres, was the only well-marked corner; and, using that as a starting point, his survey indicated that the hedge stood 9 varas east of the east line of appellant's survey, of 61 acres. The testimony of the surveyor was practically uncontradicted. Independent of the agreement between the father of appellant and the husband of appellee to make the hedge the dividing line between the two tracts of land, the testimony conclusively established that appellant got more land than he was entitled to by his title papers.

The evidence established that the hedge was planted by the father of appellant, and it is contended that the injunction should not have been made perpetual, because by the terms of articles 2501, 2502, Rev. St. 1895, appellant would have the right to remove the hedge by giving six months' notice to appellee. The terms of those statutes are not as

*Rehearing denied April 1, 1903.

¶ 1. See *Boundaries*, vol. 8, Cent. Dig. § 222.

clear as might be desired, but we are of the opinion that the word "fence," as used in the statute, has no reference to, and does not include within its meaning, a hedge. The common and usually accepted meaning of the word "fence" is an inclosing structure of wood, iron, or other material, and such definition must have been in the mind of the Legislature when the articles in question were enacted. Where two persons are the joint owners of a fence, their interests might be separated and partitioned without material injury to either; but not so with a hedge, which necessarily consists of growing trees, vines, or shrubs, unless one party owned a certain portion of it, and the other party the other part. In this case, however, it was agreed that the hedge was the boundary line—that is, that a line running directly through the middle of the hedge, no matter what its width, was the dividing line between the two tracts—which was necessarily an agreement that the absolute title to one-half the hedge thus measured belonged to each party to the agreement. Such being the case, the hedge could not be destroyed by either party without trespassing on the rights of the other. The judgment enjoins nothing but the cutting and interference with the hedge "which is situated upon and is the division line between plaintiff and defendant," and such cutting or interference with the hedge on the division line would necessarily invade the rights of appellee. In addition to the agreement that the hedge should be the boundary line, it was proved that appellee and her husband had exercised control over the east side of the hedge for over 20 years, trimming it and using and enjoying it.

The judgment is affirmed.

TEXAS & P. RY. CO. v. CARTER.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

SERVANTS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. In an action for personal injuries sustained by a section hand on a railroad by reason of a collision between a train and a hand car which plaintiff was attempting to remove from the track, evidence considered, and held sufficient to justify a finding that plaintiff was not guilty of contributory negligence in continuing his attempt to remove the car after the other members of the crew had fled.

Appeal from District Court, Cass County; J. M. Talbot, Judge.

Action by W. A. Carter against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Armistead, for appellant. Howard F. Oneal and Hines & Hines, for appellee.

TEMPLETON, J. Carter was a section hand of the railway company. He was traveling on a hand car in company with his boss and two other members of the section crew. They observed a freight train approaching them in front, and stopped the car, which was loaded with lumber and cement. They unloaded the car and attempted to remove it from the track. They got the front end off, and the hind end partially off, when all of them, except Carter, abandoned the car and fled. The train was then almost upon them. Carter was working at the hind end, and made another effort to lift it off. Before he could accomplish his purpose, the train struck the car and knocked it against him. He was thereby injured, and brought suit to recover the resulting damages. A jury awarded him the sum of \$987.50.

Complaint is made of the action of the trial court in submitting to the jury the issue of discovered peril, the contention being that the evidence does not raise the issue. It was shown that the operatives of the train saw the hand car and the section crew when the train was several hundred feet from the place of the accident; that the train was going up grade, and could have been stopped in a very short distance, but that it was not stopped or slowed up. Under the rules of the company, it was the duty of the section crew to be on the lookout for trains, and to get the car off the track whenever it became necessary to do so. The train had the right of way, and the operatives of it were authorized by the rules to expect a clear track. It is therefore insisted that the engineer was justified in going ahead, and in assuming that the track would be cleared, and the sectionmen in a place of safety, by the time the train reached the point where the car had been stopped. Ordinarily such assumption would be warranted. But the case in hand discloses unusual conditions. The hand car was heavily loaded, and extra time was required in unloading and removing it. The car was stopped, of necessity, in a cut, which increased the difficulties and danger of the work. These conditions were obvious to the engineer, and if a person of ordinary prudence, situated as he was, would not have relied unreservedly upon the rules, but would have approached the car with the train under control, then the conduct of the engineer in going ahead regardless of consequences would constitute negligence. True, the first duty of the section hands was to protect themselves, and the engineer had a right to suppose, until he saw to the contrary, that they would not be negligent in that respect. But it was also their duty to get the car off the track, and it was to be expected that they would continue at work until their purpose was accomplished, or until it appeared to them that they were in danger of being run over by the train. It was to be apprehended that they would be absorbed in their work, and

*Rehearing denied March 28, 1903.

that they would not watch the movement of the train with that degree of attention which might otherwise have been anticipated. That one or more of the sectionmen would not quit the track at exactly the right moment was possible, if not probable, and was apparent to the engineer. The conditions were suggestive of danger to Carter and his fellows, and required corresponding care on the part of the trainmen. The trial court did not err in submitting these issues to the jury for their determination.

It is contended that the evidence shows conclusively that Carter was guilty of contributory negligence. There was evidence to the effect that the section boss ordered the men off the track, and that they all obeyed the order, except Carter. On the other hand, Carter testified that, if such order was given, he did not hear it, and he was corroborated by another member of the crew. The fact that the other hands quit work was calculated to apprise Carter of the near approach of the train, but he had no time for reflection and consideration, and is not necessarily chargeable with negligence for failing to comprehend instantly the significance of their conduct. Some confusion of mind was natural under the circumstances, and he is entitled to have his actions judged from his standpoint at the time of the accident. He knew that the train was coming, and there was no obstacle to prevent him from seeing it; but he was busily engaged in discharging a duty he owed to his employer, and is in some degree excusable for not noticing the close proximity of the train. It appears that as the train neared the hand car no warning signal was given. Carter was evidently held to his work by a sense of duty, and his failure to think only of his own safety should not be weighed too strongly against him. The question is whether a person of ordinary prudence would have acted as he did, and we are of opinion that the evidence is sufficient to justify the verdict of the jury, which answers the question in the affirmative.

The judgment is affirmed.

FAYETTE COUNTY v. KRAUSE et al.*
(Court of Civil Appeals of Texas. March 10, 1908.)

COUNTY COMMISSIONERS — AUTHORITY TO COMMITTEE—RATIFICATION—ACT OF COMMISSIONERS—LICENSE.

1. An order of a county commissioners' court authorizing a committee to buy the material for and construct a sewer from the county courthouse gives the committee no implied authority to agree that citizens having property on the street in which the sewer is to be constructed shall have the right to connect their private sewers with such county sewer.

2. The agreement of a committee appointed by a county commissioners' court to construct a sewer from the county courthouse, that prop-

erty owners on the street might connect their private sewers with such sewer, is not ratified by such court approving of the work of the committee, accepting the sewer, and paying for it on the committee's report; such agreement not being contained in the report, or brought to the attention of such court.

3. Verbal permission given to persons by members of a county commissioners' court to connect with a county sewer is not the act of such court.

4. Permission given by a county commissioners' court to connect with a county sewer, being without consideration, is but a revocable license.

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Suit by Fayette county against C. D. Krause and others. Judgment for defendants. Plaintiff appeals. Reversed.

Robson & Duncan, for appellant. Brown, Lane & Garwood and Walters, Lane & Lennert, for appellees.

PLEASANTS, J. In 1886 the county of Fayette constructed a sewer from its courthouse and jail in the city of La Grange along Washington street, in said city, to the Colorado river. Appellees are the owners of business property in La Grange adjacent to Washington street, upon which they have constructed a private system of sewerage, and are claiming the right to connect same with the sewer owned by appellant. This suit was brought by appellant to enjoin the appellees from making such connection, and from injuring or using the sewer of appellant, without its consent. The petition alleges that defendants had wrongfully, and in open disregard of plaintiff's rights, and without its consent, and with intent to appropriate the same to their own use, dug away the earth therefrom, and had broken and injured plaintiff's sewer. The defendants answered by general denial and plea of not guilty, and specially pleaded "that they had the right to connect their private sewer with, and make use of, appellant's sewer, by virtue of an agreement made and entered into at the time of the construction of appellant's sewer by and between the city of La Grange, then an incorporated city under the laws of Texas, and Fayette county [the plaintiff], whereby the city of La Grange, and the citizens of said city, in consideration of the privilege granted appellant to lay its sewer in and through the streets of said city, have the right, whenever they see fit, to connect their sewers with and use appellant's sewer, it having been ascertained that its capacity would be more than sufficient to accommodate the entire population of the city of La Grange, and that the increased use would be of benefit to the same and to all parties concerned, that, upon such understanding and agreement, appellant's sewer was constructed; and that the town of La Grange, by reason thereof, now has the right to connect a system of sewerage of its own with that of appellant, and that each individual

*Rehearing denied, and writ of error denied by Supreme Court.

citizen in the town of La Grange, if he sees fit to incur the expense necessary to make connection therewith, has such right; that appellees are citizens of the town of La Grange, and owners of property located on block 23 which abuts upon Washington street in said city, the street in which appellant's sewer is laid; that appellees not only have the right to construct, operate, and connect the sewer complained of by appellant by reason of the said agreement, but that they have the special right to do so, accorded them by plaintiff, acting through its commissioners' court, at a session of said court held in the courthouse of La Grange during the month of June, 1900."

The cause was tried by the court below without a jury, and judgment rendered in favor of the defendants, from which judgment the county of Fayette prosecutes this appeal.

The trial court filed the following findings of fact:

"(1) I find that the courthouse of Fayette county, Texas, is situated on the public square of the city of La Grange, in said Fayette county, Texas; that the county jail of said county is situated on block No. 33 of said city, which abuts on the south side of the public square; and that the defendants own property on block No. 23 of said city, which abuts on the east side of Washington street and the public square of said city.

"(2) I find that on the 16th day of May, 1885, the commissioners' court of Fayette county, Texas, by an order duly entered upon the minutes of said court, appointed a committee, consisting of W. H. Ledbetter, W. W. Little, R. T. Bradshaw, H. Studeman, W. M. Chandler, and Joseph Ehlinger, to ascertain the advisability and necessity of building an underground sewer from the county jail to the Colorado river, for the purpose of draining the excrement of the jail, to ascertain the probable cost, and report to the commissioners' court. They reported at the June term, 1885, that the sewer was necessary and should be constructed, and that it should be laid on the east side of Main street to the river, with eight-inch pipe; the distance being 3,600 feet. This report was adopted by the commissioners' court, and W. W. Little, R. T. Bradshaw, M. J. Connell, W. H. Ledbetter, W. M. Chandler, and Joseph Ehlinger were, by an order duly entered of record, appointed a committee to procure the necessary material and to construct said underground sewer aforesaid. Said committee was invested only with the power to contract for and purchase, in the name of the county, all necessary fixtures and material for all necessary labor for the construction and completion of a sewer from the county jail to the river, and on completion of the sewer to make their report, accompanied by an account of the material and labor expended. This committee found it impossible to construct the sewer on Main

street, because they could not obtain permission to cross the property of one of the citizens of La Grange, which was necessary if the sewer was built on that route, and after consulting with a capable engineer (Mr. Lynch), and in order to secure the right of way and permission of citizens of the town of La Grange to lay sewer, determined that it would be more convenient for the citizens of the town that the sewer be built on Washington street, which is one street west of Main street, and is more centrally located in the town, and that, instead of using eight-inch pipe, they would use ten-inch pipe. At that time it was understood and mutually agreed by the then commissioners' court and the town of La Grange, but no order to that effect by either the city of La Grange or commissioners was ever entered of record, [or] any vote taken by either, that said sewer should be built down Washington street out of ten-inch pipe, so that citizens who wished to do so, including those on Washington street, might join their private sewers thereto—the said Lynch advising this course, as making the system more efficient, without injury to the county; and accordingly the said sewer was built by Fayette county on the changed route, and according to the changed plan. The cost of the construction of this sewer, as built, was about \$2,500, and its length was about 4,000 feet. There was no order entered of record by the commissioners' court adopting these changes, but the same was done by the concurrent agreement of said commissioners' court and the town council of La Grange, acting through the said committee and the members of the board of aldermen thereon. On this last-mentioned committee was W. W. Little, who was one of the commissioners of the then commissioners' court; W. M. Chandler, who was mayor of the city of La Grange; and M. J. Connell and W. H. Ledbetter, who were aldermen of said city, and, as such, represented the city in said contract and on said committee. I also find that the then commissioners' court approved the work of the committee, accepted the sewer, and paid for it, upon report of the committee.

"(3) I find that since the building of the sewer the commissioners' court of Fayette county has connected the courthouse with the sewer, and has also given various parties, citizens of La Grange, permission to connect their private sewers with said sewer; some of whom by orders duly entered on the minutes of said court, and others by mere verbal permission.

"(4) I find that the defendants about June, 1900, obtained the permission of the commissioners' court to connect their private sewer from the rear of their properties, which front on Washington street, and on the east side of the public square, in said city, with the county sewer as laid in Washington street. There was no order entered on the minutes of the commissioners' court authorizing it.

There was no motion made or vote taken. But the individual members of the court, except one, while the court was in session, gave their consent, and said at the time that it was not necessary to enter the order on the minutes of the court.

"(5) I find that the building of this private sewer by these defendants was delayed from time to time, from various causes, until the district judge, on application for an injunction, restrained them from further use of their private privies, as being dangerous to the health and comfort of the town of La Grange. They began anew their purpose, which was never abandoned, to connect a system of sewerage with said county sewer in Washington street, procured all necessary materials, dug their trench from their properties to the pipe of said sewer in Washington street, and laid a part of their pipe and connected with said sewer in Washington street before this suit was filed.

"(6) I find that these connections by the various parties, including these defendants, created no injury to the sewer of the county, but was a positive benefit, as affording a greater and more constant flush, and in no manner overtaxes the capacity of said sewer, of which at the time of its building it was contemplated this use would be made.

"(7) That neither the city of La Grange, nor any citizen thereof, has paid anything toward the construction of said sewer or its maintenance."

Under appropriate assignments, the appellant contends that, upon the facts found by the court, judgment should have been rendered for the plaintiff. We think the contention is sound. The sewer in controversy was constructed and paid for by the appellant, and is the property of the county, in its corporate capacity, just as is the county jail or courthouse. No understanding or agreement entered into between the members of the committee appointed by the county to contract for and superintend the construction of said sewer would be binding upon the county unless said committee was authorized by the county to make same, or the county, with knowledge of the terms of said agreement, ratified it after it was made. The court finds that one of the members of this committee was a member of the commissioners' court, and three of the committee were members of the city council, and that by the concurrent agreement of the commissioners' court and the city council, acting through said committee, it was mutually agreed that the city of La Grange, or the residents of said city, could connect their private sewers with said county sewer. There is no finding that this committee was authorized by the commissioners' court or the city council to make such an agreement, or that the agreement was ever ratified by either the court or the council. On the contrary, it affirmatively appears that the committee was only authorized to contract for

and purchase, in the name of the county, the necessary material and labor for the construction of a sewer from the county jail to the river, and upon completion of same to make their report, accompanied by an account of the material and labor expended, and that no order authorizing or ratifying the understanding and agreement of the committee as to the use of the sewer by the citizens of La Grange was ever made by the commissioners' court or the city council, and no vote was ever taken by either of said bodies upon the subject of such agreement. The finding that the commissioners' court approved the work of the committee, accepted the sewer, and paid for it, upon the report of the committee, is not a finding that the court ratified the alleged agreement made by the committee with the city of La Grange, because it is not found that said agreement was contained in the report of the committee, nor was it in any way brought to the knowledge of the court. The fact that citizens of La Grange who had heretofore connected their private sewers with the county sewer had been granted permission by the commissioners' court to make such connection shows that the county has never acquiesced in any claim of right on the part of such citizens to use its sewer without its consent. The verbal permission given appellees by the members of the commissioners' court to connect their sewer with the county sewer was not the act of the commissioners' court, in any legal or binding sense. Had the court, by a proper order regularly entered, granted such permission, such grant, being without consideration, would have been a mere license, which might have been revoked at any time. It may be stated as a general rule that a contract or agreement made by a municipal corporation—either county or city—is only valid or binding when made by or under the authority of a resolution or order duly passed at a meeting of the legislative body of such municipality, and entered upon the minutes of such meeting. *Bryan v. Page*, 51 Tex. 534, 32 Am. Rep. 637; *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Wagner v. Porter* (Tex. Civ. App.) 56 S. W. 560.

The later decisions of our Supreme Court have modified this rule to the extent that where an order of a commissioners' court is shown to have been actually made by such court, and has been acted upon, the omission of the clerk to record such order will not render the order, or the acts done in pursuance thereof, void. *Brown v. Ruse*, 69 Tex. 589, 7 S. W. 489; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000. In the case cited from 69 Tex., 7 S. W., the commissioners' court had, as required by the statute, audited and approved a school voucher issued to the plaintiff, *Ruse*, by the county superintendent, and the county judge had indorsed the approval of the court upon said voucher, but no order of approval appeared in the minutes of the court. At a succeeding term

of the court an order was entered reciting the previous approval of the voucher by the court, but directed that no draft should issue for same. This order was made without the knowledge of Ruse. In a suit by Ruse for mandamus to compel the issuance of a warrant for the amount due him, as evidenced by said approved voucher, the Supreme Court held that "the written evidence made under the direction of the court, and in part properly entered on its minutes, is sufficient to show that the claim was approved at the date of the indorsement made on same, and no subsequent action of the court, had without notice to appellee [Ruse], could affect his right, if this could have been done at all after the close of the term at which the claim was allowed." In *Ewing v. Duncan* it is held that the failure to enter of record an order for an election made by a commissioners' court will not render void the election held in pursuance of such order. Whatever may be the extent to which these decisions modify the rule as to the necessity for the entry in the minutes of orders made by a commissioners' court, they in no way modify the rule that all contracts made by a county, to be valid and binding, must be made by or under authority of an order of the commissioners' court.

It is urged by the appellees that the order of the commissioners' court authorizing the committee to construct the sewer carried with it the implied authority on the part of such committee to make any agreement necessary to the accomplishment of the work they were expressly authorized to do, and that said committee were thereby authorized to agree for the county, in consideration of the permission given by the city of La Grange, and the citizens living on Washington street, in said city, to the county, to lay the sewer on said street, that such citizens should have the right to connect their private sewers with said county sewer. The facts found do not show that the city of La Grange, or any of the citizens of said city, sustained any damage by the construction of the sewer, or surrendered any claim which they were asserting to any probable damage that might be caused by its construction. But conceding that this was the consideration for the alleged agreement, the committee had no express authority to bind the county by such agreement, and we think it clear that such authority cannot be implied from the authority given them to purchase the necessary materials and construct the sewer. The right of the county to the absolute and exclusive possession and control of property owned by it is a valuable right, and the surrender of such right will not be implied, except from acts clearly indicating such intention. It may be that no injury to the sewer would result from its use by the citizens of La Grange, and the refusal of the commissioners' court to grant permission to the appellees to connect with same is an unreason-

able and arbitrary exercise of the power of that court, but they are the exclusive judges of the propriety of allowing such connections to be made. As the representatives of the county, they have the exclusive right to the possession and control of said sewer, and are entitled to the protection of the courts in the exercise of such rights.

We are of opinion that the judgment of the court below should be reversed, and judgment here rendered in favor of appellant, granting the injunction prayed for, and it is so ordered. Reversed and rendered.

RALEY et al. v. SMITH et al.*

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

ATTORNEY—COLLECTING JUDGMENT—COMMISSION — GARNISHMENT OF PARTNERSHIP CLAIM — INDIVIDUAL DEBT — LEGALITY OF PROCEEDINGS—APPEAL—RIGHTS OF APPELLANT.

1. An attorney agreed with a firm to collect a judgment for a specified commission, and this he proceeded to do by means of garnishment proceedings against a bank. While these proceedings were pending on an appeal, which was ultimately decided in favor of the firm, a creditor of a member of the firm garnished the funds in the bank. Shortly after the commencement of the second garnishment the firm agreed to allow the attorney additional compensation, to cover expenses incurred; and he thereupon intervened in the second garnishment, attacking its legality, and praying judgment for his fees. The trial court upheld the legality of the garnishment, and gave him judgment for his fee under the first contract only. Held that, on an appeal from this judgment, the attorney was in a position to raise the question of the legality of the garnishment.

2. A claim of a partnership cannot be garnished for the individual debt of a member of the firm.

3. A firm of attorneys reduced a claim to judgment under an agreement that they were to have a certain per cent. of the claim for its collection, but afterwards the judgment was in part enforced by another attorney, acting for the creditors. It was not shown that the first attorneys had in any way neglected their employment, or that the contract with them had been abrogated. Held, that they were entitled to their commission.

Appeal from Travis County Court; Geo. Calhoun, Judge.

Garnishment by Ed. R. Smith against T. L. Wren and others, defendants, and the Frost National Bank, garnishee, in which James Raley and others intervened. From a judgment for plaintiff and Raley, interveners appeal. Affirmed in part, and reversed in part.

Jas. Raley, for appellants. Ed. Haltom, for appellee.

STREETMAN, J. This appeal is from a judgment in a garnishment proceeding instituted by Ed. R. Smith against the Frost National Bank, in a case in which T. L.

*Rehearing denied March 25, 1903.

¶ 2. See Garnishment, vol. 24, Cent. Dig. § 123; Partnership, vol. 23, Cent. Dig. § 353.

Wren and others were defendants. The proceedings necessary to an understanding of the questions are as follows: Prior to 1892 Maddox & Wren, a firm composed of John W. Maddox and T. L. Wren, were engaged as partners in a mining business; and on December 6, 1892, said partnership recovered judgment in the district court of Bexar county, Tex., against R. L. Summerlin and others for \$3,596.99. In this suit the plaintiffs were represented by West & McGown and Duval West; the terms of their employment, as stated in the record, being that they were "under a contract of ten per cent. of the amount collected." Said attorneys were paid in advance the sum of \$20. No collections were made under this judgment for some time, and Maddox & Wren then employed James Rayley to collect said judgment; the first agreement with Rayley being that he was to be allowed 25 per cent. of what he could collect, free of cost to the plaintiffs. Afterwards, on July 7, 1897, the plaintiffs Maddox & Wren agreed to allow Rayley an additional 5 per cent. on any recovery which should be made by prosecuting the case or cases in any of the higher courts. On February 14, 1902, a further agreement was made, in order to compensate Rayley for certain costs which he had incurred, to the effect that, from any amount collected, Rayley should first be paid \$125, and should have 30 per cent. of the net remainder. It will be noted that the date of this agreement was subsequent to the writ of garnishment in this case. Proceeding under his employment, James Rayley procured a garnishment against the Frost National Bank, and on June 21, 1901, obtained for Maddox & Wren a judgment against said bank for the sum of \$1,948.74 on deposit by R. L. Summerlin. J. R. Norton had claimed this fund, and appealed from the judgment. January 8, 1902, the judgment was affirmed by the Court of Civil Appeals at San Antonio, and, no motion for rehearing having been filed, mandate was issued February 17, 1902. On January 17, 1902, Ed. R. Smith, claiming an indebtedness of \$568.52 against T. L. Wren, caused a writ of garnishment to issue, which was served on the Frost National Bank January 18, 1902. The writ was returnable April 7, 1902. On March 29, 1902, the bank answered, setting out the above judgments and proceedings, and showing, further, that Susan Hancock, as executrix of John Hancock, had garnished the bank for the interest of John W. Maddox in said \$1,948.74, and asking that said executrix and Maddox & Wren be impleaded, and that such judgment be rendered as would protect the bank from a double liability. On April 8, 1902, Mrs. Eugenia G. Wren, wife of T. L. Wren, joined by her husband, intervened, and claimed to own the Wren half of the \$1,948.74; claiming that on May 24, 1890, her husband had used \$250 of her separate money, and on April 1, 1897, had transferred her his half of said judgment

against Summerlin in satisfaction of said indebtedness. T. L. Wren and Mrs. E. G. Wren afterwards moved to quash the writ of garnishment (1) because the \$1,948.74 was a debt due to the partnership of Maddox & Wren, and could not be garnished for the individual debt of T. L. Wren; and (2) because the garnishment was prematurely issued, the judgment of the Court of Civil Appeals not being final at the time said writ was issued. Mrs. Hancock, as executrix, filed an answer, in which she stated that she claimed nothing against Wren, but claimed the Maddox half of the judgment, and further alleged that Maddox had assigned to her his half of the \$1,948.74 since the institution of the suit. On August 6, 1902, James Rayley, having formerly intervened, filed an amended petition in intervention, in which he pleaded (1) in abatement that the indebtedness of \$1,948.74 was due by the Frost National Bank to the partnership of Maddox & Wren, and could not be garnished for the individual debt of T. L. Wren; and (2) claiming that he was the owner of \$125 of said fund, and also of 30 per cent. of said fund after deducting said \$125, and praying that he have judgment for said portion of said fund. On August 6, 1902, R. G. West, Floyd McGown, and Duval West intervened and filed a plea in abatement, in substance the same as that of James Rayley, and also claimed that, by virtue of their agreement with Maddox & Wren, they were the owners of 10 per cent. of the \$1,948.74. The plaintiff, in reply to these pleadings, filed general exceptions and a general denial, and a special plea to the effect that the transfer to Mrs. Wren was in fraud of the creditors of T. L. Wren. On August 29, 1902, the court rendered judgment in substance as follows: (1) Susan Hancock, executrix, was dismissed on her disclaimer. (2) The exceptions of plaintiff and the interveners were overruled. (3) The pleas in abatement and motions to quash the garnishment were overruled. (4) That the interveners, except Rayley, take nothing. (5) The court found that one-half of the \$1,948.74 was subject to the garnishment, and that the bank was entitled to a fee of \$50 for answering; and it was accordingly ordered that the bank pay into court \$974.37, less \$50, to wit, \$924.37, and that this amount be distributed as follows: To plaintiff, Ed. R. Smith, \$206.86; to Mrs. E. G. Wren, \$430.33; to James Rayley, \$287.18. It being further provided that the costs taxed against each of said parties be deducted from their respective shares. All of the parties gave notice of appeal, but this appeal was prosecuted only by the interveners, James Rayley and West & McGown and Duval West.

The first assignment calls in question the action of the court in overruling the pleas in abatement, in which the interveners insisted that the garnishment was illegal in so far as it sought to subject the fund belonging to the partnership of Maddox & Wren to the

individual debt of T. L. Wren. There is no question made as to the fact that this debt was due by the Frost National Bank to the partnership of Maddox & Wren. It does not appear that there has been any settlement or winding up of this partnership. The decided weight of authority is to the effect that a debt due to a partnership cannot be garnished for the individual debt of a member of the firm. Wade on Attach. vol. 2, § 490; Alderson on Jud. Writs and Process, § 155; Drake on Attach. §§ 567, 568, 569, and 570, citing in support of the text Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; Church v. Knox, 2 Conn. 514; Atkins v. Prescott, 10 N. H. 120; Towne v. Leach, 32 Vt. 747; Sweet v. Reed, 12 R. I. 121; Barry v. Fisher, 89 How. Prac. 521; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476; Smith v. McMicken, 3 La. Ann. 319; Mobley v. Lombard, 7 How. 318; Johnson v. King, 6 Humph. 233; Myers v. Smith, 29 Ohio St. 120; Ripley v. People's Sav. Bank, 18 Ill. App. 430; Kingsley v. Missouri Fire Co., 14 Mo. 467; Trickett v. Moore, 34 Kan. 755, 10 Pac. 147; Whitney v. Munroe, 19 Me. 42, 36 Am. Dec. 732; McCarty v. Emlen, 2 Dall. 277, 1 L. Ed. 380. See, also, McRee v. Brown, 45 Tex. 503, in which these authorities are referred to with seeming approval.

It is insisted in this case, however, that, while there may have been error, the interveners in the case are not in position to complain; Wren and wife and the garnishee not having appealed. We have concluded, however, that at least the intervener Raley has such an interest in the matter as would entitle him to raise this question, and complain of the judgment in this respect. The lower court refused to allow him the \$125 provided for in the agreement of the 14th of February, 1902; and this action of the court was very probably based on the fact that this agreement was made after the writ of garnishment in this case had been served upon the bank. If the garnishment had not been served upon the bank, we see no reason why the agreement of Maddox & Wren to allow this \$125 to Raley was not perfectly valid. This being the case, we think that Raley is in position to urge that the garnishment itself was not a legal garnishment, in so far as it sought to subject this partnership fund to the individual debt of T. L. Wren. And the question having thus been properly raised, following what we believe to be the decided weight of authority, we hold that the court, under the facts, should have abated the garnishment; and the bank having made no objection, but submitted the fund in its hands to the court for division, the court should have proceeded to divide the fund among the other parties entitled to receive the same.

The question then arises as to whether the interveners, West & McGown and Duval West, were entitled to the 10 per cent. claimed by them out of said fund. As stated, the

only evidence in the record is that, under their original employment by Maddox & Wren, they were to have 10 per cent. of the amount collected. It does not appear that they neglected the business intrusted to them after procuring the judgment, nor that their contract had been ended in any way. It simply appears that Maddox & Wren made an independent contract with Raley to collect the judgment which these attorneys had procured. We have concluded that under the evidence, as stated in the record, these interveners were entitled to 10 per cent. of this \$1,948.74.

Because of the error of the court in overruling said pleas in abatement, the judgment of the lower court is reversed; and, there being no conflict in the evidence, this court will render judgment as should have been rendered by the lower court—that the plaintiff, Ed. R. Smith, take nothing; that the judgment requiring the Frost National Bank to pay into court the sum of \$924.37 be affirmed; and that said sum of money be distributed among the parties as follows: (1) To James Raley, 30 per cent. of \$974.37, which is \$292.31; (2) to said James Raley, one-half of \$125, which is \$62.50; (3) to West & McGown and Duval West, 10 per cent. of \$974.37, which is \$97.43, less one-half of the \$20 paid in advance, leaving \$87.43; (4) to Mrs. E. G. Wren, \$472.13—and that the judgment in all other respects be affirmed.

Affirmed in part, and reversed and rendered in part.

HOUSTON & T. CENT. R. CO. v. BELL.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

RAILROADS—DEPOT EMPLOYEES—ASSAULT—LIABILITY OF COMPANY—PERSONAL DIFFICULTY—SELF-DEFENSE—AMOUNT OF DAMAGES—INSTRUCTIONS—WEIGHT OF EVIDENCE—DEPOSITION—PROPRIETY OF SUPPRESSING CHARACTER OF PLAINTIFF—ADMISSIBILITY OF EVIDENCE.

1. Evidence in an action against a railroad company for an assault by its depot hands on one getting freight from the depot considered, and held to sustain a finding that the assault was within the scope of the assailants' employment, and was not a mere personal encounter.

2. Evidence in an action against a railroad company for an assault by its depot hands on one getting freight from the depot considered, and held to sustain a finding that the assault was not in self-defense.

3. A verdict of \$1,100 for the loss of earning capacity of a laborer having 23 or 24 years expectancy, and an earning capacity of \$1.25 to \$1.50 a day, is not excessive.

4. A railroad company is liable for an assault committed by its depot hands in the discharge of their duty of protecting freight from rough handling, though they may have exceeded their precise instructions, or have been expressly forbidden to commit such wrongful act.

5. Evidence in an action against a railroad company for an assault by its depot hands on

*Rehearing denied March 25, 1903, and writ of error granted by Supreme Court.

one getting freight from the depot considered, and held to authorize submitting to the jury the issue as to whether the protection of freight from rough handling was within the scope of the assailants' employment.

6. In an action against an employer for an assault committed by its servants, an instruction that "you are charged, as a matter of law, that M. and R. [the servants] were entitled to defend their lives and persons against the assaults of the plaintiff," is properly refused, as on the weight of the evidence.

7. An instruction that, "if there is a conflict in the testimony, you must reconcile it, if you can; if not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit"—is not erroneous.

8. Error cannot be predicated on an instruction that, if there is a conflict in the testimony, the jury must reconcile it, if they can, and, if not, may believe or disbelieve any witness, where the evidence has disclosed an irreconcilable conflict.

9. It is not error to strike out a paragraph of an answer, where, under the remaining paragraphs, the same defense may be, and is, fully availed of.

10. A deposition should not be suppressed because an answer is irresponsible to an interrogatory, where it is responsive to a subsequent interrogatory, in reply to which the witness stated that he had already, in his previous answers, told all that occurred.

11. In a civil action for assault, evidence of particular acts of the plaintiff, going to demonstrate his character for violence and turbulence, is inadmissible.

12. Plaintiff was getting freight from a railroad depot, and was assaulted by two of the company's depot hands. Plaintiff's evidence was that he accidentally knocked over some freight, whereupon the employes assaulted him. The defendant's evidence was that the employes heard the falling freight, and told plaintiff he must quit handling freight in such manner, or he would be put out, whereupon plaintiff struck one of them with his fist; that the other employe ran in to help his comrade, and struck plaintiff, who then hit him and knocked him down; that plaintiff then renewed his attack on the first employe, and, after warning, was struck with a cotton hook and severely injured. Held, that neither version of the difficulty disclosed any act of plaintiff of such dubious import as to warrant the admission of evidence of his general character for violence and turbulence in explanation thereof.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by George Bell against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gregory & Batts and Frank Andrews, for appellant. S. B. Kemp, Hart & Townes, and Jno. C. Townes, for appellee.

STREETMAN, J. Appellee recovered judgment for \$5,381.50 for personal injuries inflicted upon him by two of appellant's employes. The injuries were sustained by appellee while he was engaged in getting freight, for the purpose of hauling it, at appellant's freight depot in the city of Austin. He alleged that two employes of appellant (Buford McLeary and Henry Robertson) were charged with the duty of protecting the freight in said depot from rough handling, and that on the occasion in question he was

removing certain freight from said depot for his employer, Ben Walker, when he accidentally knocked down some other articles of freight, whereupon said McLeary and Robertson, acting or assuming to act within the scope of their employment in the protection of said freight, made an assault on him, and inflicted serious personal injuries. There are many minor conflicts and discrepancies in the evidence, and there is a direct and irreconcilable conflict between plaintiff's witnesses and those of the defendant as to the material facts of the difficulty. Plaintiff's account of the transaction is, substantially: That on the morning of July 20, 1901, he went to appellant's depot after some freight for his employer, Walker. That Robertson and McLeary, employes of defendant, were there, and he went to move a trunk, and one trunk, which was on top of another, fell, and McLeary said: "Don't be breaking up that freight around here." That he paid no attention to McLeary, and McLeary kept quarreling, and appellant said: "I am not working for you. I am working for Mr. Walker." McLeary kept quarreling, and Robertson said to McLeary, "Are you going to let that damn negro throw your freight that a way?" and McLeary replied that he was going to break appellee's head or neck. That appellee thought they were joking, and finally McLeary said: "Yes; I am going to break your God damn neck." McLeary had been sitting in a chair near a south door of the freightroom, and Robertson was on the inside of the room. About this time Robertson came at appellee with a stick, and hit him in the face, and at the same time McLeary hit him in the back with a cotton hook. That he then tried to escape, and Robertson being in front, and McLeary behind, and a large amount of freight on each side, he made his way to the north door of the freightroom, and about the time he reached that door McLeary turned the hook, and struck him with the point of it, driving it through his skull, when he became unconscious. Two other negroes gave pretty much the same account of the origin and progress of the difficulty. McLeary's account was substantially as follows: "I was on the north platform of the depot, and heard a racket inside, as if freight was falling down or had been thrown down, and I started in there; and, just as I got about the north door, Henry Robertson remarked that there was a man in there throwing my freight down, and that I had better come and attend to it. About that time I was inside, and just as I walked in the door there was a case about three feet long and about six inches thick went flying across the freight-house, and George Bell had thrown it, and I told him: 'By God! you negroes have got to quit handling this freight in any such manner. I am getting blamed right along here for this, and, if you do not quit, I am going to put you out.' All the time I was walking towards him, with my coat off, and had

nothing in my hands, and he was standing behind a box, and about that time he said, 'I do not allow any God damned white man to boss me,' and as he made the remark he hit me. I do not remember whether my hands were in my pockets or out of my pockets, but they had no cause to be in my pockets, because I had nothing in them. I made that remark just after I came in the door. I suppose the door was ten or fifteen feet from George Bell. He was standing behind a box four or five feet high, and he stepped out from behind the box and hit me. He hit me on the left side with his fist, and knocked me down, in a western direction. Henry Robertson was standing about ten feet, in a northwestern direction, from the negro. After Bell struck me, Henry Robertson ran in and helped me. He had a lath about two feet long, and he hit Bell across the forehead, and Bell then hit Robertson and knocked him down, and was on Robertson when I got to him. I tried to pull him off, but I could not have done so if he had not got up and started towards me. In the meantime, after he had hit me, I had gotten hold of this hook, and when I pulled him off of Robertson he came at me, and I hollered to him to stop, and he did not stop, and I hit at him and missed him, and I was right at the door. When he knocked Robertson down, he was right at the north end of the depot, and I stepped out on the platform, and he was still coming at me, and I hollered to him to stop, and he did not, and I hit at him and hit him, and he fell outside of the door, on the platform. He was hitting at me at the time I struck him with his fist." Robertson gave an account very similar to that of McLeary, and they were corroborated in part by the evidence of H. S. Ballinger. There was much more of the evidence of these witnesses, going into the details of the difficulty; but the foregoing is substantially the outline of the occurrence, as shown by the respective witnesses for plaintiff and defendant. There was evidence to show that the injury inflicted with the cotton hook was very severe; the skull being fractured, and resulting in paralysis, and a very considerable, if not complete, impairment of plaintiff's capacity to labor. His earning capacity was from \$1.25 to \$1.50 per day, and his expectancy 23 or 24 years. Considerable evidence was introduced, bearing upon the duties of McLeary and Robertson, but upon this point we deem it sufficient to quote a part of the testimony of the freight agent, Patrick, as follows: "I am agent of the Houston & Texas Central Railroad Company in this place. I have charge of the H. & T. C. freighthouse. Checking clerks, shipping clerks, and receiving clerks at the freighthouse are instructed by the agent not to allow anything to be moved from there unless they had the freight bill and the freight is paid. People are not permitted to handle these goods. If any one were to go to handling these goods, they

would keep them from doing so if they could. They would have to keep them away the best they could; and, if they could not, they would have to call for assistance. They have no more authority to use force than any other employé of any other establishment, like in a store. If a person were to go in there and molest the other goods in the freighthouse, the employés would not have authority to use violent force in protecting these goods. They would have authority to use force just as any other employé in any other establishment. They are put there to protect the company's freight, and make correct deliveries, and see that they go to the proper ones, and that people do not molest other freight in the warehouse. It is left to them, as a general rule, on their judgment, as to what they will do under any particular state of facts that might arise. They would not be employed there if they did not have judgment as to handling freight, and certainly would have to protect it. * * *

The agent is responsible for goods in the freighthouse waiting to be delivered to the consignee. * * * He has several representatives that work under his instructions. McLeary was one, * * * and Robertson. They represented the agent. These representatives had instructions from the agent to see that freight was not roughly handled, or taken out of the depot by parties that it did not belong to." The court gave a full charge upon the law of the case, and instructed the jury, among other things, to find for the defendant if the employés Robertson and McLeary were acting in self-defense, or if the assault made by them upon the plaintiff was made for the purpose of resenting a personal insult offered to them by the plaintiff, and did not permit them to find for plaintiff unless the assault was made by said parties for the purpose of protecting the freight of defendant from rough handling.

The first assignment of error complains that the verdict is unsupported by the evidence (1) because the difficulty was a purely personal one, and had no relation to defendant's business; and (2) that the evidence showed the assault was made by Robertson and McLeary in self-defense. These issues were fully and fairly submitted to the jury by the charge of the court, and we need only refer to the testimony which we have set out above to show that upon these questions there was a direct conflict of evidence; and, the jury having resolved the conflict in favor of the plaintiff, it is not the province of this court to disturb the verdict.

The second assignment of error complains of that portion of the verdict which awards the plaintiff \$4,100 for loss of capacity to earn money in the future. The evidence bearing upon this question is set out above, and we do not think, in view of this evidence, that this item of the verdict is excessive.

The fourth paragraph of the court's charge was as follows:

"If you believe from a preponderance of the evidence that, at the time of the difficulty between the plaintiff and the said McLeary and Robertson, it was a part of the duty of said McLeary and Robertson, as employes of defendant at its said depot, to care for, and protect against injury, interference, or rough handling, the freight situated in said depot, then you are instructed, as a matter of law, that the defendant would be responsible for the wrongful acts, if any, of the said McLeary and Robertson, or either of them, committed for the purpose of caring for or protecting such freight against injury, interference, or rough handling, although such wrongful acts, if any, had not been expressly authorized by defendant, and although such wrongful acts, if any, had been expressly forbidden by defendant. The defendant would not be responsible for the wrongful acts, if any, of the said McLeary or said Robertson, committed for a purpose other than discharge of some duty for which the one so committing such wrongful act, if any, was employed."

This charge was objected to as imposing a liability upon the defendant for the wrongful acts of its employes which it had expressly forbidden, and as also being upon the weight of the evidence. It was also objected that there was no evidence to show that it was any part of Robertson's duty to protect the freight from rough handling. We do not think that there was any error in this paragraph of the court's charge. If it was in fact a part of the duties of said McLeary and Robertson to protect the freight against rough handling, and this duty had been delegated to these employes by the defendant, then the defendant was responsible for the manner in which they performed these duties, although in doing so they may have exceeded their precise instructions, and although they may have been forbidden to perform the duty in the manner in which they attempted to perform it. These views are clearly stated in the case of *Railway Co. v. Anderson*, 82 Tex. 520, 17 S. W. 1039, 27 Am. St. Rep. 902, and we see no reason why they should not have been stated to the jury as was done by the court in this case. The testimony which we have set out above shows that there was evidence authorizing the court to submit the issue as to whether these duties were within the scope of Robertson's employment.

The fifth paragraph of the court's charge was as follows:

"Now, if you believe from the preponderance of the evidence that, at the time of the difficulty between plaintiff and the said McLeary and Robertson, it was a part of the duties of said McLeary and Robertson, as such employes of defendant, to care for, and protect from injury, interference, or rough handling, the freight situated in defendant's said depot, and if you further believe from a preponderance of the evidence that the said McLeary and Robertson did commit an assault

upon the plaintiff as alleged in his petition, and if you further believe from a preponderance of the evidence that the said McLeary and Robertson, in committing such assault, if you find that they did so, committed the same for the purpose and with the intention of protecting the freight situated in said depot, or any of it, from injury, interference, or rough handling by plaintiff, then you will return a verdict for the plaintiff. Unless you so find from a preponderance of the evidence, you will return a verdict for the defendant."

It is objected to this charge that there was no evidence that Robertson was charged with any duty of caring for the freight, or that McLeary committed any assault, except in defense of himself and Robertson. What we have said with reference to the preceding paragraph of the charge shows that there was evidence that it was a part of Robertson's duty to protect the freight from rough handling, and the evidence of the plaintiff above set out shows that, at the very same time that Robertson hit the plaintiff with a stick, McLeary hit from behind with a cotton hook. The jury accepted this version of the difficulty, and evidently did not believe the testimony of McLeary and Robertson; but it certainly cannot be said that there was no evidence to authorize this instruction, or to support the verdict upon these issues.

We are of opinion that the special charge No. 6 requested by the appellant was upon the weight of the evidence. It begins with the following statement:

"You are charged, as a matter of law, that McLeary and Robertson, who are charged in the plaintiff's petition as having assaulted the plaintiff, were entitled to defend their lives and persons against the assaults of the plaintiff."

To have given this charge would have been an assumption on the part of the court, and virtually a statement to the jury, that the plaintiff was making assaults upon said parties, and, we think, would have been strongly calculated to mislead the jury as to the issues in the case.

At the request of the plaintiff the court gave the following special instruction:

"You are the exclusive judges of the weight of the evidence before you, and of the credit to be given to the witnesses who have testified in the case. If there is a conflict in the testimony, you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. In civil cases the jury is authorized to decide according as they may think the evidence preponderates in favor of one side or another."

Appellant complains that this charge is upon the weight of the evidence, is erroneous, misleading, and confusing, and did not leave the jury untrammelled to pass upon the facts in the case. The instruction complained of is an exact copy of that which was given in

the case of *Railway Co. v. Ende*, 65 Tex. 124, and in that case Judge Stayton says that the charge was not error. The first sentence of the charge is similar to the instruction which was criticised by the Supreme Court in *Railway v. Runnels*, 92 Tex. 307, 47 S. W. 971. In the *Runnels* Case, however, the charge was as follows: "If you should find there to be a conflict in the evidence, it would be your duty to reconcile such conflict. If you can, so as to give credit to the whole of the testimony. If you should be unable to reconcile such testimony, then you must decide for yourselves as to which testimony you will believe; and, in determining what weight you will give the testimony of any witness testifying in the case, you are authorized to consider their intelligence, their manner of testifying, their apparent prejudice, if any, and all other facts and circumstances in the case, and you can give to such witness testifying in the case such weight and credit as you may see fit." Judge Brown, in delivering the opinion of the court in this case, says: "The law does not impose upon the jury the duty of reconciling a conflict in the testimony of witnesses. It is impossible to reconcile positive and unequivocal affirmative and negative testimony. Seeming conflicts may be shown not to exist, but a real conflict between witnesses can only be disposed of by disregarding the testimony on one side of the issue." This much of the opinion would indicate that it was error for the court to instruct the jury that it would be their duty to reconcile a conflict in the testimony. An examination of the opinion, however, will disclose the fact that that case was reversed really because of the remaining portions of the charge, in which the jury were directed to apply certain tests in determining the weight to be given to the witnesses, including their intelligence, their manner of testifying, their apparent prejudice, etc.; and this portion of the charge, especially in that case, in which the plaintiff relied solely upon his own testimony for a recovery, was held to be upon the weight of the evidence. It will be observed that the charge in this case does not contain the remaining objectionable features commented upon in the *Runnels* Case, and, in view of the fact that the *Ende* Case is not mentioned in the opinion of Judge Brown in the *Runnels* Case, we think it proper to follow the decision in the *Ende* Case, unless it is expressly overruled.

In addition to these considerations, we are unable to see how the paragraph of the charge objected to could have been of any possible injury to the appellant. It is true that the jury were instructed, if possible, to reconcile the conflict; but an examination of the evidence makes it apparent that it was impossible for them to do so, and the only thing they could possibly do, in view of the evidence, was to disregard this portion of the charge. There was an absolute, irrecon-

cilable conflict in the testimony; and we think it may be presumed that the jury could not and did not attempt to reconcile this conflict, but that they decided the case upon what they believed to be the more credible evidence, and in doing this they were not hampered by any such charges upon the weight of the evidence as those discussed in the *Runnels* Case. For these reasons, we are unable to see how the charge could possibly have resulted to the prejudice of appellant.

Appellant requested the following special instruction:

"If you believe from the evidence that McLeary was not authorized by the defendant, in the scope of his employment with it, to use violence or force in the protection of its property, but that his duties were those of a checking clerk in charge of the freight in defendant's depot, and that he had no authority from the defendant to use any force to prevent the wrongful handling or injury to said freight, then the plaintiff would not be entitled to recover, and you will return your verdict for the defendant."

We do not think that this charge was a correct statement of the law. It would have conflicted with paragraphs 4 and 5 of the charge given by the court, which we have held to be a correct statement of the law as applied to the facts in this case.

We can perceive no substantial distinction between the ninth special instruction requested by appellant and the sixth paragraph of the court's charge, and for that reason there was no error in refusing the instruction requested.

Upon a special exception, the court struck out the fourth paragraph of defendant's answer, which set out in detail and with great particularity the plea of self-defense, and the further defense that the assault was made by McLeary and Robertson in a purely personal difficulty with appellee. We think there was no error in this ruling of the court. The other paragraphs of the answer presented as fully as necessary these defenses; and all the evidence which could have been admitted under the fourth paragraph of the answer was introduced, and the court submitted these defenses fully in its charge to the jury. And for these reasons we think there was no injury to appellant in striking out this paragraph of its answer.

Appellee propounded interrogatories to Junius Snirley, and a motion was made by appellant to suppress the depositions of this witness because they were not responsive to the interrogatories. It is probably true that the answer to the fourth interrogatory covers more ground than is called for by the interrogatory; but the seventh interrogatory calls for all of the facts stated in answer to this fourth interrogatory; and the witness answered this seventh interrogatory by stating, "I have already told all that occurred in my answers before this." If the testimony

was not responsive to the fourth interrogatory, it was clearly responsive to the seventh; and, under these circumstances, we can see no reason for suppressing the testimony.

Appellant moved to continue the case on account of the absence of B. L. Fletcher, by whom the defendant expected to prove that the witness had known the plaintiff in this case for a number of years, and was well acquainted with him—was acquainted with his general reputation for turbulence, quarreling and fighting—and expected to prove by the witness that the plaintiff was a bad, dangerous, turbulent, insolent, impudent, overbearing, insulting, and fighting negro, and especially so to white people with whom he came in contact in a business way. And defendant further expected to prove unprovoked insults and abuses by the plaintiff on the witness, and generally that the witness was acquainted with the general reputation and character of the plaintiff, and that he was a bad and dangerous man. Sufficient diligence was shown to obtain the testimony of this witness. Upon the trial the defendant offered the evidence of J. J. Stamper, Police Officer Gibson, J. T. Bardin, J. W. Quinlan, and J. S. Hamby—all upon the same line as the proposed testimony of Fletcher—and the exceptions to the exclusion of this evidence, as well as to the action of the court in overruling the motion for continuance, present the question as to whether this character of testimony was admissible in this case. There is no question that the evidence of particular difficulties was inadmissible. Even in criminal cases, where evidence of this character is admitted, it is confined to the general reputation of the party, and evidence of particular acts is not admissible, except by way of impeachment and cross-examination of witnesses who have testified to general reputation. A more difficult question, however, is whether, in a case of this character, evidence of the general reputation of the plaintiff was admissible. The case of *Shook v. Peters*, 59 Tex. 393, was an action for damages on account of an assault and battery, in which evidence of the character of the plaintiff was offered. Judge Stayton, in passing upon the question, says: "There being direct proof before the court as to the battery, it is not perceived that the court erred in refusing to admit evidence of the character of the plaintiff; and especially so as it appears from the evidence that the plaintiff was unknown to the defendant, and he could not, therefore, have been influenced in his conduct by anything other than what occurred at the time of the battery, and what he had previously learned in reference to the treatment of his son." The language of the opinion is not entirely applicable to this case, because appellant, in connection with the character evidence, offered to show that the employes McLeary and Robertson knew the reputation of plaintiff in these respects. It is clear that this is not a case in which the character of

the plaintiff was put in issue by the pleadings, as it would have been in a case of libel or slander, or other cause of action involving injury to the character itself. Discussing this kind of evidence, Judge Wigmore, in his last edition of *Greenleaf on Evidence*, says: "A fact may have probative value or relevancy, and still be excluded because of collateral reasons; that is, reasons independent of its probative value. * * * These reasons are of a great variety, but in their application to circumstantial evidence they are chiefly three in number: (a) The doctrine of undue prejudice; that is, that the fact, while relevant, may excite passion, or receive exaggerated importance in such a way as to lead the jury to decide upon some other ground than the evidence. This reason finds its chief application in excluding character evidence under certain conditions. * * * (c) The reason of confusion of issues; that is, that the fact would be likely to open up such a complication of rebutting evidence, new witnesses, the impeachment of these witnesses, and the like, that much time would be spent, the jury confused, and the main issue lost sight of. This reason also has many applications, usually in company with the preceding one, and is given greatest force in dealing with evidence of minor probative value. * * * That a human being has a moral disposition or character of a certain sort is of more or less probative value in indicating the likelihood of his doing or not doing an act of a related sort. For example, a disposition as to violence throws light on the probability of a violent killing, and a disposition as to honesty on the probability of committing a fraud. Nevertheless, character is usually not received as evidentiary for such a purpose; the reasons being chiefly the first and third of those mentioned in the preceding section. * * * Because of the usual slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges, and not easy to disentangle or to define, it has come to be generally accepted that the character of a party in a civil case cannot be looked to as evidence that he did or did not do an act charged." *Greenl. Ev.* (16th Ed.) vol. 1, §§ 14a, 14b.

Very many authorities are cited in support of this text, and some authorities may be found in which evidence of this character is admitted in civil cases. It is therefore questionable whether, in any civil case in which the character is not put in issue by the pleadings or nature of the action, evidence of the character of the parties is admissible. We do not deem it necessary in this case to decide whether the rule is as broad as these authorities would seem to indicate, and we do not hold that in no civil case would such evidence be admissible. This question has arisen most frequently in criminal cases, where self-defense was an issue. It is evident that, while some of

the issues are the same in this case as they would be if McLeary and Robertson were charged with the assault in a criminal case, yet they differ in some material respects. In a criminal case, if Robertson and McLeary had made the assault in resenting an insult, they would have been guilty, but in this case these facts would have afforded a complete defense for the appellant. As the court instructed the jury, if the assault of McLeary and Robertson was made for any other purpose whatever, except to protect the freight, then they should have found for the defendant. For these reasons the rules applicable to a criminal case do not afford an accurate test of the admissibility of this evidence, the issues not being the same; but we think it may be safely said that, if the evidence would not have been admissible in a criminal proceeding, it would not be admissible in this. The same reasons which would exclude it in a criminal case exist here, and the difference in the issues makes the reason for its exclusion stronger here than in the criminal proceeding. We therefore refer to the leading criminal case in this state governing the admissibility of this kind of evidence in criminal cases. In *Horbach v. State*, 43 Tex. 242, the deceased, Thomas, had made a motion with his hand as if to draw a weapon, and Horbach, upon his trial, offered evidence to show that Thomas was in the habit of carrying weapons, and that when intoxicated he was a quarrelsome and dangerous man. The able opinion by Judge Roberts in that case discusses at length the admissibility of character evidence, and finally announces the following conclusion: "It may be deduced from these authorities that the general character of the deceased for violence may be proved when it would serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved, before it would be admissible as evidence; that, if no such acts were proved as it would serve to explain, its rejection when offered in evidence would not be error, and, if rejected when a proper predicate has been established for its admission, it is held to be error. This results in what has been previously attempted to be developed—that the general character of the accused for violence should be allowed to be proved, not as a substantive fact, in whole or in part abstractly constituting a defense, but as auxiliary to and explanatory of some fact or facts proved to have occurred at and in connection with the killing, which tend to establish a defense when thereby aided by furnishing reasonable ground for the belief on the part of the slayer that he is then in immediate danger of the loss of his life from the attack of his assailant. It is observable

in most of these cases that it is said that the evidence of character for violence is admissible in a doubtful case. It can hardly be meant by this that it is admissible only in a doubtful case of guilt, for, if that is doubtful, there is no need of proof of character or anything else to help out the defense. The explanation, it is submitted, is that the person killing is presumed to have committed murder by the act of killing, and, in arraying the facts to establish that he acted in self-defense, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained and construed more favorably for the accused by adding to it the proof of the character of the deceased for violence, then such proof is admissible." Again, in the same opinion, it is said: "In the case of the proof of general character of the deceased, there must be a predicate established by evidence already submitted tending to prove threats of the deceased, or some act done by him at the time of the killing which it would aid or give force to, as heretofore explained; and, when admitted, it would be proper, and not charging on the weight of evidence, for the court to explain to the jury the object of its admission as auxiliary and explanatory of the threats or acts to which it was pertinent, and to be not of itself independent evidence of a defense."

Referring to the evidence in this case, we are unable to find any act of the plaintiff which required explanation, or which evidence of his character would have served to explain. If appellant's witnesses told the truth, plaintiff made an assault with his fists, first upon McLeary, and then upon Robertson. His weight and size and physical strength were fully proved. There was no evidence of previous threats, nor was there any evidence of any attempt to draw a weapon or any threatening gesture made by plaintiff. There was no evidence of any act done by him which was of a doubtful or equivocal nature. Upon appellant's testimony, therefore, there was nothing to require or render proper any evidence of the general character of the plaintiff. If, on the other hand, the plaintiff's witnesses were truthful, as the jury seems to have concluded, there was simply an assault by McCleary and Robertson upon the plaintiff, and likewise an absence of any act by plaintiff which required explanation. Upon either theory, therefore, there was nothing in the case which authorized the admission of the evidence of the general reputation of the plaintiff, and there was no error in overruling the motion for continuance and excluding this kind of evidence.

There being no error in the judgment of the lower court, it is accordingly affirmed Affirmed.

MARSHALL v. DALLAS CONSOLIDATED ELECTRIC ST. RY. CO.*

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

STREET RAILROADS—INJURY TO ANIMAL ON TRACK—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—DISCOVERED PERIL—INSTRUCTIONS.

1. In an action against a street railway company for the alleged negligent killing of a dog, plaintiff testified that he stopped before crossing the street, to avoid an approaching car; that the dog started to cross, and plaintiff called to him to come back, whereupon he stopped on the track; that the car was about 75 yards distant, rapidly approaching, without sounding the gong; and that the motorman was looking ahead, and could have seen the dog. The motorman testified that he saw the dog; that it remained on the track a second or two, under an electric light, and then ran out into the darkness, and ran back on the track, immediately under the front end of the car, so that he could not stop in time to avoid striking it. *Held*, that an instruction that, if the jury found that the plaintiff could have prevented the injury by the exercise of ordinary diligence, they should find for defendant, and that the burden of proof was on plaintiff to establish his case by a preponderance of the testimony, was erroneous, in placing the burden of proof of absence of contributory negligence on plaintiff.

2. Under the facts, the court should not have instructed as to burden of proof on the issue of contributory negligence.

3. A charge on the issue of discovered peril should have been given.

Appeal from Dallas County Court; E. S. Lauderdale, Judge.

Action by Tom Marshall against the Dallas Consolidated Electric Street Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Carden, Senter & Carden, for appellant. Finley & Knight, for appellee.

BOOKHOUT, J. This suit was instituted by the appellant, as plaintiff, to recover of appellee the value of a pointer dog owned by him. Plaintiff alleged that on November 16, 1902, one of the defendant's cars which was being operated on its Main street line negligently ran over and killed his dog; the grounds of negligence charged being that the car was being propelled at a rate of speed prohibited by an ordinance of the city; that the motorman saw the dog on the track and discovered his peril in time to have stopped the car and avoided the injury by the use of the means at his command, but that he failed to do so, and failed to give any warning of the approach of the car. It was alleged that the dog was of the value of \$500. The defendant answered as follows: (1) General demurrer to the sufficiency of the petition; (2) general denial; (3) specially, that the plaintiff was guilty of contributory negligence in allowing and permitting his dog to run at large on Main street at a time and place when cars and vehicles were continually passing and repassing, and that his in-

juries were not occasioned by any fault on the part of the defendant. The case was tried March 27, 1902, by a jury, under the charge of the court, and resulted in a verdict and judgment in behalf of defendant.

There was testimony by the plaintiff to the effect that he and a companion were returning in the early part of the evening from a hunting trip. They were in a buggy going east on Main street. Appellant had two hunting dogs with him, running loose on Main street. When he reached Stone street he stopped his buggy on the south side of Main street to avoid an approaching street car; there being obstructions on the street. After stopping, one of the dogs crossed Main street, to a vacant lot on the north side thereof. The other dog started across the street, to follow, and plaintiff called him to come back. He stopped on the street car track under an electric light, and endeavored to catch the sound of plaintiff's voice, but seemed confused by the noise of passing vehicles. Plaintiff testified that he saw the motor car on defendant's track about 75 yards from the dog, and approaching from the east at a rapid rate of speed; that no gong was sounded or signal given of the approach of the car; that the car struck the dog and killed him. He testified that the motorman was on the platform of the car, looking straight ahead, and could have seen the dog on the track, as it was light, and the dog was in plain view of the motorman. The motorman testified as follows: "Was motorman for the defendant on November 19, 1901, and as I was coming down Main street, moving west, I observed a dog on the track under the electric light at the corner of Main and Stone streets. The dog remained on the track a second or two, and then left the track and ran out into the darkness. There were some buggies moving east on the north side of Main street, and a great many vehicles up and down the street, and I was observing these buggies, with my car under control, running five or six miles an hour. When I arrived at the corner of Main and Stone streets, the dog ran back onto the track, right under the front end of the car, and it was then too late for me to stop the car or avoid striking the dog."

The court, in the main charge, instructed the jury as follows: "If you find and believe from the evidence that the plaintiff was the owner of the dog, the value of which is in controversy herein, and that the said dog was injured by defendant's car running over him, which resulted directly and proximately in the death of said dog, and that defendant's cars were at the time running at a greater rate of speed than eight miles an hour, and that plaintiff could not have avoided or prevented the injury by the exercise of such care, prudence, and efforts on his part as a person of ordinary care and prudence would have exercised under the same or similar circumstances, then you will find for the plaintiff; and his measure of damages would

*Rehearing denied March 23, 1903.

be the reasonable market value of the dog at the time and place of injury." He further instructed them as follows: "If you find and believe from the evidence that Tom Marshall, plaintiff, could have prevented the injury to the dog by the exercise of ordinary diligence and care on his part, and that he failed to use ordinary diligence and care to prevent the injury, then you are instructed to return a verdict for the defendant. * * * The burden of proof is upon the plaintiff to establish his case by a preponderance of the testimony, and, if he fails to do so, you will find for the defendant." The charge places too great a burden upon the plaintiff, in requiring the jury to believe, before they could return a verdict for the plaintiff, that he could not have avoided the injury by the exercise of such care, prudence, and efforts upon his part as a person of ordinary care and prudence would have exercised under the same or similar circumstances. The burden was not on the plaintiff to show that he could not have avoided or prevented the injury. The defendant pleaded contributory negligence, and was entitled to have this defense submitted to the jury as defensive matter. Usually the burden of proof on the issue of contributory negligence is on the defendant. Under the facts as shown in this record, the court should not have instructed as to the burden of proof on this issue, but left it for the jury to determine whether, under all the facts, the plaintiff was guilty of negligence in permitting his dog to be exposed to the danger of being run over by a street car. The theory upon which plaintiff mainly relied for a recovery was that the motorman saw the dog on the track, and discovered his peril in time to have stopped the car by the use of the means at his command, and avoided the injury, but failed to do so, and that such failure was negligence which entitled plaintiff to recover. The plaintiff requested a special charge calling the court's attention to this theory of the case. Under the facts of the case, a charge on this issue should have been given.

For the errors in the charge, the judgment will be reversed, and the cause remanded.

ST. LOUIS, S. F. & T. RY. CO. et al. v. GRAYSON COUNTY.

(Court of Civil Appeals of Texas. March 14, 1903.)

HIGHWAYS — USE BY RAILROAD — RIGHT OF COUNTY TO SUB-MEASURE OF DAMAGES — EVIDENCE — INSTRUCTIONS.

1. Rev. St. 1895, art. 4426, provides that a railway may construct its road along or upon a highway which the route of such railway may intersect or touch, but that it shall restore such highway "to its former state, or to such state as not to unnecessarily impair its usefulness." *Held* that, where a railway thus appropriates a highway, a county may maintain an action for any damages resulting from the appropriation.

2. Where a railroad appropriated a portion of a highway, and constructed a new road near to and parallel with the old one for the distance that the latter had been appropriated, the measure of damages to be recovered by a county for such appropriation is the amount required to put the new road in as good condition as the old road was in when appropriated.

3. A railroad appropriated a highway, and, to replace it, built a new road parallel thereto. *Held*, in an action by the county against the railroad for damages, that it was error to admit testimony showing the condition of the old road long before it was appropriated, or of the new road long after it was completed.

4. A railroad appropriated a highway, and, to replace it, built a new road parallel thereto. In an action by the county for damages for such appropriation there was evidence that the railroad had made excavations adjacent to the new road since its construction. *Held*, that it was error to refuse a charge that no damages could be allowed on that account, where the pleading did not authorize a recovery for such damages, as the jury were liable to consider such evidence in the absence of such an instruction.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by Grayson county against the St. Louis, San Francisco & Texas Railway Company. The railway vouched in Munson Bros., and prayed for judgment over against them in the event judgment was rendered against it. Judgment for plaintiff against the railway and for the railway against Munson Bros., and both defendants appeal. Reversed.

Head & Dillard and R. C. Foster, for appellants.

RAINEY, C. J. The St. Louis, San Francisco & Texas Railway Company constructed its line of railway upon and entirely occupied a part of a dirt road known as the "Denison and Colbert Wagon Road" in Grayson county, thereby appropriating it to its own use, and rendering it useless as a wagon road. Said railway company, through its contractors, Munson Bros., constructed a new wagon road near to and parallel with its track for the distance that the old road had been appropriated, for the purpose of restoring the highway to public use. This arrangement seems to have been assented to by the county commissioners, though no formal action thereon was ever had by the commissioners' court of said county. This action was brought by Grayson county to recover damages for the appropriation of the highway by the railway company. Said railway company answered generally and specially that the appropriation of said highway was by the consent of the lawful authorities, and that such highway was restored to its former state, and to such state as not to unnecessarily impair its usefulness, before this suit was instituted. Munson Bros., the contractors aforesaid, were vouched in by the railway company, which prayed for judgment over against them in the event judgment was rendered against it. Plaintiff recovered judgment against said railway company, and

judgment in its favor was rendered over against Munson Bros. for a like amount. All the defendants appeal.

The first contention is that the "county * * * cannot sustain an action for damages for the appropriation of a public road by a railway company in the construction of its railroad." This contention we do not consider tenable. The county, through its commissioners' court, has power to lay out, construct, control, and maintain public roads, and it is its duty to maintain and keep same in repair for the use of the public. A railway company, under Rev. St. 1895, art. 4426, has a right to construct its road along or upon such highway, but the duty devolves upon such company to restore such highway "to its former state, or to such state as not to unnecessarily impair its usefulness." This is a duty due the public, and, if the railway company fails to comply with this duty where it has built upon the highway, then the public is entitled to recover damages resulting from such failure. Opening and maintaining a highway is of some expense to counties, and it would be somewhat singular that a railway company could appropriate a well-improved highway, and not respond in damages. The county represents the interest of the public in such matters, and can maintain a suit where such interest is infringed.

It was the duty of the railway company in this instance to place the new road in as good condition for public use as the old road was at the time it was appropriated. If it failed in this, then the county would be entitled to recover as damages such amount as would be required to be added to the work done to put the new road in such condition. The statute contemplates that, where it is practicable, the railroad shall restore the highway to its former condition. In this instance that could be done. Where the railway intersects or crosses the highway, it may be, by reason of the very nature of things, impracticable to restore the road exactly to its former condition. The Legislature, recognizing this, made provision for such a contingency by providing in the alternative for the restoration of the highway "to its former state, or to such state as not to unnecessarily impair its usefulness." The railway company having performed work on the new road, the court erred in charging the jury that "the measure of recovery would be the reasonable amount that it would take to procure another road in the place of the one taken, and put the same in as good condition as the one taken, or in reasonably safe and convenient condition for public travel." This authorizes the jury to find for the full amount that it would cost to build the new road, without regard to the work done on it by the railway company. If the new road, when completed, was not placed in as good condition as the old one, then the county would only be entitled to recover such

an amount as was necessary for that purpose.

The court erred in admitting the testimony showing the condition of the new road long after it was completed. Also testimony as to the condition of the old road long before it was appropriated by the railway company. The testimony should have been confined to the condition of the old road when appropriated and the condition of the new road when completed, and damage, if any, to be measured by the difference in their then conditions. There was not sufficient evidence of the consent or acts on the part of the authorities of Grayson county to preclude a recovery. If, in fact, damages resulted from the appropriation of the old road.

There was evidence introduced showing that the railway company had made excavations adjacent to the new road since its construction. A special charge was requested by appellants, and refused, to the effect that the jury in no event should allow any damages on that account. We think there was error in refusing this charge, because there was no pleading authorizing a recovery for such damages, and the jury were liable to consider said evidence in the absence of such an instruction.

The judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. v. LYNCH et al.*
(Court of Civil Appeals of Texas. Feb. 21, 1903.)

CARRIERS—EJECTION OF PASSENGERS—INJURIES—CONNECTING LINES—LIABILITY—RATIFICATION OF CONTRACT—JURISDICTION—PLEADING—PLEA IN ABATEMENT—WAIVER—ACTUAL DAMAGES—EXCESSIVE DAMAGES.

1. Rev. St. art. 1262, provides that the defendant in his answer may plead as many several matters as he shall think necessary for his defense, provided that he shall file them all at the same time, and in due order of pleading. A motion to quash the service of a citation showed on its face that it was filed subject to defendant's plea of privilege. *Held*, that the pleas were not in due order of pleading in accordance with rule 7 of Court of Civil Appeals (67 S. W. xiv), prescribing the order of pleading, by which pleas in abatement precede a plea of privilege, and the previous filing of the plea of privilege constituted a waiver of the exception or plea in abatement of the writ.

2. The acceptance by a railroad of freight from a connecting line and transporting it to its destination within the state on a through waybill made by the initial carrier to the shipper, and receiving its proportion of the through rate, constituted a ratification of such contract of shipment and of an agreement, made a part of such contract, that the shipper should have free return passage over the different connecting lines, under Rev. St. art. 331a, which provides, *inter alia*, that connecting lines be deemed to be the agents of each other, and be held to be under a contract with each other and with the shipper for the safe through transportation of the property; and that such contract as to the shipper shall be deemed to be the contract of each of such common carriers.

3. Under the express provisions of Gen. Laws 1899, p. 214, whenever any freight or other

*Rehearing denied March 28, 1903.

property has been transported over two or more railroads operating any part of their roads in Texas, suit for loss or damage thereto, or other cause of action connected therewith, or arising out of such transportation, or contract in relation thereto, may be brought against any one or all of such railroads in any county in which either of such railroads extend or is operated.

4. Plaintiff shipped horses over connecting railroad lines, of which defendant was one, and was to receive return transportation for himself on condition that he present to defendant's agent transportation request issued with the contract for return pass. *Held*, that the fact that plaintiff did not present the form of request furnished was immaterial where he did present the contract itself, and his identity was unquestioned, and no objection to the form of the request was made, and in answer thereto the agent received the contract, stamped it, and returned it to plaintiff with the statement that it would be "all right"; and plaintiff would not be precluded from recovering damages for being ejected from a train for failure to present the return pass or pay his fare.

5. Plaintiff was wrongfully ejected from defendant's train, in breach of its contract to furnish him return passage, which contract he showed to the conductor. *Held*, that it was not necessary for him to pay his fare to entitle him to recover for breach of the contract.

6. Plaintiff was wrongfully ejected from defendant's train, in breach of its contract to furnish him return passage. Before such ejection he showed his contract to the conductor, and also informed the latter that he (plaintiff) was suffering from blood poisoning in his hand. *Held*, that the enhanced pain in the blood-poisoned hand, caused by defendant's forcibly expelling him, might have been properly considered in assessing damages.

7. Plaintiff, while suffering from blood poisoning in his hand, was wrongfully ejected, in the nighttime, from defendant's train, by the conductor, and carried therefrom by a negro porter, and was compelled to spend the night at the station where he was ejected, and suffered increased pain in his hand. *Held*, that a verdict of \$1,500 was not excessive.

Appeal from District Court, Baylor County; Jo A. P. Dickson, Judge.

Action by D. H. Lynch against the Texas & Pacific Railway Company and others. Judgment for plaintiff, and the defendant specially named appeals. Affirmed.

Stanley, Spoons & Thompson, for appellant. Montgomery & Hughes, for appellees.

CONNER, C. J. This suit was instituted against the Wichita Valley Railway Company, the Ft. Worth & Denver City Railway Company, the appellant, the Texas & Pacific Railway Company, and one W. E. Hunter, for damages resulting from appellee's forcible ejection from one of appellant's regular passenger trains by said W. E. Hunter, who was appellant's conductor in charge thereof at the time. The trial resulted in a verdict and judgment in favor of all defendants save appellant, as against which appellee recovered the sum of \$1,500.

The action is based upon substantially the following facts: The lines of railway mentioned are connecting carriers from Seymour, Baylor county, Tex., to Texarkana, Tex.; the Wichita Valley Road extending from Seymour to Wichita Falls, from which point the Ft. Worth & Denver Railway extends to Ft.

Worth, where it connects with the Texas & Pacific Road extending from Ft. Worth to and through Texarkana. On December 11, 1901, appellee being desirous of shipping one car of 29 horses from Seymour to Texarkana, pursuant to contract therefor, loaded them at Seymour for transportation. The contract of shipment was made by the agent of the Wichita Valley Railway Company in behalf of said company, and also in behalf of the Ft. Worth & Denver City Railway Company. By the terms of the contract they agreed and undertook to transport said horses from Seymour to Ft. Worth, the liability of the companies being therein specially limited to the several lines upon which any injury might occur. Appellee was also to be furnished return transportation for himself to Seymour upon the condition that he should present to the properly authorized agent of said Ft. Worth & Denver City Railway Company transportation request issued with the said contract for return pass. The contract also contained other provisions, not necessary to notice. The transportation of the horses, however, was duly made from Seymour to Texarkana, to which point they had been originally billed by the Wichita Valley Railway Company, no complaint in this suit being made of delay or injury to horses in transit. When the horses arrived at Ft. Worth, they were accepted by the appellant company, and transported to Texarkana upon the original shipping contracts and waybills, without demand for or the execution of any other or further contract of shipment. Some time after the arrival of appellee and his horses (appellee having accompanied the shipment), to wit, on January 2, 1902, appellee, desiring to return home, went to the duly authorized agent of the appellant company at Texarkana, exhibited the original contracts of shipment before mentioned, and told him that he wanted to have his contract so fixed as that he might thereby return to Ft. Worth. Said agent took the contract, affixed thereon a stamp of the appellant company, handed it back to appellee, and assured him that it would be "all right." Thereafter appellee took passage upon appellant's regular passenger train bound for Ft. Worth, and, after going some two or three miles from Texarkana, said Conductor Hunter came along, and called for tickets, and appellee handed him said contract, stamped as stated, but which the conductor refused to recognize, and thereafter, together with the assistance of the negro porter, forcibly ejected appellee from the train.

The railway line of appellant company does not extend to or through any part of Baylor county where this suit was instituted, nor has it therein any office or representative of any kind, its general residence being in Dallas county, Tex. Appellant was cited by service of citation upon its local agent in the city of Ft. Worth, Tarrant county, Tex., and appellant's first and second assignments of error relate to the action of the court in

overruling its motion to quash the service had upon it, and in not sustaining its plea of privilege that had been duly filed and presented.

Appellant insists that service of citation on a local agent of a railway company is authorized only in cases where the suit is instituted in the county in which such service was had. While we do not find it necessary to so decide, this contention seems to be supported by the terms of the Revised Statutes, art. 1222, prescribing how service of citations may be had upon incorporated companies. The court, however, overruled the motion to quash on the ground that the defect in service had been waived by the fact that appellant had filed its plea of privilege at the same time that the motion to quash was filed. The motion to quash was filed at the same time as was appellant's general answer to the merits, the motion appearing first in order upon the same piece of paper with such answer to the merits, which, upon its face, was presented subject to the court's ruling upon the motion and upon said plea of privilege. The latter plea, as we infer, being included in a separate paper. In an opinion, as yet unpublished, in the case of *Pyron & Davidson v. Graef*, 72 S. W. 101, we recently decided that exceptions to a citation and to the service thereof, presented in due order of pleading, though written upon the same piece of paper as the answer to the merits, were not waived by the mere fact that such exceptions had been filed at the same time as the answer to the merits. Such practice, as we there held, being contemplated by Rev. St. art. 1262, which provides: "The defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause: provided, that he shall file them all at the same time, and in due order of pleading."

But while the reason given by the court in this case for his action on the motion may not have been the proper one, we nevertheless think the ruling must be sustained. As shown on the face of the motion, it was filed subject to appellant's plea of privilege, which, in order, is made to precede the motion. The pleas, therefore, were not in due order of pleading. Exceptions to the citation or writ are pleas in abatement by both common law and rule 7 (67 S. W. xiv), prescribing the order of pleading for our own courts. Such pleas precede in due order a plea of mere privilege to be sued in the county of the litigant's residence, such as was appellant's plea in the instance before us. It hence follows, in accord with the well-settled rule, that the previous filing of appellant's plea of privilege constitutes a waiver of the exception or plea in abatement of the writ. *Towns on Texas Pleading*, 355; *Graham v. McCarty*, 60 Tex. 323, 7 S. W. 342; *Hoffman v. Loan Association*, 85 Tex. 409, 22 S. W. 154.

While the action of the court in overruling appellant's plea of privilege may not be so clearly maintainable, we nevertheless conclude that the first assignment, which presents that question, should also be overruled. It is insisted, in effect, that the foundation of the suit is an alleged wrong committed in Bowie county, that resulted in mere personal injuries, if anything, and, other exceptions which would give Baylor county jurisdiction having been disproved, that the plea should have been sustained. The plea seems quite full, including a denial of partnership or joint interest in the shipment, and allegations of fraud in averments of the appellee's petition showing jurisdiction, and the facts therein set forth are admitted to be true. A careful scrutiny of the plea of privilege, however, discloses the fact that it does not traverse the explicit allegations of appellee's petition to the effect that the contracts of shipment and for return passage were made as alleged, and that appellant had accepted, ratified, and made such contract its own by receiving freight and acting upon the waybill for through shipment, etc. Indeed, the proof in support of these allegations of appellee's petition seems to be undisputed, and we hence conclude that under the operation of article 331a, Rev. St., relating to connecting carriers, appellant ratified and adopted the original contracts, and made them its own, and also applicable to that part of the shipment occurring on its own line. *T. & P. Ry. Co. v. Randle* (Tex. Civ. App.) 44 S. W. 603. If so, among other things, appellant assumed and contracted for appellee's free return passage from Texarkana to Ft. Worth, and appellee's cause of action was, therefore, founded upon a breach of contract to which all of the railway companies named were parties, as well as upon a tort. It hence further follows that the court properly entertained jurisdiction over appellant together with the Wichita Valley Railway Company, sued at the same time, and over which the court undisputedly had jurisdiction. See act approved May 20, 1899 (Gen. Laws 1899, p. 214).

What we have said will in part also apply to the third and fourth assignments, which challenge the action of the court in refusing to give peremptory instruction to the jury to find for appellant. As we have seen, the contention that appellant was under no contract to return appellee from Texarkana to Ft. Worth is not maintainable. Nor is importance to be attached to the fact that appellee did not present to appellant's agent at Texarkana the form of request for return passage furnished in the first instance by the Wichita Valley Railway Company. Appellee did present the contract itself to such agent. His identity was unquestioned, and no objection to the form of the request was made. In answer to the request made, appellant's agent at Texarkana received the contract, stamped it, and returned it to appellee with

the statement that it would be "all right." The contract so stamped, as well as rule 3, from rate sheet promulgated by the Railroad Commission of Texas, which was introduced in evidence, provided that return pass for appellee should be given, and we think it evident from the contract as a whole that appellee was not restricted for return passage to transportation upon trains upon which live stock was being transported.

The evidence shows that before appellee's attempted return from Texarkana he was affected with blood poisoning in his hand, and that after his ejection from the train, and after remaining all night at the station at which it occurred, he walked back to Texarkana, with a view of returning to Ft. Worth over the Cotton Belt Railroad, which cost him about \$10. He also testified that when ejected he informed the conductor of the condition of his hand, and testified that he had money sufficient to pay return passage to Ft. Worth, but declined to do so. As relating to this proof, appellant requested the court to give its special charges Nos. 3 and 4, and also assigns error to the following portion of the court's charge: "You are further charged that if you shall find for the plaintiff against the Texas & Pacific Railway Company and W. E. Hunter, its conductor, or either of them, then you will consider as elements of damage in plaintiff's petition claimed, and render your verdict for such sum as will compensate the plaintiff for his physical and mental suffering and humiliated feelings caused by being ejected from said railway train, in view of all the circumstances in evidence before you, together with such other actual damages as the evidence may show he has suffered by reason of such ejection from said train, against the party or parties that you may find liable therefor. But should you fail to find against the defendant Texas & Pacific Railway Company and W. E. Hunter, its conductor, both or either of them, you will simply render your verdict, and find for such defendants." The propositions asserted under the assignment relating to the special charges named are, in effect, that negligence on the part of appellee in failing to reduce or lessen his injury, if any, that contributed thereto, would preclude him from recovering, and that appellee could not recover damage for his walk to Texarkana, or for the pain which he suffered because of blood poisoning in his hand; the objection to the court's general charge above quoted being that thereunder the jury were permitted to assess damages for physical and mental suffering and humiliated feelings, which alone were recoverable, and also to assess other actual damages not included in the claim therefor in appellee's petition. While these assignments have presented some difficulty, we conclude that the propositions thereunder cannot be sustained. The clause of the court's charge quoted restricted the jury to

compensation for physical and mental suffering and humiliated feelings (to which no objection is urged), and to such other actual damages as shown by the evidence. Actual damage other than for physical and mental suffering was shown, in that it is undisputed that at least \$6 in money was necessarily expended in procuring return passage to Ft. Worth, so that, as far as it went, the charge was not subject to the objection made. If appellant desired to exclude suffering, if any, arising alone from appellee's return walk to Texarkana, and from blood poisoning in his hand, correct special charges therefor should have been presented. We think appellant's special charge No. 3 was objectionable, in that the jury were instructed thereby that negligence on the part of appellee which contributed to his injury would defeat the recovery. Appellee was not required to pay his fare to entitle him to recover for a breach of his contract for return passage, and, while he may have unnecessarily walked from T. C. Junction to Texarkana, it does not appear that he specifically claimed damages for this, or that he suffered any pain by reason of this fact alone; but, if so, and if it be conceded that appellee could have avoided this by the exercise of reasonable prudence on his part, he would not thereby be precluded from all recovery. He nevertheless would be entitled to recover for the mental and physical pain proximately resulting from his wrongful ejection. This also would be true as to pain that may have resulted to appellee from blood poisoning. We do not think the court, under the circumstances, was authorized to instruct the jury, as was the effect of special charge No. 4, that they could in no event consider the fact that appellee was so poisoned. The fact is not denied. He testified that the conductor, Hunter, was informed thereof before his ejection, and that the night was dark; that he had some difficulty in obtaining lodging that night; that his ejection was forcible, and that he suffered great pain; and we do not feel prepared to say that the jury might not properly consider the enhanced pain, if any, in the blood-poisoned hand, caused by appellee's forcible expulsion.

What we have said we think substantially disposes of all the assignments of error save that which questions the verdict of the jury as excessive. The verdict seems quite large, but we hesitate to say that it is so grossly disproportionate as to manifest passion or prejudice on the part of the jury. As has been often held, no specific rule for the measurement of the character of damages shown in this case can be given, it being very largely matter for the determination of the jury from all of the circumstances in evidence. As we have found appellee's ejection was wrongful, his testimony supports the conclusion that it was forcible; that it attracted the attention of a large number of other passengers on the car; that he was taken from

the train by the negro porter; that a negro had never prior thereto violated his person in that manner; and that he suffered inconvenience, and great humiliation and pain of mind and body. *The Wells, Fargo & Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824. We hence conclude that the evidence sustains the verdict and judgment, and that all assignments should be overruled.

Judgment affirmed.

WILDEY LODGE, NO. 21, I. O. O. F. v. CITY OF PARIS et al.

(Court of Civil Appeals of Texas. March 14, 1903.)

LEASES—ASSIGNMENT—STATUTORY PROHIBITION—WAIVER—DENIAL OF LESSOR'S TITLE.

1. Under Rev. St. 1895, § 3250, prohibiting the assignment of a lease unless it contains a stipulation permitting assignment, a lessor which made no objection to two assignments of the lease until 20 years after the first and 15 years after the second assignment waived its right to object.

2. Where the consideration for a lease was the lessee's agreement to maintain a certain kind of school on the premises, and an assignee of the lease maintained a school for several years to the character of which the lessor did not object until some 17 years after it was instituted, the lessor was not then entitled to object to the character of the school and claim that it had not received the consideration for the lease.

3. In an action by a lessor to recover leased premises, an allegation that a corporation to which the lease was assigned was incapable of accepting an assignment, without alleging any ground of incompetency, was not sufficient to show the invalidity of the assignment.

4. A denial of the lessor's title by an assignee of the lease, and an assertion of title in itself, terminates the assignee's rights under the lease.

Appeal from District Court, Lamar County; Ben. H. Denton, Judge.

Action by Wildey Lodge, No. 21, I. O. O. F., against the city of Paris and others. From a judgment for defendants, plaintiff appeals. Reversed.

Hale & Hale and Wm. Hodges, for appellant. Burdett & Connor and Moore, Park & Birmingham, for appellees.

TEMPLETON, J. This suit was brought by Wildey Lodge, No. 21, Independent Order of Odd Fellows, against the city of Paris and the board of trustees of the public schools of said city. The record does not show the exact date of the filing of the original petition, but it is to be inferred that the same was filed in 1901. On April 17, 1902, the plaintiff filed its second amended original petition. As this appeal turns upon the legal sufficiency of the said petition, it becomes necessary to state the substance thereof, which will be done as briefly as possible.

It was alleged in said petition that the

plaintiff is a duly incorporated private corporation, with authority to receive, hold, and convey real estate, and own, conduct, manage, and control institutions of charity and learning, and to act as trustee for such purposes; that in 1868 it acquired certain lots situated in the city of Paris, and is now the owner thereof.

It was further alleged that on April 16, 1878, the plaintiff being desirous of assisting in the education of the children of the county, leased said premises for a nominal consideration to J. B. Lyle, an educator of high standing, for the purpose of having a school taught there of the kind that would carry out its desire to provide educational opportunities for the youths of Lamar county and the country; that said lease was for the term of 99 years, and gave to said Lyle the privilege of erecting buildings on said property suitable for school purposes; that, among other things, the lease contained a stipulation that the premises were to be used for the purpose of maintaining and keeping thereon a school for the instruction and education of the white youths of the country; that the lease was signed and acknowledged by the parties thereto, and was duly recorded in 1879.

It was further alleged that the said Lyle took possession of said premises under and by virtue of said lease, and conducted thereon the school provided for until December 21, 1880, when he attempted to transfer his right in said lease to the W. B. Aikin Institute, an unincorporated association or stock company that was incapable of receiving or holding property, or of being a trustee of any kind, or of becoming a lessee of real estate for any purpose; that the said Lyle continued to conduct the required school on said premises until June 23, 1884, when he permanently abandoned the premises, and failed and refused to further maintain or keep a school on said premises, and has never since that time maintained or kept any school on said premises or caused the same to be done by any one else, and has never since that time asserted or claimed any right, title, or interest in said property for any purpose whatever, but has wholly abandoned the same.

It was further alleged that on the said 23d day of June, 1884, W. B. Aikin and O. C. Conner, assuming to act as president and secretary of the Aikin Institute, without authority, executed an instrument, in writing, purporting to convey and assign all the rights of the institute in said lease to the city of Paris; that said assignment contained a stipulation that said premises were to be used for the purpose of maintaining thereon a school for the education of the white youths of the city, exclusively; that the city accepted said assignment, and, acting thereunder, took possession of the said premises, and caused the assignment to be recorded as evidence of its right to the possession of the premises

and its authority to conduct a school thereon; that the city continued to occupy said premises and to claim under the said assignment until after the institution of this suit.

It was further alleged that the said assignments of the said lease were made without the knowledge or consent of the plaintiff, and that the assignees, at the time of the execution and acceptance of the assignments, had notice, both actual and constructive, of the terms of the original lease and of the rights of the plaintiff.

It was further alleged that the city conducted on said premises a school for the education of white youths of the city of Paris within the scholastic age from the date of the assignment to it until 1899, when it abandoned the premises for school purposes and let the same as a place for storing merchandise; that, after this suit was begun, the city resumed the use of the premises for school purposes, for the sole purpose of defeating a recovery by the plaintiff.

It was further alleged that after the institution of this suit the city disclaimed and repudiated the title of the plaintiff, and it is claiming to own and hold the premises in its own right, and is denying that the plaintiff has any right, title, or interest in or to the said premises.

The plaintiff prayed for a decree for the recovery of the title and possession of the said premises, and for a cancellation of the assignment to the city as a cloud upon the plaintiff's title and right of possession.

A general demurrer and two special exceptions, which set up the statute of limitations in bar of the plaintiff's action, were presented and urged by the defendants. The demurrer and exceptions were sustained by the court, and the plaintiff declined to amend. Judgment final was thereupon entered against the plaintiff, and this appeal followed.

At common law, in the absence of a covenant to the contrary, the lessee may assign the lease without the consent of the lessor. Such assignment is, however, prohibited by article 3250 of the Revised Statutes of 1895 of this state, and, under this statute, unless the lease contains a stipulation permitting an assignment, none can be legally made without the assent of the lessor. When the lease is silent on the subject, as in this case, the statute becomes a part of the contract, and the lease will be construed as would a lease at common law which contained a provision prohibiting an assignment. *Forrest v. Durnell*, 86 Tex. 647, 23 S. W. 481. The lessor may, however, waive such provision, and, where he does so, the assignment is valid, and the assignee becomes the lawful tenant of the lessor for the term of the lease, and his rights as tenant cannot be thereafter avoided or questioned. *Forrest v. Durnell*, supra; *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853; *Wood's L. & T.* § 323. Such assignee would not be a tenant at will or by sufferance, but a tenant for the term of the

lease, and his rights and liabilities would be governed and controlled by the provisions of the lease.

Applying these rules to the case in hand, the conclusion is reached that, if appellant acquiesced in and ratified the assignments in question, it cannot now be heard to say that the assignments were unauthorized and void. There was an allegation in the petition that the assignments were made without the knowledge or consent of appellant, but it is evident that appellant must have learned thereof soon after the same were made. The first assignment was made more than 20, and the second more than 15, years before the institution of this suit, and no complaint appears to have been made before the suit was filed. Acquiescence in the assignments for such period of time is indicative of assent and ratification. Consent may be inferred from the acceptance of rent from the assignee. In this case no rent was paid in money, but none was owing. The consideration for the lease was the maintenance of a school on the leased premises, and the city has attempted to comply with this obligation of the contract. If appellant, with knowledge of the facts, permitted the city to carry on the school it maintained on the premises from 1884 to 1889, without objection, it is too late now to complain of the school as not being of the character required by the lease, and appellant must be held to have received from the city the consideration contracted to be rendered. *Maddox v. Adair* (Tex. Civ. App.) 68 S. W. 811.

Our conclusion is that the facts alleged in the petition show an implied assent on the part of appellant to the assignments of the lease, and acquiescence in the school conducted by the city as being the school required by the contract. In view of this holding, it becomes unnecessary to consider the question of limitations.

We have not overlooked the allegation in the petition to the effect that the Aikin Institute was incapable of accepting an assignment of the lease. No ground of incompetency was alleged, and we know of no reason why an unincorporated association should be held disqualified from acting in the capacity assumed by Aikin and his associates. It was not charged that the city was incapable of receiving an assignment of the lease, and none of the parties to the assignments are complaining of the incapacity of the assignees. We do not believe that the incompetency of the Aikin Institute was alleged in such way as to affect the validity of the assignments.

The title to the lots in controversy is in appellant, and if, as alleged in the petition, the city has repudiated the lease, abandoned its rights thereunder, denied the title of appellant, and asserted title in itself, then its possession has ceased to be rightful, and appellant is entitled to the relief sought. The petition stated a good cause of action in this

respect, and the demurrers were therefore improperly sustained.

The judgment is reversed, and the cause remanded.

HARTFORD FIRE INS. CO. v. KING.

(Court of Civil Appeals of Texas. March 18, 1903.)

INSURANCE—JUDGMENT—RES JUDICATA—PARTIES—SUBJECT-MATTER—COLLATERAL ATTACK—ATTORNEY—POWER TO COMPROMISE.

1. Plaintiff, as attorney for insured, pledged certain policies, after a loss, as collateral for the benefit of all assured's creditors except K. Thereafter insured transferred the policies in question to plaintiff as trustee to secure her entire indebtedness, including that of K. Plaintiff sued in the name of the pledgee on two of the policies, agreeing to indemnify him from all liability for costs, etc., and employed counsel, and conducted the same for his benefit as trustee, as well as for the benefit of K. Defendant answered to the merits, and the suit was subsequently settled, and judgment rendered that the pledgee take nothing, etc. Plaintiff thereafter sued as trustee to recover on the same policies. *Held*, that the real parties in interest and the subject-matter in both actions were identical, and that the former judgment was a bar to the second.

2. Where an action was compromised, and judgment was rendered in pursuance thereof, it will be presumed, as against a collateral attack, that plaintiff's attorney had express authority to compromise the claim.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by W. O. King, as trustee, against the Hartford Fire Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Finley & Knight and F. M. Etheridge, for appellant. Crane, Greer & Wharton, for appellee.

NEILL, J. On the 28th day of October, 1900, the appellee, W. O. King, as trustee of Mrs. F. K. Hurley, sued the Hartford Fire Insurance Company on two insurance policies for \$1,000 each, issued by appellant respectively on October 7 and October 12, 1896, to Mrs. M. K. Hurley, on a certain one-story, metal-roofed building situated in the town of Belcherville, Montague county. The first policy covered the building to the amount of \$500, and the store and office furniture and fixtures in the same sum. The second covered the building alone. All the property described in the policies was that of Mrs. Hurley, and the insurance on it was effected for her. The appellee based his right to sue as trustee upon a certain deed of trust executed to him by the assured on the 24th day of December, 1897, which will be more fully described in our conclusions of fact. He alleged the issuance of the policies, the total loss by fire of the property on October 29, 1896, which was during the term of its insurance under the policies sued upon. The insurance company answered by a general denial and a plea of *res judicata* in which the matters pertaining thereto, stat-

ed in our conclusions of fact, were averred. By a supplemental petition the appellee pleaded in reply to appellant's plea of *res judicata* that the judgment upon which the plea is based was procured as a compromise between the plaintiff in the suit wherein it was rendered and the appellant in this case, who was the defendant; that it was entered by agreement between said plaintiff and defendant without a trial, and without the introduction of evidence, for a mere normal sum, without the authority of the assured or of Mrs. M. A. King, nor from appellee to agree to said compromise or make the same. The case was tried before a jury, and the trial resulted in a judgment in favor of the appellee for the sum of \$2,428.12, from which this appeal is prosecuted.

Conclusions of Fact.

The two policies were issued by the appellant at the time stated in our statement of appellee's pleadings. The property covered by the policies was entirely destroyed by fire on October 29, 1896. The property was also covered by policies issued by other companies. At the time the insurance was effected and the property burned, Mrs. F. K. Hurley was engaged in the mercantile business, which was carried on in the building insured, under the management of her brother, the appellee, as her agent. At the time Mrs. King, as a merchant, was indebted to several parties, among whom W. A. Orr Shoe Company, of St. Louis, Mo., which company she owed about \$1,500. The indebtedness to her other merchant creditors was about \$2,465. Besides this indebtedness, it is claimed she owed her mother, Mary A. King, \$7,600. When the fire occurred the appellee was in Kingsville, Mo., and on the next day received information of it by telegram from Mrs. Hurley. Upon receipt of this information he immediately went to St. Louis, and transferred the policies sued upon, as well as the others covering the property, to the Orr Shoe Company, as collateral for all of Mrs. Hurley's creditors except Mrs. M. A. King; and after he returned to Belcherville he sent the policies to said company, with a written assignment of them indorsed on each to the shoe company, signed, "Mrs. F. K. Hurley, per W. O. King, Attorney." On the 24th day of December, 1896, Mrs. F. K. Hurley, by an instrument in writing of that date, conveyed to W. O. King, trustee, seven certain fire insurance policies, among which are the two sued on in this case, to secure the payment of indebtedness to certain creditors, among whom the name of W. A. Orr Shoe Company appears first and of Mary A. King last in the order in which creditors are named in said instrument. The instrument directs that the trustee proceed at once to collect the policies, and apply the proceeds to the payment in full to said creditors in the order in which they are named, and, after paying the indebtedness and costs of

collecting the policies, if any balance should be left, that it should be paid by the trustee to her. This is the instrument upon which the appellee bases his right to prosecute this suit as trustee.

On the 8th day of June, 1898, a suit was instituted in the district court of Montague county, Tex., in the name of W. A. Orr Shoe Company against appellant, the Hartford Fire Insurance Company, on the same two policies upon which appellant is sued in this case. While said suit was brought in the name of said shoe company, it was in fact inaugurated, participated in, and controlled by the appellee, W. O. King, who employed counsel of his own selection to institute and prosecute the suit for his own benefit, as trustee, as well as for the benefit of Mrs. M. A. King. On the 5th of July, 1898, defendant, Hartford Fire Insurance Company, appeared in the case, and answered to the merits. On the 10th day of July, 1899, final judgment was entered in the case, in which it was adjudged and considered by the court that the plaintiff, the W. A. Orr Shoe Company, a corporation, take nothing by the suit, and that the defendant, Hartford Fire Insurance Company, go hence without day. This judgment recites that both parties appeared by their attorneys, and filed in the case an agreement in writing to the effect that the parties to the suit had settled and compromised the matters involved, and agreed that judgment should be rendered that plaintiff take nothing by the suit, and that defendant go hence without day, and that all costs be paid by the defendant, and that the judgment was rendered in accordance with such agreement.

We base our conclusion that the suit was inaugurated, participated in, and controlled by W. O. King, trustee, by and through counsel of his own selection, for his benefit, as well as for the benefit of Mrs. M. A. King, upon the following testimony: W. O. King's testimony upon this point is: "Myself, as trustee, and Mrs. F. K. Hurley employed Mr. Chambers [who was the attorney who brought the suit] to file the suit in Montague county in the name of the Orr Shoe Company against the defendant. My connection with said suit was as trustee. That suit was filed by Mrs. Hurley, Mrs. King, and myself in the name of the Orr Shoe Company, and the Orr Shoe Company was indemnified against costs of suit. Mr. Chambers had full control over the suit. He was my lawyer, and advised me of the settlement of the suit." J. M. Chambers, the attorney who brought the suit, testified: "I represented all parties interested in the recovery. The suit was brought in the name of W. A. Orr Shoe Company, which was in the hands of W. E. Fisse, receiver. All parties at interest in the policies knew of and authorized the bringing of the suit. W. O. King, Mrs. F. K. Hurley, and Mrs. Mary A. King all knew of the bringing of said suit, for they employed me to bring it."

The agreement upon which the judgment was entered was in writing, and signed: "J. M. Chambers, Attorney for Plaintiff, W. A. Orr Shoe Company, and Harris, Etheridge & Knight, Attorneys for Defendant Hartford Fire Insurance Company." Neither W. O. King, Mrs. F. K. Hurley, nor Mrs. Mary A. King agreed personally to the compromise. Their attorney, J. M. Chambers, notified both Mrs. Hurley and W. O. King of the agreement and settlement before the judgment was entered. Neither of them made to the attorney any protest against the agreement and settlement. No suit was ever filed against the shoe company by either King or Mrs. Hurley for a breach of the alleged trust. Long after the compromise judgment was rendered, W. A. Orr Shoe Company received \$400 or \$500 out of moneys realized from other insurance companies in full settlement of its debt, with the full knowledge and consent of Mr. King and Mrs. Hurley. In the compromise the insurance company paid the shoe company \$166.66 in settlement and discharge of the former's liability on the policies sued on, and on each policy was indorsed a receipt and cancellation and surrender of the policy to the insurance company, which was signed, "W. A. Orr Shoe Company, per W. E. Fisse, Receiver."

These facts relating to the suit, compromise, and judgment pleaded as *res judicata* by appellant in this case are undisputed, and are shown by appellee's own testimony.

In deference to the verdict, we find that, before the judgment in the district court of Montague county was rendered, the Hartford Fire Insurance Company had notice that the transfer of the policies sued on was made to the W. A. Orr Shoe Company simply to secure the payment of Mrs. Hurley's indebtedness to said company and others, and that Mrs. Hurley did not consent to the rendition of said judgment, and has not since ratified it.

Under our view of the law, which will be presently stated, the facts thus found in accordance with the verdict are not necessary to a proper disposition of this appeal. They are simply made for the purposes of enabling the Supreme Court to finally dispose of the case should it differ with this court upon the law applicable to it.

Conclusions of Law.

The only assignment of error which we deem necessary to consider is the first. It complains of the court's refusal to give, at appellant's request, the following special charge: "Under the evidence the alleged claim of plaintiff herein is concluded by the judgment entered on the 10th of July, 1899, in the case of W. A. Orr Shoe Company vs. Hartford Fire Ins. Company, in the district court of Montague county, Texas, and you will, therefore, return your verdict for the defendant." The question thus raised is not whether the W. A. Orr Shoe Company, as

the pledgee of the two insurance policies, was authorized to compromise with the company that issued them, but it is whether the appellee, W. O. King, trustee, can, under the facts, collaterally attack the compromise judgment pleaded in bar of his action in this case. Where the court has jurisdiction of the parties and subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by the parties or privies in any collateral proceeding whatever. *Black on Judgments*, § 254; *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Willis v. Ferguson*, 46 Tex. 406; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100. It may be that, upon the principle that the holder of negotiable or quasi negotiable paper as a pledge to secure him in the payment of a debt owed by a third party cannot compromise with the obligor on such paper without the consent of the pledgor (*Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 274; *Depuy v. Clark*, 12 Ind. 427; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Wood v. Matthews*, 73 Mo. 479; *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 613, 18 L. R. A. 120, 32 Am. St. Rep. 704; *Zimpleman v. Veeder*, 98 Ill. 613; *McLemore v. Hawkins*, 46 Miss. 715), the compromise judgment might have, upon a proper proceeding directly attacking it, if promptly brought by the appellee or Mrs. Hurley, been annulled. But this offers no solution of the question as to whether it is open to a collateral attack. When a judgment of a court of record having general jurisdiction is collaterally called in question, it must be deemed valid unless it appears that no facts could have been shown which would render it so. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Templeton v. Ferguson*, 89 Tex. 57, 33 S. W. 329; *Endel v. Norris*, 93 Tex. 543, 57 S. W. 25. The rule prohibiting the collateral impeachment of a judgment applies only to the parties to the action and those in privity with them who are entitled to take proceedings to have the judgment opened, vacated, or reviewed. *Black on Judgments*, 260. Under the term "parties" the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers in its result, and for or against whom the record of the former proceedings might be adduced in evidence on another trial; those who have the right to be heard and to offer testimony and examine witnesses. "Privies" are those who are so connected with the parties in estate * * * as to be identified with them at interest, and consequently to be affected by them in the litigation. *Black on Judgments*, § 534. In many instances trustees and their cestuis que trustant are regarded as being so independent that proceedings against one have no effect on the other, and both are essential to a complete termination of an action in reference to the trust estate. But when a debt-

or makes an assignment for the benefit of his creditors, the assignee acquires a legal and the creditors an equitable estate, and a judgment against the assignee in relation to the property embraced in the assignment is conclusive, unless it can be avoided for fraud or collusion. *Freeman on Judgments*, § 172. The real party at interest cannot escape the result of a suit conducted by him in the name of another; for the fact that an action was prosecuted in the name of a nominal party cannot divest the case of its real character, but the issues made by the real parties and the actual interest involved must determine what persons are precluded from agitating the question, and who are estopped by the previous decision. *Jackson v. West*, 22 Tex. Civ. App. 483, 54 S. W. 297; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792; *Id.*, 34 N. E. 416; *Freeman, Judgments*, §§ 174, 175; *Black on Judgments*, § 537. Extrinsic evidence is admissible to prove that a real party in a suit is not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party, and whenever this is made to appear the real party is concluded by the judgment as effectually as if he had been a party to the record. *Cleveland v. Heidenheimer* (Tex. Civ. App.) 44 S. W. 551; *Black on Judgments*, § 539.

In the case now under consideration the subject-matter is identical with what it was in the case in which the judgment pleaded in bar of this action was rendered. The defendant is the same in each case. The plaintiff, the W. A. Orr Shoe Company, in the former case, as the pledgee of the policies sued on, occupied the position of trustee to the owner, Mrs. Hurley, to pay, first, the debt due it; second, the indebtedness to the other merchant creditors; and then the surplus over to the pledgor. Except as to Mrs. Mary A. King, the relation of the shoe company regarding the policies was the same as to all the parties as that of W. O. King, the appellee, as trustee, by virtue of the written assignment made to him. It would have practically made no difference whether the Montague county suit had been brought and prosecuted by him or by the W. A. Orr Shoe Company. In either event it would have been in the interest of the parties for whose benefit the policies were assigned as security for indebtedness owed by Mrs. Hurley, and the effect of a judgment rendered in favor of or against W. O. King as trustee would have been the same as if rendered in favor of the Orr Shoe Company, with the exception that, after paying the mercantile creditors, the surplus would have been paid to the extent of her indebtedness to Mary A. King. But as W. O. King, as trustee, and Mrs. F. K. Hurley employed counsel to bring the Montague county suit in the name of the Orr Shoe Company against the defendant, which suit, according to appellee's own testimony, was "filed by Mrs. Hurley, Mrs. King, and him-

self in the name of the W. A. Orr Shoe Company, which was indemnified by them against costs of suit," Mrs. King was as much bound by the judgment as if the suit had been brought in the name of W. O. King, trustee, instead of by the Orr Shoe Company. Therefore, from the undisputed facts, W. O. King, trustee, being the real party at interest in the Montague county suit, the parties in that case were the same as in this. Thus is shown an identity of parties at interest, as well as of the subject-matter in the two suits.

A former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceedings and judgment in the first case involved an investigation (or afforded an opportunity for an investigation) and determination of the merits of the suit. That the merits of the suit be determined, it is not deemed necessary that there should have been an actual trial and canvassing of the facts of the case, for a judgment entered upon confession without action is as conclusive as any other. Black on Judgments, §§ 684, 685. Judgment proceeds upon the merits when the very cause of action is decided upon. Bigel. Estop. (5th Ed.) 53. The majority of cases in this country hold that a judgment is none the less effective as a bar because its merits were determined in whole or in part by the agreement of the parties. Black on Judgments, § 705. A final judgment on the merits is just as conclusive on the merits if entered by consent as if rendered after contest. *McCreery v. Fuller*, 63 Cal. 30; *Hewitt v. Stewart's Ex'r*, 11 La. Ann. 100; *Gattman v. Gunn* (Miss.) 7 South. 285; *Donnelly v. Wilcox*, 113 N. C. 408, 18 S. E. 339; *Royston v. Horner*, 75 Md. 557, 24 Atl. 25; *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882.

While an attorney at law may not have any implied power to confess or consent to a judgment against, or to compromise a claim of, his client (Mech. Ag. § 815), express authority may be presumed in favor of an agreed judgment when collaterally assailed, for a judgment must be deemed valid against a collateral attack unless it appears that no facts could have been shown which would render it so. *Martin v. Robinson*, supra. It certainly could be shown, were it a fact, when a compromise judgment was agreed upon and entered at the instance of the attorneys, that the attorneys were expressly authorized by their respective clients to agree upon the compromise, and have judgment entered in accordance with it. In fact, if such a matter were properly a subject of inquiry in this case, it might well be held from the evidence, if such authority was not expressly given the attorney by appellee, and those for whom he stood as trustee in the Montague county case, such action of the attorney was acquiesced in and ratified by them, with full knowledge of the facts, after such judgment was rendered.

But, however this may be, we have before us a case in which there is an identity of the subject-matter, an identity of the real parties at interest with the one in which a final judgment upon the merits was rendered by a court of competent jurisdiction of the persons and matters in controversy. Such judgment is conclusive against the appellee in this case, and should have been so held by the court below, and the charge requested by appellant given, and upon which a verdict in its favor would necessarily have been returned under the undisputed facts. Therefore it becomes our duty to reverse the judgment of the district court, and here render judgment in favor of appellant, which is accordingly done.

Reversed, and rendered for appellant.

BANGS et al. v. SULLIVAN et al.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

DISMISSAL AND NONSUIT—RIGHTS OF INTERVENERS—SETTING ASIDE NONSUIT—WHO ENTITLED TO INTERVENE.

1. Where the reorganization committee of an insolvent corporation agrees with the corporation's mortgagee that the latter shall foreclose and purchase the corporate property and subsequently convey it for a certain consideration to a new corporation, and after foreclosure the consideration is paid to the mortgagee and the new corporation organized, but in a suit by the committee for specific performance of the agreement the committee takes a nonsuit, and a stockholder intervenes on behalf of himself and other stockholders, alleging collusion between the committee and defendants, it is in the discretion of the court to set aside the order for nonsuit and allow the stockholder to intervene.

2. Where the purpose of intervener was merely to protect his own interests, and not the interests of all who were similarly interested, the committee was entitled to take the nonsuit, subject only to intervener's right to be heard on his claim for affirmative relief.

3. The fact that one of the members of the committee refused to join with the rest in taking the nonsuit could not deprive the committee of their right to take it, where the agreement between the stockholders and the committee expressly provided that the power conferred on the committee, which included authority to institute, prosecute, compromise, and dismiss suits, might at any time be exercised by a majority of its members.

4. Intervener's cause of action, as shown by his petition, not being against plaintiffs in their capacity as a committee, but against them as individuals to recover an interest in the trust fund alleged to have been lost by the willful neglect of each of them, he had no right to intervene.

Appeal from District Court, Bexar County: J. L. Camp, Judge.

Action by Francis S. Bangs and others against the Yorkshire Investment & American Mortgage Company and another. From a judgment in favor of defendants and in favor of Daniel Sullivan, intervener, plaintiffs appeal. Reversed and rendered.

*Rehearing denied April 1, 1903, and writ of error denied by Supreme Court.

Shook & Vander Hoeven and Coke & Coke, for appellants. J. O. Terrell, J. C. Sullivan, Chas. W. Ogden, and W. H. Lipscomb, for appellees.

NEILL, J. On April 28, 1897, Francis S. Bangs, Geo. H. Southard, D. W. McWilliams, Jos. M. Keatinge, W. J. Caesar (appellants), and C. W. Ogden, as a reorganization committee, brought this suit against the Yorkshire Investment & American Mortgage Company and Alfred Crebbin for specific performance of a certain contract mentioned in our conclusions of fact, or, in the alternative, to recover \$28,947.63 alleged to have been paid by plaintiffs as such committee to defendants on said contract.

On October 4, 1897, the defendants answered by a number of special exceptions, a general and special denial, and specially pleaded that they had ever been ready and willing to perform their part of the agreement, and that their failure to fully perform it is due to the plaintiffs' failure and refusal to perform their part of the contract.

On March 20, 1901, D. Sullivan & Co. were granted leave to intervene; but on April 8, 1901, before Sullivan filed his petition, the plaintiffs, without Sullivan's knowledge, took a nonsuit, which was, on motion of D. Sullivan—in which Ogden joined—on the 25th of May, 1901, set aside and the cause reinstated. On the same day all the plaintiffs, except Ogden, orally moved a discontinuance, which motion was at the instance of D. Sullivan refused. On May 30, 1901, all the plaintiffs, except Ogden, filed a written motion in which they represented they would no further prosecute the suit, and prayed the court to enter a discontinuance on their behalf against the defendants. This motion was likewise denied.

On June 7, 1901, D. Sullivan filed his original petition of intervention against all the plaintiffs, except Ogden, and the defendants, in which he alleged, as an original shareholder and as assignee of another stockholder, he was interested in the subject-matter of the litigation to the extent of \$5,700, which had been paid to the reorganization committee for the purpose of carrying out the scheme of reorganization under the contract with defendants. That plaintiffs were trustees of the fund paid them for the purpose of reorganization, which fund included the \$5,700 paid by him and his assignee, and it was their duty to preserve the same from misappropriation, and see that it was used for the purpose for which it was provided. That, through the willful default and neglect of plaintiffs, said trust fund, or the principal part thereof, had been wasted, it having been by them paid to defendants under the pretense that the payment was on account of the agreement to purchase the property for which the fund was created, without plaintiffs having received anything of value therefor. That defendants received the mon-

ey with full knowledge that it was a trust fund provided for the purpose of acquiring title by and for the reorganized company to the land—the object and end of contract and reorganization scheme between the parties; but that defendants had failed and refused to convey the land to the reorganized company, or to refund any portion of the trust fund received by them. That the filing of this suit by plaintiffs was a pretense, and that it was never at any time their intention to prosecute it, or in any manner protect and enforce the rights of the beneficiaries of said trust fund. That the discontinuance of this suit by them was entered pursuant to a wrongful and fraudulent combination with defendants that plaintiffs would not further prosecute it. That by reason of the willful negligence and default of plaintiffs, and the wrongful and unlawful combination and conspiracy entered into between them and defendant Crebbin, all of said trust fund has been lost and wasted, and that thereby plaintiffs and defendants became liable to intervenor for the amount of his interest in said trust fund, with interest, etc. The intervenor prayed that plaintiffs be required by order of the court to render an account of all of said trust fund, and what disposition had been made of the same and by whom, and, upon final hearing, that intervenor have judgment against plaintiffs and against defendants for the sum of \$5,700, with interest, etc.

(Note. The plaintiffs against whom the petition of intervention is directed and who answer it are those only who are the appellants, Ogden being excluded.)

On November 4, 1901, all the plaintiffs, except Ogden, without waiving their rights to the discontinuance and nonsuit theretofore claimed to have been entered and taken by them, but expressly insisting upon them, moved the court to strike out the plea of intervention upon the following grounds: (1) Because, at the date it was filed, the cause had been discontinued by them, and no cause was pending in which the petition of intervention could be filed. (2) Because, if the effect of the order reinstating the cause was to bring them again into court, the order was erroneous, and they should not be deemed in court so that the plea of intervention should be filed against them. (3) Because the cause of action, if any, set out in the plea of intervention, did not show that intervenor was interested in the subject-matter of the suit, and showed no cause of action against them which could be made the subject of intervention. And (4) because plaintiffs had sued in their representative capacity as the reorganization committee, and were not in court in their individual capacity, whereas the plea in intervention was filed against them as individuals. They prayed that the intervention be dismissed, and the cause stricken from the docket, as it had theretofore been dismissed and discontinued by them.

On the same day plaintiffs filed special exceptions, which are substantially the same as are embodied in their motion to strike out the intervenor's plea of intervention. Then they answered the plea of intervention (1) by a general denial, (2) by plea of statute of limitation of two years, and (3) by the four years' statute of limitations. On the same day said motion and the general and special exceptions were heard and overruled by the court, to which rulings appellants excepted. At the same time were heard defendants' general and special exceptions to plaintiffs' petition, and the court overruled the general exceptions, but sustained special exceptions as to the prayer for specific performance, but overruled them to that part of the petition which seeks to recover back the purchase money paid in damages.

On January 14, 1902, the defendants amended their original answer, and on the same day filed their original answer to Sullivan's plea of intervention. They afterwards, on May 10, 1902, filed their second amended answer to plaintiffs' petition. Thereafter, on the same day, defendants presented to the trial court general and special exceptions contained in the second amended original answer to plaintiffs' petition, and also their general and special exceptions contained in the answer to the petition of intervention of D. Sullivan, all of which exceptions, being heard by the court, were overruled.

Thereafter, on the same day, the cause was called for trial. Whereupon the plaintiffs, except Ogden, declined to make any announcement, but claimed that they had theretofore discontinued their suit, and further declined to read plaintiffs' original petition to the jury; whereupon Chas. W. Ogden, for himself and in behalf of intervenor, D. Sullivan, prayed and obtained leave from the court to read said petition to the jury, and to proceed with plaintiffs' case and that of the intervenor; to which the five plaintiffs who are appellants objected, upon the following grounds: (1) Because the suit had been dismissed before the filing of any intervention on the part of the intervenor, and they had declined to further prosecute it; (2) because they had the right to control the litigation on the part of plaintiffs, and that plaintiff Ogden could not compel them to prosecute the suit after they had elected to abandon it; and (3) because Ogden could not alone prosecute said suit. The defendants joined said plaintiffs in these objections, which were overruled by the court, and plaintiff Ogden and intervenor Sullivan were permitted to read the original petition of plaintiffs to the jury, and to introduce evidence thereunder, to which action of the court said plaintiffs excepted.

On May 22, 1902, the trial of the case resulted in a verdict in favor of the defendants mortgage company and Crebbin against all parties, and in favor of D. Sullivan against appellants for the sum of \$5,728, with inter-

est thereon at 6 per cent. per annum from September 20, 1895; on which verdict judgment was rendered that plaintiffs, including Ogden and intervenor Sullivan, take nothing by their suit against defendants mortgage company and Crebbin, and that intervenor D. Sullivan have and recover of appellants the sum of \$8,019, with interest thereon from date of judgment at the rate of 6 per cent. per annum. Then follow instructions as to costs and execution. From this judgment the plaintiffs Francis S. Bangs, George H. Southard, D. W. McWilliams, Jos. M. Keatinge, and W. J. Caesar have appealed.

Conclusions of Fact.

Prior to August 31, 1895, the Alamo Heights Land & Improvement Company, a domestic corporation, owned a considerable body of land near San Antonio, Tex., incumbered by three mortgages, held by the Yorkshire Investment & American Mortgage Company, aggregating something over \$63,000. Prior to the fall of 1895, the Alamo Company being insolvent and the mortgages in default, certain of its stockholders, believing the land worth much more than the mortgage debts, requested plaintiffs to furnish a plan for reorganizing said company for the purpose of protecting its stockholders against the loss of said property at foreclosure sale under the mortgages. Accordingly plaintiffs, as a reorganization committee, undertook to reorganize the company for that purpose. To this end a written contract was entered into between plaintiffs, as a reorganization committee, such of the stockholders of the Alamo Company as should come into the reorganization, and the Franklin Trust Company, which fixed the rights, duties, and liabilities of the respective parties, giving plaintiffs, as the reorganization committee, full power and authority, as agents of the stockholders coming in under the agreement, to do any and everything requested or necessary to carry out and effect the purpose and object of the reorganization scheme; and it was expressly agreed that the power conferred upon the committee might at any time be exercised by a majority of its members, the committee agreeing to use its best efforts to carry into effect the plan of reorganization; but it is expressly stipulated that no member of the committee shall be liable in any respect, except for his own willful misconduct and default.

The reorganization committee, in pursuance of the plan, entered into negotiations and effected a contract with the mortgage company, whereby it was agreed that the company should foreclose its several mortgages on the property, and at the foreclosure sale that either the company or its agent, Alfred Crebbin, should purchase it and convey it to the new company to be created by the reorganization committee, upon such company's paying the full mortgage debt and cost of foreclosure; the purchase money in

excess of \$45,000 to be paid in cash, and for the \$45,000 the mortgage company should accept the bond, to run for five years, of the new company, secured by a proper mortgage on said property. In accordance with the agreement, the property was sold under the mortgages, and bought in by the defendant Crebbin on September 3, 1895, for himself, subject to the agreement between plaintiffs and the mortgage company, plaintiffs, as such reorganization committee, paying the costs of the foreclosure. And afterwards, on September 20, 1895, they paid the mortgage company \$18,070.67, that being the full amount of the indebtedness due the company above \$45,000. During the year 1896, the committee, relying upon its contract with defendants, paid the mortgage company the following amounts: On March 15, \$1,806.50, being interest on the \$45,000 for which the mortgage bond of the new company was to be given, at the rate agreed upon, from date of sale to March 1, 1896; on April 6th, \$1,460.90, for accumulated taxes on said property; on September 23, \$1,803.50, interest on said \$45,000 from March 1 to September 1, 1896; on December 18th, \$596, taxes on said property for the year 1896, and also \$100 to defendants' attorney for certain legal services performed by him in connection with the title to a part of said property; and on January 27, 1897, \$110 insurance on a hotel situated on the property—which payments aggregate \$23,947.63. Of this money, \$5,700 was paid the reorganization committee by the intervener, Sullivan, and Chas. W. Ogden, as original stockholders in the Alamo Heights Land & Improvement Company, for the purpose of carrying out the reorganization scheme under the agreement and contract referred to. Ogden afterwards, for value, assigned his interest in the fund, and the rights growing out of the contract under which it was paid, to the intervener.

The reorganization committee caused to be incorporated the new company contemplated by the reorganization scheme, but the property was never conveyed to it, nor were the mortgage and bond of such company ever executed for the \$45,000 of the purchase money.

Plaintiffs and Alfred Crebbin had not discussed or agreed upon the trustee who should be named in the mortgage or deed of trust which was to be given to secure the \$45,000 purchase money, nor had all the terms and provisions to be incorporated in the instrument been reached prior to the 20th of September, 1895, when the cash payment was made by plaintiffs to Crebbin. Subsequent to that date, these matters were taken up and discussed by plaintiffs and Crebbin, but they did not fully agree upon them, and therefore the conveyance of the property was never executed by Crebbin to either the new mortgage company or plaintiffs.

As between the intervener and defendants, we find that it was not the fault of Crebbin

that an agreement upon all matters material to the conveyance of the property was not reached, but that the failure to agree upon the material matters touching such conveyance, and the mortgage contemplated to secure the payment of the purchase money, was due to the fault of the reorganization committee. But as to whether this fault can be attributed to each member of the committee, and, if so, is such as to amount to willful misconduct on his part, we do not, in view of the conclusions of law reached by us, deem it necessary or proper for us to find.

Conclusions of Law.

The first, second, and third assignments are directed to the action of the court in setting aside the order of nonsuit and in refusing to allow the appellants to discontinue their action. If the suit had been brought by appellants alone in their individual capacity upon a demand in which they only were personally interested, it would seem that they, or any of them, could at any time during the pendency of the suit, before the jury retired, take a nonsuit; though they could not thereby prejudice the right of the adverse parties, or either of them, to be heard on their claim for affirmative relief, if any, were interposed. Rev. St. 1895, art. 1801. But this suit was not instituted nor prosecuted by appellants in such capacity for such purpose. It was brought by them as a committee of reorganization for such of the stockholders of the old corporation as had entered into and complied with the agreement and scheme for reorganizing and preventing a sacrifice of the property at foreclosure sale by having it bought in and conveyed to a new company. Plaintiffs' relation to such stockholders was fiduciary, and, as is apparent from the face of their petition, it was in discharge of the duty arising from such relation the suit was brought. Having voluntarily assumed such relation, plaintiffs, as a committee of such stockholders, were legally as well as equitably bound to faithfully discharge such duty for the promotion of the ends and objects of the committee's appointment. *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Gould v. Seney* (Sup.) 9 N. Y. Supp. 822.

From this it follows that, if the matters alleged against the defendants in plaintiffs' petition were true, it was their bounden duty as trustees and agents of such stockholders to prosecute this suit in good faith to final judgment, to the end that specific performance of the contract they had made in behalf of and in the interest of the stockholders might be enforced, or, in the event such relief could not be obtained, that they might obtain, in behalf of the beneficiaries, such other relief as they were entitled to. If, then, plaintiffs were not in the bona fide discharge of this duty, and did not intend to perform it, but were, as is alleged in the in-

tervener's motion to set aside the nonsuit, in collusion with the defendants for the fraudulent purpose of defrauding their cestu que trustent of their rights in the subject-matter of the litigation, and in pursuance of such fraudulent purpose entered a discontinuance of the action, we think that it would be within the discretion of a court of equity, at the instance of a stockholder who had obtained leave to intervene, upon motion showing his interest in the subject-matter and such fraudulent collusion and its purpose, to set aside the nonsuit and allow him to intervene in order to protect his own interest. And other stockholders alike interested might, with leave of the court, have joined him. We have reached this conclusion from the analogy of the plaintiffs as a reorganization committee to a board of directors to a corporation, for plaintiffs, as such committee, were practically the directors of the new company organized by them for carrying over the property. When a corporation will not prosecute a suit in its corporate capacity to vindicate a wrong done it, a court of equity may permit a stockholder to intervene for the purpose of protecting his own interest. *Bates*, Fed. Eq. Proc. § 632.

In this case, as is shown by his petition, the purpose of the intervener was to protect his interest alone, and not as well that of those similarly situated and alike interested. In view of this, the intervention did not deprive the plaintiffs of the right to take a nonsuit, subject only to the right of intervener to be heard on his claim for affirmative relief without being prejudiced by plaintiffs' exercise of such right. Nor did the fact that Ogden, as one of the plaintiffs, refused to join them in taking the nonsuit, but resisted them in their efforts to do so, deprive them of this right, subject to such limitation; for the agreement between the stockholders and the reorganization committee expressly provided that the power conferred upon the latter, which included the authority at their discretion to institute, prosecute, compromise, and dismiss suits, might at any time be exercised by a majority of its members. The stockholders did not, by the agreement or in any other manner, clothe Ogden with the authority, upon any contingency, to prosecute the suit alone in their behalf. He had parted with his interest in the subject-matter of the litigation, and, when he refused to abide the action of the majority, he had no right to interfere with the conduct of the suit save as an attorney for the intervener for the purpose of protecting his interest in the matter in controversy—a part of which he had transferred to him. Even had the plaintiffs failed to appear, the proper practice would have been for the court to have dismissed the original suit for want of prosecution. But, having appeared, they had the right to dismiss their suit, over the protest of the intervener, leaving the petition of intervention pending as against the parties, defendants as well

as plaintiffs, from whom the intervener sought affirmative relief. *Harris v. Schlinke* (Tex. Sup.) 65 S. W. 172. The action of the court in refusing to permit them to take a nonsuit, subject to the right of intervener to be heard on his petition, placed them in a more unfavorable attitude than they would have been had they failed to appear at all. This is demonstrated by the case being tried as between them and defendants, over the former's protest, without their participation, and a final judgment entered against them in favor of the defendants, which, if allowed to stand, forever concludes plaintiffs, as well as those whose rights and interests they represent, from obtaining any relief against the defendants, however meritorious their cause of action may have been. For the intervener to recover against the plaintiffs, it was necessary for him to fail in his action against the defendants, and, to do this, it was essential to show that plaintiffs had no cause of action against either of them. For, had plaintiffs recovered against defendants, intervener's action against them, as well as against plaintiffs, must necessarily have fallen to the ground. Thus it is shown that it was to the common interest of the intervener and defendants to show that the latter were not at fault, but that the blame for the failure of the reorganization scheme lay alone at the door of plaintiffs. This may have been easily shown while plaintiffs were standing on their right to dismiss their action, and in doing so were not, and could not be, participants in the trial.

Our conclusion that the court erred in refusing to permit the plaintiffs to take a nonsuit, subject to the right of the intervener to prosecute his suit for affirmative relief, necessarily requires a reversal of the judgment against them in favor of the defendants, and might, if the intervener had such a cause of action against appellants as could be prosecuted by intervention in this case, also require a reversal of the judgment in favor of the intervener.

This brings us to the question, raised by the fifth and sixth assignments of error: Does the petition of intervener disclose such an interest in the subject-matter of the suit as constitutes a cause of action that can be set up and prosecuted by intervention? This question does not involve the matters alleged by intervener against the defendants, or either of them, but is directed solely to the cause of action alleged against appellants.

To confer upon a party the right to intervene in a pending suit, he must have such an interest in the subject-matter of litigation as makes it necessary or proper for him to come into the case for the protection of such right. *Stansell v. Fleming*, 81 Tex. 295, 16 S. W. 1033. In other words, his interest in the subject-matter involved must be such that had the original action never been commenced, and the intervener had brought the suit in his own name as plaintiff, he would

have the right to recover, to the extent, at least, of a part of the relief sought; or, had the action been first brought against him as a defendant, he would be able to defeat a recovery, in part, at least. *Pool v. Sanford*, 52 Tex. 621.

The original suit was brought by plaintiffs, not as individuals, but in their representative capacity as a reorganization committee, to enforce specific performance on the part of the defendants of a contract between them and such committee for the conveyance of lands described in the original petition, or, in event such relief could not be obtained, to recover the money paid and expended by the committee in carrying out such agreement. The relief sought was not for them as individuals, but as a committee representing others who are to receive the benefit of such judgment. Otherwise than as such committee, the plaintiffs did not come into court with their suit. As individuals, they had no standing, and could obtain nothing there for themselves. Their standing as a committee before the court could not be so changed by it as to convert them into individuals for the purpose of allowing a party to intervene, set up a cause of action against them as such, and obtain a personal judgment against each of them.

The intervenor's cause of action was against appellants, not in their capacity as a committee, but, as is shown from our statement of the case, was brought against them as individuals to recover an interest of \$5,700 in a trust fund alleged to have been lost by the willful neglect and default of each. And it is a personal judgment against each that was recovered.

The loss of a trust fund in which intervenor had an interest, by the willful negligence and default of appellants, by whom it was received as a committee for the purpose of carrying out the reorganization agreement, while it may furnish a cause of action in favor of intervenor against each member of the committee guilty of such willful neglect, is not the subject-matter of the suit brought by the plaintiffs against the defendants. It is an independent cause of action, involving subject-matter distinct and entirely foreign to that involved in the original suit, upon which the intervenor could have brought and prosecuted an original suit to judgment, without regard to the result or disposition of the suit between plaintiffs and defendants. It was neither necessary nor proper for him to come into this case for the prosecution of any right or interest which his petition discloses that he had against the appellants.

We are therefore of the opinion that the petition of intervention, as against appellants, should have been dismissed upon their motion, and that, as to them, the court erred in not sustaining the exceptions to it.

These conclusions render it unnecessary for us to discuss or pass upon the remaining assignments of error, and require us to re-

verse the judgment of the court below, between all the parties, except as between the intervenor, Sullivan, and the defendants, and to here render such judgment as the district court should have rendered. Accordingly, the judgment in favor of defendants, the Yorkshire Investment & American Mortgage Company and Alfred Crebbin, against the plaintiffs, and that in favor of intervenor, Sullivan, against appellants, will be set aside, and judgment here rendered dismissing plaintiffs' action and the intervenor's petition of intervention, in so far as it affects appellants, without prejudice to his right to bring and prosecute his cause of action, if any he has against them, in any court having jurisdiction of the subject-matter and of their persons. The judgment in favor of the defendants against the intervenor, as it is not complained of by any party, will be affirmed.

All costs of suit incurred in the court below, up to and including April 8, 1901, will be taxed against the plaintiffs, and all costs incurred since that date in the district court, as well as on this appeal, will be assessed against the intervenor, D. Sullivan.

Reversed and rendered.

WESTERN UNION TELEGRAPH CO. v. JAMES.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—NEGLIGENCE—EVIDENCE—CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF—INSTRUCTIONS—EXCESSIVE VERDICT.

1. On the issue whether by the exercise of ordinary care the addressee of a telegram could have been found and the telegram delivered to her in a reasonable time, though the telegraph operator and messenger did not know her, and inquired of several persons, who could give no information in regard to her, testimony of witnesses that they knew her, and that she was well known in the town, as well as evidence that she lived within a few blocks of the telegraph office, is admissible; but testimony of persons that they did not know her is not admissible.

2. A pleading of contributory negligence because the telegram was not sent in care of the person for whom the addressee worked will not support a finding of contributory negligence because the sender failed to inform the operator that the addressee lived near a certain building.

3. The defining by an instruction of the term "preponderance of evidence" as meaning the greater weight of evidence is proper.

4. Failure of the court to define the terms "reasonable promptness" and "ordinary care," if error, is not affirmative error, and cannot be complained of, a special instruction defining them not having been requested.

5. A verdict of \$1,995.25 for negligent failure to deliver a telegram, informing a mother of the sickness of her son, till after his death and burial, is not excessive.

Appeal from District Court, Colorado County; M. Kennon, Judge.

*Rehearing denied, and writ of error denied by Supreme Court.

Action by Viney James against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Norman G. Kittrell and Burns & Jayne, for appellant. Adkins & Green, for appellee.

PLEASANTS, J. Appellee brought this suit to recover damages for mental anguish caused by the alleged failure of appellant to use reasonable diligence to deliver a telegraphic message announcing the illness of appellee's child, and received by appellant for transmission and delivery to appellee. The amount sued for was \$1,995.25. The trial in the court below by a jury resulted in a verdict and judgment for plaintiff for the full amount claimed in the petition. The material facts disclosed by the record are succinctly stated as follows:

On August 24, 1901, the plaintiff lived at Columbus, Colorado county, Tex., and on said date her son Frank James, aged 6 years, who was visiting plaintiff's aunt, Eliza Garner, who lived at Simonton, Fort Bend county, became very sick. Plaintiff's aunt, being desirous of informing plaintiff of the condition of her child, sent a messenger to Eagle Lake, in Colorado county, and there delivered to defendant's agent, for and on behalf of plaintiff, the following telegram: "To Viney James (Colored) Columbus, Texas: Come at once. Your child very low. Eliza Garner." In consideration of the sum of 25 cents paid to defendant by said Eliza Garner, defendant promised to transmit and deliver this telegram within a reasonable time to plaintiff at Columbus. The telegram was promptly transmitted by the defendant's agent at Eagle Lake, and was received by its operator at Columbus at 2:05 p. m. on August 24, 1901. Within a few minutes after its receipt at Columbus it was turned over to the defendant's messenger boy, with instructions to try to deliver it promptly. Neither the defendant's operator nor messenger boy at Columbus knew the plaintiff, or where she lived. The message was not delivered to plaintiff until several days after her child's death, when it was given her at her request. Plaintiff's child died at 7 o'clock p. m. on August 24, 1901, and was buried in the afternoon of the following day. Plaintiff did not hear of her child's sickness until the day after its death, when a messenger came from Simonton to Columbus and informed her that her child was dead. She did not receive the information in time to reach Simonton before the burial of the child. Had the telegram been promptly delivered she could have reached Simonton before the death of her child, and had the comfort of ministering to him in the last hours of his life, and attending his burial.

Defendant's messenger boy at Columbus, Frank Prucha, testified that, as soon as the message was given him for delivery, he at once began a search for the plaintiff, and

made inquiry of six persons, naming them, as to where plaintiff could be found, but none of them knew plaintiff, or could give him any information as to where she could be found, except Mr. Weete, the postmaster at Columbus, who told him that he knew plaintiff, but did not know where she lived, and thought she was out of town, because she had not called for her mail in some time. The other persons inquired of were colored men who had lived in Columbus for a number of years, and were well acquainted with the colored people who lived in the town. Having failed to learn of plaintiff's whereabouts, Prucha returned to the telegraph office with the message at 3:40 p. m., and the operator sent a service message to the operator at Eagle Lake informing him that plaintiff could not be found, and asking for further information as to her address. No further information could be obtained by the operator at Eagle Lake, for the reason that the messenger who had brought the telegram from Simonton had gone back to that place. The operator at Columbus testified that, while the messenger boy was out with the telegram trying to find the plaintiff, he inquired of several persons, naming them, all of whom were acquainted in Columbus, as to whether they knew plaintiff or could tell him where she lived, and none of said persons could give him any information on the subject. He also made inquiry of several persons after he sent the service message, but could find no one who knew anything about plaintiff. During the afternoon of the 24th he made inquiry of eight or nine persons.

The town of Columbus contains 2,000 inhabitants. Plaintiff lived within three blocks of the telegraph office at Columbus, and was at home on the day the telegram was sent. Ben Davis testified, for plaintiff, that he heard Frank Prucha, on the evening of the 24th of August, 1901, tell John Walker that he had a telegram for plaintiff, and ask him if he knew where plaintiff lived, and Walker replied that he did not; that witness then said to Prucha that he knew plaintiff, and pointed to that portion of the town in which she lived, and told Prucha that if he would go there he could find her. Dan Davis, a witness for plaintiff, testified that Prucha asked him if he knew plaintiff, and he replied that he did not, but told him that she was a cousin of a Mrs. Conoway, who lived near the woodyard, and, if he would inquire of her, she could tell him where plaintiff lived.

Prucha contradicted the statements of both of these witnesses. The persons mentioned by Prucha and the operator at Columbus as those of whom they made inquiry as to where plaintiff lived all testified in the case, and stated that such inquiries were made, and that they did not know plaintiff, and could give no information as to where she lived.

Elisa Garner testified, for plaintiff, that she did not know at the time she sent the telegram for whom plaintiff was working. Plaintiff introduced 30 witnesses, each of whom testified that he had lived in Columbus for a number of years; that he knew plaintiff; that she was well known in said town; and that, if the witness had been asked by Prucha or the telegraph operator, both of whom knew witness, he could have told them where the plaintiff lived. None of these witnesses saw the messenger boy or the operator, or was seen by them on the 24th of August, 1901.

We conclude that the evidence is sufficient to sustain the finding of the jury that the appellant did not use ordinary care to deliver the telegram with reasonable promptness, and that, by reason of such negligence on the part of appellant, the appellee was damaged in the amount found by the jury.

The first assignment of error attacks the ruling of the trial court in admitting the testimony of each of the witnesses who testified that plaintiff was well known in the town of Columbus, and that if witness had been asked by the appellant's messenger boy or the operator he could have told them where plaintiff lived. The proposition under this assignment is as follows:

"When the issue in the case was whether or not defendant's receiving operator and messenger boy exercised ordinary care and diligence to find the plaintiff in the case, to whom the message [telegram] was addressed, who and whose address were unknown to said employes of defendant, and there was evidence tending to show ordinary diligence and care on the part of said employes in making inquiry, and ordinary effort to find her to deliver the message, it is error in the court to allow plaintiff, over defendant's objection thereto, to prove by one witness or any number of witnesses (thirty in this case) that he or they knew the plaintiff on the day or days in question, and that, had he or they been asked by one of the said employes of defendant if he knew the plaintiff and where she lived, that he could have told where she lived, who she was, or could have given such information as would have enabled defendant to have found her, because such evidence is not competent, because it is irrelevant to the issue involved as to whether defendant's agents used due care or reasonable diligence under the circumstances surrounding them of time, place, and opportunity for inquiry. Such testimony cannot afford any reasonable presumption of the principal fact or matter in dispute; it does not tend to prove it, and it does tend to draw away the minds of the jurors from the point in issue, and to lead them to believe that the burden was on the defendant to show why it was that at the time and place in question its agents did not interview each of the witnesses so testifying and make the necessary inquiry of such witnesses, and so such testimony excites the prej-

udice of the jurors, and misleads them as to the real issue; "and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it."

To enable the jury to determine whether the appellant, by the exercise of ordinary care, could have found plaintiff and delivered the telegram within a reasonable time, they were entitled to have all of the circumstances surrounding the parties before them. It cannot be doubted that, if plaintiff had been a prominent citizen of the town, that fact could have been proven as a circumstance tending to show that her place of residence could have been ascertained by the use of ordinary diligence on the part of appellant's agents, notwithstanding such agents may not have known the plaintiff, and may have inquired of a number of persons who could give them no information upon the subject. The proximity of plaintiff's residence to the telegraph office, which was shown without objection, was also a circumstance which the jury might properly consider upon the issue of negligence. The fact that plaintiff was well known in the town of Columbus was a circumstance pertinent to the inquiry as to whether she could have been found by ordinary diligence on the part of appellant's agents. If she had been an obscure person who lived in a distant portion of the town from the telegraph office, and was known to only a few persons, such facts could have been shown by the appellant as a circumstance tending to show that its failure to find her was not negligence. All of the witnesses introduced by the plaintiff upon this issue testified that they knew her, and that she was well known in the town. This was the only material part of their testimony. The further statement made by these witnesses to the effect that, if appellant's messenger boy had inquired of them they could have told him where to find plaintiff, was nothing more than a repetition of the statement that they knew where the plaintiff lived, or was, rather, an inevitable conclusion from such statement, and its admission in evidence, if error, was manifestly harmless. This testimony was not calculated to lead the jury from the issue in the case, nor were they likely to have concluded from its admission that the defendant was guilty of negligence in failing to inquire of all of these witnesses, or of any particular one of them, as to plaintiff's place of residence. Its only object and effect was to assist the jury in determining whether, under all of the evidence in the case, the defendant exercised ordinary diligence to deliver the telegram with reasonable promptness. *Tel. Co. v. Carter* (Tex. Civ. App.) 20 S. W. 834.

The second assignment of error complains of the action of the trial court in refusing to allow the defendant to prove by the sheriff, the district clerk, and two other witnesses that they had each lived in the town for

a number of years and were well acquainted in said town, and did not know the plaintiff. Neither the messenger boy nor the agent had asked any of these witnesses for information as to the plaintiff. The court permitted the defendant to ask all of these witnesses whether the plaintiff was well known in the town of Columbus, and all of them stated that they had no knowledge as to this fact. The fact that none of these witnesses knew plaintiff was not material to any issue in the case, and their testimony was properly excluded.

The trial court did not err in refusing the special instructions requested by the defendant as contended in the third, fourth, and seventh assignments of error. The issues presented by these instructions were fully and correctly submitted to the jury in the main charge.

The only contributory negligence pleaded by the defendant was the failure of Eliza Garner to send the telegram in care of the person for whom plaintiff was working. This pleading would not support a finding of contributory negligence because of the failure of said Eliza to inform defendant's agent that plaintiff lived near the Baptist Church, and the trial court properly refused to instruct the jury that plaintiff could not recover if Eliza Garner was guilty of contributory negligence in failing to inform appellant's agent that plaintiff lived near said church. This disposes of the issue presented by the fifth assignment.

In the sixth assignment the appellant complains of the charge of the court in that it defines the term "preponderance of evidence" as meaning the greater weight of evidence; and in the eighth assignment complains of the charge because it fails to define the term "reasonable promptness" and ordinary care. Both of these assignments are without merit. The definition of the term "preponderance of evidence" given by the court was accurate, and no injury could possibly have resulted to the appellant by giving such definition. It may have been unnecessary for the court to have defined the term, because its meaning is well known and understood by jurors of average intelligence, but, having defined it accurately, the appellant has nothing of which to complain.

The failure of the court to define the terms "reasonable promptness" and "ordinary care," if error, cannot be regarded as affirmative error, and appellant, not having requested the giving of a special instruction accurately defining said terms, cannot now complain of the failure of the court to give such definition.

The remaining assignments of error attack the verdict and judgment as being excessive, and contrary to the great weight and preponderance of the evidence. As before stated, we think the evidence is sufficient to sustain the verdict for the plaintiff, and that the amount found by the jury is not excess-

ive. There is nothing in the evidence nor in the form or amount of the verdict which indicates that the jury were influenced by any improper motive.

The judgment of the court below will be affirmed, and it is so ordered. Affirmed.

SULLIVAN v. DOOLEY.

(Court of Civil Appeals of Texas. March 11, 1903.)

WATER COURSES—OBSTRUCTIONS—JURISDICTION OF EQUITY—PETITION—ALLEGATION OF INSOLVENCY OF WRONGDOER.

1. Where a stream which forms the boundary between two landowners frequently overflows and inundates portions of the land on both sides, but more easily overflows the land of one of them, equity will enjoin the latter from filling in the low places on his land, and constructing a levee along the stream on his side, so as to cause the stream to unnaturally overflow the lands of the other.

2. In a suit to restrain such owner, it is unnecessary to allege in the petition that defendant is insolvent; Rev. St. 1895, art. 2989, authorizing the granting of an injunction when it appears that the party applying therefor is entitled to the relief demanded, and such relief, or any part thereof, requires the restraint of an act prejudicial to the applicant.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Suit by J. A. Sullivan against M. C. Dooley. From a judgment for defendant on sustaining a demurrer to the petition, plaintiff appeals. Reversed.

Ford & Crawford, for appellant. M. L. Dye, for appellee.

FLY, J. Appellant applied for an injunction to restrain appellee from erecting a levee along the banks of a creek which formed the boundary line between the land of appellant and appellee. A general demurrer to the petition was sustained. It was alleged in the petition: That the parties owned lands adjoining each other, the creek forming the boundary line between them. That the creek was ten miles long, and flowed into the Trinity river, two miles below the land of the parties. That the creek frequently overflows its banks, and inundates portions of the land on both sides of it; that of appellee being easier overflowed than that of appellant. "That the defendant, in violation of plaintiff's right to have the water of said stream pursue its natural course, began the construction of a levee on the north bank of said stream, and continues to build the same. That the defendant has filled in the natural low places of the said stream, and is about to construct a levee on the north bank of said stream along the entire length of the boundary line between plaintiff and defendant. Plaintiff shows to the court that he is cultivating and using his land on the south bank of said stream up to the bank, and that the erection of said dikes on defendant's side of said stream, and the filling in

of the low places, drains, and draws in said bank, will cause the stream to unnaturally overflow the lands of plaintiff, to his great damage; that on the — day of —, 1902, defendant began such work, and threatens to continue the same, to plaintiff's great damage; that said injury is irreparable, and cannot be compensated in damages; and that the defendant is not now, and would not be, in the opinion of the plaintiff, at the termination of this suit, the owner of property, real or personal, sufficient to satisfy this plaintiff for the damages he would ultimately sustain from the diversion of the said stream of water from its natural channel aforesaid, and the flooding of his lands, as the defendant is now doing and is about to do."

Under the civil law it appears that all waters, whether surface water or that flowing in water courses, are regulated by the same rule, which is that if they have their course regulated by the contour of the land, by regulation or by title or ancient possession, no change can be made in the course of the water, to the detriment of any one else. The common-law rule on that subject is uncertain, but it has been declared to be the rule of the common law that a person may act as he pleases to get rid of the surface water, and that neither its detention, diversion, nor repulsion is an actionable injury, even though damage may ensue. *Jones v. Hannover*, 55 Mo. 462; *Bowlsby v. Speer*, 31 N. J. Law, 351, 36 Am. Dec. 216. There has been a great diversity of opinion as to the rights and liabilities of parties diverting surface water from their land, but not more so than on the question as to what constitutes surface water. Some courts hold that flood water from a stream is surface water, but the larger number class such water as a part of the stream, and hold that it is not surface water. In the case of *O'Connell v. Railway*, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246, the authorities on the question as to what constitutes surface water, and as to the rights of parties to divert waters, whether surface or otherwise, are fully reviewed by the Supreme Court of Georgia. The court said: "If the flood water becomes severed from the main current, or leaves the stream, never to return, and spreads out over the lower ground, it has become surface; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times, without losing the character of a water course. So, on the other hand, it may have a flood channel to retain the surplus waters until they can be discharged by the natural flow." We

think the language quoted is supported by common sense and experience, as well as the weight of authority.

The question presented in the Georgia case is the same one presented by the record in this case, and that is whether the owner of land on the bank of a stream can, without liability, erect on his own land an embankment which increases the overflow in times of flood upon the land of the opposite proprietor to the injury thereof. The court held: "There is no public policy to allow one landowner to improve his condition at the cost of his neighbor, but the improver must, at his peril, see to it that the benefit to himself is large enough to pay both him and his neighbor's damage, if any. The law does not look to the interest of one individual, but recognizes and enforces the duties implied in his relation to others." In the case of *Railway v. Brevort* (C. C.) 62 Fed. 129, 25 L. R. A. 527, the subject of riparian rights is well discussed. It was said: "The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural water course, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural water way or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a water course in which it is accustomed to flow, for, having entered the stream, it becomes a part of it, and loses its original character. * * * It must necessarily follow from this general principle that where water naturally flows, though the volume may change with the varying seasons, there is a natural water course, even though at times the place where the water flows in ordinary floods may become entirely dry." It was held by the court that the construction of a levee along the banks of the stream, whereby the flood waters were carried on the land of an adjoining proprietor, was a plain invasion of his rights, and that an injunction should be granted. In the case of *Burwell v. Hobson*, 12 Grat. 322, 65 Am. Dec. 247, it was contended that a riparian proprietor might lawfully protect his property from floods by erecting obstructions, though the necessary effect was to turn the water on the land of the adjacent landowner. It was held, "He has no right to build anything which in times of ordinary flood will throw the waters on the grounds of another proprietor, so as to overflow and injure them." In the case of *Webster v. Harris* (Tenn.) 69 S. W. 782, an

injunction was sought to restrain the defendants from interference with riparian rights, and it was held that the rights of riparian proprietors are correlative, and such rights may be protected by injunction.

We conclude that the allegations in the petition to the effect that appellee has filled in the low places in the stream, and is about to construct a levee which will cause the stream to unnaturally overflow the lands of appellant, showed a contemplated invasion of the rights of appellant, and that the petition was good as against a general demurrer.

It was not necessary to allege that the wrongdoer was insolvent or unable to respond in damages. "To protect against constant or frequently recurring injuries from the wrongful diversion of water, equity has jurisdiction concurrent with courts of law, and will enjoin the wrongdoer, without regard to his ability to respond in damages, since a single action at law would not furnish an adequate remedy, and a multiplicity of suits can be avoided by proceeding in equity." *Roberts v. Vest* (Ala.) 28 South. 412; *Railway v. Tait*, 63 Tex. 223; *Railway v. Seymour*, 63 Tex. 347. It is held in the case of *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, that by virtue of the provisions of article 2989, Rev. St. 1895, an action for injunction may be maintained in cases "Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief, or any part thereof, requires the restraint of some act prejudicial to the applicant," although there may be an adequate remedy at law.

The judgment will be reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. BUTLER et al.
(Court of Civil Appeals of Texas. March 11, 1903.)

CARRIERS—SHIPMENT OF LIVE STOCK—INJURIES—MEASURE OF DAMAGES—CONNECTING CARRIERS—EVIDENCE.

1. Where, in an action against a carrier for injuries to live stock, the evidence showed that a delay at C. occurred after the cattle had been delivered to defendant, and defendant did not seek to recover over against the connecting carrier for his failure to notify it when the cattle reached C., evidence with reference to such question of notice was properly excluded.

2. In an action against a carrier for injuries to live stock, an instruction that defendant would be liable for all injuries received on its line, though they might not have developed or been discovered while the cattle were in defendant's custody, was erroneous, for failure to limit defendant's liability to such injuries as resulted from its breach of contract or negligence, and for failure to exempt it from liability for ordinary shrinkage and damage necessarily incident to the shipment, and from inherent weakness or vice of the cattle.

3. The measure of a carrier's liability for cattle dying from injuries in transit, arising from its negligence, is the market value of such cattle at the point of destination.

4. Where an owner of cattle, which died from injuries in transit, sold the same at the point of destination, the amount received therefor should be deducted from damages recovered against the carrier for injuries to the cattle.

Appeal from Brown County Court; R. P. Conner, Judge.

Action by W. A. Butler against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment in favor of plaintiff, the above-named defendant appeals. Reversed.

J. W. Terry and A. H. Calwell, for appellant. West, Chapman & West, for appellees.

STREETMAN, J. Appellee W. A. Butler brought this suit against the Gulf, Colorado & Santa Fé Railway Company for damages to a shipment of cattle, eight cars of which were shipped from San Angelo, Tex., and one from Brownwood, Tex., to East St. Louis, Ill. It was alleged: That the eight car loads of cattle were, prior to the shipment, held in a pasture about 34 miles from San Angelo, and on October 14, 1899, the agent of the Gulf, Colorado & Santa Fé Railway Company at San Angelo agreed to furnish eight stable cars for said cattle, and, relying on said promise, plaintiff drove said cattle to San Angelo, but said defendant failed to furnish the cars, and for several days plaintiff had to hold the cattle in small pastures near San Angelo, where the grass was not good, on account of which they were injured and reduced in weight. That on the 18th of October, 1899, the agent of said defendant notified plaintiff that the cars would be ready on the morning of the 19th, and by his direction plaintiff placed his cattle in said pens about 9 o'clock of said October 19th; but the cars were not furnished until about 12 o'clock that night, and during this time the cattle were kept, without feed or water, in said pens of defendant, causing them to deprecate in weight and value. The shipment was then loaded and carried over the Gulf, Colorado & Santa Fé Railroad to Brownwood, Tex. From there, with the addition of another car, making nine cars, it was carried by the Ft. Worth & Rio Grande Railway Company to Cresson, where it was again delivered to the Santa Fé Company, and by it carried, by way of Cleburne, to Paris, and thence over the St. Louis & San Francisco Road to East St. Louis, Ill. It was alleged that at Cresson and at Cleburne there were unreasonable delays, and that defective cars were furnished, causing injury and damage. The verdict and judgment were against the Gulf, Colorado & Santa Fé alone.

This case was reversed upon a former appeal (63 S. W. 650) on account of error in the court's charge upon the measure of damages. Upon the last trial the court submitted a charge very different from that upon the former trial, and the case is present-

ed in a materially different aspect. The charge of the court upon this trial eliminated all claims for damage while the cattle were held in pastures near San Angelo, and only authorized a finding of damages sustained after the cattle were, by direction of defendant's agent, placed in the stock pens of said company for shipment. This renders unnecessary a discussion of many of the questions raised with reference to this element of damages.

There are several assignments relating to the delay at Cresson, and with reference to these we deem it sufficient to say that the evidence showed that such delay as occurred at that place occurred after there had been an actual delivery of the property to the Santa Fé Company; and, under the facts in evidence, the plaintiff had the right to look primarily to the Santa Fé for such damages as he may have suffered by the delay at Cresson, if such delay was unreasonable, and that there were no pleadings by the Santa Fé against the Ft. Worth & Rio Grande which would authorize them to recover over against that road for failure to properly notify the Santa Fé when the stock would reach Cresson. We therefore hold that, under the condition of the evidence and pleadings, there was no error in refusing the special charges and excluding the evidence offered with reference to this question of notice.

The case must be reversed, however, because of the following paragraph of the court's charge:

"You are further instructed that the defendant, the Gulf, Colorado & Santa Fé Railway Company, would be liable for all injuries to said cattle received on its line, though such injury might not have developed or been discovered while said cattle were in the custody of the said defendant."

This charge does not limit the liability of the Santa Fé to such injuries as resulted from its breach of contract or negligence, but holds it responsible for all injuries. It does not exempt it from the ordinary shrinkage and damage necessarily incident to every shipment of live stock, nor from the inherent weakness or vice of the cattle. This was an interstate shipment, and they were only liable under the contract for such injuries as resulted from their negligence and failure to perform the contract, but, even if they were liable as at common law, this charge would be improper. The remainder of the charge nowhere corrects the error contained in this paragraph, and we cannot say that the jury were not influenced by it to the prejudice of the defendant.

The court's charge contains the following paragraph:

"You are further instructed that if you believe from the evidence that some of the cattle, while in the custody of defendant, the Gulf, Colorado & Santa Fé Railway Company, were so injured that they died while in

transit from San Angelo, Texas, to East St. Louis, Illinois, you will find for the plaintiff the value of the cattle dying from such injuries."

It is contended that the court should have instructed them that the market value at East St. Louis, Ill., was the measure of damages for the cattle that died. This is the correct measure, and while the case would probably not be reversed on account of this error, as the evidence shows the value at East St. Louis to be higher than at any other point on the route, yet it will be better upon another trial to correct the charge in this respect. In this connection we note that the evidence shows that the plaintiff received \$2 per head for the dead cattle at East St. Louis, and, while no question is raised with reference to that upon this appeal, upon another trial it would be well to instruct the jury to deduct from any damages for cattle that died such amount as plaintiff may have received for such dead cattle.

Thirty-two assignments of error are presented by appellant, all of which have been carefully considered, but the views which we have expressed sufficiently indicate our views upon all of the questions involved, without a separate mention of the several assignments.

We find no error, except as above indicated, but for that the judgment is reversed, and the cause remanded. Reversed and remanded.

GIPSON et al. v. MORRIS et al.

(Court of Civil Appeals of Texas. March 20, 1903.)

RELIGIOUS SOCIETIES—GOVERNMENT—RIGHTS OF MAJORITY—PRESUMPTION AS TO RULES—ARBITRARY RULING BY MODERATOR—CONCLUSIVENESS.

1. In an independent religious society having a congregational form of government, and owing no fealty or obligation to a higher authority, the will of the numerical majority of its members will control as to all questions of church government and as to the use of the church property.

2. When a division occurs in an independent religious society during a regular meeting of the society, which leads to a separation into two distinct bodies, the rights of such bodies must depend on which had a majority of the members at the time of the division, unless by the rules governing the society the majority failed to assert its right to control the meeting in the proper manner or at the proper time.

3. A voluntary association will not be presumed as a matter of law to be governed in its deliberations by the commonly accepted parliamentary rules, though there is no showing that it has adopted any other rules.

4. The rule that the announcement by the presiding officer of a voluntary association of the result of a viva voce vote is conclusive, unless a division or a call of the vote is demanded, cannot be invoked in favor of a false and fraudulent announcement, or one that is clearly contrary to the actual result.

5. Where the fellowship of an independent religious society has been withdrawn from a member at a regular meeting of the church confer-

ence, he is no longer a member, and has no vote at a subsequent meeting.

Appeal from District Court, Shelby County; Tom C. Davis, Judge.

Action by R. E. Morris and others against C. H. Gipson and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Bryarly & McKnight and E. H. Carter, for appellants. Blount & Garrison, for appellees.

PLEASANTS, J. Appellees brought this suit to restrain appellants from interfering with the possession and control by appellees of the property belonging to the First Baptist Church of Timpson. The evidence shows that a division in the First Baptist Church of Timpson occurred at a regular meeting of the church conference held on the 2d day of May, 1901, since which time there have been two factions in the membership of said church, each faction claiming to be the First Baptist Church of Timpson. The appellants are the representatives of one of these factions, and the appellees of the other. The division occurred under the following circumstances:

At a regular meeting of the church conference held on Thursday before the first Sunday in April, 1901, the fellowship of the church was withdrawn from appellant Gipson, he having been found guilty, upon charges regularly preferred against him, of violating the rules of the church. At the next meeting of the church conference, held on May 2, 1901, the minutes of the previous meeting were read, and the moderator asked if there were any objections to said minutes. One of the members objected to the minutes on the ground that they were unscriptural. The moderator ruled that no such objection could be sustained, as the only question upon the adoption of the minutes was whether they correctly recorded the proceedings of the previous meeting. From this ruling the member who had made this objection appealed, but the moderator ruled that the appeal was out of order, refused to put the question, and declared the minutes adopted. After considerable disorder the meeting resumed a consideration of the regular order of business, and disposed of the various matters that were brought before it. When the subject of new business was reached in order of business, one of appellants, Tom Reed, moved that the majority then present declare nonfellowship for every one who had voted to exclude the appellant C. H. Gipson. This motion was ruled out of order by the moderator, but Mr. Reed insisted upon its being voted upon. The conference, on motion duly made and seconded, sustained the moderator, and refused to consider the Reed motion. Several other motions were then offered by the friends of Gipson, none of which were put by the moderator to a vote of the conference. After another scene of disorder, a motion

to adjourn was made, and, on a viva voce vote by the conference, the moderator declared the motion carried, and adjourned the meeting. No division was called for, but the friends of Gipson protested against the action of the moderator in declaring the motion carried and adjourning the meeting. The Gipson faction remained in the church after the moderator had declared the meeting adjourned, and reorganized the meeting by electing a new moderator and a new clerk. After some discussion they adjourned until the following week, when they again held a meeting, and effected a church organization which they claim is the First Baptist Church of Timpson. The appellants are the representatives of this organization, and the appellees are the officers and representatives of the old organization. The evidence is conflicting on the issue as to whether a majority of the members of the church present at the meeting of May 2d voted with the appellees in favor of the motion to adjourn, or with the appellants against said motion. There is no evidence that the church had adopted any parliamentary rules for conducting business, nor is there any evidence of what are the parliamentary rules generally observed by deliberative bodies. The First Baptist Church of Timpson is an independent religious society having the congregational form of church government, and owes no fealty or obligation to any higher authority. Such being the character of the church, it follows that the will of the numerical majority of its members must determine the action of the church upon all questions of church government, and control the use of the property of the church. When a division occurs in an organization of this character during a regular meeting of such organization which leads to a separation into distinct and conflicting bodies, the rights of such bodies must depend upon which of the two had a majority of the members of the original organization at the time of the division, unless by the rules governing the method of transacting business adopted by the organization the majority failed to assert its right to control such meeting in the proper manner or at the proper time. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 686; *First Baptist Church v. Port* (Tex. Sup.) 54 S. W. 892, 49 L. R. A. 617; *First Baptist Church v. Port* (Tex. Civ. App.) 55 S. W. 409; *Gipson v. Morris*, 67 S. W. 433, 4 Tex. Ct. Rep. 592.

When the First Baptist Church of Timpson met in regular conference on the 2d of May, 1901, no division had occurred in said church, and the right to determine all questions of church government, and also the right to the possession of the church property, was vested in the membership of said church then present, the exercise of such rights by the church being subject to the will of the majority of the members present, properly expressed. If at that meeting a majority of the members present voted in

favor of the motion to adjourn, the adjournment ended the meeting as a conference of the First Baptist Church of Timpson, and the action of the minority in remaining in the building and reorganizing the meeting could not make the meeting thus reorganized a conference of the First Baptist Church of Timpson. Such reorganized meeting became a distinct and separate body from the First Baptist Church of Timpson, and, by refusing to recognize the governing authority of the majority of said church, forfeited all right to the possession and control of the church property. On the other hand, if a majority of the members present at the meeting of May 2d voted against the motion to adjourn, and the minority, in disregard of the properly expressed will of the majority, declared the meeting adjourned, and left the building, the majority had the right to reorganize the meeting, and, when so reorganized, said meeting became a conference of the First Baptist Church of Timpson, and those persons belonging to the organization effected by said conference are members of and constitute said church, and are entitled to the possession and control of the church property. A stream cannot rise higher than its source, and no action of either of the bodies into which the church became divided on May 2, 1901, had subsequently to said date, can affect the question as to which of said bodies constitutes the First Baptist Church of Timpson.

From what has been said, it is clear that the only issue of fact raised by the pleadings and evidence which should have been submitted to the jury upon the trial in the court below was, which of the two contending factions in the church at the meeting held on May 2, 1901, comprised the numerical majority of the members of the church present at said meeting and voting upon the motion to adjourn? As before stated, the evidence upon this issue was conflicting, the evidence offered by each party supporting the contention that its side was largely in the majority. Such being the state of the evidence, the trial court, at the request of plaintiffs, gave the jury the following special instruction:

"You are instructed that every deliberative body or gathering of persons is and of necessity must be governed by some rules governing its actions in the transaction of such business as may come before it. In event such body has formulated or adopted a certain code of rules for such purpose, then their conduct of business must be governed by such rules as construed by such body in their discretion; and in event such body has not formulated or adopted a code or set of rules for its government, then the commonly understood and commonly accepted parliamentary rules governing deliberate bodies or assemblies must be looked to for such guide and government. In the case now on trial there is no evidence of the adoption by the First Baptist Church at Timpson of any code

of rules for the government of its conference when in session, and therefore such conference, in the transaction of their business affairs, would be governed by common parliamentary rules as generally understood and accepted. The First Baptist Church in meeting assembled in conference at Timpson on May 2, 1901, was a deliberative body, met regularly and lawfully for the transaction of such business as might properly come before it, and R. E. Morris was the proper and legal presiding officer of such body. During the meeting of such deliberative body, if a motion is made and seconded to adjourn, it is the duty of the presiding officer to put such motion to the assembly, and, after the vote of such assembly is taken by viva voce vote, if any member present is not satisfied with the certainty of said vote as thus ascertained, he has the right to demand a division, or a rising vote, or a vote by roll call. But, to secure this division and another vote by rising or roll call, he must make the demand for same before the presiding officer announces the result of the first ballot, and cannot make such demand after announcement of the result of the first ballot by the presiding officer. And, in event any member of such deliberative body so desires, he may, after the chair declares the result, appeal from the chair as to the result, and have a vote of the members on his said appeal from the ruling of the chair; and any action of any deliberative body stands as the same is declared to have been carried or not carried by the chairman, unless rescinded by such assembly by vote of its members in the manner indicated, or by motion to reconsider at some subsequent meeting. Applying these principles, if you find that, during the session of such conference on May 2d, a motion to adjourn was made and voted on by viva voce vote, and there was no division demanded by any member, and the chairman or moderator declared the conference adjourned by a majority vote, and there was no appeal from such declared result, then such ruling of the moderator is binding on the assembly of the question of how the majority voted on the question of adjournment. And on the question of majority herein submitted to you, you may give to the vote as thus ascertained on adjourning, if you find it was thus ascertained, such weight as you think the same entitled to."

This assignment must be sustained. There is no evidence in the case tending to show that the First Baptist Church of Timpson had adopted any rules governing the manner in which the deliberations of the church conference should be conducted, nor is there any evidence as to what are the commonly understood or commonly accepted parliamentary rules governing deliberative bodies. In the absence of such evidence, the trial court could not assume that the church conference was governed by general parliamentary rules, and that, under such rules, when the mod

erator upon a *vive voce* vote declared the motion to adjourn carried, such announcement was conclusive against those voting against such motion, unless a division or roll call was demanded before the meeting was declared adjourned; and it was error to instruct the jury to act upon such assumption. The undisputed evidence shows that the moderator, after the vote was taken on the motion to adjourn, announced that said motion was carried, and declared the conference adjourned, and that no division or roll call was demanded on said motion. Such being the evidence, this charge was in effect an instruction to the jury to find for the plaintiffs. Conceding, for the sake of argument, the correctness of the proposition that courts can judicially know what are the commonly understood and accepted rules by which deliberative bodies are generally governed in transacting the business coming before them, it cannot be held as a matter of law that a voluntary association of persons, when assembled as a deliberative body, are bound by rules which they are not shown to have adopted and of which they may be entirely ignorant. If the church had adopted rules governing the method of transacting its business when assembled in conference, and such rules prescribed that the announcement of the result of a vote by the moderator of the conference could only be challenged by a demand for a division or for a call of the vote, those who opposed the motion to adjourn, having failed to demand a division or a call of the vote upon said motion, should not be heard to say that said motion had not carried, unless it be shown that the moderator falsely and fraudulently made such announcement. The simplest and most expeditious manner of ascertaining the will of any assembly of persons is to call for a *viva voce* vote upon the question before them. The presiding officer of such assembly, whose duty it is to put the question and announce the result of the vote, when such vote is close, may often be mistaken as to the result of the vote, and may unintentionally make an erroneous announcement. The rule which makes the announcement by the presiding officer of the result of a *viva voce* vote conclusive, unless a division or a call of the vote is demanded, should only be applied to cases in which the announcement by such officer is honestly made, and should not be invoked in favor of a false and fraudulent announcement, or one that is clearly contrary to the actual result. No presiding officer should be permitted to arbitrarily or fraudulently defeat the will of the majority of any deliberative assembly by making a knowingly false announcement of the result of a vote, merely because such announcement was not promptly challenged in the manner prescribed by the rules under which the business of such assembly is transacted.

The fellowship of the church having been withdrawn from the appellant Gipson prior

to the meeting of the church in conference on May 2, 1901, he was not a member of the church at that time, and not entitled to vote upon any question that came before that meeting, and, if he voted at said meeting, his vote should not be counted in determining the question of which of the two factions was in the majority when the division in the church occurred.

Because of the error in the charge above set out, the judgment of the court below is reversed, and the cause remanded for a new trial. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. BLANCHARD.*

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—AFFIDAVITS—SUFFICIENCY—DILIGENCE—STATEMENTS OF CONCLUSIONS—IMPROPER CONDUCT OF JURY—COUNTER AFFIDAVITS—APPEAL—BURDEN OF SHOWING ERROR—FAILURE TO CONTEST.

1. Where affidavits of defendant's attorney and a juror, tending to show misconduct of the jury in disregarding special instructions, were opposed by affidavit of plaintiff's attorney and two jurors to the contrary effect, a holding of the trial court that the charge of misconduct was refuted cannot be disturbed on appeal.

2. Where the newly discovered evidence for which a new trial was sought was that of a witness who was stopping at a hotel near the place of the accident which resulted in the action, and other witnesses from the hotel testified on the trial, affidavits which do not show that movant's attorney searched the hotel register, or made any inquiries of the guests there at the time of the accident, do not show sufficient diligence in discovering the evidence before trial to entitle movant to a new trial, although the witness was a transient at the hotel, and gave no information about her knowledge of the accident until after trial.

3. Affidavits in support of a motion for a new trial on the ground of newly discovered evidence, which merely state that diligent inquiry was made of persons likely to know about the matters in suit, and that full investigation was made, and all sources of information searched, but which fail to state any specific thing that was done to discover evidence, are too general and indefinite to support the motion.

4. The burden is on an appellant to show reversible error, and the appellee is not bound to contest the points raised on the appeal.

Miller, Special Judge, dissenting in part.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by L. F. Blanchard against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. K. Lee and J. W. Terry, for appellant. Henderson, Streetman & Freeman, for appellee.

KEY, J. On the 2d day of August, 1901, L. F. Blanchard was riding in a wagon along a public street in the town of Cameron, and,

*Rehearing denied April 1, 1906.

† 2. See New Trial, vol. 37, Cent. Dig. § 310.

when he came to where the Gulf, Colorado & Santa Fé Railroad crosses the street, he found a long train standing on the track, the rear end of which was obstructing most of the street. He undertook to drive across the street, and, while doing so, the train was moved backward, struck the wagon, and caused him to either fall or jump out. On September 9, 1901, Blanchard brought this suit against the railway company, charging that, as a result of the collision referred to, he was seriously and permanently injured, and also charging the defendant with several acts of negligence. In its answer, the defendant charged the plaintiff with various acts of contributory negligence. The case went to trial on November 12, 1901, and resulted in a verdict and judgment for the plaintiff for \$7,000, and the defendant has appealed.

1. The trial court prepared and submitted to the jury a very fair and correct charge; and, in addition thereto, gave all the special instructions (nine in number) requested by the defendant. Nevertheless, some objections are now urged to the court's charge. Without discussing them in detail, we hold that they are without merit, and that the court's charge, as supplemented by the requested instructions given, was as favorable to the defendant as it was entitled to.

2. We also overrule the assignments which complain of the verdict. If the jury gave credence to the testimony submitted by the plaintiff, we cannot say that the verdict is wrong. It is true that the defendant adduced much testimony tending to break down the plaintiff's case, and indicating that he was not seriously injured. But it conflicted with that produced by the plaintiff, and the jury had the right to conclude that the evidence on behalf of the plaintiff was more credible than that offered for the defendant.

The verdict involves findings of fact to the effect that the defendant was guilty of negligence; that the plaintiff was not guilty of contributory negligence; and that, as a direct result of the defendant's negligence, the plaintiff was injured to such an extent as entitled him to recover \$7,000 as compensation therefor. And we hold that there is testimony in the record that sustains all these findings, and the defendant is not entitled to a reversal on account of the objections urged against the verdict.

3. One of the defendant's attorneys made a verified statement to the effect that while he was in company with an attorney for the plaintiff, near the jury room, while the jury were considering the case, he heard a juror say, in substance, that special charges were not to be considered as any part of the law of the case, but merely as embodying the views of the attorneys asking such charges. A juror also made oath that, after the case was submitted to the jury, and while they were considering of their verdict, he did not hear the special charges read or considered,

and that the general charge given by the judge was read and discussed several times.

Contesting these charges, the plaintiff filed affidavits made by the foreman and another juror to the effect that the foreman read each special charge to the jury several times, and that they were considered by the jury as part of the law of the case. Also the plaintiff's attorney, who was referred to by the defendant's attorney, filed a verified statement to the effect that he was for a short time near the jury room with the defendant's attorney, and heard some member of the jury say that a certain charge was signed by the judge, and that others were signed by the attorneys for the defendant, but did not hear the other statements which the defendant's attorney said he heard.

Thus standing the testimony on the subject, the trial court may have held that the charge of misconduct against the jury was refuted, and we cannot say that such holding was erroneous.

4. The refusal of the court below to award the defendant a new trial on account of newly discovered evidence is assigned as error, and that assignment is strenuously urged in the brief and argument submitted for the appellant.

After giving the question thorough consideration, a majority of this court have reached the conclusion that the showing of diligence to procure the testimony before trial was not sufficient, and that, for that reason, the motion for a new trial was properly refused. The new witness is a Mrs. Mullen, and her affidavit, as well as affidavits made by J. M. Ralston and J. W. Evans, were filed with and in support of the motion for new trial.

Mrs. Mullen's affidavit states: "On the 2d day of August, 1901, I was in Cameron, Milam county, Tex.,—and stopped at the Ruby Hotel, and in the evening of said day, while standing in the front door of said hotel, about seventy-five yards from where the railroad crosses Belton street just below the jail, I saw a man attempt to cross said railroad with a canvas-top hack, and, before his hack got across, I saw the caboose, which was attached to a train of cars, come back up against the hind part of the hack, and pushed or shoved the hind part of said hack around and off the track, but did not turn it over. Then the man who was in the hack got out of the hack at the front end, and when he jumped out he lit on his feet, and it is my impression that he did not fall at all, if at all not lower than his knees, and was up in an instant. He did not fall down. I was looking right at him, in plain view of the whole affair. He did not get out of the hack at all until the hack had been pushed off the track, and the end of the caboose had passed the hack. The hack was stopped and still, at the time he got out of the hack, he held to the lines and was working around there after he got out, and I did not think of his being

hurt after seeing the way he got out of back, and the manner the caboose pushed the hack around, so I paid no more attention to the affair and heard nothing about it. I left for my home on the 2:30 train Sunday morning after the occurrence on Friday, and the next time I heard any more about it was when I went to Cameron as a witness in the Moore Case, and the jury had rendered a verdict in the case. I heard Mr. A. S. Ruby speaking about the case having been tried, and I then remarked to Mrs. Ruby that I had seen that accident when I was there before. I did not mention that matter to any one before the trial of the case; thought nothing more about it until I heard about the trial having been had. I never mentioned these facts to any of the railroad company's agents, attorneys, or employes until after the trial of said cause, and the first they could have known of my seeing the accident was after the trial, and after my conversation with Mr. and Mrs. Ruby. I am a stranger in Cameron, and was never there except on these two occasions, and was there upon these two occasions as a state witness in the Moore case, and I had no communication from anyone from Cameron or Milam county between these two visits, and told no one about having seen the accident until after the trial of said case."

J. N. Ralston's affidavit states: "I was local attorney of defendant at Cameron, and in connection with J. W. Evans, claim agent, was intrusted with the duty of getting up all the facts and witnesses in regard to how the accident occurred, and I did make diligent inquiry to find out names of all witnesses who saw the accident or knew anything about it, and did not hear anything of Mrs. M. R. Mullen until after trial of this case."

J. W. Evans' affidavit states: "I am now, and was at the time that the accident occurred to L. F. Blanchard, claim agent for defendant, and it is my duty and business to investigate the facts in reference to any claim made or likely to be made against the said company for damages; and, when the accident in question occurred, I, in the discharge of my said duties, came to Cameron, the third day after it occurred, to investigate the facts, and learn and ascertain what person or persons saw the accident or knew the facts about it; and from that time on to the day of the trial of the case I was constantly investigating and inquiring of all persons I had any intimation knew of any facts or testimony bearing on the case; and I, in connection with J. N. Ralston, the company's local attorney, had full charge of the investigation of the facts and preparing the company's defense in this cause. I did investigate the same as fully and as thoroughly as possible, and did develop all sources of information that came to my knowledge, and did locate and talk to all witnesses that I could hear of, but, notwithstanding all this, the defendant was not advised and did not know that Mrs. M. R. Mullen knew and

would testify to any facts material to the defense of this case, or would testify to the facts set forth in her affidavit attached to the defendant's motion for a new trial, until after the said case was tried and verdict rendered. That, as shown by her said affidavit, she did not live in Cameron, but was a stranger there, only a strange guest at a hotel, and left Cameron two days after the accident, and went to her home near Copperas Cove, and did not return to Cameron until after the trial of this cause. I did not know, and had no means of finding out the fact, that she knew anything about the accident in question, or that she knew of any of the facts set forth in her affidavit until after the trial."

The defendant knew from information derived from other sources, as well as from the averments in the plaintiff's petition, that the accident which gave rise to the plaintiff's suit occurred at a particular place and on a particular day. The record does not show when citation was served, but the defendant's original answer was filed October 22, 1901, and it is not shown or claimed that the case was tried so soon after the defendant had notice of the filing of the suit as not to afford reasonable time for investigation. As soon as the defendant was served with official notice of the pendency of the suit, the law placed upon it the duty of inaugurating and prosecuting diligent search to ascertain (1) who was near enough to have seen the collision, if looking, (2) who of the persons so situated were looking and saw it, and (3) what they did see. Now, when one is charged with the duty of ascertaining who saw a particular transaction which occurred in broad daylight and in sight of and near a house, ordinary intelligence and prudence would suggest that the house probably had inmates, and that one or more of them might have seen the transaction. The very existence of a house near by and in plain view of the scene would suggest that people were there; because, as a general rule, houses are occupied by people. But the record indicates that the defendant had actual knowledge, before the trial, not only of the existence and proximity of the house where Mrs. Mullen was stopping, but of the fact that it was occupied, and that its occupants, if at certain places about the house, could have seen the accident, because it used Mr. Ruby, the proprietor of the house, as a witness, and he stated that he saw the accident from his front gallery, where he was sitting. Therefore, having obtained one witness at that house, who, while there, saw the collision, surely reasonable diligence required the defendant to ascertain, if it could, the names of the other inmates, and, if they could be found, interview them.

But we are told that Mrs. Mullen was not a member of Mr. Ruby's family, nor a regular inmate of his house; that she was a stranger, and merely a guest at a hotel, and

left soon after the accident occurred. This is all true; but the very fact that the house was a hotel ought to have suggested to a careful investigator that guests might have been there. And, as a general rule, hotels keep registers that disclose the names and addresses of temporary guests. Besides, in this instance, the probabilities are that, if seasonable inquiries had been made of the landlord, the defendant would have ascertained that Mrs. Mullen was at that time a guest at the hotel. But it is also shown that Mrs. Mullen, prior to the trial, kept a silent tongue, and told no one what she knew. That fact, however, can afford no excuse for the defendant. In the exercise of proper diligence, it could not wait until it heard that she saw the affair before exerting itself to discover what she knew. She being within a hundred steps of the collision, if by reasonable diligence the defendant could have ascertained that she was there, it was its duty so to do, and to exercise like diligence to discover what she knew in regard to it, which would involve a direct inquiry of her.

These observations are sufficient to indicate our views as to the character and extent of investigation that should have been made to meet the requirement of reasonable diligence, and they are supported by authorities. In *G. C. & S. F. Ry. Co. v. Reagan* (Tex. Civ. App.) 34 S. W. 793, a new trial was sought on account of newly discovered testimony of one Work and his wife, and the Court of Civil Appeals at Galveston, in refusing to revise the action of the trial court in not granting a new trial, said: "The affidavits of defendant's agents who had charge of the suit show very considerable efforts on their part to discover such testimony as that presented in the affidavits. Having previously done all that could have been required of them, they propounded interrogatories to Mrs. Reagan, and caused her depositions to be taken March 17, 1894, and requested her to state the names and addresses of all persons whom she knew or with whom she had talked about her injuries while at Cameron; and the witness, in reply, gave the name and residence of Mr. and Mrs. Melson, and the sister of the former, living with them, adding that she knew no one else at or near Cameron. Defendant then caused inquiries to be made in that neighborhood to discover witnesses who might possess knowledge upon the subject, but made no inquiry of Melson, his wife, or sister. Work and wife left that neighborhood in December, 1893, and hence they could not have been found there at the time search for witnesses was made. But it appears that Mrs. Work, during Mrs. Reagan's stay at Melson's, was engaged in attendance on Mrs. Melson in such a way as to make it probable that an inquiry of any member of that family would hardly have failed to disclose the existence and whereabouts of the witness. Besides, it appears that Mrs. Melson's depositions were

taken in the case, and no effort seems to have been made to elicit information as to any other witnesses who might possess knowledge on the subject. It further appears that Walpole, who was produced as a witness on the stand, lived in 1893 on the same place in Milam county on which Work and wife then lived; that they all left there in December, 1893, and all are found in Palestine at the time of this trial. It is to be presumed that Walpole knew of the presence of these parties at Melson's when he was there, and when he was found he could, if asked, have given information as to the probability of their having knowledge of the same kind as that which he possessed. These are circumstances which bring in question the sufficiency of the diligence used to discover such evidence as that of the Works." The Supreme Court refused a writ of error in that case, which gives it standing as final authority.

In *The Chicago & Eastern Illinois Ry. Co. v. McKeehan*, 5 Ind. App. 124, 31 N. E. 831, a new trial was sought under a statute authorizing new trials after the court has adjourned for the term. The suit was to recover the value of two horses killed by a train, and in the course of the opinion the court said: "In the original complaint it was alleged that the horses entered upon the railroad at a point where it ought to have been securely fenced, but was not. At the trial, appellee proved that he was in possession of lands lying upon both sides of and adjoining the railroad right of way, and he had his horses pasturing in a field adjoining the railroad; that they were killed at a highway crossing near the pasture field, by a train of cars on appellant's road, at about 5 o'clock a. m. on the 5th of January, 1891. He also introduced evidence tending to prove that the fence inclosing the right of way was insecure, and the horses went over it upon the railroad, and wandered along the track some distance to a cattle guard at a public highway crossing; that a north-bound train on appellant's road frightened the animals, and caused them to jump over the cattle guard into the highway; and a south-bound train, a few hours later, collided with and killed them at the crossing. Appellant's theory at the trial was that the animals did not enter upon the railroad through the right of way fence, but they escaped from the pasture field into the highway at a point some distance from the crossing, and wandered along the highway to the crossing where they were killed. Evidence was introduced tending to support this theory. After the adjournment of the term of the court at which the trial was had, appellant discovered that Rufus Weese and his wife saw the horses escape from the pasture field into the highway, several hundred yards from the crossing, at about 4 o'clock on the evening before they were killed, and saw them grazing along the highway as late as 8 o'clock on said evening.

Weese was the first to discover the death of the animals, and notified appellee thereof. He lived about 100 rods from and in plain view of the crossing, and on the opposite side of the highway from the field in which the horses were pasturing. Appellant showed, by affidavits of its claim agent and a section foreman, that they exercised diligence in attempting to discover evidence by visiting the location of the collision a number of times, and carefully examining the surroundings, and by interviewing every person in that vicinity they had reason to suppose knew anything about the matter. They testified to having consulted with a large number of persons, among them the road supervisor, but they did not learn the names of the persons so consulted, nor did they learn anything that would lead to the discovery of the fact that Weese and wife had possession of information relevant to the controversy. They did not interview Weese or his wife, but gave as a reason for not so doing that they had no reason to believe those parties knew anything about the case, and, further, that Weese and wife had agreed with each other to conceal their information from the attorneys, officers, and agents of appellant, and it would have been useless to have consulted them. Weese and wife testified in their affidavits to the fact that they agreed with each other to conceal their information from appellant, because appellee was their neighbor, and they were averse to going to court as witnesses against him, and they did so conceal such information until after the trial, when Weese informed one of appellant's servants, supposing that the case was ended. At the original trial evidence was introduced tending to prove that the horses wandered along the highway from the direction of Weese's house to the crossing. Also two witnesses testified, in behalf of appellant, that appellee admitted to them that the horses escaped from the field into the highway, and then went upon the railroad at the crossing and were killed. It is the duty of every litigant to be active and vigilant in preparing for the trial of his cause, and these qualities would prompt him to search for evidence in the place where, from the nature of the controversy, it would be most likely to be found. The law treats with disfavor all attempts to reopen causes upon the ground of newly discovered evidence, and never permits it to be done except upon a clear and unequivocal showing that the appellant was diligent in his efforts to procure the evidence for the first trial. It will be presumed that the litigant could have discovered the evidence in due time by the use of proper means, and this presumption can only be rebutted by a satisfactory showing to the contrary, particularly stating the means employed. It is not enough to allege in general terms that diligence was used. *Hines v. Driver*, 100 Ind. 315; *Beers v. Flock*, 2 Ind. App. 567, 28 N. E. 1011. In the case before us, appel-

lant was in quest of evidence to prove that appellee's animals went from the pasture field into the highway, and not upon the railroad. Their presence in the highway, at a distance from the crossing, a short time before the injury, would have been a strong circumstance supporting that view. Tracks at the crossing, as shown by the testimony of appellant's witnesses at the trial, indicated that the horses had entered upon the highway in the vicinity of Weese's house. Weese lived in a situation which would enable him, if any one, to know of the horses being in the highway, and yet he was not applied to for information until after the trial. Here was an utter lack of diligence, a failure to investigate in the place where, from the nature of the surroundings, information would be most likely to be discovered. This delinquency cannot be excused upon the ground that Weese and wife had agreed to conceal their knowledge from appellant. It will not do to speculate upon what these parties might have done in the event they had been consulted, but it was appellant's plain duty to have interviewed them, and then, if they had disclaimed any knowledge of the matter, appellant would not have been in ignorance through its own fault. The agreement of Weese and wife to conceal their knowledge from appellant can only be construed to mean that they would not voluntarily disclose it. We cannot presume, in order to relieve appellant from the imputation of negligence, that they would have willfully falsified respecting the occurrence."

In *East v. McKee*, 14 Ind. App. 54, 42 N. E. 371, this rule is announced: "Diligence in the search of evidence means more than simply the act of making inquiry of those with whom we come in contact as to what they may know in reference to the matter in controversy; it means thorough and untiring search in the immediate vicinity of the place where the occurrence took place, and inquiry of those who were known, or by reasonable search could be found, who were present or in a position where they might have known the facts."

It is also settled law in this state that, even in an application for a continuance, a statement that the applicant "had made or caused to be made diligent inquiry and search to ascertain the residence of a witness" is too general, the court holding that the application should have stated in detail what had been done, and that the statement quoted was a mere conclusion of the applicant. *Hogan v. Railway Co.*, 88 Tex. 679, 32 S. W. 1035. The same, if not a more rigid, rule applies when a new trial is sought on account of newly discovered evidence. *Ry. v. Forsyth*, 49 Tex. 178; *Bourland v. Skimnee*, 11 Ark. 671; *Toney v. Toney*, 73 Ind. 34; *Hines v. Driver*, 100 Ind. 323; *East v. McKee*, 14 Ind. App. 45, 42 N. E. 368; *Moody v. Priest*, 69 Iowa, 23, 28 N. W. 415.

In *Hines v. Driver*, supra, it is said:

"Where the diligence used is alleged to have consisted in making inquiries, the time, place, and circumstances must be stated. The reason for this rule is obvious. The applicant for a new trial must rebut the presumption existing against him, and this he can only do by showing that he made inquiries in the proper quarter and in due season. In speaking of the necessity of showing what inquiries were made, and their character, it was said in *Toney v. Toney*, 73 Ind. 34, that 'the general statements of the appellant in his affidavit that he had been diligent in making inquiries of such as he deemed likely to know anything in relation to the case are not sufficient to overcome the manifest presumptions against him arising out of the suggestions above mentioned.'"

In *Moody v. Priest*, supra, the applicant stated "that he made diligent inquiry of all persons likely to have knowledge or information in relation to the matters in suit," and that statement was held to be too indefinite.

The rule announced in the cases cited is believed to be correct, and an analysis of the application under consideration will show that it fails to meet the requirements of that rule. For instance, take Mr. Ralston's statement as to diligence, and there is an entire absence of specification and detail as to what he did in searching for testimony. In fact, it would be difficult to frame a statement of diligence in more general terms than he has done. As to Mr. Evans, while his affidavit is longer on the subject of diligence, it also deals in generalities and conclusions, and is equally barren of details enumerating exactly what he did to justify his sweeping conclusions. His affidavit, as well as Mr. Ralston's, will be searched in vain for a specific statement that the Ruby Hotel register was examined, or inquiries made of the landlord, to ascertain if any guests were there on the day the accident occurred. If such investigation was in fact made, it could easily have been stated; and, if it was not made, there was a lack of reasonable diligence.

Therefore, conceding that the application was in other respects sufficient, we conclude that the showing made as to diligence was so indefinite and unsatisfactory as to justify the trial court in refusing to award a new trial on the ground of newly discovered evidence.

In reaching this conclusion, we have not overlooked the fact that this point has not been urged in this court by appellee's counsel. But an appellee is not compelled to appear by brief or otherwise in this court, and, when he does so, he should not be held to concede the correctness of every proposition of law asserted by his adversary and not specifically denied by him. The burden rests upon the appellant to show reversible error, and, if we conclude that a ruling complained of was correct, though for a different reason than that assigned by the appellee, it is our

duty to sustain that ruling. And this is particularly true when a new trial is refused, and that ruling is complained of; because the ending of litigation is a matter in which other suitors and the public have an interest. *The Ready Roofing Co. v. Taylor*, 15 Blatchf. 98, Fed. Cas. No. 11,613.

Our conclusion is that no reversible error has been shown, and therefore the judgment will be affirmed. Affirmed.

STREETMAN, J., having been of counsel, did not sit in this case.

MILLER, Special Judge (dissenting). A majority of the court are of the opinion that by proper inquiry appellant would have ascertained before the trial that Mrs. Mullen, the new witness, saw the accident. I am unable to concur in this conclusion.

Mrs. Mullen—a stranger in Cameron—was temporarily stopping at a hotel near where the accident happened, and left the second day afterwards for her home in another county, where she remained until called back to Millam county as a witness in a criminal case after the trial of the present case. The plain effect of her affidavit is that she told no one in Cameron, and no one there knew, that she had seen the accident, until on her return she heard the hotel proprietor, Mr. Ruby, talking about the case having been tried. Then for the first time she let it be known that she saw what had occurred. If she speaks truly in saying no one in Cameron before that knew that she had seen the collision, appellant could not have learned from any one in Cameron that she would be a witness.

It appears from the affidavit of appellant's claim agent that the investigation of the accident was begun by him on the third day after it occurred, and from then to the trial he did "locate and talk to all witnesses he could hear of," and inquire of all persons that he "had any intimation knew of any facts or testimony bearing on the case," but he did not hear anything about Mrs. Mullen; and, from the affidavit of the local counsel of appellant, it appears that he did make inquiry "to find out the names of witnesses who saw the accident or knew anything about it, and he did not hear anything of Mrs. Mullen until after the trial of the case." While the persons talked to and inquired of for the names of those who saw the accident or knew anything about it are not enumerated in the affidavits, Mr. Ruby, besides several other eyewitnesses, were evidently among them, because they were discovered and called by appellant's agent to testify at the trial. The language of these affidavits, though general, is not fairly susceptible of any other construction, and consequently appellant is entitled to the benefits of such construction. It therefore follows, as well from these affidavits as from the one by Mrs. Mullen, that no inquiry at Cameron or about the scene of

the accident from the time appellant begun its investigation until the trial—a period of about three months—would have led to the discovery of the new witness.

But it is contended that appellant's agent investigating the facts should have examined the hotel register, or inquired of the proprietor, to get the names and addresses of every one stopping there, because the hotel was in sight of the place of accident; and that he either should have written to each of such persons, or sent some one to talk with them to find out if, perchance, some one of them did not see the occurrence; and this, too, when such guests, though having apparently full opportunity to do so, had given no intimation to any one that they had ever heard of or seen the collision. It does not seem to me that the Reagan Case and other authorities relied upon in the majority opinion support this view. In that case defendant's attention was specially directed to Mr. and Mrs. Melson, as persons with whom Mrs. Reagan stayed at Cameron, and with whom she consequently had probably talked about her injuries. Mrs. Work, on account of whose testimony, a new trial was sought, was engaged in attendance upon Mrs. Melson, while Mrs. Reagan was stopping there, and so had an opportunity of observing whether Mrs. Reagan appeared to be injured. Defendant took Mrs. Melson's deposition, but did not ask her if any one besides herself had observed Mrs. Reagan while at her home, and defendant further omitted to inquire of its witness Walpole, who was at the trial and knew of the presence of Mrs. Work at Mrs. Melson's while he was there, as to who was there and had an opportunity of seeing Mrs. Reagan while she stayed there. Inquiry of either Mrs. Melson or Walpole as to who else besides themselves knew what they knew would have led to the discovery of Mrs. and Mr. Work, and the court, therefore, held that failure to make such inquiries was a lack of diligence on the part of defendant in the Reagan Case.

But from what witness in the present case could appellant, by the most searching questions, have learned that Mrs. Mullen probably saw the accident in question? Inquiry of those at the hotel with whom she had communicated would not have availed anything. The fact that she said nothing to any one about the accident, although remaining at the hotel for two days afterwards, supported the inference that in all likelihood she knew nothing about it. Any guest who had seen the accident might naturally have been expected to mention it to some one, and defendant's claim agent who questioned Mr. Ruby, the proprietor of the hotel, who did see it, if he knew of any one else who saw it, might reasonably accept his statements without sending some one after, or writing to, every traveler residing however distant who happened to be on that day registered

at the hotel. If the list of transient guests was a long one, and their residences in remote quarters of the country, as might on particular occasions well be the case, the rule laid down by the majority would make the preparation of causes for trial a more difficult and expensive proceeding than, in my opinion, is necessary or practical, and ordinarily such efforts would be without any compensating results, for the chances of any particular guest having seen the accident would be small, and, if he saw it, of not mentioning it to any one, quite remote.

Appellant in the present case had only about three months in which to procure its evidence, while in the Reagan Case the court, referring to the long lapse of time before the trial for preparation, said: "When the time and opportunity for preparation have been great, the more complete should be the showing of diligence, and of the importance of the desired testimony." I do not think any laches can be imputed to the appellant for failing to learn of Mrs. Mullen as a witness before the trial.

Appellee's counsel do not rely in their brief upon the point so far discussed, but insist that the newly discovered evidence is merely cumulative, and for that reason furnishes no ground for a new trial.

Appellee testified that in consequence of the collision of the moving car with his wagon he was knocked out, and "sorter wrenched around," and in falling his hip and side struck the ground, which threw him back and wrenched him around; that, after he got up, he went to his horses and caught them by the bits, and the next thing he remembered he was standing leaning over, and his back was paining him. The testimony in his behalf was to the effect that as a result of the collision he received injuries of a very serious and permanent nature.

It is in evidence, on the other hand, that shortly before appellee got to the crossing, and while he was driving at a rapid trot, the front wheels pulled out from under his wagon, causing him to pitch forward some distance, and fall pretty hard on his hands and knees. The weight of the testimony tended, in my opinion, to support appellant's contention that appellee's injuries were not serious or lasting, and that, such as they were, they were more likely due to the first fall than to the effect of the collision.

Several eyewitnesses to the accident at the crossing were called by appellant, and gave their version of the occurrence, but from the vagueness of their testimony they left it uncertain as to whether appellee was knocked out of his wagon by the impact of the car, or whether he fell or jumped out, and as to what part of his body struck the ground. None of these witnesses said anything as to whether the wagon was in motion or had come to a standstill when appellee left it. No reason is given in the affidavit for a new trial why these witnesses were

not examined by appellant's counsel upon this last point, and since the fact, if true, as stated in Mrs. Mullen's affidavit, that the wagon was standing still apparently, might have been shown by some of them, a new trial to establish that fact by a new witness should probably be denied for lack of diligence in not proving it by the witnesses at the trial, who, so far as the record discloses, might have testified on the subject. Walker v. Brown, 66 Tex. 556, 1 S. W. 797.

But the proposed new testimony of Mrs. Mullen, an apparently credible witness, relates to other subordinate facts that have an important bearing on the main issue in the case. The effect of her affidavit is that the appellee was neither knocked out nor fell out of the back as a result of the jar or collision, but that he voluntarily got out of the front end by jumping, and in so doing he "lit on his feet," and, if he fell at all, it was not lower than his knees; that from the way in which he got out, and the manner in which the car pushed the back around, he was so evidently not hurt that she paid no further attention to the matter.

If a jury should believe this apparently disinterested witness rather than the appellee—and it is their peculiar province to decide controverted issues of fact—it is in the highest degree improbable that they should find that appellee was injured in the manner and to the extent found in the first verdict. He could not reasonably have received the serious and permanent injuries he complained of in jumping out of the front end of his back and alighting on his feet, when that end, as the other witnesses testified, was, as the result of the collision, on the ground. If he did so alight, his injuries must almost necessarily have resulted from his first fall a few minutes before, when he pitched forward and landed pretty hard on his hands and knees. Mrs. Mullen's affidavit, if accepted as true, almost conclusively excludes the theory upon which appellee recovered.

If no laches can be imputed to appellant in not having Mrs. Mullen at the trial—and her evidence is so conclusive that it will probably change the verdict upon another trial—does not common justice demand that appellant should have an opportunity of submitting it to a jury? To hold otherwise in this case, where the verdict is against the weight of the testimony, would be to practically deprive a litigant of his day in court. Wolf v. Mahan, 57 Tex. 175. The rule against allowing new trials on account of newly discovered cumulative evidence does not apply in such cases. Mitchell v. Bass, 26 Tex. 372; Ry. Co. v. Forsyth, 47 Tex. 171; Ry. Co. v. Barron, 78 Tex. 425, 14 S. W. 698; Ry. Co. v. Reagan (Tex. Civ. App.) 84 S. W. 798. As a general principle, that rule is salutary in order to prevent the needless protraction of litigation and to enforce the diligent preparation of causes for trial, and, ordinarily, it

imposes no undue hardships upon litigants, because such evidence is not likely to bring about a different result. But the rule is not to be so extended or inflexibly applied as to defeat the ends of justice. "And, after all," says the court in *Parsons v. L. B. & B. Street Railway (Me.)* 52 Atl. 1007, "while it is important to have the general rules in regard to the granting of new trials upon this ground, which may be known to the profession, and by which the court will be governed as far as practicable, each case differs so materially from every other that the decision of the question as to whether or not a new trial should be granted in any particular case must necessarily depend, to a very large extent, but, of course, within the limits of such general rules, upon the sound discretion of the court, which will always be actuated by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done."

Our statutes provide that new trials may be granted "for good causes," and, as stated by Lord Mansfield in *Bright v. Eynon*, 1 Burr. 395, "the reasons for granting new trials must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."

In *Railway Co. v. Boon* (Tex. Sup.) 1 S. W. 632, the verdict was upon conflicting testimony, and a new trial was denied on the ground that the new testimony was cumulative. The court, however, added, "Nor can it be said that it would probably change the result of the suit on another trial."

In the Reagan Case the court observes: "The evidence to procure which the new trial is sought is not of a conclusive nature, nor can we say it would or might change the result, if another trial were had and it were produced."

Where the additional testimony to the same fact leaves it still doubtful, a new trial should be denied on the ground that the testimony is cumulative, but, if the new evidence is sufficient to render clear that which was before a doubtful case, it is not, within the meaning of the law, cumulative, and in such cases justice and precedent require that it should be submitted to the jury. 14 Ency. Pl. & Prac. 821; *Ellis v. Ginsburg*, 163 Mass. 146, 39 N. E. 800; *Keet v. Mason*, 167 Mass. 154, 45 N. E. 81; *Berberich v. L. B. Co. (Ky.)* 46 S. W. 692; *State v. Stowe*, 3 Wash. St. 206, 28 Pac. 337, 14 L. R. A. 609; *Anderson v. State*, 43 Conn. 519, 21 Am. Rep. 669; *Kelster v. Rankin* (Sup.) 54 N. Y. Supp. 275; *Solowye v. Hazlett* (City Ct. N. Y.) 71 N. Y. Supp. 486; *Parsons v. Railway (Me.)* 52 Atl. 1007; 3 *Graham & Waterman on New Trials*, 1064.

While the new evidence in the present case is of the same general character as the testimony of some of appellant's witnesses, it furnishes some additional grounds in support

of its defense. The proposed testimony is more than a simple repetition in substance and effect of what was before testified to. It is distinct and positive evidence of the facts and circumstances left in doubt by the former testimony, and which, if established inferentially, supports appellant's main contention. The fact for determination of the jury was whether appellee was seriously or permanently injured by the collision, and the new evidence establishes subordinate facts not positively and distinctly before in evidence, which, if true, effectually excludes the possibility that he was so injured. In my opinion, the new evidence is not, within the meaning of the best-considered authorities, entirely cumulative.

Appellee suggests, as a further reason for refusing a new trial, that appellant's counsel declined to promptly inform his counsel of the name of the new witness, or to give them an opportunity of getting from her a counter affidavit, or of calling her before the trial court for cross-examination. It appears that appellee's counsel learned from the opposing counsel, about a week before the motion for new trial was filed, that such motion would be made upon the ground of newly discovered evidence, but was unable, until the day before the motion was filed, to get from them the name of the new witness. The witness lived in an adjoining county, and did not give her affidavit until a day before the motion was filed. Appellee's counsel was given the motion before it was filed, and on the day the affidavit of the new witness was obtained. This was on the 5th of the month, and the court did not adjourn for the term until the 9th. I do not find in these circumstances any intention to deprive appellee's counsel of a chance to inquire into the facts stated in the affidavit.

I am of the opinion that the refusal of the trial court to grant a new trial on the ground of newly discovered evidence was erroneous, and that the judgment of that court ought to be reversed.

LOCHRIDGE v. CORBETT et al.

(Court of Civil Appeals of Texas. March 21, 1903.)

EJECTMENT—EVIDENCE OF TITLE—SECONDARY EVIDENCE—PROBATE PROCEEDINGS—RECITALS IN DEEDS—JUDGMENTS—ESTOPPEL BY JUDGMENTS—BONA FIDE PURCHASERS—LACHES—APPEAL—HARMLESS ERROR.

1. In ejectment, where plaintiff claimed title under conveyances from the original owner of the headright certificate, and defendant claimed under a conveyance from heirs of the original owner, and defendant was in possession, a finding by the trial court that defendant's vendors were not shown to be heirs of such owner was, if error, immaterial.

2. In ejectment, secondary evidence is admissible on the issue of transfer of title, after proof of death of all parties having knowledge of the alleged transaction, and proof of search for lost original papers.

3. In ejectment, the inventory and appraise-

ment of the estate of a grantor in plaintiff's chain of title, showing that the headright certificate to the land was inventoried and appraised as a part of the estate, and the order of the court authorizing and approving the sale of the certificate, and the administrator's deed reciting its purchase by his decedent from the original owner, though they are not binding on the heirs of the original owner or their grantees, nor are the declarations evidence of the truth of the matters stated, are admissible in evidence as muniments of title and declarations of ownership.

4. An unlocated land certificate is a chattel passing by verbal sale and delivery, long-continued possession of which under a claim of right, attended with acts of dominion and control, may be sufficient, after witnesses of the supposed sale are dead, to support the presumption of a sale.

5. In ejectment, plaintiff offered in evidence a judgment in favor of a grantee from a grantor in plaintiff's chain of title, establishing title in such grantee to a part of the lands covered by the headright certificate under which plaintiff's lands were also located, against the heirs of the original owner of the certificate, under whom defendant claimed. Plaintiff's grantor was not vouched in the action to warrant title. Held, that the judgment, lacking mutuality, in that plaintiff's grantor was not a party, would not operate as an estoppel on defendant.

6. The judgment should have been admitted as an assertion of title, under the same certificate as that under which plaintiff claimed.

7. One who seeks to establish title to lands against a purchaser under conveyances from the original owner of the headright certificate, under which the lands were located, on the ground of bona fide purchase from the heirs of such owner, must establish the fact that they were the heirs.

8. The rights of one who has acquired a legal or equitable title to lands cannot be barred by lapse of time, unaccompanied by adverse possession.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by H. M. Lochridge against W. C. Corbett and others. From a judgment for defendants, plaintiff appeals, and defendants prosecute cross-assignments of error. Reversed.

Jacob C. Baldwin, for appellant. Rowe & Rowe, for appellees.

GILL, J. By this action appellant sought to establish his title to the Samuel Young survey of land in Harris county, and to recover possession thereof from the appellee W. C. Corbett. Judgment by default was rendered against other parties made defendants, but Corbett answered by general denial, plea of not guilty, and limitation; and, in a trial before the court as to him, judgment was rendered that appellant take nothing and pay the costs. Lochridge has appealed and assigned errors.

Appellant claims under an alleged purchase of the land certificate from Samuel Young, the original grantee, connecting himself with the alleged purchaser, as will hereinafter appear. Appellee claims under the alleged heirs of Samuel Young, with whom he connects by mesne conveyances. It thus appears that if appellant has established a sale and transfer of the certificate from Samuel Young, as al-

leged, he should be permitted to recover; no title by limitation being shown in appellee. If such transfer has not been shown, and appellant has not been prevented from establishing the fact by some erroneous ruling of the court, the judgment of the trial court is right, and should be affirmed. This being the sole issue, and Corbett being in possession, the finding of the court that his vendors were not shown to be the heirs of Young, if error, is immaterial.

On the 23d day of November, 1838, the board of land commissioners of Harrisburg county issued to Samuel Young a second-class headright certificate No. 1026, for one-third league of land. The certificate recited that Young personally appeared before the board on the date named, and made the proof required by law to entitle him to its issuance. The original certificate was, subsequent to 1852, located on 681 acres of land in Washington county, Tex., and the certificate returned to the land office. Thereupon, on December 1, 1858, there was issued in the name of Samuel Young certificate No. 396 6/403, for the unlocated balance not appropriated by the original certificate. The proof admitted does not disclose who located the certificate in Washington county, nor furnish any history of the land since its location. As to the certificate for the unlocated balance, the name of G. W. Crawford appears beneath the file mark thereon, and the same was located in Harris county upon the land in controversy. It is not shown who procured this location, but the patent issued in the name of Samuel Young was delivered to G. W. Crawford. Its date is 1861. The significance of the appearance of Crawford's name in these connections will appear from the following: Plaintiff adduced in evidence a deed from the administrator of Cyrus T. Ward, deceased, to G. W. Crawford, purporting to convey to him, as purchaser at a public sale thereof, certificate No. 1026, issued to Samuel Young for one-third league of land. This deed was dated November 11, 1852. On May 25, 1868, George W. Crawford deeded to Isaac P. Lochridge the land in controversy in this suit, describing it as "survey No. 1032 by virtue of certificate No. 396 6/403 issued by the commissioner of claims on the 1st of December, 1838, for the unlocated balance of headright certificate No. 1026 issued by the board of land commissioners of Harrisburg county on November 2, 1838, * * * the same being a portion of the headright of Samuel Young, the certificate having been transferred by Young to Cyrus T. Ward and by the administrator of Ward to me [G. W. Crawford] November 11, 1852, and by me located and patented February 8, 1861." On the 1st day of February, 1898, I. P. Lochridge conveyed the land to appellant. It thus appears that appellant's chain of title is perfect, if by the proof admitted it is made to appear that Samuel Young transferred the certificate to Cyrus Ward. It should be stat-

ed in this connection that by proof of death of all parties having actual knowledge of the alleged transactions, and proof of search for lost originals, the proper predicate was laid for the introduction of secondary evidence on the issue of the transfer.

There are two questions presented for our consideration upon this appeal: First. Did the court err in holding that the evidence admitted was not sufficient to establish prima facie a transfer of the certificate from Samuel Young to Ward? Second. Did the court err in excluding evidence proffered by appellant, the exclusion of which is complained of in assignments noticed hereafter?

The first question we shall not discuss at length, as it involves an expression of opinion as to the force and weight of the evidence, and, in view of another trial, we refrain from doing this. We are of opinion it does not justify this court in here rendering judgment for appellant, and hence the prayer of appellant in this respect is refused.

It has already been stated that the deed from Ward's administrator to G. W. Crawford was admitted in evidence. A part of it, reciting the purchase of the certificate by Ward from Young, was excluded. Appellant offered in evidence the inventory and appraisal of the estate, showing that the certificate was inventoried and appraised as a part of the estate. He offered, also, the orders of the court authorizing the sale, and the report and approval of sale. On objection of appellee, these were excluded. The grounds of objection were that the declarations of transfer and assertions of ownership contained in those orders were self-serving, and that neither the judgment nor orders bound appellee, neither he nor his predecessors in title being parties thereto. The exclusion of this evidence is assigned as error. Both propositions of law embodied in the objections to the proffered evidence are sound. The probate orders and judgment in the estate of Ward do not bind appellee, for the reasons stated in the objection. The declarations therein that Young had conveyed the certificate to the decedent, and that the estate owned it, do not conclude the heirs of Young; nor, as against appellee, are they evidence of their truth. Yet it does not follow that they were not admissible in this case. In the first place, plaintiff had the right to show that he had acquired whatever right the estate had; and, to do this, it was proper that he should offer the judgments and orders authorizing the administrator to make the sale and deed. A familiar instance involving the same principle is where one claims land under execution sale. In support of the sheriff's deed, he may adduce the judgment and execution under which the sale is made. They are admissible as muniments of title. The matters offered were admissible for the further purpose of showing an open assertion of ownership of the certificate on the part of the estate, just as the subsequent

acts of G. W. Crawford were admissible upon the same point, not as proof of the truth of the assertion, but of the fact that ownership was openly asserted and claimed more than 50 years ago. It was not admissible in the absence of proof of possession of the certificate on the part of the estate, or of G. W. Crawford under the sale by the estate; but we think his possession of the patent, and the presence of his name on the back of the certificate, are sufficient to authorize the proof. We understand that in many of the cases it is held that declarations of a previous owner in favor of his title are hearsay, self-serving, and therefore inadmissible, but the same cases hold that assertion of ownership is admissible in connection with proof of possession and open acts of dominion. *Herndon v. Davenport*, 75 Tex. 462, 12 S. W. 1111; *McDow v. Rabb*, 56 Tex. 158; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030. If possession is admissible as a circumstance tending to prove ownership, the character of that possession, whether adverse or not, is certainly a pertinent inquiry. We think, therefore, the claim of ownership may be shown, not as evidence of the truth of the claim, but to establish the fact that such a claim was made. An unlocated land certificate is a chattel. It may pass by verbal sale and delivery as any other chattel. But mere possession is not sufficient evidence of ownership, for it is not necessarily inconsistent with ownership in another. But long possession under a claim of right, attended with acts of dominion and control, may, in the absence of opposing proof, in a contest arising after the witnesses to the supposed sale are dead, be sufficient to support the presumption of a sale. *Davidson v. Wallingford*, supra.

We think the evidence should have been admitted for the purposes stated above. We wish to state distinctly, however, that we do not indorse the contention of appellant that the judgment and orders in the probate proceedings in the estate of Ward are such judgments in rem as bind the world, and that a declaration therein declaring certain property to be a part of the estate would bind claimants thereof who were not parties or privies to the judgment. Nor does the mere fact that judgments and deeds made or rendered between others than defendants are admissible as muniments of title authorize the conclusion that the declarations therein bind others than parties or privies thereto. Such instruments are admissible as evidence of their own existence, and the cases cited by appellant on the point hold no more. Appellant seems to have wholly misconceived the purport of the cases on which he relies.

The original petition and judgment in the case of John M. Brown against the Unknown Heirs of Samuel Young et al. was offered in evidence by appellant. This petition was filed in the district court of Washington county, Tex. The petitioner claimed, as

against the heirs of Young, that their father, Samuel Young, deceased, had sold certificate No. 1026 to Cyrus T. Ward, deceased; that G. W. Crawford had bought the certificate from the estate of Ward, and located same on 681 acres of land in Washington county, and had sold petitioner the land. Petitioner prayed for judgment establishing the transfer of the certificate to Ward, and judgment for the land. On April 12, 1860, after citation by publication, and appointment of an attorney ad litem, a trial by jury was had, and judgment rendered in favor of petitioner as prayed for. The evidence was excluded on the objection of appellee that the land in controversy was not involved in that suit, and that the parties were not the same. Appellant insisted, and here insists, that it was admissible as an act of ownership, and was also admissible and conclusive on the issue of transfer of the certificate, because it was a suit between the vendee of G. W. Crawford and the heirs of Young; this being also a suit between another vendee of Crawford and the alleged heirs of Young—the same title being involved. In disposing of this assignment, it must be borne in mind that the sale of the certificate on which that judgment depended was the same sale sought to be established in this cause, and that the land sued for therein was that on which the original certificate was located in Washington county. That petition asserts that G. W. Crawford owned that certificate by purchase from Ward's estate, had it located on the land sued for therein, and sold the land to petitioner. Those assertions were made by the vendee of G. W. Crawford as to land which by the proof in this case is shown to have been located in Washington county, by virtue of the original certificate, at a date subsequent to the sale by the Ward estate. If the whole certificate had been located in that county, and Brown had sued for the whole tract, and plaintiff were claiming under Brown, it cannot be doubted that the judgment would not only have been admissible, but conclusive as against the claimants under the heirs of Young. Had G. W. Crawford sued, instead of Brown, and recovered judgment establishing the sale of the certificate to the Ward estate, it would seem that such judgment would have been res adjudicata against the heirs or their vendees in a suit for the second tract, located in Harris county; the right to judgment in each case depending on the establishment of the alleged transfer. *Webster v. Mann*, 56 Tex. 119, 42 Am. Rep. 688; *Harlick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, and authorities cited. But the judgment in question, in more than one respect, is lacking in those elements which, as against the appellee, would constitute an estoppel. One of the settled rules governing estoppels by judgment is that the estoppel cannot be successfully invoked except against a party or privy. Another rule is that the estoppel

must be mutual. Black on Judgments, § 548. It is plain that there is no privity between Brown and appellant or between Brown and appellee. As to the second rule, it is plain, if Brown had lost his suit against the heirs of Young, it would not have estopped G. W. Crawford from claiming the land located under the supplemental certificate, for he had not been vouched in as warrantor, nor in any way had his day in court. Decisive of this principle are the authorities holding that a warrantor is not bound by a judgment against his vendee involving the title warranted, unless vouched into the suit, and in a suit by the vendee upon the warranty he must make out his case independent of the judgment, whereas, if the warrantor had been brought in, the latter would not be heard to question the judgment of eviction. Black on Judgments, § 567. The case differs from cases like *Hanrick v. Gurley*, supra, in which both parties were represented, and the judgment was binding either way. When the parties are the same, the legal effect of the former judgment is not impaired because the subject-matter of the second suit is different, provided the second suit involves the same title and depends upon the same question. *Aurora City v. West*, 7 Wall. 97, 19 L. Ed. 42; *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205. Here the defendant, in his capacity as claimant under the heirs of Young, is, in legal effect, the same party as defendants in the Brown suit. The same title is invoked, though not the same subject-matter, but the parties plaintiff are not the same; and, lacking this, the judgment is not binding upon appellee.

We think the petition and judgment were admissible to show an assertion of right by a vendee of Crawford to land located under the original certificate, and that the right was asserted by virtue of the transfer so necessary to the plaintiff in this suit. The sale in question occurred, if at all, more than 50 years ago. G. W. Crawford is shown to have had possession of the supplemental certificate. The original was issued in 1838, and nothing done with it until after the purported sale by Ward's estate to G. W. Crawford. From that on, locations begin, and none but Crawford and those claiming under him assert any claim thereto. These claims remain unquestioned for 50 years. The deed from the estate of Ward to G. W. Crawford shows by one of its file marks that it was filed in the suit of Brown against the heirs of Young in 1859. The location in Washington county, the sale to Brown by Crawford, and the suit by Brown were among the earliest assertions of claim to and under the original certificate. A mere statement of these facts makes it plain how forceful is the fact that Brown, in 1859, having bought the Washington county land from Crawford, filed a suit in that county claiming the land as his own—claiming under the Crawford transfer, claiming against the Young inter-

ests, and publishing the claim to the world. Especially would the fact be forceful if followed by proof of possession of the land by Brown. It has been said by high authority, and is doubtless the rule, that after a long lapse of time, together with adverse possession, slight proof is sufficient to establish a grant, especially if nothing appears suggesting a contrary conclusion. *Abbott's Trial Ev.* p. 898. Proof of notoriety of claim of ownership is admissible. *Dailey v. Starr*, 26 Tex. 562. The authorities already cited also justify the conclusion we have reached.

We do not deem it necessary to review the many authorities cited by appellee in support of the judgment. The question of proof of transfers of land certificates have been before the courts of this state many times and in many forms, and the decisions abound in loose and inconsistent expressions. But this may be regarded as settled law—that an unlocated land certificate is a chattel, and may be sold and passed by delivery as any other chattel; that such a transfer may be shown by circumstances, and, after a long lapse of time, possession, open claim of ownership, and assertion of dominion over the certificate, or land located thereunder, are deemed sufficient, in the absence of all opposing claims, to authorize the inference of a transfer. Ordinarily the question is for the jury, as in cases involving the existence of a deed, where none can be shown by direct proof.

In view of the determination of this appeal and of another trial, it is necessary to notice the propositions affirmatively presented by appellee:

By the first and second cross-assignments of error, appellee complains of the finding of the trial court that the evidence failed to establish that the vendors of B. L. Phillips, the immediate vendor of appellee, were the heirs of Samuel Young. We forbear to discuss the evidence bearing upon the issue, as the same issue may arise upon another trial, and will become a fact question to be determined by the trial court. We say no more at present than that the assignment cannot be sustained in support of the judgment on this appeal. The evidence on the point certainly does not authorize this court to hold, as matter of law, that the heirship was established. As we have already shown, even if this issue is determined in favor of appellee on another trial, it cannot avail the appellee, if the alleged transfer of the certificate is shown, except under the plea of innocent purchaser for value without notice. If a purchase from the heirs for value without notice of the claim of appellant is shown, the judgment will be for appellee. But it will not be enough that appellee believed his vendors were the heirs of Young. They must be shown to be. The evidence does not present the issue of three years' limitation. If there was a transfer of the certificate, the chain of transfer from the sovereign to the appellee was broken, and he

could not prescribe under the three-years statute. If there was no transfer, limitation was not necessary to a recovery by him.

Appellee also contends that the trial court erred in refusing to sustain his plea of stale demand, and cites, among other authorities, *Johnson v. Newman*, 43 Tex. 642. In that case there was a written sale and transfer of the certificate, but no delivery. The original grantee afterwards sold the certificate to another, to whom the patent was issued. After 40 years the first purchaser of the certificate sued the second, who was in possession. The court held, among other things, that since the vendor in the first sale repudiated the sale more than 40 years ago, and the vendee, with necessary knowledge of the facts, had not sooner asserted his equity in the land, he was barred by the plea of laches. In this case the asserted right under the alleged transfer was not questioned until some time in 1896 or 1897. The cases are easily distinguished.

We are of opinion the issue of stale demand is not presented, for the further reason that appellant's title, if any he has, is an equitable one, as distinguished from a mere right to enforce a promise to convey. When one who has a contract for the execution of title sleeps upon his rights, the plea of stale demand may be successfully interposed; but when one has already acquired a title, whether it be legal or equitable, no lapse of time, unaccompanied by adverse possession, will defeat the right to recover. *Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 681, 23 S. W. 720, 1015; *Martin v. Parker*, 26 Tex. 253. The land in controversy was never reduced to possession by any one until some time subsequent to 1895.

For the reasons given, we think the court erred in excluding the proffered evidence.

On account of an erroneous construction of parts of the record, we originally concluded the judgment should be reversed, and judgment here rendered for appellant, and an order to that effect was entered on March 12th. Our error was discovered immediately after the entry of the order, however, and no opinion based upon that conclusion was handed down. The record, as it stands, discloses the fact that the case has not been fully developed. The date of the death of Young is not shown, even approximately. It is not shown who located the certificate in Washington county—whether or not that land has been reduced to possession, and, if so, under what claim of right. Nor is it shown who procured the location of the supplemental certificate in Harris county. All these matters would be useful in arriving at the truth of the case, and the record suggests that they are susceptible of proof. It also appears probable that the proof on the issue of heirship, as a basis for the plea of innocent purchaser, may be more fully developed. The fact that the case thus appears not to have been fully tried, and our

error with reference to the state of the record, have induced us, of our own motion, to set aside our former order rendering judgment in favor of appellant, and to remand the case for another trial. Reversed and remanded.

BOX et ux. v. EQUITABLE SECURITIES CO. et al.

(Supreme Court of Arkansas. March 14, 1903.)

SUMMONS—SERVICE—RETURN.

1. The statute provides that a summons may be served "by leaving a copy of it at the usual place of abode of the defendant with some person who is a member of his family over the age of fifteen years," and that the return of service upon it "must state the time and manner of the service." *Held*, that the return need not state the name of the member of the family with whom the copy is left.

Appeal from Benton Chancery Court; James N. Pittman, Chancellor.

Action by the Equitable Securities Company and another against Sam Box and wife. Judgment for plaintiffs, and defendants appeal. *Affirmed*.

McGill & Lindsey, for appellants. Bridges & Wooldridge, for appellees.

BATTLE, J. The Equitable Securities Company and M. H. Johnson instituted a suit in the Benton circuit court against Sam Box and Mary Box, his wife, to foreclose a deed of trust made by them to secure the payment of a certain bond executed by defendants to Norman F. Thompson for \$1,600, and of certain coupons for the interest thereon; the same having been assigned to the plaintiff Equitable Securities Company. A summons directed to the sheriff of Benton county, and commanding him to summon the defendants to answer the complaint of the plaintiffs in 20 days after the service thereof, was issued by the clerk, and was returned by the sheriff with the following indorsement made by him thereon:

"State of Arkansas, County of Benton. On this 27th day of February, 1899, I have duly served the within writ by delivering a copy and stating the substance thereof to the within-named Mary E. Box, and by leaving a copy for Sam Box with a member of his family over 15 years old, at his usual place of abode, in Benton county, Arkansas. J. G. McAndrew, Sheriff. Cris Reel, D. S."

The court, at a term thereof begun and held after the expiration of 20 days after the service of the summons, finding that such writ had been legally served, and the defendants failing to appear, rendered a decree against them for the amount due upon their bond and coupons, and for the foreclosure of the deed of trust.

Defendants have appealed, and insist that the decree should be reversed because the return of the sheriff did not state the name of the member of the family of Sam Box

with whom a copy of the summons was left. This is the only ground alleged for reversal.

The statute provides that a summons may be served "by leaving a copy of it at the usual place of abode of the defendant, with some person who is a member of his family over the age of fifteen years," and that "the return of service upon" it "must state the time and manner of the service."

The object of a return upon a summons is to show to the court whether it has been properly served, and the defendant has been informed of the pendency of the action in the manner prescribed by law. *Southern Building & Loan Association v. Hallum*, 59 Ark. 583, 28 S. W. 420.

As the court is governed by the return, the statement in it of the name of the member of the family with whom a copy was left would not afford any additional assistance in determining whether the summons was properly served, and it is not to be presumed that a defendant's family is so numerous and uncertain that a return like that in this case would render it difficult for him to ascertain whether it be true or not. We think that the return in this case is sufficient, but that it would have been better if the name of the member of the family with whom the copy of the summons was left had been stated.

Decree affirmed.

FINDLEY et al. v. MEANS.

(Supreme Court of Arkansas. March 14, 1903.)
CONTRACTS—PAROL EVIDENCE—ADMISSIBILITY.

1. Parol evidence is inadmissible to prove that a contract in writing was delivered by one of the parties thereto to the other, to take effect on the performance of certain conditions.

Hughes, J., dissenting.

Appeal from Circuit Court, Pope County; William L. Morse, Judge.

Action by T. E. Means against W. W. Findley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. B. Wilson, for appellants. U. L. Meade, for appellee.

BATTLE, J. T. E. Means had a contract with the United States to transport the mail on route No. 47,529, from Dardanelle to Carden's Bottoms, in this state, and return, six times a week from October 1, 1899, to June 30, 1902, and sublet the same to W. W. Findley, as principal, and John Findley and O. R. Findley, as sureties. The Findleys having failed to perform their contract, Means brought this action against them to recover \$300, the liquidated damages they stipulated to pay him on account of such nonperformance.

One of the defenses to the action was that it was expressly understood and agreed between plaintiff and defendants that the con-

tract sued on should not take effect and become operative until it was approved by the postmaster at Dardanelle, and that it had not been approved by him. Plaintiff recovered a judgment for the \$300, and the defendants appealed.

The evidence adduced at the trial proved that the contract was delivered by appellants to appellee. There was no written stipulation that it should take effect when certain conditions were performed. Appellants offered, and the court refused to allow them to prove, that it was delivered on the condition named in their defense. It was never approved by the postmaster.

The court committed no error in refusing to admit the testimony. It has been repeatedly held by this court that a deed, bond, note, or other instrument of writing delivered to the grantee or obligee to take effect when certain conditions are performed, becomes operative and binding from the time of the delivery, though the conditions never be performed. *Pope v. Latham*, 1 Ark. 66; *Inglish v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Scott v. State Bank*, 9 Ark. 36; *Chandler v. Chandler*, 21 Ark. 95; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

Judgment affirmed.

HUGHES, J., dissents.

ST. LOUIS S. W. RY. CO. v. SMITH.

(Supreme Court of Arkansas. March 14, 1903.)
COMPENSATION FOR SERVICES—PARTIES
LIABLE.

1. A servant employed by a corporation created under the laws of one state, and operating a railroad commencing at the terminus of a railway company of the same name, organized under the laws of another state, could not hold the latter company liable for the services so rendered; the two companies being distinct, and there being no evidence that they were jointly liable.

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by W. M. Smith against the St. Louis Southwestern Railway Company. From a judgment of the circuit court in favor of plaintiff on appeal by defendant from a default judgment for plaintiff rendered in justice court, defendant appeals. Reversed.

Gaughan & Tifford and Saml. H. West, for appellant.

HUGHES, J. On April 30, 1901, the appellee recovered a judgment by default against the appellant, the St. Louis Southwestern Railway Company, in the sum of \$35.29, before W. J. Smithers, a justice of the peace of Miller county, on a claim for labor alleged to have been rendered for the appellant. From this judgment an appeal was taken to the circuit court, where, upon a new trial, judgment was rendered for the appellee for

said sum of \$35.29. From this judgment an appeal was taken to this court.

The evidence in the case shows that the labor, the value of which now sued for, was performed in the state of Texas for the St. Louis Southwestern Railway Company of Texas, which was incorporated in the state of Texas, and whose line extends from Texarkana, on the line between Arkansas and Texas, into the state of Texas, and that it is a distinct and separate corporation and entity from the St. Louis Southwestern Railway Company, which was incorporated under the laws of Missouri, and extends to Texarkana only. Smith was employed and worked for the St. Louis Southwestern Railway Company of Texas, and it alone was liable to him, and the St. Louis Southwestern Railway Company is not shown to have owed him anything. There was no evidence that the two companies were jointly liable. *St. Louis Southwestern Ry. Co. v. Gate City Co-op. Grocery Co. (Ark.) 65 S. W. 706.*

The judgment of the circuit court is reversed, and judgment will be rendered here for the appellant.

FRANKLIN LIFE INS. CO. et al. v. GALLIGAN.

(Supreme Court of Arkansas. March 14, 1903.)

INSURANCE — LIFE POLICY — WARRANTIES — BREACH — CONTRACTS — VESTED RIGHTS — AMENDMENT OF STATUTE — EFFECT — CHANGE OF BENEFICIARY.

1. Where the answers given in an application for insurance are warranties, questions as to how long since the applicant was attended by a physician, and as to the nature of the ailment, must be construed as referring to some disease that would affect the contract of insurance, and the failure of the applicant to mention a slight bilious fever does not avoid the policy.

2. Knowledge of the examining physician of a life insurance company that the answers written down by him in an application for a policy are false estops the company from forfeiting the policy on account of such falsity.

3. Where the answers in an application for a life policy were warranties, and the applicant gave as the name of the physician who had attended him during his most recent illness one of two physicians who had attended him — such physician having been the one who attended him during the latter part and greater portion of his illness — there was no breach of warranty.

4. Under the express provisions of a Missouri statute, no representation in obtaining or securing a life policy shall render the same void unless the matter misrepresented shall contribute to the contingency or event on which the policy is to become due or payable.

5. A life policy issued by a Missouri corporation, signed and sealed in Missouri, and calling for the payment of premiums there, and payment of the loss there, is a Missouri contract, and governed by its laws.

6. A statute of Missouri provided that no misrepresentations made in obtaining or securing a life policy should render the same void, unless the matter misrepresented should contribute to the contingency on which the policy was to become payable. Subsequently the statute was amended so as to make it applicable to citizens of Missouri alone. *Held*, that such amendment

did not affect a policy holder, not a resident of Missouri, whose policy was issued prior to the amendment.

7. The interest of a beneficiary in a regular life policy is a vested one, and the insured cannot change the beneficiary without authority derived from the contract itself.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Consolidated actions by R. A. Galligan and W. P. Lawton against the Franklin Life Insurance Company. From a judgment for plaintiff Galligan, the other plaintiff and defendant appeal. Reversed in part.

On March 6, 1899, the Merchants' Insurance Company of the United States, a Missouri corporation, with general offices in St. Louis, Mo., issued and delivered to one Stephen Galligan its policy of insurance, by which it agreed to pay the beneficiary therein named the sum of \$3,000 upon proof of death of said Galligan. The said policy was signed by the president and secretary, and the corporate seal was affixed, at St. Louis, Mo. It was stipulated therein that the premiums should be paid at the home office, unless otherwise authorized by the association's receipt, signed by the secretary; and, upon death of insured, it agreed to pay to the beneficiary, "at the home office of the association in the city of St. Louis, state of Missouri, three thousand dollars." The beneficiary, Mary V. Galligan, died on the 24th day of April, 1899, and thereafter Stephen Galligan made the following indorsement upon said policy: "Owing to the fact that my late wife, Mary V. Galligan, departed this life at Tucker, Arkansas, on the 24th day of April, 1899, it is my desire and wish that this policy be paid to my son, Willie P. Galligan; that is to his legal representatives, appointed by me or the proper court. This 22nd day of June, 1899. S. Galligan, Insured." Stephen Galligan died on August 7, 1899, and notwithstanding proofs of his death were submitted to the Franklin Insurance Company, which company had assumed the insurance, it refused to pay the loss; claiming that the policy was void from its inception, on account of misrepresentations made by assured in obtaining the same. Suit was thereupon brought by R. A. Galligan as guardian for appellee, who claimed as the heir of S. Galligan, and as substituted beneficiary under the policy; and a suit on the same policy was instituted by cross-appellant, W. P. Lawton, who based his claims as the heir of his daughter, Mary V. Galligan, the original beneficiary named in the policy. To the complaints above, the company filed its answers, in which it admitted the execution and delivery of the policy and the death of Galligan, and rested its defense upon the following misrepresentations, which it claimed were made by Galligan in obtaining the policy, and which consequently rendered the policy void: (1) That in answer to the question, "How long since you were attended by a physician, or had occasion to consult one?" the deceased re-

plied, "1898." (2) That in answer to the question, "State the nature, gravity, and duration of the ailment or disease?" the deceased replied, "Typhoid fever; four weeks." (3) That in answer to the question, "Give the name and address of the physicians?" the deceased replied, "R. W. Lindsay, Little Rock, Ark." (4) That in answer to the question, "Do you use ardent spirits, wine, or malt liquors?" the deceased replied, "No." (5) That in answer to the question, "Do you smoke or use tobacco?" the deceased replied, "No."

The proof showed that Dr. Edwin T. Pry, a physician who lived at Tucker, who had been employed by the agent of the insurance company to examine Galligan, and who wrote down all of the answers of Galligan to the questions in the application, had during the month of August, 1898, attended Galligan on two separate occasions, at which time he found him suffering "with a mild remittent fever or bilious fever—a mild bilious attack." Dr. Pry further testified, however, that at the time he prepared the application he remembered the attack, and at that time he had certified that it had in no manner affected Galligan's constitution. He stated he did not remember whether or not he called Galligan's attention to this illness, or whether Galligan mentioned the fact of this illness to him, but as he frequently tells applicants, when they mention a mild illness, like that one, they should mention something more serious, it might be possible that Galligan called his attention to this illness, and he did not note it, as he did not consider the bilious attack of sufficient import to be included in the application, and therefore had, with full knowledge of that attack, certified that no previous illness of Galligan had in any manner affected his constitution.

The two cases were consolidated, and a common fight was made by both plaintiffs against the insurance company. The verdict was in favor of plaintiff Galligan against insurance company, and Lawton and they both appeal.

Austin & Taylor, for appellant. White & Altheimer and F. T. Vaughan, for appellee, Galligan. Cypert & Cypert and Bridges & Wooldridge, for cross-appellant, Lawton.

WOOD, J. (after stating the facts). By the contract of insurance the answers given in the application are warranties. If untrue, they void the policy. But they must be construed in the sense contemplated by the parties to the contract. By the questions, "How long since you were attended by a physician, or had occasion to consult one?" "State the nature, gravity, and duration of the ailment or disease?" and "Give the name and address of that physician?" and the answers thereto, the parties had in view some ailment or disease that would affect the con-

tract of insurance. They did not, evidently, have in mind some slight indisposition, or trivial and temporary ailment, that in no wise affected the general health or constitution of the assured, and therefore did not increase the risks of insurance. In *Assurance Society v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, the court said: "Where questions propounded to an applicant for insurance, upon his life, as to his physical condition, are in such terms as include the most trivial ailments or injuries, they should be interpreted as referring only to such illness or injuries as affect the risk to be assumed, unless they are in words which exclude such interpretation. The presumption is that trivial ailments or injuries are not within the contemplation of the parties, and that the questions, in the absence of words directing attention to them, are not asked with the view or purpose of ascertaining the existence of the same. The answers of the applicant should be interpreted in the same manner as the questions eliciting them; that is to say, as responsive to the questions in the sense in which they are asked." The fact, therefore, that the assured had since 1893 a "mild remittent or bilious fever," and was attended during this illness by another physician than Dr. Lindsay, did not falsify the answers to the questions in the application supra, because Dr. Pry, the physician who attended him during this sickness, testified that "he was not very ill; having mild remittent or bilious fever, that did not affect his constitution." Moreover, Dr. Pry, the witness who attended the assured during this illness, was also the examining physician for the company, who propounded the questions to the assured in the application, and took down his answers. Being fully cognizant of the fact that the assured had been ill with bilious fever since 1893, and that he attended him for such illness, he should not have permitted the assured to have given false answers, which he knew would forfeit his policy. The fact that the assured answered the questions as he did, and that its physician took them down as the assured gave them, shows that they both concluded that the bilious attack of 1898 was not within the scope of the question in the application, and did not affect the question of insurance. Even if it had been material to the contract of insurance, the knowledge of the physician, the company's agent, under such circumstances, was the knowledge of the company; and the company would be estopped from taking advantage of any false answers to forfeit the policy, when it knew the same to be false at the time the contract was executed. *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458. See, also, *Pudritzky v. Sup. Lodge K. of H.*, 76 Mich. 428, 43 N. W. 878; *Miller v. Mutual Ben. Life Co.*, 81 Iowa, 216, 7 Am. Rep. 122.

The fact that the assured failed to dis-

close the name and address of one Dr. A. L. McLard, who attended him the first four or five days during his illness with typhoid fever, did not falsify the answer that Dr. R. W. Lindsay, of Little Rock, was the physician who attended him. The question was, "Give the name and address of that physician?" It does not require the name and address of all the physicians that might have been in attendance upon him during a serious illness. Dr. McLard attended the assured only during the first four or five days of his illness, when he was removed to Little Rock, where Dr. Lindsay was called and attended him during the remainder of his illness—something over three weeks. The assured correctly answered that Dr. Lindsay, of Little Rock, was the physician who attended him, and gave by such answer all the information called for by the question. The object of the question was to apprise the company of the name of a physician who was in attendance, and who would know about the nature of the disease, and the effect it may have had upon the constitution of the one who was contemplating insurance. If the question had called for the names of the physicians who attended him, there might be some room for the contention.

As to the use of liquors and tobacco, the question called for the habit of the assured in these respects at the time of the application, and there was proof to sustain the finding that at that time the assured was not addicted to their use. It was held in *Van Valkenburg et al. v. Life Ins. Co.*, 70 N. Y. 605, that the question, "Did the insured use any intoxicating liquors or substances?" did not direct the mind to a single or incidental use, but to a customary or habitual use."

2. But even if there were a breach of warranty by the assured in the matters discussed supra, still appellant could not avail itself of such breach, under a statute of Missouri which is as follows: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable and whether it so contribute in any case shall be a question for the jury." The proof justified the conclusion that the company taking the insurance was a Missouri corporation; that the contract of insurance was a Missouri contract, to be performed in Missouri. Therefore the laws of Missouri governed in its enforcement. *State Ins. Ass'n v. Brinkley Stave Co.*, 61 Ark. 5, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Seiders v. Merchants' Ins. Co.* (Tex. Sup.) 54 S. W. 753. Since the law of Missouri governs, the only question is, did the matters alleged to have been misrepresented contribute to the death

of the assured? This question was properly submitted to the jury and their verdict should stand. The appellant contends that the above statute was not applicable, because since its enactment it had been amended so as to make it applicable alone to citizens of Missouri, and that the statute as amended should apply to the enforcement of the contract. We cannot adopt that view. The law in force when the contract was made entered into it, and conferred upon the assured and the beneficiary under the contract rights which subsequent legislation could not annul. The right vested by this law, not to have the contract forfeited by any matter misrepresented, unless such matter contributed to the contingency on which the policy became payable, was a most important one, and, for aught we know, the one that controlled in the making of the contract. But for this right, we are not warranted in saying that the assured would have entered upon the contract at all. What was said by the court in *St. L., I. M. & So. Ry. Co. v. Alexander*, 4 S. W. 753, is apposite here: "It is not material to ascertain whether the provisions of the act of 1883 which are relied upon were intended to be retroactive in their operation or not. The plaintiff's right to recover all that was adjudged to him had vested before the repealing act was passed. The law in force when the sale was made, regulating its obligations and defining the rights and duties of the purchaser, all the provisions beneficial to him, and constituting a material inducement to the purchase, entered into and became a part of his contract, and passed beyond the legislative control." The instructions of the court were correct, and judgment against the company was correct. This determines the controversy as to appellant.

3. The remaining question is to determine whether appellee, Galligan, or cross-appellant, Lawton, should recover. This question, we think, is settled in favor of cross-appellant by the decisions of this court in *Block v. Valley Mut. Ins. Co.*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166, and *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 874. These were cases against mutual benefit societies. In the first case we said: "But regardless of the character of the company, the rights of persons claiming insurance arise out of and depend upon contract. * * * When the courts are invoked, the contract measures the rights of one and the obligation of the other party, and relief must be granted, if at all, according to its terms." In both of the above cases we held that the holder of a policy in a mutual benefit society cannot change the beneficiaries named therein, unless expressly authorized to do so by the policy itself, or by the articles of association or by-laws of the society, where these are by the terms of the policy made a part of it. If this doctrine be sound as to mutual benefit societies, a fortiori must it be when applied to regular life policies issued by an ordinary life insur-

ance company. If the rights of the beneficiary are so vested by the contract as to preclude the assured from changing the beneficiary while she is living, then the assured certainly could not name another beneficiary after her death. Upon the death of the beneficiary, the law, eo instanti, fixes the devolution of her rights. The right to recover on the policy was a chose in action expectant, or contingent upon the death of the assured, which passed upon the death of the beneficiary like any other of the personal assets. These, under our statute, do not pass to the husband, as did choses in action of the wife not reduced to possession during their joint lives, under the common law, but they go to her estate. Section 4946, Sand. & H. Dig.; also section 2470, par. 2. Such we believe to be the logical sequence of the doctrine that the interest of a beneficiary in a policy of life insurance is vested by the terms of the contract, and that the assured cannot change the beneficiary without authority derived from the contract itself. The decisions are not harmonious, but the doctrine of our own court is supported by eminent authority, and is, perhaps, the prevailing rule. 2 A. & E. Ency. Law (2d Ed.) pp. 980, 987; Drake v. Stone et al., 58 Ala. 133; 1 Bacon, Ben. Soc. & Life Ins. §§ 292 to 294, and cases cited; Cook on Life Insurance, and cases cited; 2 Joyce on Ins. § 828.

McELROY v. McELROY et al.

(Supreme Court of Tennessee. Feb. 6, 1903.)

WILLS—CONSTRUCTION—SALE OF LAND—ADMINISTRATOR WITH WILL ANNEXED—EQUITABLE CONVERSION.

1. Under a will which, after certain specific bequests, directs "that the remainder of my property, real and personal, be disposed of, and that my son W. have one-half of the remainder, and my son J. have one-fourth," and disposing of the other one-fourth to others, the intent of the testator was that such remaining property should be sold, and the division made of the proceeds.

2. Where a will contains the direction for the sale of land, but provides for no executor or donor of power to sell, a sale can only be made through the court of chancery; hence a sale by the administrator with the will annexed is void; Shannon's Code, § 3976, providing that administrators with the will annexed shall have the same power as the executor had by the will, having no application to a will which provides for no executor.

3. A direction in a will that real estate be sold, and the proceeds divided among certain legatees, does not authorize an administrator with the will annexed to treat the estate as personal property, and sell it, under the doctrine of equitable conversion.

Appeal from Chancery Court, Rutherford County; W. S. Bearden, Chancellor.

Action by W. A. McElroy against E. P. McElroy and others. From a judgment of the Court of Chancery Appeals reversing a judgment of the chancellor and dismissing the bill, defendants appeal. Affirmed.

Palmer & Ridley and C. A. Sheafe, for appellants. W. R. Chambers and R. S. Brown, for appellee.

NELL, J. The bill in this case contains these allegations, viz.: That W. E. McElroy made the following will: "I will, that after my death, my burial expenses are paid; that my two sons, J. N. McElroy and W. Z. McElroy, have and divide my household and kitchen furniture as they see fit; and that my son, W. Z. McElroy, have my orange grove in Florida. I will that my granddaughter, Maggie McElroy, and my grandson, Willie McElroy, have one hundred dollars each of the \$216.35 that my son-in-law, A. B. McElroy, owes me; and that my son-in-law, A. B. McElroy, have the remainder of the note and account and all the interest. I further will that my grandson, Sylvan McElroy, have one hundred dollars out of my estate, and that my grandson, Mearle McElroy, have one hundred dollars out of my estate, and that my daughter-in-law, Queenie, have my wife's gold spectacles. And that the remainder of my property, real and personal, be disposed of, and that my son, W. Z. McElroy, have one-half of the remainder, and my son, J. N. McElroy, have one-fourth, and that my granddaughter, Maggie McElroy, and my grandson, Willie McElroy, have the other fourth when they become of age. And if any of them die before it is of age, the other is to have its part. And if both of them die under age, their one-fourth is to be equally divided between my son-in-law, A. B. McElroy, and my son, J. N. McElroy, and my son W. Z. McElroy. April 12, 1892. W. E. McElroy." That the said W. E. McElroy died on August 2, 1895, leaving the said last will and testament, and leaving as his only heirs at law his two sons, defendants J. N. McElroy and W. Z. McElroy, and his two grandchildren, complainant, William A. McElroy, and defendant Maggie McElroy, and that complainant, William A. McElroy, is the same person mentioned in the will under the name of Willie McElroy. That defendant E. P. McElroy was appointed administrator with the will annexed in the county court of Rutherford county, and qualified as such on August 5, 1895, and that letters of administration were duly issued to him; that the personal estate of the testator was amply sufficient to discharge the specific bequests of the will, and to pay the legacies of \$100 each to defendants Sylvan and Mearle McElroy, and that the latter sums have been paid. That the testator owned at his death 160 acres of land lying in the Twenty-Third Civil District of Rutherford county, fully described in the bill, and that this was the only land he owned, except the orange grove in Florida, and that this 160 acres was the land which the testator, in his will, directed to be "disposed of," and the proceeds to be divided in the manner stated therein. That on September 5, 1896, the defendant E. P. McElroy,

assuming authority to sell the said land in his character of administrator with the will annexed, made a pretended sale thereof to the defendant J. M. Jones for the consideration of \$1,288.25, and, in pursuance of the said pretended sale, executed to the said Jones a deed, a copy of which is exhibited, and that said Jones thereupon entered into possession of the land, claiming under the said deed, and has ever since received the rents, issues, and profits, and appropriated them to his own use. That, although the land was sold for \$1,288.25 by the administrator with the will annexed, it was really worth \$2,500, and had a rental value of \$250 per year. That complainant and his sister, the defendant Maggie McElroy, were both minors when the sale was made; the defendant attaining her majority on January 14, 1900, and the complainant on September 19, 1901. That complainant has never received any portion of the proceeds of the sale to defendant Jones, and has never in any way recognized that sale as a valid disposition of the property.

Complainant insists that, having attained his majority, he now has the right to recover said land for the benefit of himself and the other persons interested under the will. His contention is that the land descended to the heirs at law of the testator, subject to the directions for disposition thereof contained in the will; that the sale made by the administrator with the will annexed was void for want of power in that office to make such sale; and that the parties interested under the will have the right to have the land sold through the court of chancery, and the proceeds divided pursuant to the terms of the will. The bill was filed February 10, 1902, within a few months after the complainant attained his majority. The defendant E. P. McElroy, administrator with the will annexed, and the purchaser, J. M. Jones, filed a demurrer, presenting the point of law that under the facts stated the administrator did have the power to make such sale and to execute the deed complained of. The chancellor sustained the demurrer and dismissed the bill. On appeal of the complainant, the Court of Chancery Appeals reversed the chancellor, but based its decision upon the ground that, under a proper construction of the will, the direction therein contained was not that the land should be sold, but that it should be partitioned in kind. That court was of opinion that the administrator with the will annexed would have had the power to sell the land involved in this case, if the will had contained a direction to sell, but that, inasmuch as there was no such direction, the sale was necessarily void, for want of power in the administrator.

We are of opinion that, under a true construction of the will, the testator intended that his household and kitchen furniture should be divided in kind; that there was a specific devise of the land in Florida; that

the debt of \$216.35 was specifically bequeathed to Maggie McElroy, Willie McElroy, and N. B. McElroy, in the proportions set out in the will; that there was a general legacy of \$100 each to Sylvan and Mearle McElroy; that there was a specific bequest of the gold spectacles to testator's daughter-in-law, Queenie; and that the testator intended that the residue of his property, real and personal, should be sold, and the proceeds divided in the manner stated (that is, one-half to W. Z. McElroy, one-fourth to J. N. McElroy, and one-fourth to Maggie and Willie McElroy together). We do not deem it necessary to go into a special exposition of the will, in support of this construction, as it seems to be the most obvious and natural one, and most in harmony with the meaning of the expression "disposed of," when used in connection with the alienation of property.

The main question is whether the administrator had the power to sell the property. It is insisted that he had such power, under section 3976 of Shannon's Code. This section reads as follows: "An administrator, with the will annexed, appointed instead of an executor resigned, and all administrators, with the will annexed, shall have the same power and authority as the executor had by the will of the testator, and may sell land, if the executor possessed that power." This section was carried into the Code from Acts 1851-52, c. 141. Shortly before that act was passed, at the September term, 1848, it was decided by this court in the case of *Armstrong v. Park's Devisees*, 9 Humph. 195, 206, that when a will gave discretionary powers to executors to sell, lease, or dispose of real estate in any way they might think best for the estate, a personal trust was conferred, and was confined to the executors, and could not be exercised by the administrator with the will annexed, but by the advice and consent of the chancellor. In *Harrison v. Henderson*, 7 Heisk. 315, 350, it is said that the general rule, before the passage of the provision above quoted, was that the executor, as such, by virtue of the power contained in the will, might dispose of the real estate of the testator for the payment of debts, the payment of legacies, or any other purpose specified in the power, but that even then it was held that the power was personal, and could not be exercised by an administrator with the will annexed, and that the statute was passed to change the latter part of this rule, and confer all of the powers on the administrator, by virtue of his office, that belonged to the executor by virtue of his, yet that the statute did not interfere with or change the principle laid down in *Armstrong v. Park's Devisees*, supra; that it simply authorized the administrator with the will annexed to sell when the executor, as such, simply by virtue of his office, and in that character alone, had power to sell, but not when the party, though executor, held the twofold character of executor and trustee,

and the power to sell was confided to him as a personal trust, to be executed by him as such trustee, and not as executor. See, also, for comparison, *Andrews v. Andrews*, 7 Heisk. 247, 249. In *Green v. Davidson*, 4 Baxt. 488, 490, it was held that the administrator with the will annexed had the power to sell real estate when the will directed the land to be sold on fixed terms, and the money to be equally divided among testator's children, and, if any of his children should marry, that they should have "an equal part of his estate as those already married, to be given them out of his perishable property," and that his children should be made equal, taking into consideration what the testator had given those already married; this, with the appointment of the executor, and direction as to the payment of debts, being the substance of the will. In *Caruthers v. Caruthers*, 2 Lea, 264, it was held that the administrator with the will annexed had power to sell real estate when the testator, by his will, directed his debts to be paid as soon as possible out of any money he might be possessed of, or which should first come to the hands of his executor, and gave the executor "full power to sell and convey" any of the testator's property, "real or personal," for the purpose of paying debts and supporting his children. In *Parker v. Sparkman*, 2 Tenn. Cas. 544, 545, it was held that if the will directs the estate to be sold, without naming a donee of the power, it naturally and by implication devolves upon the executors, if they are charged with the distribution of the fund; and it is further said that the question whether the executors are to distribute the fund need not be found settled in direct terms on the face of the will, but is to be determined from the whole scope and context of the will, by necessary implication, as well as by express designation.

The foregoing are all of the authorities we have bearing upon the right of the administrator with the will annexed to sell and convey real estate of the decedent under the authority of the section of the Code above quoted. In none of them is found any sanction for the administrator's selling the land where the will provides for no executor, and where, as in the will under examination, the office of executor is not even mentioned in any way whatever. We do not think the statute or section of the Code referred to can be extended to cover such a case. The language of the section is explicit. The administrator with the will annexed is declared to have the same power and authority as the executor had by the will of the testator, and may sell land if the executor possessed that power. A necessary predicate of such administrator's power to sell real estate is that there was an executor named in the will, or at least the office recognized and named, and that the will gave the executor that power. The will in the present case does not come up to or fall within the case provided for by the

statute, and hence the administrator with the will annexed took no power or authority thereunder. The will does contain, as we have already said, a direction for the sale of the land; but as there is no executor provided, and no donee of the power, it results that the sale could only be made through the court of chancery.

There was another cause of demurrer filed, which raised the point that inasmuch as there was a direction contained in the will that the property should be sold, and the proceeds distributed among certain persons named, an equitable conversion was wrought, and the land was changed into personalty; hence that the administrator with the will annexed could sell it, or any other personal property, without the aid of the statute. This contention claims for the doctrine of equitable conversion a much wider scope than it really has. Under the operation of this doctrine, the property is treated as personalty or realty, as the case may be, only for certain purposes—mainly, as determining succession. The remedy or the mode of actual conversion from one species of property into the other is not affected. *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486. The same principle was recognized by this court in *Wayne v. Fouts*, 108 Tenn. 145, 158, 85 S. W. 471.

It results that the decree of the Court of Chancery Appeals, overruling the demurrer and remanding the cause, must, on the grounds and for the reasons herein stated, be affirmed.

NICHOLS et al. v. GUTHRIE et al.

(Supreme Court of Tennessee. March 28, 1908.)

WILLS—CONSTRUCTION—ESTATES CREATED—CLASS REMAINDER—INTEREST OF INDIVIDUALS—RIGHTS OF CREDITORS—CONVEYANCE BY ESTOPPEL.

1. Under a will devising to testator's granddaughter a tract of land for her natural life, and at her death to be equally divided among her children then living, and their descendants, only those children, or descendants of children, living at the death of the life tenant, would take in remainder.

2. Under a will devising land to devisee for life, and at her death to be divided among her children then living, or their descendants, the remainder vests in the remaindermen as a class during the life of the life tenant, but does not vest in them individually until the death of the life tenant, and then on the contingency of their being in existence at that time.

3. A contingent remainder to the descendants of a life tenant, living at her death, not being the subject of conveyance at common law, cannot be sold on execution at the suit of a judgment creditor of a contingent remainderman.

4. Shannon's Code, § 63, providing that the words "real estate, real property, and lands" include lands, tenements, and hereditaments, and all rights and interest therein, whether legal or equitable, does not subject the interest of a member of a class, having an interest in land, expectant on the death of the life tenant, to execution, as such person has no interest, legal or

¶ 3. See *Execution*, vol. 21, Cent. Dig. § 73.

equitable, in the land until the death of the life tenant.

5. A purchaser from a member of a class, in which a remainder expectant on the death of the life tenant is vested, takes title against his vendor by estoppel, on the death of the life tenant.

Appeal from Chancery Court, Maury County; A. J. Abernathy, Chancellor.

Bill for partition by one Nichols and others against one Guthrie and others. From a decree for complainants, defendant Hoge appeals. Affirmed.

W. S. Fleming, for appellant Hoge. James A. Smiser, for appellees.

BEARD, C. J. The present case involves a controversy, growing out of the third clause of the will of Thomas Walker, made in 1852, which is as follows: "To my granddaughter, Elizabeth Sims, I give the tract of land on which she now resides, containing about one hundred acres, also another tract of about the same size adjoining William McLane * * * to have and to hold said property during her natural life, to be free from the debts, liabilities or contracts of her present * * * husband, and at her death all of said property is to be equally divided among the children of said Elizabeth then living, or the descendants of such children."

During the existence of the life tenancy of Elizabeth Sims, a judgment creditor of Walter Sims, who was a son of the life tenant, caused to be levied an execution upon his interest in the land, and, at the sale made under and by virtue of this levy, became the purchaser, and took from the sheriff a deed to the same. Whatever interest, if any, he acquired thereunder, has subsequently passed to one Hoge, who is defendant to this cause. After the levy, but before the sheriff's sale thereunder, Walter Sims aliened and conveyed all his interest in the same land to his sister, and she subsequently conveyed the same interest to one Nichols, who is one of the complainants in this cause. The life tenant died after these various transactions, and the present bill was filed for a partition, or a sale for partition, of this land. The only controversy in the case arises with regard to the Walter Sims' interest.

The complainant Nichols insists that the levy and sale were ineffectual to vest any title or interest in the defendant Hoge, because of the fact that, at the date of such levy and sale, the interest of Walter Sims was a mere possibility or expectancy not subject to execution. His further insistence is that this expectancy, or possibility, could be alienated, and, as an allenee, he was substituted to all the right and interest of Walter. The converse of these propositions is maintained by the execution purchaser, Hoge.

1. We think it clear that the devise over, in this case, falls under the class doctrine or rule announced in *Satterfield v. Mayes*, 11 Humph. 58, and applied in *Womack v.*

Smith, Id. 483, 54 Am. Dec. 51, *Beasley v. Jenkins*, 2 Head, 192, and *Connell v. McKenna*, 2 Tenn. Cas. 190; and that (omitting, for convenience of discussion, those designated as descendants of children dying during this life tenancy) only the children of Elizabeth living at her death would take the remainder estate.

2. This being so, where was this remainder during the life tenancy? If it vested, then in whom? An answer to these questions is distinctly given in *Satterfield v. Mayes*, supra, as follows: "That it vests in the described class, as a class, and not individually in the persons comprising such class, and the entire subject of the gift survives to and vests in the persons constituting such class at the period when payment or distribution of the fund is to be made." That case was one of a legacy of slaves, or personal property, while the present involves a devise of realty, but the controlling principle in the two is the same. The correctness of the answer thus given is essential to the class doctrine. For if the remainder, during the continuance of the particular estate, vested in the individual members of the class, the interests so vested would be transmissible, as in any other vested remainder, and thus would destroy or abrogate this doctrine altogether.

3. The interest of each member of the class being a mere possibility, ripening into a vested estate only upon the contingency of his being in existence at the time the antecedent estate falls in, is it subject to levy and sale by an execution creditor? Or assuming, as a number of the courts have held, that the effect of such a provision is to create a contingent remainder in each one of the class, then is this such an interest as can be reached by a judgment creditor?

At common law, where the person to take was certain, and the event only uncertain, the remainder was descendible, but this was otherwise where the person was uncertain, and only the event certain. *Fearne, Rem.*, 534; 4 *Kent*, 262. On the point of the transmissibility of a contingent remainder, Mr. Washburne, in the second volume of his work on *Real Property* (page 522), says: "For a long time, a contingent remainder was not supposed to be the subject of alienation, because it was rather a possibility than an estate, like the possibility of an heir at law, for instance, having the estate when his ancestor shall have died. But it is now settled that, where the contingency upon which the remainder is to vest is not in respect to the person, but the event, where the person is ascertained who is to take, if the event happens, the remainder may be granted or devised, and the grantee or devisee will come into the place of the grantor or deviser, with his chance of having the estate. But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can

make an effectual grant or devise of the remainder." Again, on page 549 of the same volume, as to a remainder, where the person to take is uncertain, he says: "At common law, before the contingency happens, contingent remainders cannot be conveyed except by way of estoppel, though they are assignable in equity, since, theoretically, such a remainder is not an estate, but a mere chance of having one."

The present certainly falls within the class of cases where the event on which the contingency depends is certain, while the person to take on the happening of the event is uncertain. For which one, if any, of the children of Elizabeth Sims would survive her, and then be capable of taking the remainder, was uncertain until her death occurred, and whatever interest either of these children had in the remainder was a pure expectancy.

It would seem, on principle, that such an interest or expectancy, not transmissible at common law, was beyond the reach of an execution creditor. Whether a contingent remainder of any kind can be subjected by a judgment creditor, may be regarded as an open question in this state, though in *Henderson v. Hill*, 9 Lea, 34, in the form of dictum, it is said: "The weight of authority seems to be that a legal contingent remainder is not subject to execution"—citing *Freeman on Execution*, § 175. Upon examination of the cases, we think it will be found that this statement, though a dictum, is correct. At least, such was the holding in *Watson v. Dodd*, 68 N. C. 528; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 13 Am. St. Rep. 120; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Jackson v. Middleton*, 52 Barb. 9; *Moore v. Littel*, 41 N. Y. 66, and *Woodgate v. Fleet*, 44 N. Y. 9, are cited as contra, but the first of these cases simply held that an interest, vested or contingent, is alienable during the continuance of the antecedent estate, while in the second the argument of the court was mainly devoted to the determination of the question whether the remainder involved was contingent or vested.

But it is said that the effect of section 63 of Shannon's Code, which provides that the words "real estate," "real property," "lands," include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal, is to change the rule, and make an interest purely contingent as the one in question, subject to the claim of an execution creditor. We are referred to the case of *White v. McPheeters*, 75 Mo. 286, where, in construing a statute similar to ours, this view is expressed.

But if we are right in our holding that, during the life tenancy, the remainder in the property in question vested in the class as a unit, and not severally in the members of that class, then there is no room for the ap-

plication of this statute, as in such case no member of the class has an interest which can fairly be called legal or equitable. On the other hand, if the other view obtains, that this was a mere possibility made by reason of the contingency as to the person, the same results follow.

It results, therefore, that the execution purchaser, Hoge, took nothing by his purchase, while complainant Nichols, as alienee, if upon no other ground, upon that of estoppel, did acquire the interest of Walter Sims when it fell in upon the death of the life tenant.

The decree of the Court of Chancery Appeals is affirmed. The costs of appeal will be paid by defendant Hoge. The case is remanded to the chancery court of Maury county for further proceedings in accordance with this opinion.

BLACKBURN et al. v. BLACKBURN et al.
(Supreme Court of Tennessee. March 28, 1903.)

DEEDS—CONSTRUCTION—ESTATE CONVEYED—
LIFE ESTATES—VESTED REMAINDERS—
"CHILDREN"—RECONVEYANCE.

1. A father deeded certain land to his daughter, her husband, and "her children forever," and by a subsequent clause of the deed warranted the title to the daughter "and her children," and provided that, in the event the daughter should predecease her husband, he should be entitled to 400 acres of the tract for life, which, at his death, should go to "such children and bodily heirs of" the daughter, and that the daughter and the husband were put in possession of all the lands and improvements to their own use, the husband to have control of the same during the life of the wife, and of the 400 acres during his life. *Held*, that the deed created life estates in the husband and wife, with vested remainders as to the entire tract in the children living at the date of the deed, which were subject to open and admit after-born children, so that a subsequent reconveyance by the husband and wife to the grantor and his wife operated to pass the life estates only.

Appeal from Chancery Court, Giles County; A. J. Abernathy, Chancellor.

Bill by Nancy M. Laird and others against one Blackburn and others to recover certain land and for partition. From the decree, defendants appeal. Modified.

W. H. McCallum, for appellants. R. H. McLaurine, for appellees. Smithson & Eslick, for Truett.

BEARD, C. J. On the 15th day of July, 1875, Robert H. Laird made and delivered a deed to his daughter, Mary McMillion Blackburn, by which was conveyed a valuable tract of land in Giles county, consisting of 1,063 acres. In the premises of this instrument it is recited that the grantor, for the love and affection he bore his daughter, and for a nominal money consideration, did "give, transfer, and convey to the said Mary McMillion Blackburn, wife of Jas. K. Polk Blackburn, and her children, forever," the

land in question, describing it by metes and bounds, with all the appurtenances and improvements. Following the description, the deed contains the following clauses, viz.: "I covenant with the said Mary McMillion Blackburn * * * to warrant and defend the title to the said land * * * to the said Mary McMillion Blackburn and her children * * * against any claim to be made by me. * * * And I * * * do further agree and provide in this transfer * * * that in the event of the death of Mary McMillion Blackburn, wife of James K. Polk Blackburn, before her said husband, then * * * he, the said James, * * * shall have by three disinterested landowners in said county * * * set apart for him four hundred acres of the above-described lands; * * * to have and to hold and use and occupy during his lifetime, and at his death to go to the said children, bodily heirs of said Mary McMillion Blackburn; and further, the said Blackburn and his said wife are hereby put in possession of all of said lands and improvements * * * to their own use, said Blackburn having control * * * of the said place with all the proceeds thereof during the lifetime of his said wife and then to the said four hundred acres herein provided for * * * during his lifetime." At the date of this deed Mrs. Mary McMillion Blackburn had four living children, one of whom, a daughter, married Alpheus Truett, and had born to her of this marriage a child named Edward Truett. Mrs. Truett afterwards died during the lifetime of her mother, leaving surviving this child. Subsequent to the date and delivery of the deed there were born to Mrs. Mary Blackburn five other children. Thereafter she died, leaving surviving her husband and, in all, eight children and the grandchild, Edward Truett. Another fact which it is proper to state is that on the 7th of January, 1878, James K. P. Blackburn and his wife, Mary M. Blackburn, conveyed all the interest of whatever kind which they had in this tract to the original grantor, R. H. Laird, and his wife, Nancy M. Laird. The grantee R. H. is now dead, leaving his wife, Nancy, surviving; so that, if this deed conveyed any interest at all, it was an estate by entirety, of which she is now the owner.

The present bill was filed by Nancy M. Laird and the three surviving children of Mary M. Blackburn who were living at the date of the deed from R. H. Laird to Mary M. Blackburn and her children against the children born after that date and Edward Truett, the minor child of the dead sister. The claim of complainants is that under this deed Mrs. Blackburn and her then four living children took as tenants in common the property in question, to the exclusion of the after-born children; that the minor succeeded to the interest of his mother upon her death; and that Mrs. Laird, by virtue of the deed to herself and husband and her survivorship,

was the owner of the interest originally conveyed to Mrs. Blackburn; and they ask that their claims be established by a decree, and that the land be partitioned between them.

This claim thus made, resisted as it is by the after-born children, makes necessary a construction of the deed of 15th July, 1875. There is no doubt that a conveyance to a mother and her children, without qualifying words, is often held to be one in present, vesting title in the then living children and the mother as tenants in common, and by construction of law excluding children coming into being thereafter. In the cases where this has been held, the rule is rested either upon the idea that a freehold could not be created to take effect in futuro, as at common law livery of seisin was essential to such estate, or else upon an implication from the instrument of an intention upon the part of the grantor that the title should pass to the living children as if they had been named therein. *Lillard v. Rucker*, 9 Yerg. 64; *Seay v. Bacon*, 4 Sneed, 100, 67 Am. Dec. 601; *Bearden v. Taylor*, 2 Cold. 134; *Livingston v. Livingston*, 16 Lea, 448; *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. 915, 11 Am. St. Rep. 439; *See v. Derr*, 57 Mich. 369, 24 N. W. 108; *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438; *Brasington v. Hanson*, 149 Pa. 289, 24 Atl. 344. But if the deed, when taken altogether, discloses a purpose upon the grantor's part that all the children of the mother, without regard to the time of their birth, shall become beneficiaries of the property conveyed, then to effectuate this purpose the mother will be converted into a tenant for life, and the children into remaindermen, the remaindermen vesting in those living at the date of the instrument, and the estate opening upon the subsequent birth of children so as to embrace them; or else the mother will be held to be trustee for herself and her then living as well as her after-born children. And a slight indication will induce the courts to adopt the construction of the deed which will effectuate the intention of the grantor. *Moore v. Simmons*, 2 Head, 546; *Beecher v. Hicks*, 7 Lea, 207.

In view of these rules of interpretation, we will examine the deed in question. In the first place, we can see no reason why the grantor should have preferred the living to the exclusion of the after-born children of his daughter. The moving consideration for its execution was the "love and affection he bore to his daughter and her children." If his purpose was to make the then living children of this daughter the special objects of his bounty, it would have been an easy matter for the grantor to have named them, so as to leave doubt impossible. In addition, this would be the natural mode of expressing such purpose. But, familiar as the grantor was with his daughter's family, he forbore to name them as grantees, but used the broad and generic term "children," compre-

hensive enough to embrace all those who at any time were born to this daughter.

In the second place, we think an examination of the deed not only makes it clear that this term was designedly used in this comprehensive sense, but that this design or purpose of the grantor, so evidently fair and just, may be carried out by the courts without doing violence to any sound rule of construction. In *Beecher v. Hicks*, supra, the deed was to "Sarah Catherine Hicks" and to "the children of the said Sarah Catherine upon her body begotten by her said husband," and it was held that it was the clear purpose of the grantor to carry the property conveyed to all the children falling within the class cited as the direct objects of his bounty, and that this would be effectuated either "by treating the conveyance as being to the mother in trust for herself and her children, or giving her an estate for life, with remainder to her children." There were no other words in the conveyance upon which such a conclusion could be rested, but the court, to effectuate the purpose of the grantor, seized upon the clause which has been quoted above. But we think in the present deed is to be found phraseology which indicates that the intention of the grantor was to embrace all the children of Mrs. Blackburn, and at the same time to restrict her to a life estate. This is found in the paragraph where it is provided that "the said Blackburn and his said wife are hereby put in possession of all said land, * * * and every part thereof, to their own use, said Blackburn having control and management * * * during the lifetime of his wife." If the deed was to take effect in present, as is claimed by the complainants, it is difficult to account for this provision; for, taking effect at its delivery, the mother and her living children would have had vested in them an estate in fee, the use and control of which, by operation of law, would have redounded to the interest of all as tenants in common; and the mother's interest would, upon her death, have passed under the statute of descents or by virtue of her last will, as the case might be. Evidently, however, this was not in the grantor's mind. It was, so far as the mother was concerned, intended that the property as a whole should be limited to a use by the husband and wife during the term of her natural life. For whom and in whose interest was this use thus limited? Can it be for a moment supposed the idea was in the mind of the grantor that Blackburn and wife and the children living at the date of this deed were to be alone the beneficiaries of this use? Such a supposition is unnatural, and, we are satisfied, does violence to the purpose of the grantor. On the contrary, our opinion is that he intended this valuable property as a home for his son-in-law and daughter and the children whenever born to this daughter, as long as she lived, and that upon her death leaving surviving her husband and children,

the remainder interest of the latter ripened into a right of possession, so that her husband, if he saw proper, could, after the mode prescribed in the deed, have set apart to him 400 acres out of the tract for his own use during the remainder of his life, and at his death this portion of the tract would pass into the possession of their children or their representatives. In other words, we think two life estates were therein provided for—one for the mother in the whole tract during her life, and upon her death another for the father in a portion of it, if he saw proper to assert it. The provision in the deed that upon the death of J. K. P. Blackburn the portion set apart to him shall "go to the said children, bodily heirs of said Mary McMillion Blackburn," neither adds to the class of remaindermen nor reduces the interest of any of the class already provided for or named earlier in the deed.

The result of this construction is that the children living at the date of the deed took a vested remainder in the whole tract; that the remainder opened up to admit after-born children; that the minor, Truett, succeeded upon the death of his mother to her interest in the land; and that under the deed of Blackburn and his wife to R. H. Laird and his wife the grantees took only the life interest of Mrs. Blackburn in the whole, and the possible life interest of Blackburn in the 400 acres contingently provided for him.

A decree will be entered in accordance with this opinion, and for a remand for partition or sale for partition. The costs of the lower court accrued up to the date of the appeal will be paid by the complainants, and of the appeal will be divided between the complainants and defendants, save and except Edward Truett. The costs accruing upon the remand will be disposed of by the chancellor.

HOLT & JOHNSON v. HAYES.

(Supreme Court of Tennessee. March 21, 1903.)

TRESPASS—CUTTING TIMBER—MEASURE OF DAMAGES.

1. Where defendant purchased stave bolts of trespassers, who cut the same on plaintiff's land, some of the bolts being purchased before and some after notice of the trespass, the measure of damages is, for the timber purchased before notice, its value as it stood on the land, and, for that so purchased after notice, the value in the form of stave bolts, without deduction for the expense of cutting and preparing for market, in the absence of facts showing special injury to the land by the removal of the timber.

Appeal from Chancery Court, Humphreys County; J. S. Gribble, Chancellor.

Action by Holt & Johnson against A. L. Hayes. From a judgment of the Court of Chancery Appeals affirming a decree of the chancellor in favor of plaintiffs, defendant appeals. Affirmed.

T. L. Lanier and Patterson & Stratton, for appellant. R. T. and J. F. Shannon, for respondents.

NEIL, J. This was an action brought for the conversion of timber, on the following facts: Will Lashlee and Henry Brown went upon the land of the complainants as pure trespassers, without any bona fide claim of right, and cut and hauled timber therefrom, and sold it to the defendant. Before defendant had any notice of the trespass of the said Lashlee and Brown, he purchased from them 43½ cords of wood, of the value of \$1 per cord standing in the tree, or \$43.50 for the whole. Complainants then notified the defendant that Lashlee and Brown were trespassing upon their lands in cutting and removing the timber, and requested him to buy no more of them. The defendant refused to heed the notice, or comply with the request, but thereafter bought from Lashlee and Brown 77 cords of the wood, worth \$77 in the tree in the woods, but worth \$246.40 in stave bolts delivered at the factory of defendant, in which form the said Lashlee and Brown prepared the timber and sold it to the defendant, and delivered it, after taking it from complainants' land.

The chancellor rendered a decree against defendant for \$289.90 (made up of the \$43.50 and the \$246.40) and costs of suit. The defendant filed the record for error, and the cause was referred to the Court of Chancery Appeals. That court, after full consideration, affirmed the decree of the chancellor. From this decree the defendant prayed an appeal to this court, and assigned error.

It is insisted that the decree of each of the courts referred to was erroneous, in that the defendant was charged with the said sum of \$246.40, the value of the timber after it had been converted into stave bolts. It is said that the true measure of damages was the value of the timber as it stood in the tree at the time it was cut, and, at all events, the defendant should be allowed the costs of converting the timber into merchantable form.

There is no error in the decree of the Court of Chancery Appeals. We are of the opinion that the same rule should be applied in cases of this character as are applied in cases of mining trespass. The rules applicable in the latter class of cases are those laid down in *Dougherty v. Chesnutt*, 86 Tenn. 1, 9, 10, 5 S. W. 444. It is there said: "There are two rules for the computation of damages in these cases of mining trespass, recognized by the courts, sometimes designated as the 'mild' and the 'harsh' rule. The mild rule is applied where the wrong was innocently done, by mistake or inadvertence; the harsh where the facts show the trespass to have been malicious, or with full knowledge of the title of the injured party, and in willful disregard of his rights. The former rule charges the defendant with the

value of the coal, ore, or rock mined, in situ, usually measured by the royalty in the particular locality. The latter charges him with the value of the same after severance, without compensation for mining and preparing for market."

Applying these rules to the case of timber removed, we hold that the defendant, for the timber purchased before notice of the trespass, was rightly charged, under the mild rule, with its value as it stood upon the land when it was felled; and that, for the timber purchased after he had notice of the trespass, he was rightly charged, under the harsh rule, with its value in the form of stave bolts, without any deduction for the expense of cutting and preparing for market.

The foregoing were the rules for measuring damages applicable to Lashlee and Brown, as to all of the timber, they being willful trespassers as to all; and the defendant, having bought the 77 cords from them with full notice, stands in their place as to that purchase.

There is another element of damages that sometimes appears in timber cases, that is, damages arising out of special injury done to the land by the removal of the timber (*Ensley v. Nashville*, 2 Baxt. 144), but no facts appear in this case to make that rule applicable here.

The decree of the Court of Chancery Appeals must be affirmed, with costs.

TENNESSEE CENT. R. CO. v. CAMPBELL et ux.

SAME v. MURPHY LAND CO.

(Supreme Court of Tennessee. Jan. 31, 1903.)
RAILROADS—CONDEMNATION PROCEEDINGS—ACKNOWLEDGMENT OF AMENDMENT TO CHARTER—CURATIVE ACT—LOCATION OF LINE—CONSTRUCTION OF CHARTER—PROCEDURE.

1. An amendment to a railroad charter, originally defective because acknowledged before a notary public, was validated by the express provisions of Acts 1901, p. 179, c. 118, amending Acts Ex. Sess. 1890, p. 43, c. 17.

2. A railroad company was authorized by charter to construct a line of road between N. and O. *Held* that, the location of the line not being exactly and definitely fixed by the charter, discretion as to where to locate it was vested in the company.

3. A railroad company was authorized to construct a line of road between N. and O. by a charter not exactly and definitely fixing the location of the line. Condemnation proceedings by the road were opposed on the ground that it was attempting to build a belt line around the city of N., which it had no authority to do. It appeared that while the route selected was not the most direct one between the two places, and did skirt the city of N. by a route some 10 miles long, it arose out of economic reasons, on account of the physical features and topography of the country, instead of other purposes and designs, such as a belt to reach industrial enterprises and business centers. *Held* not a belt line.

4. Condemnation proceedings by a railroad were opposed on the ground that the contemplated line was not located by the company or

its directors, but only by its president on the suggestion or advice of its general manager and engineers. *Held* that, there being no statute requiring the line to be located by the directors, a location by them was not indispensable to its validity.

5. Where condemnation proceedings by a railroad are opposed on the ground that they are not authorized under the charter of the road, the determination of the preliminary questions involved in the right to condemn, such as the construction of the charter, is for the court, even though facts may, to some extent, be involved in such preliminary questions.

Two separate proceedings to condemn land by the Tennessee Central Railroad Company against Lemuel R. Campbell and wife and the Murphy Land Company. Judgments for plaintiff, and defendants petition for writs of certiorari and supersedeas. Petitions dismissed.

T. M. Steger, T. H. Malone, Jr., J. M. Anderson, J. H. Acklen, John J. Vertrees, Wm. O. Vertrees, J. C. Bradford, Jas. A. Ryan, and Jas. S. Pilcher, for petitioners Lemuel R. Campbell and wife. J. C. Bradford, J. M. Anderson, and Jas. A. Ryan, for petitioner Murphy Land Co. Pitts & Witherspoon, for respondent.

WILKES, J. This is an application for writs of certiorari and supersedeas to review the action of the law court of Davidson county in proceedings instituted to condemn rights of way across lands of the petitioners. The cases involve the same questions of law, and, while the parties and lands affected are not the same, yet the rights of way are sought over each by the same railroad company and the same line of road, and they will therefore be considered together.

The cause has been before the court upon a former occasion for the same purpose.* At the time of the filing of the first petition the court below had proceeded regularly to the appointment of a jury of inquest or commissioners to lay off the right of way required, and to assess the damages of the defendants, but no report of its action had been filed. Upon the application for the jury the defendants resisted the taking of their property by issues made in their answers to the petitions filed by the railroad company, insisting upon grounds more fully set out hereafter. Upon the appointment of the jury, they tendered their bill of exceptions and prayed appeal to this court, which was granted. They filed their first petition for writs of certiorari to bring the proceedings before this court for review, and, pending the decision of this court, for supersedeas to suspend further proceedings in the court below, to prevent any entry upon the land and stop prosecution of the work. Upon mature consideration of the objection made, that certiorari would not lie to review

such proceedings, this court held that it would lie in a proper case, and was a substantive mode for the correction of errors, to which a party is entitled as a matter of right, as much as to any other mode for the correction of errors of inferior tribunals; citing in support of the holding Shannon's Code, §§ 4853, 4854, 6329, 6336; Kearney v. Jackson, 1 Yerg. 294; Warner v. State, 13 Lea, 52; Johnson v. Harris, 16 Lea, 136; State v. Taxing District, 16 Lea, 245; Brizendine v. State, 103 Tenn. 677, 54 S. W. 982. It was also held that in such cases, in the discretion of the court, a proper case being presented, supersedeas might issue to stay further proceedings in the court below pending the disposition of the case in the appellate court; Shannon's Code, § 6336. But the court was further of opinion that at the then stage of the proceedings a proper case was not presented for the issuance of the writs; that it was only after the report of the jury, assessing the damages, had been filed, exceptions thereto, if any, disposed of, and demand made by either party for a trial by a traverse jury in the court, or, in the absence of such contesting proceedings, the report had been confirmed, the right of way adjudged to the road, and the damages awarded the landowner, that the judgment became final, in such sense that it might be reviewed, in the case first put, by certiorari, and that supersedeas in proper case might issue. The court was of opinion that proceedings to condemn land for rights of way were, under our statute, dual in their nature—that is, a preliminary question, in proper cases, may arise as to the right of the road to acquire and condemn rights of way, either altogether, or across the particular lands of the defendants; and when this preliminary question is raised, and settled by the appointment of a jury of inquest, and that jury has acted as the statute prescribes, and has made its report, which has been excepted to, and a traverse jury demanded, for a trial in court, then the defendant may have the question of the right to condemn reviewed upon certiorari to this court. The theory is that the cause, as to this feature of the case, has reached a final decree, inasmuch as the petitioners may then, upon giving bond, as the statute provides, to secure the compensation that may be finally adjudged, have the defendants ejected from the right of way, and take possession of the same, and proceed to construct its road. Not only may certiorari issue in such case, but supersedeas, also, if a proper case is made out, in the judgment of the court, to warrant a stay of proceedings while the right to take is being reviewed. The gist of the decision is that every citizen whose land is sought to be taken for rights of way has the right to test the preliminary question whether the railroad seeking such rights of way is entitled thereto upon any terms. The question

* See Eminent Domain, vol. 12, Cent. Dig. § 536.

* Memorandum opinion.

of the amount of compensation to be paid is a separate one, but dependent, from the nature of the case, upon the right to take at all.

After the adjudication was thus made upon the first application for writs of certiorari and supersedeas, refusing the same for the reasons and upon the grounds stated, the petitioners filed other petitions, and now represent that the proceedings have reached such a stage, as heretofore indicated in the opinion of the court, as authorizes the issuance of the writs. These second petitions were presented to the Chief Justice of this court at chambers, and he ordered the issuance of the writ of certiorari as prayed for, but denied the application for supersedeas. The matter now comes before this court upon the merits of the preliminary inquiry, and the question is, have the complainants shown a legal right to condemn the lands of defendants as they seek to do? We do not understand that any serious controversy is now made as to the right to the certiorari, nor the correctness of the action of the Chief Justice in granting the same. No motion is made to dismiss, but the case is presented to us and argued before us as to the right and propriety of permitting the railroad to condemn the right of way. The railroad company has demanded and been granted a trial by jury in the court below upon the feature of the amount of compensation, and that matter is not now before this court.

It appears that the report of the jury of review and inquest has been made and filed, and to it the railroad company has excepted, and from it prayed and been granted an appeal to a traverse jury in court upon the question of the amount of compensation. The company has tendered a bond, which has been accepted, and is entitled, under the law, to possession of the lands and rights of way, and it has entered upon them to construct the road, and pending the proceedings under these second petitions much work has been done upon such construction.

The points now made against the right of the railroad to condemn the rights of way are, in substance, as follows: (1) That complainant railroad has no charter authority to construct the line of road at the place and along the route now being occupied by it; (2) that the railroad company is attempting to construct a belt line around the city of Nashville, instead of a main or direct line from Nashville to Clarksville, or to build such belt line in addition to and in connection with the line from Nashville to Clarksville; (3) that the line or route has never been located by the railroad company through its proper officials, as is authorized by law, but that the line was and is located alone by the president and engineer. The contention may be summarized that the railroad has no charter authorizing the route selected; that it has no right, under its

charter, to build a belt line; and that the line or route can only be located by the directions of the company, and not by its president and engineer.

Considering the first question raised, it appears that the complainant road had its birth under a charter naming it as the Nashville & Clarksville Railroad, and its purpose, as stated in this original charter, is to construct and operate a railroad from the city of Nashville to Clarksville, in Montgomery county. This original charter was amended in June, 1901, so as to change its northern terminus from the city of Clarksville to a point in Montgomery county, at the state line, between the states of Tennessee and Kentucky, in a northwesterly direction from the city of Clarksville, and so as to change its capital stock from \$1,000,000 to \$7,000,000; the object being to purchase and consolidate the Tennessee Central Railway Company and Nashville & Knoxville Railroad Company, in addition to building its own line from Nashville to Clarksville, and on the Kentucky state line, so as to form a continuous line, by way of Clarksville, Nashville, Lebanon, and Cookeville, to the Southern and Cincinnati roads; and these various lines were accordingly purchased and consolidated under the name of the Tennessee Central Railroad Company, and these latter amendments were made in April, 1902. The Tennessee Central Railroad Company, above referred to, was chartered in June, 1897, to construct a railroad from the west bank of Clinch river, near Kingston, Roane county, to the city of Nashville, and this charter was subsequently amended by changing the western terminus from the city of Nashville to Clarksville. It is said this amendment was acknowledged before a notary public, and it is insisted that this rendered it inoperative and void; while it is said in reply that, if originally defective because of the acknowledgment, it was validated by chapter 118, p. 179, of the Acts of 1901, amending chapter 17, p. 43, of the Acts of the Extra Session of 1890. We think the contention of invalidity not well made.

It thus appears that the Tennessee Central Railroad Company, under its own charter, has authority to construct and operate a line of road from Nashville to the state line, northwest of Clarksville, by way of Clarksville, and by virtue of the charter of the Tennessee Railway, which it has purchased, and now owns, it has authority to construct and operate a railroad from Clinch river to Clarksville by way of the city of Nashville. Neither of these charters locates the exact line, nor any point in either city that must be touched, either in approaching, entering, or leaving the city, but the obvious purpose is to construct a continuous line from the state line, beyond Clarksville, to the eastern terminus in Roane county, by way of the city of Nashville. We are of opinion that, under the provisions of these

charters and consolidation agreements, the complainant company had the right to construct a line of railroad from any point accessible in the city of Nashville, or upon the outskirts of the city, to the city of Clarksville, at such place as it might find accessible and feasible, whether within that city or upon its outskirts; and, the location of the line not being exactly and definitely fixed by charter, discretion vested in the company, as will be more fully discussed hereafter.

The railroad, in response to the second objection made, says that it is not constructing or proposing to construct a belt line, but only a main or direct line from Nashville to Clarksville. It appears that the line, so far as it is now in controversy, connects with the tracks of what is styled the Terminal Company at Stanley street in South Nashville, and extends to the bridge across Cumberland river in West Nashville; while petitioners claim that the main or direct line should be over the tracks of the Terminal Company to the foot of Broad street, and thence down the river through the city of Nashville. The president of the company states that the route selected was chosen after a thorough examination and great expenditure of money—some ten to fifteen thousand dollars—and the result was the selection of the line in controversy as the main line, and that it was virtually forced upon the company against its preference, by the physical features and topography of the country, and economic considerations growing out of these conditions forced the adoption of the line as the best and most feasible one. The vice president says that the line in question has been finally surveyed and located as the main line, and has been adopted as such by the officers and board of directors of the company, and the company has no other line in contemplation at this time. It appears that the sum of \$120,129.28 has been paid for rights of way along this line, and some \$200,000 to \$300,000 expended in construction, exclusive of the cost of rights of way. The proof tends to show that this line is not through a thickly settled section, built up with residences and business houses, but is through an agricultural section, largely. It appears that other surveys were made and lines projected, which would have resulted in two routes—one a main line, and another a belt, to reach various industries—but these projects were abandoned because of their cost, and the present line was approved and adopted by the president, superior officers, and others interested in the road in a pecuniary way, as well as by the construction company that built the road. The general manager, Miller, gives the location of the line from its start at Stanley street to its crossing of the river. The route appears somewhat circuitous, and does not enter the business part of the city, except over the tracks of the Terminal Company;

but we have not been cited to any evidence, beyond general statements, showing that the contemplated route is a belt line, instead of the main line. The weight of the evidence is that, while the route selected is not the most direct from the terminus in Nashville towards Clarksville, and does skirt the city by a route some 10 miles long, it arises out of economic reasons, instead of other purposes and designs, such as a belt to reach industrial enterprises and business centers. Under the law in regard to the construction of railroads, when the route is not definitely located by the charter a legislative discretion is allowed in making such location, provided there is not a substantial deviation from the course and direction indicated by the charter. Elliott on Railroads, vol. 3, p. 1264, note 2; So. Minn. R. Co. v. Stoddard, 6 Minn. 150 (Gil. 92). We do not think the contention is sustained that the proposed line is a belt road.

Passing from the question whether the contemplated line is a belt road, it is said that it has never been located by the company or its directors, but only by the president, upon the suggestion or advice of the general manager and engineers. The contention, as before stated, is that, until and unless the line is located by the board of directors of the company, there is no right in the company to condemn the lands along such line. There does not appear to be any statute of this state so providing, nor is there any decision of the court so holding. The facts in regard to the manner of the location of the line are stated by the officers of the company to be substantially as follows: The vice president states that the line was finally adopted by the officers and board of directors of the company. He says, however, that there was no formal meeting—the proceedings were not reduced to writing, nor spread upon the minutes. He further states that the line was adopted by both the officers of the railroad and construction company. Mr. Miller, the general manager, states that the line was agreed on at a meeting held for the purpose of locating the line; that there were present the president, vice president, two directors, the president of the construction company, the general counsel, and general manager, and perhaps others, and, as a result, he was directed to build the line in controversy. The general manager made reports recommending the line, in writing, and they were adopted and filed, and constitute a part of the official records of the company.

As to the legal question involved, we have no direct authority in the statutes of the state. Under proceedings authorized by our statutes for subscriptions by counties and municipalities to railroads, it is provided there shall be a survey of the entire line, and a substantial location; but it appears, nevertheless, that it is only necessary for the chief engineer to make the survey, location, and estimates, and certify the same (Shannon's

Code, §§ 1542e, 1560), and such proceedings are sufficient. There is no provision in the general incorporation act of 1875 (Shannon's Code, § 2024 et seq.) that requires the location to be made by the board of directors. It is not one of the duties of the directors, as enumerated in the act. Shannon's Code, §§ 2024 et seq., 2076, 2413, 2415, 1844-1867. In proceedings to condemn land for rights of way, the provision is simply that a petition be filed, setting forth the land wanted, the extent wanted, the name of the owner, and the object for which desired, and a prayer that a suitable portion be decreed by metes and bounds. The jury are required to examine the ground, and set apart by metes and bounds a sufficient quantity of land for the purposes wanted, and assess the damages to the owner.

Counsel for petitioners cite quite a number of cases from other states—notably, New York, Pennsylvania, Massachusetts, Rhode Island, Indiana, North Carolina, since 1872—in support of their contention; but it appears that in these states the statutes require the final survey and location to be made, and maps approved by the board of directors, and filed in some public office, before the road can finally determine its line and acquire the right to condemn lands. Rap. & Mack's Dig., vol. 6, 352 to 358. The rule is laid down in 3 Elliott on Railways, § 920, as follows: "When the duty of locating the road is imposed by statute upon the president and directors of the company, an exercise of discretion on their part is called for, which cannot be delegated; and a location made by an executive committee provided for in the by-laws of the company is inoperative, and cannot be ratified by the company, so as to make it valid as against the rights of another company, which have attached to the property in question prior to such ratification." Many of the cases cited by petitioners involve controversies between rival lines seeking priority over the same route located by each, and in states where the statutes expressly prescribe that the location shall be made by the board of directors.

But it is insisted that in the absence of any statutory provision, and by the rules and principles of common law, in the absence of any such provision, it is the duty of the directors to locate the line of road, as it is one of the most important of all things required to be done in regard to their building, and that, the board of directors being the governing and legislative body of a corporation, its president or other officers cannot enter into contracts in its behalf, except as to matters of simple administration, which must, from necessity, oftentimes be managed by him alone. These general principles may be conceded, and it may further be conceded that it would be best and more regular for the line to be approved, and in that sense located, by the board of directors, by formal entries upon its minutes; but still the question re-

mains, is such action indispensable to the location? Necessarily the location must be controlled, to a large extent, by the topography of the country, and the natural advantages and obstacles to be met on the different routes; and the determination of these questions rests largely in the engineer, and upon his judgment and discretion the location must largely depend. It is a question upon which he is much more competent to judge than a director, and upon his report the directors must largely base their action. Whatever may be the policy of other states, and whatever may be said as to the necessity for corporate acts of an important character to be done by a board of directors, and in a formal manner, we find that the policy of our own state is most liberal and broad, and leaves the question of location largely to the discretion of the company. The Legislature does not designate either the route or the terminus. The charter need not designate the route, but only the terminus, and it need not prescribe the matter of surveying and locating the route. We think we should follow up this liberal construction, since it is evident that, if a location is made which a board of directors does not approve, they have the remedy in their own hands to change the same; and, since the construction of the line is a matter of physical and open notoriety, it is evident that no fraud could for any length of time be perpetrated; and, if no objection is made within reasonable time, it is fair to assume that the location meets the approval of the directors and other officials interested.

It is said the trial judge committed manifest error in refusing to petitioners their constitutional right to a trial by jury of the issues raised in their answers. This question of the right to a trial by jury of the preliminary questions involved in the right to condemn has been considered by this court in two unreported cases—one of *Morrison v. Mayor & City Council*, and the other the case of *Bithall Howard et al. v. The Mt. Pleasant Southern R. Co.*, in both of which it was held that the question was one for the court, and not for the jury; basing the holding upon reason and the authority of the cases of *McWhirter v. Cockrell*, 2 Head, 10; *Evans v. Shields*, 3 Head, 70; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Savannah v. Hancock*, 91 Mo. 54, 3 S. W. 215; *Thompson on Trials*, § 1508; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 17 Sup. Ct. 581, 41 L. Ed. 979. It is said that, while this may be a correct rule as to general application, still, there may be cases where facts are involved in this preliminary question which it is proper and requisite should be submitted to a jury. In other words, the argument is that, so long as the right involves what are called "political questions," such as the propriety of a public improvement, or the necessity of taking property for such improvement, the question is one for the courts,

and not for the jury, but, when facts are involved upon which the right to take is based, it is a question for a jury, as when the improvement proposed is outside of the scheme of the charter. But we think the distinction attempted to be set up is not applicable in this case, if at all. It is the duty of the court to construe the language of the charter; and while facts may, to some extent, be involved in the preliminary question, they are not involved any more in a case like the present one than they were in the Bithall Howard Case, where the question was whether the enterprise was one prosecuted in good faith, or was a mere sham.

Upon the whole record, we are of opinion the defendants have not made out a case to warrant the court in refusing to allow their lands to be condemned for the purposes of the railway company, and the petition is dismissed. As before stated, the question of compensation to the defendants for the lands taken does not arise in this case. The petitions are dismissed at the costs of the petitioners.

LEDBETTER, Road Com'r, v. CLARKSVILLE & R. TURNPIKE CO.

(Supreme Court of Tennessee. March 28, 1903.)

TURNPIKES—INJUNCTION—ACTION BY ROAD COMMISSIONER.

1. By Shannon's Code, §§ 493-499, counties are corporations vested with power to acquire property for county purposes, and they may sue and be sued as other corporations. By section 6038, county courts are given exclusive control of the establishment and supervision of roads and ferries. By sections 1624, 1626, 1707, counties are authorized to build turnpikes and bridges, and pay for the same by the issuance of bonds. Section 1677 makes it a misdemeanor to place obstructions upon a highway, and requires the road commissioner to prosecute offending parties. Acts 1901, c. 136, § 1, vests in a road commissioner authority to supervise the roads in his district. *Held*, that the commissioner of a road district is merely the agent of the county as to construction and repair of roads, and cannot sue to restrain a turnpike company from collecting tolls on the ground that its charter has expired; the county alone having a right to institute any such suit.

Appeal from Chancery Court, Montgomery County; J. S. Gribble, Chancellor.

Suit by R. Ledbetter, as commissioner of Road District No. 12 of Montgomery county, against the Clarksville & Russellville Turnpike Company. From a decree of the Court of Chancery Appeals, overruling a demurrer to the complaint, defendant appeals. Reversed.

H. C. Merritt, for appellant. Savage & Johnson, for appellee.

SHIELDS, J. The bill in this cause was brought by complainant, Ledbetter, in his official capacity as commissioner of Road District No. 12 of Montgomery county, to enjoin the defendant from collecting tolls from the public using a bridge built by it on its turnpike across Red river, in his district;

the ground of relief sought being that the charter of defendant corporation has expired by limitation, and its franchises ceased to exist, and the turnpike become a public highway, free of toll, and subject to the jurisdiction of the county court, and to be controlled by the highway officers of the county and road district through which it runs, under the general road laws of the state. The defendant interposed a demurrer, the first ground of which challenges the right of complainant, as road commissioner, to bring and maintain this bill, for want of title or interest in the subject-matter of the litigation; the insistence being that the ownership, title, and control over public roads within its boundaries are in Montgomery county, and it alone has the right to institute a suit for the purpose of which this is brought. If this cause of demurrer is sustained, it will not be necessary or proper to pass upon the others, which go to the merits of the controversy.

We are of opinion that the contention of the defendant is sound, and that the demurrer should be sustained. Counties in Tennessee are corporations, and the justices of the peace, assembled in county court, are their representatives, and authorized to act for them. They are vested with the power to acquire property for county purposes, and the grants and conveyances therefor are required to be made to the county acquiring the same. They may sue and be sued as other corporations; all suits instituted in their interest to be brought in the name of the county suing, except actions against delinquent officers and their sureties, which shall be brought in the name of the state for the use of the county. Shannon's Code, §§ 493, 496, 499; *Hawkins County v. Railroad Co.*, 1 Tenn. Cas. 303. The county courts, composed of the justices of the peace, the representatives and authorized agents of the counties, are given exclusive control of the establishment and supervision of roads and ferries. Shannon's Code, § 6038. Public bridges are included in the general term "roads and highways." Shannon's Code, § 70. But public streets in incorporated towns and cities are not under the control of the county court. *White's Creek Turnpike Co. v. Marshall*, 2 Baxt. 118. Counties are also authorized to build turnpikes and bridges, and pay for the same by the issuance of the bonds of the counties, when authorized by special legislation, to be paid out of the public county funds, and by special levies for that purpose; and, in all cases of laying out of new roads or changing the location of old ones, the damages assessed for the right of way taken are adjudged against the county having the same done, to be paid out of the county funds. Shannon's Code, §§ 1624, 1626, 1707; *Justices of the Peace of Williamson County v. Jefferson*, 1 Cold. 419. From this it clearly appears that the public roads and bridges of each county are constructed, paid for, and controlled by the county in which they are located, and the owner-

ship and title thereto, which is generally an easement, is vested in the county in its corporate capacity; and, under the elementary rules of pleading, suits brought to protect such roads and bridges, and enforce the rights of the county therein, which are the same as the rights of the public, must be brought and prosecuted in the name of the county. This has been repeatedly held by this court. In the case of *Evans v. Shields*, 3 Head, 73, it is said: "It is impossible to maintain, as it seems to us, that it would be competent for the justices of the county court to devolve the power and trust confided to them, on behalf of the public, to a private and irresponsible individual, and thus, in effect, leave the important matter of the establishment and regulation of the public roads of the county to be controlled by the interests, prejudices, or resentments of private individuals. This cannot be tolerated. As before stated, the proper and necessary parties in all such cases are the justices (not the county), on the one side, and the party interested or aggrieved in the premises, on the other." In accord with this are the cases of *Beard v. Campbell County*, 3 Head, 98; *Cannon v. McAdams*, 7 Helsk. 376; and *Harmon v. Taylor*, 15 Lea, 535. And the district attorney for the circuit in which the county is situated is required to represent the county in the circuit court, and the Attorney General, for the state, in the Supreme Court, in all cases involving controversies over roads. Shannon's Code, § 1629. Complainant has no interest whatever in the public roads of his district, and is merely the agent of the county to superintend the construction and repair of the same, and cannot maintain any action in relation to them in his own name. Section 1 of chapter 136 of the Acts of 1901, under which he was elected, and relied upon by his counsel, vests in him no such authority. It merely makes him the agent or officer of the county to supervise the roads in his district. Nor does section 29 of chapter 1, Acts 1891 (Shannon's Code, § 1677), if not repealed by subsequent road laws, also relied upon by counsel, give him any such authority. It only declares the placing of certain obstructions upon the highway a misdemeanor, and requires the commissioner to prosecute offending parties, which actions, of course, must be in the name of the state.

The decree of the Court of Chancery Appeals, overruling the demurrer, is reversed, and the demurrer upon the grounds stated is sustained, and the bill dismissed, with costs.

TROUGHBER v. AKIN.

(Supreme Court of Tennessee. March 28, 1903.)

RECEIVERS—CONTROL OF LAND—APPOINTMENT—SEPARATE SUITS—PROCEDURE—NOTICE—APPEARANCE—WAIVER OF DEFECTS—SUPERSEDEAS—REVIEW.

1. Where an action was brought to establish the title of certain land, and, during the pend-

ency thereof, plaintiff brought another suit, in aid of the original, for the appointment of a receiver of the land pending such litigation, and the court, in granting the application, considered the record in both suits, and the chancellor's order appeared as though made on motion supported by such records, it was not invalidated by the fact that it was entered under the style of the dependent cause, rather than under the original.

2. Where, on an application for the appointment of a receiver of land in litigation, defendant appeared and filed counter affidavits contesting the application, an order appointing a receiver was not erroneous for want of notice to defendant.

3. Where a court had power to appoint a receiver under the facts stated, objections as to matters of form only could not be reviewed when collaterally presented to the Supreme Court on an application for a supersedeas.

4. An order of the trial court appointing a receiver to take charge of land in controversy pending litigation over the title may be reviewed by the Supreme Court on application for supersedeas, or on a motion to discharge a supersedeas granted.

5. In a prior action it had been twice determined that plaintiff was entitled to land in controversy, which was in defendant's possession, and such determination in each instance had been set aside on a technical point. Defendant, who was insolvent, had committed waste on the land, had destroyed valuable timber, and by improper care had greatly lessened its value. On an application for a receiver, defendant admitted cutting the timber, but denied waste, in general terms, and denied plaintiff's allegation as to the method of cultivating the land; and, while denying his insolvency, defendant admitted that he had made a mortgage to his son-in-law of all of his personal property, as alleged by plaintiff, but averred that the mortgage debt was just. Defendant had no other real estate, except a twenty-eighth interest in the land in controversy, purchased from another. *Held*, that such showing did not authorize the Supreme Court to grant a supersedeas to restrain an order appointing a receiver as prayed.

Bill by E. E. Troughber against J. T. Akin. Decree entered appointing a receiver. Application by defendant for a supersedeas to restrain the execution of an order appointing a receiver. Application denied.

H. C. True, Jno. F. House, and Joel B. Fort, for plaintiff. A. E. Garner and L. T. Cobbs, for defendant.

NEIL, J. This is a proceeding to obtain a supersedeas to restrain the execution of an order entered in the chancery court of Robertson county, appointing a receiver to take charge of and rent out the lands in controversy in the case of *E. E. Troughber v. Stephen Smelser et al.*, pending in that court. To properly understand the matter, it is necessary to state the following facts: On the 15th of April, 1898, a bill was filed in the chancery court of Robertson county by E. E. Troughber against J. T. Akin and others for the purpose of setting up a will which it was alleged that one G. W. Smelser had executed in favor of the complainant while he was of sound and disposing mind, and which he had subsequently been caused to destroy, while of unsound mind, by the defendant J. T. Akin and his wife, Emmaline Akin, and

also for the purpose of setting aside a deed which it was alleged the said Akin and wife had induced the said G. W. Smelser to make to them through undue influence, and while he was in said state or condition of unsound mind; also for the purpose of enjoining certain proceedings instituted by Stephen Smelser and Mary A. Cook, as heirs at law of G. W. Smelser, to have the said Akin deed declared void, and to have themselves adjudged entitled to a portion of the land as heirs at law of G. W. Smelser. Troughber claimed all of the land, consisting of several tracts, as devisee, to the exclusion of the heirs at law and of the said grantees under the Akin deed; also all of the personal property which was likewise bequeathed in the will, and which Akin and wife had obtained from G. W. Smelser by a bill of sale at or about the same time they obtained the deed to the land. The prayer of the bill was that the court should set up and establish the will referred to as the last will and testament of G. W. Smelser, deceased, and that it should then be certified to the county court of Robertson county, to be legally recorded as the said last will, to the end that letters testamentary might issue, and that the provisions of the said will might be fully carried out; also that the said Akin deed might be set aside, and the bill of sale of the personal property, and that Akin and wife might be enjoined from committing waste upon the land, and held liable for such waste as had already been committed, and for the value of the personal property appropriated and converted by them; also that Stephen Smelser and Mary A. Cook be enjoined from the further prosecution of the suit brought by them, above referred to. Answers and other pleadings were filed, and a decree finally rendered in the chancery court. From this decree an appeal was prayed and granted to this court, and at the December term, 1901, was referred to the Court of Chancery Appeals for examination and decision. That court found the facts as claimed by complainant, Troughber, but was of the opinion that a final decree could not be rendered in favor of Troughber, because he had asked for a trial by jury in the chancery court, and had been refused by the chancellor, and that the cause should be remanded to the chancery court for the said trial by jury. On appeal to this court, the decree of the Court of Chancery Appeals was affirmed. When the cause again reached the chancery court, a jury was impaneled, and, in response to issues made up and submitted to them, found that G. W. Smelser executed the will as claimed in the bill; that he subsequently destroyed that will, while of unsound mind; that he was unduly influenced to destroy it; that he was unduly influenced by Akin and wife to execute to them the bill of sale of the personalty and the deed to the realty; and that he was of unsound mind when the latter papers were executed. This verdict

was rendered on December 11, 1902. Thereupon the defendant J. T. Akin moved for a new trial, and the hearing of the motion was continued over until a future day of the term. On January 3, 1903, the motion was determined in favor of Akin, on the ground that his wife, Mrs. Emmaline Akin, had died before the hearing of the cause, and the trial had been had without revivor as to her heirs at law, and that the latter were necessary parties. On the same day Stephen Smelser and Mary A. Cook asked leave of the court to withdraw all of the defenses to Troughber's bill, and this was permitted, and judgment pro confesso was entered against them. On December 12, 1902, after the verdict of the jury was rendered, and before the motion for new trial had been disposed of, complainant, Troughber, filed the bill in the present case. In this bill he recited the substance of what has been above stated, down to the rendering of the verdict of the jury, and then alleged the following facts, viz.: That Akin had had possession of the lands devised to complainant, and had taken the rents and profits, since the death of G. W. Smelser, in January, 1896; that the rentals were worth \$250 per year, and that Akin was indebted to him in the sum of \$1,700 on account of these rents, and in an additional sum for the value of personal property which he had appropriated to his own use, and which had been bequeathed to complainant—in all, the sum of \$2,000, or over, and that J. T. Akin was wholly insolvent; and that he was about to fraudulently dispose of his crops raised on said land, and of a $\frac{1}{28}$ interest in said lands which he had purchased from one D. O. Andrews, for the purpose of defrauding the complainant out of the said sum due to him, and also to escape the payment of the costs of the cause. It was alleged in the bill, on information and belief, that, when the Court of Chancery Appeals decided the case against Akin, he had removed a portion of his personal property into the state of Kentucky, and had disposed of it, for the purpose of escaping the payment of the rents and profits to complainant, and "that his son-in-law, George Miller, voluntarily paid the costs, which were adjudged against defendant Akin by the Supreme Court, and publicly stated that he was conducting the lawsuit, and proposed to hold the land, and use the rents and profits from the same for the purpose of paying the expenses of the said litigation." It was further alleged in the bill, in positive terms, that defendant Akin, since he had been in possession of the land, had used it in so reckless a manner that it was washed in holes and gullies, and was worth hardly half as much as it was when he entered upon it, and that he had cut a large amount of valuable timber. The bill also referred to the motion for a new trial above mentioned as an evidence of the fact that the defendant Akin had resolved to remain in possession of the

land and use it in defiance of right and justice. The prayer of this bill was for an attachment to issue for the purpose of seizing the crops before mentioned, and also the $\frac{1}{2}$ interest in the land purchased from D. O. Andrews, to secure the payment of the amount claimed for rents and personal property converted, and also for a receiver to take charge of the said lands involved in the first case—that of *E. E. Troughber v. Stephen Smelser et al.* It was alleged that, if a receiver should not be appointed, the land would be very greatly injured and lessened in value. This bill was sworn to on "knowledge and belief." On January 3, 1903, the day the motion for new trial was determined in the parent case, Troughber filed an amended bill, which contained the additional allegation that on May 5, 1902, defendant J. T. Akin had mortgaged all of his personal property of every description to one George Miller to secure a note in the sum of \$500, and that both the note and mortgage were fictitious and fraudulent, and made for the purpose of defrauding the creditors of Akin, and especially for the purpose of defeating complainant's claim for rents and for the costs of the litigation in the case of *E. E. Troughber v. Stephen Smelser et al.* A copy of the mortgage was exhibited. This bill was sworn to on "knowledge, information, and belief." On the same day Akin filed an affidavit in the cause, containing the following denials and averments, viz.: "That he is not insolvent; that he has not injured the land; that he has not tried to nor has he wrongfully cultivated the said land; that he has not cultivated the land so as to make gullies in it; that he does not owe to complainant a cent for rents; that the verdict of the jury has been set aside; that he has not committed waste; that the land is more salable now than when he got it; that he has been in possession of the land since January, 1895; that the mortgage to George Miller is for an honest debt, and was not made to hinder and delay creditors; that he has improved the land greatly; and that he has a legal and valid defense to the bill filed in this cause." The chancellor therefore appointed a receiver to take charge of the lands and rent them out, first requiring a bond of the complainant. The decree states that the receiver was appointed on motion of the complainant, and that this motion and the action of the court were based upon the bill and amended bill in the present case, and the mortgage made by Akin to Miller, exhibited with the amended bill, the affidavit of Akin, "and the whole record in the case of *E. E. Troughber* against *Stephen Smelser* and others, pending in this court, and the court granted said motion for a receiver, and appointed said receiver after due consideration of the same." The petition now before us was filed for the purpose of having the said order superseded, and is accompanied by the record in the case of *E. E. Troughber v. J. T. Akin*, as well as the

record in the case of *E. E. Troughber v. Stephen Smelser et al.*; the latter appearing in a transcript of more than 900 typewritten pages. Both of the cases are still in the lower court. Nothing is here, technically speaking, except the application for supersedeas.

We are mindful of the fact that the consequences of our decision upon this matter cannot be otherwise than grave and important to the respective parties, and we have given as full consideration to the questions involved as we could in the time at our command.

Numerous errors are assigned that go merely to the form of the proceeding below. These we shall dispose of very briefly.

It is said that the appointment was made in the present case, and not in the original case in which the land was sued for. This is immaterial. The present suit was brought only in aid of the original suit, and to enforce rights growing out of that suit. The entire litigation was treated as one by the chancellor, and both records referred to. The bill in the present case was, among other things, filed expressly for the purpose of having a receiver appointed for the property involved in the prior pending litigation. Application may be made by bill or petition. (*Gibson's Suits in Chancery* §§ 856, 857), or even on motion (*Henshaw v. Wells*, 9 *Humph.* 568, 570); but, when a case is already pending in which the property is involved, the proper practice is to present the matter by petition or motion supported by affidavit in that cause. It appears that, when the chancellor referred to the application in the decree, he spoke of it neither as having been made by petition nor by bill, but as if made by motion supported by the record in both causes. The real, substantial thing is that both causes were in the same court, and referred to the same subject-matter, only in different aspects; and the chancellor had both before him, together, and also had jurisdiction of the property involved, and his decree appointing the receiver shows these facts. Under these circumstances, if he otherwise had jurisdiction to make the order, it could not be held that his jurisdiction was defeated by the fact that the order was entered under the style of the dependent cause, rather than under the original.

It is said the appointment was made without notice to Akin. This is met by the fact that Akin seems to have been present, and he filed a counter affidavit, which the chancellor considered.

It is said that Akin's affidavit fully met the allegations of the bill; also that the affidavit to the bill was not sufficient in form; that the receiver was not seasonably applied for, the bill in the original cause having been filed April 15, 1898, and the application not having been made until January 3, 1903. The foregoing are all matters of mere form, not going to the jurisdiction of the chancellor to appoint the receiver, and cannot, in gen-

eral, be considered when collaterally presented, as upon the present application. If the chancellor had the power to appoint a receiver under the facts stated, this court could not, in general, review, on an application for a supersedeas, his irregular exercise of that power, any more than it could review any other interlocutory order—as an order granting or dissolving an injunction. *Baird v. Turnpike Co.*, 1 Lea, 394; *Bramley v. Tyree*, 1 Lea, 531; *Johnson v. Hanner*, 2 Lea, 11; *Hamilton v. Wynne*, 3 Tenn. Cas. 34; *Roberson v. Roberson*, 3 Lea, 50, 52; *Enochs v. Wilson*, 11 Lea, 228, 232, 233. The appointment of a receiver is ordinarily in the nature of granting extraordinary process, for it neither settles nor prejudices rights, and is only resorted to for the purpose of preserving the property pending the litigation. *Id.*

The real question for determination is whether the appointment of a receiver in the pending litigation was a true exercise of the right of the chancellor to preserve the property for the benefit of whomsoever may be finally successful in the suit for the property, or whether it was really a decision upon the merits of the controversy, by interlocutory order, in advance of a final decision of the cause. The settlement of the question requires an examination of some of our decisions:

Richmond v. Yates, 3 Baxt. 204. In this case it appeared that Yates had caused to be levied on and sold certain land as the property of Mrs. Richmond's husband, and had become the purchaser at the sheriff's sale. Mrs. Richmond, being in possession of the land, and claiming to be the owner of it by reason of its having been bought and paid for with her money, filed her bill against Yates to assert her right thereto, and contesting his claim. Yates thereupon filed a cross-bill, making the husband of Mrs. Richmond a party thereto, but not Mrs. Richmond herself; his purpose being, we assume (the facts not being fully stated in the opinion), to obtain possession of the property under the sheriff's deed. Yates proceeded to take the testimony on his side, and having secured enough, in his opinion, to establish his right to the land, he asked the chancellor for a receiver. The receiver was accordingly appointed, and the appointment superseded by an application to one of the judges of this court at chambers. Subsequently the matter came up on motion to discharge the supersedeas; the cause still pending in the court below, not being ready for trial. In this state of the matter, this court, speaking through Nicholson, C. J., said: "To discharge the supersedeas under such circumstances would be tantamount to deciding the question of title upon an ex parte view of the proof. The same reason exists now which induced the granting of the supersedeas. It is a contest as to the title of the land, the complainant being in possession; and, until

it is determined upon the hearing that her title is invalid, she cannot be disturbed in the possession."

Morford v. Hamner, 3 Baxt. 291. This is a case usually cited upon the subject we now have in hand, but the only point decided in it was that the vendor's lien does not extend to the rents, and the vendor cannot have a receiver appointed for the purpose of impounding the rents, and applying them to the payment of the purchase-money debt. The court said: "It is no part of the contract of sale, either express or implied, that the vendor shall appropriate anything but the land itself by sale for the satisfaction of his purchase money; and by the contract the purchaser is entitled to the possession until the land shall be sold to satisfy the unpaid purchase money. Upon this ground the supersedeas in the present case was granted, and for the same reason the motion to discharge it is disallowed." See, however, the reasoning in *Moore v. Knight*, 6 Lea, 434-439.

Davis v. Reaves, 2 Lea, 649. This was an application for the appointment of a receiver in this court in a suit which was said to be, in substance, an ejectment suit. The substance of the decision was that the rule that no receiver could be appointed in such cases, announced in *Richmond v. Yates*, supra, was not an inflexible one, but that a very strong showing must be made before such appointment could be had. In that case it appeared that the complainants had succeeded in the court below, and the defendants appealed. Speaking to the motion for the appointment for a receiver, the court said: "Even if the decree below for the complainants raised a presumption in their favor—a questionable point, in view of the settled doctrine of this court that the appeal vacates the decree—it would not alter the general rule. The burden would still be on the applicant for a receiver to establish a proper case, and the law certainly requires, in an ejectment suit, a strong showing to justify interference with actual possession. Such a showing obviously demands that the court should be reasonably satisfied that the recovery, on the basis of the decree, would be in favor of the complainant, and for some definite amount, and that this recovery would be lost unless the receiver were appointed. There is no such showing."

State v. Allen, 1 Tenn. Ch. 512. In this case Judge Cooper used the following language, which expresses the substance of the case: "The court is very slow to appoint a receiver of realty in the peaceable possession of defendant under a claim of right, and when the contest is between claimants of the legal title. For the court cannot interfere with the legal title unless there be some equity by which it can affect the conscience of the party in possession. *Knight v. Duplessis*, 1 Ves. Sr. 324; *Willis v. Corlies*, 2 Edw. Ch. 281; *Hugonin v. Basely*, 13 Ves. 105. And such interference is, to a certain extent, giving relief, and, upon a preliminary

motion, depriving the defendants of the present use and enjoyment of the estate, and pro tanto and pro tempore giving a decision against him. *Houlditch v. Lord Donegall*, 1 Beatty, Ir. Ch. 402. The property was not, however, at the filing of the bill, in the peaceable possession of the defendant," etc.

Cassetty v. Capps, 3 Tenn. Ch. 524. The syllabus fully expresses the substance of the case, and is as follows: "Equity will not, pending a suit for a sale of land for division among co-tenants, interfere, by the appointment of a receiver, with the lawful possession of one of the tenants—it not appearing that he disputes the title, or interferes with the possession of his co-tenants—especially if there is no sufficient averment of insolvency."

Blake v. Dodge, 8 Lea, 465. The bill in this case was filed to close up a partnership in a race mare. The mare was to be trained by the defendant, at certain wages, and when trained sold, and the profits divided. In the court below an order was entered to sell the mare—whether through a receiver or otherwise does not appear. Upon application to one of the judges of this court, the order was superseded. Subsequently, upon a motion to discharge the supersedeas, the court said: "The order of sale deprives the defendant of his property before the animal is trained so as to insure the expected profits. The order may not be erroneous, and yet it certainly accomplishes in advance all the purposes of the final decree. It falls clearly within the statute."

Downing v. Dunlap Coal & C. Co., 93 Tenn. 221, 24 S. W. 122. The syllabus states the substance of the case fully, and is as follows: "A supersedeas is properly granted by a judge of this court to stay an interlocutory order of a chancery court, based alone upon bill, answer, and ex parte affidavits, placing a solvent and going corporation in the hands of a receiver pending a suit by the minority of its stockholders to wind up its office, thereby determining finally, in advance of a hearing on the merits, issues made by the pleadings, vital to the interests of the parties, and wresting the management of the corporation from the majority of its stockholders," etc.

Pearson v. Gillenwaters, 99 Tenn. 446, 456, 42 S. W. 9, 63 Am. St. Rep. 844. One of the questions in this case was whether at the instance of a purchaser of real estate at a chancery sale, and after confirmation, a receiver could be appointed to take charge of the land and rent it out pending an appeal from the decree of confirmation. The court held that such a receiver could not be appointed, on the ground that the appeal vacated the confirmation, and the owner of the land was entitled to the rents until the final confirmation, not on any question of disturbing possession, merely, pending a litigation.

There are some general observations in some of these cases and in others that should

be noticed here. In *Downing v. Dunlap*, etc., Co., supra, it is said (page 235, 93 Tenn., and page 125, 24 S. W.): "The question is as to the effect of the decree at the stage made, and in the condition of the record. It is not whether the order was erroneous, but whether one to be enforced actively, and which may deprive the party complaining, of rights of money or property, in advance of the final hearing. All the court can do on application for or on motion to discharge a supersedeas is to see that the order complained of is of this character. *Blake v. Dodge*, 8 Lea, 465. The power is limited to such an order or decree as determines rights of the parties, about which they are litigating, in advance of a hearing, and which is susceptible of being executed by some affirmative action or process." In *Johnson v. Hanner*, supra, it is said: "The appointment of a receiver, as the court has recently said, is ordinarily in the nature of extraordinary process, for it neither settles nor prejudices rights, and is only resorted to for the purpose of preserving the property in controversy, pending the litigation, for the benefit of the successful party. *Baird v. Cumberland & Stone River T. P. Co.*, 1 Lea, 394. All of our circuit judges and chancellors are by statute authorized to make such an appointment in vacation as well as in term time. *Shannon's Code*, §§ 3948, 4452. Such an appointment is therefore clearly within the competency of the court, and an order in term cannot be reversed by this court by a supersedeas under *Shannon's Code*, § 3933. *Bramley v. Tyree*, 1 Lea, 531. Nor, a fortiori, a fiat making the application at chambers." In *Enochs v. Wilson*, 11 Lea, 228, 233, it is said: "An order appointing a receiver merely for the purpose of taking possession of property in litigation, and managing it for the interest of all parties, is in its very nature interlocutory, no matter at what stage of the cause it may be made. All of the courts of this state, and the judges thereof, are clothed with the power to appoint receivers for the safe-keeping, collection, management, and disposition of property in litigation, when necessary to the end of substantial justice. *Shannon's Code*, §§ 3768, 3948. Such an order can neither be appealed from directly, nor superseded under the special provisions of the Code authorizing the superseding of certain interlocutory orders. *Shannon's Code*, § 3933. Such orders, as well as all other proceedings in a chancery case, are brought up for revision by a general appeal, but remain in force unless otherwise ordered by this court," etc.

In this connection, it is proper to introduce the case of *Cone v. Paute*, 12 Heisk. 506. The complainant was a judgment creditor of Paute and filed his bill, after return of execution nulla bona, to reach and subject the equitable interest of Paute in the property, and with a view thereto, sought the foreclosure of prior deeds of trust, seeking to reach the surplus after the satisfaction of the prior

debts. To this end, he prayed for a receiver *pendente lite*. The chancellor made the order upon the ground that the defendant, Paute, was in possession of the property involved in the controversy, receiving the rents and profits, but failing to remove and keep down the accumulating incumbrance of state, county, and city taxes, and in the order directed that the property, lands, etc., be taken out of the possession of the defendant, Paute, and placed in the hands of the receiver, and that the latter appropriate the rents and profits to the payment of taxes accrued and accruing. Speaking to this order, this court said, through Nicholson, C. J.: "This is such an interlocutory decree as may be superseded where a proper case is made out." But upon examination (page 508, 12 Heisk.) the court held that the chancellor acted judiciously in making the order, and declined to interfere with it.

There are some general conclusions to be deduced from the foregoing authorities, which will be found useful in enabling us to reach a correct solution of the special case we have for decision. They are as follows, *viz.*: That the power to appoint receivers belongs to all of the courts of the state, and to the judges thereof, and orders appointing receivers belong to the class of interlocutory orders; and are not, in general, reviewable upon application for supersedeas, any more than other interlocutory orders—such as those granting or dissolving injunctions; that interlocutory orders, however, may be so erroneously passed and drawn as really to contain elements proper only in a final decree or judgment, and when so drawn, and when, in addition, they are of a kind capable of active enforcement, they may be reviewed upon application for supersedeas, and may be deprived of their obnoxious features, being allowed in other respects to remain in force; that before interlocutory orders can be restrained, upon such application, they must have both of the features above referred to (that is, must trench upon final relief, and must be of a nature to be actively enforced; neither feature alone being sufficient to justify interference, because, even if the order trenches upon final relief, it may await correction upon appeal, if not of a nature to be actively enforced, and, on the other hand, it may be of a nature to be actively enforced, yet not amenable to supersedeas, because it does not have the color of final relief); that all orders appointing receivers require and necessitate action (that is, from their very nature, must be actively enforced, to be at all efficacious), yet they are not on that account open to review on application for supersedeas, but, before becoming so reviewable, must go further, and contain some element that should only appear in a decree granting final relief (that is, in a final decree upon the merits of the controversy involved in the pleadings). The race-mare case (*Blake v. Dodge*), *supra*, and the case brought by the

minority stockholders of a corporation against the corporation and the majority of the stockholders (*Downing v. Dunlap*, etc., *Coal Co.*, *supra*), for the purpose of obtaining control of the corporation, and wherein the said minority stockholders were given immediate control in advance of final hearing by the chancellor, by means of and in the form of an order appointing a receiver of the corporation, are examples of the unlawful use of the power belonging to all the courts of this state, and to their judges, to appoint receivers, because the order referred to really determined in advance of final hearing matters that should have awaited and should have been reserved for that hearing. It seems that orders disturbing the possession of real estate pending a litigation concerning that class of property, when the title is involved in the litigation, are always to be treated as, if not wholly pertaining to final relief, yet in the nature of final relief, and are always reviewable upon application for supersedeas; but, notwithstanding they are of such a nature, this court, upon so reviewing them, will allow them to stand until final hearing, if it can be seen, under the facts of the special case, that good and substantial reasons appear for such action, and that no abiding injury is done to the party deprived thus temporarily of possession. *Rocco v. Cicalla*, 12 Heisk. 508. In the case of *Richmond v. Yates*, *supra*, it does not appear that any reason whatever was made to appear for the appointment of the receiver, further than that the chancellor was of the opinion, apparently, from the testimony introduced by the defendant and cross-complainant in that case, that he was entitled to the land, and that the original complainant had no interest in it; and this in advance of any testimony offered in the cause by the complainant, and while she yet had the legal right to present her testimony—a clear case of final action in the form of an order appointing a receiver. In the case of *Cone v. Paute*, *supra*, the reason given was that the taxes were not kept down, but were being allowed to accumulate and incumber the property, and this was held to be a sufficient reason. In *Davis v. Reaves* it was assumed as settled law that a receiver in such cases could be appointed upon a proper showing. It seems that the question there was as to whether the receiver should be appointed to protect rents, and the court, not being able to see that any special amount would be due, declined to make the appointment. In *State v. Allen*, *supra*, it was said that the court would be very slow to appoint a receiver in this class of cases, but this implies that upon a strong showing the appointment might be made. In *Cassety v. Capps*, *supra*, the receiver was denied; that being really, as stated by Cooper, J., an ejectment suit brought by one tenant in common against the other; but it was intimated that, if the defendant had denied the rights of his co-tenants to their shares or interests

in the land, and there had been a sufficient allegation of insolvency, a receiver might be appointed in such a case. *Pearson v. Gillenwaters*, supra, does not bear upon the special phase of the matter now under discussion, and need not be further noticed. The same is true of *Morford v. Hamner*, supra.

So we think it may be stated as a settled rule in this class of cases that a receiver may be appointed to take charge of the land in controversy pending the litigation over the title, upon a proper state of facts being made to appear, showing the necessity for such action, but that the action of the lower courts in such cases is subject to review by this court upon application for supersedeas, or upon motion to discharge a supersedeas granted by one of the judges of this court, and that upon such review this court will determine the sufficiency, in law, of the grounds on which the judge of such inferior court acted, and will either affirm or disaffirm, as it may be found by this court that such grounds are sufficient or the contrary. But in determining whether the facts exist as found by the lower court, this court will give great weight to the conclusion of the lower court. *Cone v. Paute*, 12 Heisk. 508.

Before applying the foregoing principle to the facts of the present case, it is proper to observe that it is not intended in any wise to impair the rule that this court has the right, on final appeal or writ of error, to review orders appointing receivers, just as it has power to review any other interlocutory order of a lower court, as well as the final decrees and judgments of such courts (such were the cases of *Henshaw v. Wells*, 9 Humph. 568, 570; *Williams v. Bartlett*, 4 Lea, 624, 625; *Bidwell v. Paul*, 5 Baxt. 693), or to impair the rule that the judges of inferior courts have the right to appoint receivers of personal property, for care, management, and safe-keeping, and that such orders cannot be interfered with or restrained by this court upon petition for supersedeas, or the rule that the judges of inferior courts have the right to appoint receivers in cases where mortgages have been executed upon real or personal property, and a showing is made that it is necessary for the preservation of the property that a receiver should be appointed, or it is made to appear that the corpus of the estate is insufficient to pay the mortgage debt, and the mortgagee is insolvent (*Williams v. Noland*, 2 Tenn. Ch. 151), or that taxes are unpaid and accumulating, and that in such cases this court cannot restrain such orders upon application for supersedeas (*Williams v. Bartlett*, 4 Lea, 624, 625; *Bidwell v. Paul*, 5 Baxt. 693; *Bramley v. Tyree*, 1 Lea, 531-533). But, as already stated, neither the inferior courts, nor the judges thereof at chambers, can appoint receivers of either real or personal property, whether under mortgage or not, by orders containing provisions applicable only to final decrees or judgments, and capable of active

enforcement; and this court can, upon application for supersedeas, examine any interlocutory order of the inferior courts for the purpose of determining whether it contains such objectionable features, but, upon finding that it is not amenable to such objection, this court can do no more than to dismiss the petition and adjudge the costs thereof. On the contrary, if upon such examination the objectionable features referred to are found to exist, the court will restrain their enforcement.

Cases involving title to real estate, as we have already pointed out, stand in a distinct class. This special phase of the question we have already discussed. To this class belongs the case we now have for decision, and we shall now briefly apply the principle ascertained to the facts of this case. The facts on which the chancellor based his action were, in substance, that the complainant had shown an equity entitled to consideration upon an application for the appointment of a receiver, in the fact that the merits had been twice determined in his favor, the findings in each instance having been set aside upon a merely technical point; that the defendants had committed waste upon the land, in the destruction of valuable timber; that the defendants had so cultivated and managed the land as that it had washed into gullies and holes and had been greatly lessened in value, and would probably continue to be injured if allowed to remain in their possession, and that it was essential to the preservation of the property that it should be placed in the hands of a receiver; and, finally, that the defendants were insolvent. The first point—as to the equity arising out of the result of the former trials—is indisputable. As to the second point or series of facts, the defendants deny all but the charge of cutting valuable timber (denying waste, however, in general terms) and support their denial by the affidavit of defendant J. T. Akin. The affidavit of defendant Akin also, in terms, denies the charge of insolvency, but does not deny the making of the mortgage to his son-in-law, and that it contained all of his personal property. On this matter he contents himself with the averment that the mortgage debt is just. In addition, it is a fair inference from the record that defendant Akin has no other real estate, outside of the real estate in controversy, except the $\frac{1}{28}$ interest purchased from D. O. Andrews. The only fact upon which there is a square denial, and upon which the complainant makes no showing other than his own affidavit, is as to the method of cultivating the land. However, taking all of these phases of the matter into consideration, and having regard to the rule laid down in *Cone v. Paute*, supra, that great weight must be given to the finding of the lower court in such a matter, we cannot say that it would be proper to grant a supersedeas in this case, or that the chancellor acted erroneously in

appointing the receiver. From all that appears, his action seems to have been dictated by a sound discretion, and is in accord with "the ends of substantial justice" (Shannon's Code, § 5549), looking only to the preservation and care of the property pending the litigation, so that the successful party, whichever of the two it may be, shall receive the land undiminished in value.

Therefore the application for supersedeas is denied.

DULANEY et al. v. BUFFUM et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

JOINT TORT FEASORS—SATISFACTION—DISCHARGE—RESERVATION OF CAUSE OF ACTION.

1. Where, pending an action against several joint tort feasons, plaintiffs accepted money in satisfaction of the liability of two of them, such satisfaction was a bar to the action against all the others.

2. Pending an action against several joint tort feasons, plaintiffs acknowledged in writing the receipt of a sum of money; "the same being in full settlement of all claims on account of the matters set up in the petition, so far as said two defendants are concerned." *Held*, that such reservation did not prevent the acknowledgment of satisfaction from operating as a bar to a further prosecution of the suit against the other defendants.

3. Rev. St. 1899, § 897, providing that it shall be lawful for every creditor of two or more debtors, joint or several, to compound with any one or more of his debtors as he may see fit, and to release them from further liability, without impairing his right to collect the balance from the other debtors, applies only to creditors and debtors in the common acceptance of those terms, and does not prevent the acceptance of a satisfaction from one of several joint tort feasons from operating as a bar to a suit against any of the others.

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by W. P. Dulaney and others against Frank W. Buffum and others. From a judgment for defendants, plaintiffs appeal. Appeal dismissed.

This suit was begun by the appellants in Saline county on December 31, 1897. There was a trial of this cause at the February term, 1899, of the circuit court of Saline county. At the close of the evidence on the part of the plaintiffs the court instructed the jury to find the issues for the defendants. In accordance with such direction by the court, the jury rendered a verdict for the defendants, and judgment was rendered in pursuance of the verdict. The motion for new trial having been overruled, plaintiffs, in due time and form, prosecute their appeal to this court.

At the April term, 1902, of this court, defendants Frank W. Buffum and La Crosse Lumber Company filed their motion to dismiss as to them, to which motion was attached a receipt for \$750 in settlement with these two defendants of all claims against them on account of the charges alleged in the petition; also a letter from the plaintiffs to

one of the defendants, stating that they had directed the discontinuance or dismissal of this case against these two defendants, which motion and release thereto attached are as follows:

"Now come F. W. Buffum and the La Crosse Lumber Company, two of the above-named defendants [respondents], and move the court to dismiss as to them in said cause, and, for reasons therefor, state that plaintiffs [appellants] and the said defendants [respondents] F. W. Buffum and the La Crosse Lumber Company have fully settled the matter of differences between them, complained of in said cause, as fully shown by the receipt and letters hereto attached; and said plaintiffs, as shown by this said letter, agree to dismiss said cause in this court as to them."

"William P. Dulaney and S. J. Dulaney, Composing the Firm of Dulaney Brothers, Plaintiffs, against Frank W. Buffum, La Crosse Lumber Company, H. C. Taylor, R. J. Hurley, George D. Hope, A. A. White, and Harry Gorsuch, Defendants. Received from Frank W. Buffum and La Crosse Lumber Company, two of the defendants in the above-entitled cause, which was instituted in the circuit court of Saline county, Missouri, and is now pending in the Supreme Court of said state, the sum of seven hundred and fifty (\$750.00) dollars, the same being in full settlement and satisfaction of all claims and demands in our favor, or in favor of either of us, on account of the matters and things set up or referred to in the petition in the above-entitled suit, so far as said two defendants are concerned; and we hereby agree to at once discontinue and dismiss said suit so far as said two defendants are concerned. In witness whereof, we have hereunto set our hands this 14th day of December, 1901, at Slater, Saline county, Missouri. W. P. Dulaney. S. J. Dulaney. Dulaney Bros., by S. J. Dulaney."

The motion as above quoted was sustained, and on the same day, at the April term, 1902, the other defendants in this cause filed their motion to dismiss the appeal herein pending, which motion is as follows:

"Now come H. C. Taylor, R. J. Hurley, George D. Hope, A. A. White, and H. A. Gorsuch, a part of the defendants in the above-entitled cause, and show to the court that this is an action for damages for alleged torts on the part of the above-named defendants and other defendants, Frank W. Buffum and La Crosse Lumber Company, charged to have been committed by them jointly; that since the date of the granting of the appeal in this case the said plaintiffs and defendants F. W. Buffum and La Crosse Lumber Company have compromised, adjusted, and settled all matters in controversy in this case, and that the said plaintiffs have received from said Buffum and La Crosse Lumber Company, in full payment and satisfaction of all the matters complained of in their petition in this case, the sum of \$750, and in con-

sideration thereof they executed and delivered to said Buffum and said La Crosse Lumber Company a receipt in full payment, satisfaction, and discharge of all liability resulting from any and all things set forth in their petition in this case. Said receipt is attached to another motion filed in this cause. Wherefore the above-named defendants move the court to dismiss the appeal herein."

Burks & Sterrett, Harvey & Gower, and W. M. Williams, for appellants. Elijah Robinson, Stuart Carkener, and Rector & Lyons, for respondents.

FOX, J. (after stating the facts). It will be observed that the contention urged by the defendants, not included in the receipt or release, is that the settlement by plaintiffs with the La Crosse Lumber Company and F. W. Buffum, as indicated by the receipt filed, operated, in law, a release to all of the defendants. There can be no dispute that this is an action sounding in tort. It is an action for injury to plaintiffs' business by reason—so the petition alleges—of the malicious, wrongful, and unlawful conduct of the defendants. The defendants are charged to have committed the wrongs which resulted in the injury of appellants' business jointly. That we may fully appreciate the nature of this action, and as the vital question involved in this motion depends wholly upon its nature, we here quote the petition, omitting the caption:

"Now at this day come the plaintiffs, and, for their cause of action herein against the defendants, state that at all of the times hereinafter complained of they were, and still are, copartners trading and doing business under the firm name and style of Dulaney Bros.; that their residence and place of business is in the city of Slater, in the county of Saline and state of Missouri, aforesaid; that the defendant the La Crosse Lumber Company during the same time was, and still is, a corporation duly organized and created under the laws of the state of Missouri, and that the said corporation has and usually keeps an office and agent in the county of Saline and state of Missouri for the transaction of business. Plaintiffs state that they have been engaged in the business and trade of retail dealers in lumber and manufactured products of lumber, to wit, doors, sashes, blinds, and such other articles as usually form a part of the stock in trade of retail lumber dealers, and that on the 1st day of January, 1893, they had a cash capital employed in their said business of eight thousand dollars (\$8,000), and that in the conduct of their said business they had succeeded at that time in building up and establishing a large and lucrative trade, which had been and was then a source of large profits to the plaintiffs in their said business and employment; that as such retail lumber dealers they were engaged in selling lumber at the said town of Slater, and at other towns along the

line of the Chicago & Alton Railroad, to wit, the towns of Marshall, Blackburn, Shackelford, Norton, Gilliam, Glasgow, Mexico, Bowling Green, Vandalla, Laddonla, and other towns along the said Chicago & Alton Railroad, which were of easy access to them in the management and conduct of their said business, also at other points in Saline county and in Montgomery county, Missouri, and that their said business had extended throughout the territory named; that in the prosecution of their said business the plaintiffs had established good credit with the wholesale lumber dealers throughout the country, and were in good repute as retail lumber dealers, with good financial credit as such; that the defendant the La Crosse Lumber Company at the same time was engaged in the lumber business as retail dealers, and that the other defendants above named were at the same time, and still are, engaged in the lumber business as retail dealers at different points in the state of Missouri and Kansas; that on or about the 1st day of January, 1894, the defendants maliciously, wrongfully, and unlawfully entered into a conspiracy for the purpose and malicious intent of injuring the plaintiffs in their said business in which they were then and still are engaged, and with the malicious intent to obstruct, hinder, and prevent plaintiffs from carrying on their said business, and, in order to further carry out the said malicious intent and design of the said defendants, that they, with divers and sundry persons and corporations, formed themselves into a federation or association under the name and style of the Missouri & Kansas Association of Lumber Dealers, and that all of the above-named defendants, together with the Gurdon Lumber Company, a corporation, the Badger Lumber Company, a corporation, the Southern Lumber Company, a corporation, the Clarkson Lumber Company, a corporation, the Eagle Lumber Company, a corporation, with a view of hindering and preventing the plaintiffs from carrying on their said business, did combine and confederate together to publish, and did publish, to all wholesale lumber dealers, that the plaintiffs' firm was not engaged in a legitimate business as retail lumber dealers, and as not being in sympathy with the said association known as the Missouri & Kansas Association of Lumber Dealers, and ordered and directed that the said wholesale lumber dealers, who were members of the said association, should not make shipments to plaintiffs' firm, and that plaintiffs were denominated by said publication as 'poachers,' which said denomination is understood and intended by the defendants to mean that the said persons so denominated were not engaged in the business of retail lumber dealing, but that they should be treated by the members of the said association and by the wholesale lumber dealers as such poachers, and that the said wholesale lumber dealers and members of the said association

were required, under the penalty of expulsion from membership in the said association, to refuse to sell lumber to the plaintiffs' firm in any quantity, and under the further penalty of a fine to be inflicted by the members of the said association upon the offender, in the sum of twenty-five dollars (\$25), for each and every car, or less than a car, which might be shipped to the plaintiffs' firm; that the said publication was in writing, and published in a newspaper issued by the defendants under the name of 'The Official Bulletin,' published and circulated by them from their office at Kansas City, Missouri, and circulated among all of the wholesale and retail lumber dealers in the states of Missouri and Kansas; and that said publication was made for the purpose of injuring the plaintiffs in their business, and preventing them from engaging therein, and was published from time to time in the years 1896 to 1897, and is continued in every current number of said paper.

"Plaintiffs further say that the defendants have further associated themselves together in a combination for the purpose of preventing the plaintiffs' firm from engaging in competition with them as retail lumber dealers at the points and places above named, and have associated themselves together for the purpose of controlling the business of the retail lumber trade at said points, and preventing the plaintiffs' firm from engaging therein at said points. Plaintiffs state that by reason of the acts of defendants as aforesaid, and the said publication so made by the defendants as aforesaid, they have been prevented from engaging in the retail lumber business at the said points outside of said Slater as they had been accustomed to do before said publication was so made by the defendants as aforesaid, and that by reason thereof the plaintiffs' firm lost large profits arising from the conduct of their said business at said places, outside of said Slater, to wit, the sum of five thousand dollars (\$5,000). Plaintiffs say that, by reason of the acts of defendants as aforesaid, all of the above-named wholesale dealers so alleged to be members of the said association have continuously and repeatedly refused to ship lumber to the plaintiffs' firm, as retail dealers of lumber, to any of the points above named, in which they were legally engaged in the business as retail dealers, and that plaintiffs have been unable to fill and perform contracts made and entered into by them with their customers for supplying them with lumber, whereby the plaintiffs lost the profits belonging to said contracts, and that all of said contracts for supplying their customers with lumber would have made a profit, to wit, the sum of five thousand dollars (\$5,000). Plaintiffs state that, by reason of the said conduct of the defendants, they were put to great expense in procuring lumber from other points with which to fill their contracts as aforesaid, and were compelled to resort to

local rates for shipments of lumber, whereby they were compelled to make a great outlay of money for said expense, to wit, the sum of one thousand dollars (\$1,000). Plaintiffs state that, before the malicious interference with their business by the defendants in the manner and form as aforesaid, they were enabled to conduct the same at a profit, but that, by reason of the said unlawful combination of the defendants to prevent the plaintiffs from carrying on their said business and making a profit thereby, they have continued to lose money by the operation of their said business, and have been compelled to buy at higher prices than they would otherwise have to pay for their stock in trade, and have been compelled to sell at a greater disadvantage and at large expense, so that the plaintiffs, instead of conducting a profitable business, have lost money annually in said business from the 1st day of January, 1894, up to the present time, to wit, the sum of twenty thousand dollars (\$20,000). Plaintiffs say that the said association so formed by the defendants as aforesaid, and known and described as the Missouri & Kansas Association of Lumber Dealers, has for its principal object and purpose the design to prevent competition among retail lumber dealers, and to maintain exorbitant prices for the commodities which they manufacture and sell, and for the purpose of preventing other persons, not members of the said association, from engaging in the business of the retail lumber dealing, and for the purpose of oppressing and maliciously harassing all such persons as may be engaged in the retail lumber business, and particularly the plaintiffs' firm, in the territory in which the plaintiffs' firm is engaged and has been engaged in said business as aforesaid. In furtherance of said purpose and design on the part of the defendants, and to compel the plaintiffs' firm to retire from the said business, plaintiffs state that the defendants have willfully and maliciously published the plaintiffs' firm to all of the wholesale and retail dealers of lumber in the state of Missouri by their said publication in said paper, published by them, and called 'The Official Bulletin,' as 'poachers,' and not entitled to credit as retail lumber dealers, and have threatened to visit fines and penalties upon such wholesale dealers as should sell to the plaintiffs, and have threatened to withdraw their patronage and support from said wholesale lumber dealers if they should sell to the plaintiffs any lumber to be used by them in their stock in trade, thereby preventing the plaintiffs from procuring lumber with which to replenish and maintain their said stock, and preventing the plaintiffs from making profits usually incident to their said business, and which they had made before the said malicious interference and hindrance with their business by the defendants as aforesaid. The plaintiffs say that by reason of the premises they have suffered actual damage in the sum of twenty

thousand dollars, and by reason of the malicious interference of the defendants with their business and their malicious acts as above set forth they have suffered damages in the further sum of twenty thousand dollars. Wherefore they pray for a judgment against defendants for \$20,000 actual damages and for the further sum of \$20,000 for punitive damages as aforesaid, and for costs and for all proper relief."

In the case of *Haggerty v. Morrison*, 59 Mo. 324, and *Marx v. Hart*, 166 Mo. 517, 68 S. W. 260, this court held it was proper practice, in case of discharge in bankruptcy, after an appeal to this court, to file such discharge in this court, to the end that the bankrupt might avail himself of the effect of such discharge in the proceeding pending in the appellate court. We see no difference in principle to the practice adopted in those cases to the case before us. If subsequent to the appeal a release has been executed, which would operate as a bar to the further prosecution of this case, we see no reason why the respondents cannot avail themselves of such release by filing it in this court. We assume, further, from the suggestions of the appellants, as well as the respondents, upon the motion to dismiss the appeal, that they desire this question passed on, for there is no intimation in the suggestions as to the propriety of this court doing so.

The receipt, in the nature of a release of two of the defendants, is on file, and is now before us. If, under the law, it operates as a bar to a recovery against the other defendants, then this motion should be sustained, and this cause ended. The receipt or release recites "the sum of \$750.00, the same being in full settlement and satisfaction of all claims and demands in our favor, or in favor of either of us, on account of the matters and things set up or referred to in the petition in the above-entitled suit." This, under the rules of the common law, was a full satisfaction of the injury, and would operate as a complete bar as to all the joint tortfeasors. In the case of *Gunther v. Lee et al.*, 45 Md. 60, 24 Am. Rep. 504, all the cases are cited and discussed, and the learned judge announced the conclusion reached. He says: "All the cases, both English and American, maintain the doctrine that satisfaction from one joint tortfeasor, whether received before or after recovery, extinguishes the right as against the others. The plaintiff is not entitled to receive more than one satisfaction for and in respect of the same injury." While it is true that a wrong of the nature alleged in the petition is joint, yet in contemplation of law it is several, and the action may be maintained against any person participating in the infliction of the wrongs, and separate judgments may be rendered; but, after all, there can be but one satisfaction. Judge Cooley, in discussing this question, says: "It is to be observed in respect to the point above considered, where the bar accrues in

favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all." In the case of *Lovejoy v. Murray*, 8 Wall. 1, 18 L. Ed. 129, it was announced very clearly that "where the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages." In the release or receipt filed, "full settlement and satisfaction of all claims and demands on account of the matters and things set up in the petition" are acknowledged. It is true, following this acknowledgment it is said, "so far as said two defendants are concerned." This cannot change the application of the rule. When the plaintiffs acknowledge full satisfaction of all the injuries complained of in the petition, any effort to reserve a cause of action against those jointly liable will not prevent the operation of the bar as to those not included in the release. In the case of *Ruble v. Turner et al.*, 2 Hen. & M. 38, this question is directly passed on. In that case there was a receipt or release similar in form to the one in the case at bar. In that receipt Thos. W. Ruble said (after reciting payment), "Shall be satisfaction for the part he, the said Motley, took in an assault and battery committed upon me at said mount;" then added this proviso, "provided this shall not be considered as any satisfaction in favor of Joseph Nunn, Stephen Maynor, James Turner, or Archibald McNanny, who were guilty of the same at the same time and place." The learned judge said in that case: "It is a rule of construction that if there be any clause or condition in a deed which is either contrary to law, or repugnant to the nature of the estate created, it is void. Now, here the question is whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him, and I hold that he was, for the reasons already given. What, then, is the effect of this? The law says that if one joint trespasser be released, or make accord and satisfaction, it shall bar a recovery against all the others. The plaintiff can no more change the law in this particular by any subsequent proviso or condition, than he could, after a grant in fee simple, by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law, neither of which will it be contended that he could do. The proviso, then, is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants." The receipt or release in the Ruble Case was much

stronger and more favorable to the plaintiffs than the receipt on file in the case before us for determination, and the clear and logical announcement of the rule in that case is decisive of the question before us, provided the common law is in force in respect to the subject under discussion. In the case of *Bronson v. Fitzhugh*, 1 Hill, 185, it is said "that the release, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong, and after satisfaction, although it moved from only one of the tortfeasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done." This court, in the case of *Page v. Freeman*, 19 Mo. 421, by Judge Scott, said: "In case of a joint trespass, the plaintiff may sue two or more of them jointly, or may sue them separately, and may recover a judgment against them. But for one trespass or wrong he can have but one satisfaction." He further adds that, if he recovers separate judgment, he must elect which one he will proceed to enforce. To the same effect are *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Turner v. Hitchcock*, 20 Iowa, 310; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163, 4 Pac. 1165. See, also, *A. & E. Encyclopædia of Law*, vol. 20, pp. 764, 765, notes, where all the cases are collated.

If in this case plaintiffs had elected to sue the defendants separately, and had recovered separate judgments, and acknowledged satisfaction as to one of the judgments, it would have operated a complete bar to the enforcement of the other. The same principle is applicable whether the satisfaction is received before the judgments, or subsequent.

This leads us to the only remaining question upon this motion. The only suggestions made by appellants upon this motion is a reference to section 897, Rev. St. 1899, which provides: "It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released: provided, that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his co-debtors, as is by law now secured to him." It is clear that the action in this case against the defendants, charging them with a wrong and injury to their business, does not fall within the provisions of this section. The plaintiffs in this case are in no sense, under the allegations in the petition, to be designated creditors of defendants; nor are the defendants, under any sort of interpretation of this action, to be construed as debtors. The section referred to and quoted has appli-

cation to creditors and debtors in the common acceptance of those terms, and is not to be applied to an action where the parties are charged with a tort, and as joint tortfeasors. The affidavits of one of the plaintiffs as to the understanding in accepting this \$750 does not relieve the difficulty. If a written reservation of the cause of action as to the other defendants would not serve this purpose, as was announced in the case of *Ruble v. Turner et al.*, *supra*, we are unable to see how a verbal understanding could do so. This receipt, in the nature of a release for \$750, in full settlement and satisfaction of all claims and demands by reason of the causes complained of in the petition, must be held as one satisfaction for the injury to their business alleged in the petition. They are entitled to but one satisfaction, and such a fact must be held as a complete bar to any recovery against the other defendants.

Our attention has not been called to any statute altering or changing the rules of the common law in actions of this character; hence we are of the opinion that, as to actions predicated upon the facts as alleged in this petition, the common law is applicable, and this appeal will be dismissed. All concur.

SOUTHWORTH v. SOUTHWORTH et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

WILLS—EXECUTION—TESTAMENTARY CAPACITY—BURDEN OF PROOF—EVIDENCE—ATTESTING WITNESSES—CANCELLATION—FILLING BLANKS AFTER EXECUTION—APPEAL—REVIEW.

1. In an action to set aside a will, evidence held sufficient to show testamentary capacity.

2. Where, in a will contest, testamentary capacity was satisfactorily shown by one attesting witness and by other evidence aliunde, the fact that the remaining two attesting witnesses refused to testify that testator was of sound mind at the time the will was executed did not justify a refusal of probate.

3. In a will contest, proof that testator was of the requisite age and was sane when the will was executed is sufficient to make out a prima facie case, and shift the burden of establishing incompetency to the contestants.

4. Where, at the time of making his will, testator had sufficient intelligence to understand the act he was performing, the property he possessed, the disposition he was making thereof, and the persons or objects he made beneficiaries, the fact that his memory was imperfect, and that he was forgetful, asked idle questions, and required a repetition of information, was not sufficient to establish incompetency.

5. Where, in a will contest, which was not permitted to go to the jury, the record contained all the evidence, and the Supreme Court considered all the legitimate evidence in the record, the rulings of the court in the exclusion of evidence would not be reviewed.

6. Where, at the time a will was properly executed, it contained a blank for the insertion of the name of the executor, which was inserted after execution, the will was entitled to probate, except as to the clause appointing the executor.

7. Where, at the time a will was executed, it contained a clause that it should not be pro-

bated or become a public record, the fact that such clause was subsequently canceled by drawing an ink line through the same did not invalidate the balance of the will.

Appeal from Circuit Court, Mercer County; Paris C. Stepp, Judge.

Proceedings by Ole Southworth, by guardian, against Henry J. Southworth and others, to set aside the will of O. H. Southworth, deceased. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Ira B. Hyde and Eldon C. Orton, for appellant. Alley & Alley and Harber & Knight, for respondents.

BRACE, P. J. On the 14th day of October, 1899, Oscar H. Southworth, late of Mercer county, died possessed of an estate of the value of about \$12,000, consisting of real and personal property situate in said county, leaving, him surviving, as his only heirs at law, two grandchildren, both children of a deceased son. The plaintiff, Ole Southworth, is one, and the defendant Henry J. Southworth is the other, of these grandchildren. The other defendant, Eliza J. Southworth, is the mother of said deceased. Afterwards, on the 23d of October, 1899, there was presented to the probate court of said county for probate an instrument in writing in words and figures as follows, to wit:

"In the name of God, amen. I, O. H. Southworth, of Mercer county, Missouri, being of lawful age and of sound mind do make and constitute this my last will and testament as follows, to-wit: First, I give and bequeath to Henry J. Southworth, my grandson, all my real estate on the following conditions: That the said grandson, Henry J., shall not come into full possession of said real estate until he arrives at the age of thirty years. The land mentioned is to be kept in grass and the proceeds of the same is to be used for the maintenance of my two grandchildren, Henry J. Southworth and Ole Southworth, my granddaughter. The said proceeds shall be distributed as follows: Henry J. to receive three-fourths and Ole one-fourth of said income. This division is to run until Henry J. arrives at the age of twenty-one years. When Henry J. arrives at the age of twenty-one years he is to have the right to the personal use of said real estate if he so chooses.

"I further desire that my personal property at my demise be sold and the proceeds of the same be loaned and the interest of the same be used as follows: One-half thereof to go to my mother, Eliza J. Southworth, while living, the other half to the two named grandchildren equally until Henry J. arrives to the age of thirty years. After the death of my mother all the interest to go to the two named grandchildren. When Henry J. arrives to the age of thirty years the remainder of the personal estate to be applied as the real estate.

"I further desire that this last will and

testament shall not be probated or become of public record.

"I herein make, constitute and appoint F. M. Kobbe Exr., who shall give and execute a good and sufficient bond to the state of Missouri to take and execute this my last will and testament according to the provisions herein made.

"I, the undersigned O. H. Southworth, do declare on this 5th day of October, 1899, that the foregoing instrument is my last will and testament in the presence of the witnesses here signed.

"O. H. Southworth.

"Witnesses,

"W. H. Odneal.

"J. J. Gadberry.

"S. M. Gadberry."

And upon the same day the said instrument was admitted to probate in part, as follows:

"Certificate of Probate.

"State of Missouri, County of Mercer—ss. In the Probate Court.

"I, Fred W. Coon, judge of the Probate Court of Mercer County, Missouri, having examined the foregoing instrument purporting to be the last will and testament of O. H. Southworth, deceased, and signed by O. H. Southworth and having heard the testimony of W. H. Odneal, J. J. Gadberry and S. M. Gadberry, subscribing witnesses thereto in relation to the execution of the same, do declare and adjudge a part of said instrument to be the last will and testament of the said O. H. Southworth, deceased, late of Mercer County, Missouri, and the same except that part constituting and appointing an executor, is hereby admitted to probate.

"In testimony whereof I have hereunto set my hand and affixed the seal of said Court at office in Princeton, this 23rd day of October, 1899.

"Fred W. Coon, Judge of Probate. [Seal.]"

Afterwards, at the September term, 1900, of the circuit court of said county, this suit was instituted, under the statute, to contest the validity of said instrument as the last will and testament of said deceased; the grounds of contest set out in the petition being in substance as follows: (1) That the following clause in said instrument, to wit, "I further declare that this my last will and testament shall not be probated or become of public record," was "scratched out" after it was signed and attested. (2) That at the time the instrument was signed and attested the place for the name of the executor was left blank, and the name of F. M. Kobbe was thereafter inserted in such blank space, without the same being re-executed. (3) That said instrument was not signed and attested as required by law. (4) That the testator was of unsound mind. (5) That the instrument was procured to be executed by the undue influence of W. H. Odneal.

At the close of all the evidence the court instructed the jury to "find the instrument read in evidence to be the last will and testament of Oscar H. Southworth." The jury returned a verdict accordingly, and thereupon the court rendered judgment establishing said instrument as hereinbefore set out, except the clause as to nonprobating the same, as the last will and testament of the said Oscar H. Southworth, and the plaintiff appealed.

On the trial the defendant introduced the attesting witness Odneal, who was the scrivener of the instrument, as a witness, who testified to the execution of the instrument by the testator, and its attestation in manner and form as required by the statute, and that he was of sound mind at the time it was executed; and another witness, who testified that the testator was of sound mind at the time the instrument was executed, but who was not present at its execution; and thereupon offered the instrument in evidence. To its introduction the plaintiff objected. The objection was sustained, and the defendants then introduced J. J. Gadberry, another of the attesting witnesses, who, after testifying to the formal execution and attestation of the instrument, further testified as follows: "Q. Well, I will get you to state what was Mr. Southworth's mental condition at the time he signed the will, as you observed it. A. Well, I would not consider it very good, from the action of the man. Q. Well, what do you say as to whether he understood the contents of the will? A. Well, if he did, I never seen anybody that acted like he did that did understand anything." Thereupon the defendants again offered the instrument in evidence. To its introduction the plaintiff objected. The objection was overruled, and the instrument read in evidence, and thereupon the defendants rested, and the plaintiff introduced evidence in support of her contest; the first evidence introduced being the deposition of Susan M. Gadberry, wife of the said J. J. Gadberry, the other attesting witness to the instrument, who, after testifying to the formal execution and attestation thereof, as the other two attesting witnesses had done, testified further as follows: "Q. State what was Mr. Southworth's mental condition at the time of signing said will. A. He acted to me like he was under the influence of strong medicine, or was so weak that he did not know what he was doing. Q. State whether or not, in your opinion, he understood the contents of said alleged will. A. I don't think he understood half there was in it." After which the plaintiff introduced other evidence developing, in connection with the evidence of the foregoing witness, substantially the following facts of the case:

1. At the time the will was executed the only persons who had any natural claim upon the bounty of the testator were his mother and his two grandchildren aforesaid, for

each of whom he made provision in his will. Both the father and mother of these children had then been dead for several years; the father having died first, and the mother in the year 1885. In pursuance of an understanding between the testator and their mother, the boy, after her death, remained with his grandfather to be reared and provided for by him, and the girl, for a like purpose, was taken by her uncle, a Mr. Hunter, her mother's brother, who resided in the state of Nebraska. The testator was an intelligent and educated farmer, who raised but little grain, kept his farm in grass, and made a specialty of breeding and raising thoroughbred shorthorn cattle, in which stock and in hogs he dealt principally. He lived on his farm, and his little grandson, in whom his affection was centered, had lived with him since the death of his mother. He was devoted to his business, and always gave it his personal attention. In the summer or fall of 1899 he attended a meeting of the stock association at Kansas City, at which he took some premiums on his stock, and delivered an address, which was published. His farm was about four miles from the town of Harris, in Sullivan county, where Dr. Wingo resided and practiced. On the 30th of August, 1899, he called on Dr. Wingo, complaining that he was feeling tired and unwell, and the doctor, without diagnosing the case, prescribed for him, and requested him to call again in a few days, which he accordingly did, and the doctor then diagnosed his case as "progressive anemia." The particular day on which this diagnosis was made does not appear, but it was evidently in the first days of the month of September. Between that date and the 5th of October he visited the doctor at his office about twice a week, coming from his farm to the doctor's office for that purpose. The doctor testified that he "seemed to be in rather good condition, so far as his mind was concerned," but gradually growing worse at each succeeding visit. "I could not see any decided change at any of the times that he was at my office, only for the worse, and that gradually." "I don't know what the condition of his mind was during those times." During this period he continued on his feet, going about, attending to his business as he had always theretofore done. On one of his visits to Dr. Wingo the doctor informed him that he could do nothing for him; and on the 19th of September he spoke to Mr. Odneal about drawing his will, giving him a general idea of the disposition he intended to make of his property. About this time he was negotiating a sale of some of his cattle to Mr. Purdy, the sale seems to have been consummated about the 23d of September. The number of cattle sold or the amount of the sale does not appear, but it seems to have been a transaction of considerable magnitude for a man of his means; was conducted by himself; and notes were

taken by him for some of the purchase money. On or about the 3d day of October two of his neighbors, who, under an agreement with him, had put up the hay on his place for a portion thereof, called at his house for the purpose of making a division thereof. He told them that he did not feel able to go out that morning, but thought they could make the division at the house. There were 20 stacks of different sizes, and in different places, but by means of a rough diagram drawn on the wall of the house, the division was satisfactorily made, although the proceeding by this means, under the agreement, was a somewhat difficult matter, requiring good memory, and a correct appreciation of quantities. On Thursday, the 5th day of October, Mr. Odneal came to Mr. Southworth for the purpose of drawing his will. Found him sitting on the side of his bed; and in a few minutes thereafter Mr. and Mrs. Gadberry arrived, came into the room where they were, and, after the usual salutations, Mr. Gadberry asked Mr. Southworth what he wanted with him. Mr. Southworth asked him if he had brought that milk down, and, upon his answering that he had, asked him to bring him some milk and some crackers; after eating which he told Gadberry that he wanted him to take halters, and go and look after two horses that were supposed to be in one of the renter's corn, and bring them to the barn, and tie them up there. Thereupon Gadberry departed on this mission. Mr. Odneal told Mr. Southworth that he had come to do that writing. Mrs. Gadberry went into an adjoining room, used as a kitchen, leaving the door between the two rooms half open, and busied herself doing up the chores there, and Mr. Odneal commenced the preparation of the will. He wrote it as directed by Mr. Southworth. He wrote it first in pencil, and then copied it in ink. He would write as far as directed, and then ask Mr. Southworth, "What next?" When they came to the clause appointing an executor, Mr. Southworth said he had two men in mind (Johnson and Kobbe), but hadn't made up his mind which to appoint, and a space was left blank for the name of the executor. While the will was being dictated, Mr. Southworth seems to have been lying down on the bed. While the will was being copied, he turned over with his face to the wall, and went into a doze. About the time Odneal had finished copying the will in ink, Mr. Gadberry returned. Odneal invited Mrs. Gadberry into the room, aroused Mr. Southworth from his doze, and asked him if those folks would do for witnesses. Mr. Southworth nodded assent, and Mr. Odneal then read the instrument to him as copied in ink, in the presence of Mr. and Mrs. Gadberry, and asked him if that would do. Mr. Southworth asked him if he could change it if he got up, to which Mr. Odneal replied that he could, and Mr. Southworth then and

there, in the presence of all three of these witnesses, signed the instrument by his own hand, sitting up in the bed for that purpose, with the will before him on an atlas resting upon his knees; and Mr. Odneal and Mr. and Mrs. Gadberry then and there in his presence, and in the presence of each other, signed the same as witnesses. The next day (Friday, October 6th) some of the neighbors assembled at the house of Mr. Southworth for the purpose of arbitrating a little lawsuit that had been instituted against him for damages caused by the trespass of some of his stock. The arbitration resulted in an award of a small amount of damages against him, was satisfactory, and he paid the amount by check signed by himself. In the meantime he had changed his mind about the nonprobating clause of his will, and had decided to have Mr. Kobbe, who had acted in his behalf in the arbitration, for executor of his will, and so informed Mr. Odneal, who was present assisting in the arbitration, who thereupon, as requested by him, canceled said clause by drawing an ink line longitudinally across all the words thereof, and inserted the name of F. M. Kobbe as executor in the blank space in the will, calling the attention of the other arbitrator to the fact at the time. On the next day (Saturday, October 7th) he was visited by his friends Mr. Henderson and wife, who found him feeble, and he told them that he had done up his business the day before; that it nearly worried him to death, and that was the reason he was so weak. On that day or the next (Sunday) he was removed to their home, where he remained, gradually growing weaker until he died on the following Saturday, October 14, 1899. After his removal to Henderson's, he talked with Mr. Henderson and others about his stock; told one of his attendants that Mr. Kobbe was his executor; that he wanted to see him, and requested that he be sent for. Mr. Kobbe came, received his notes from him, and afterwards (probably the day before he died) he told Mrs. Henderson the amount of them, and on the day that he died told Dr. Wingo, who had been attending him since his removal to Henderson's, and with whom he had also talked about his stock, who he wanted to appraise his cattle, and how he wanted them appraised. He could then only speak in a whisper.

2. The grounds of this contest, except one, may be briefly disposed of. There was no evidence whatever tending to prove that the instrument was procured by the undue influence of W. H. Odneal, or any other person; and it is beyond question, on the evidence, that the instrument was executed animo testandi in manner and form as required by the statute. The facts that it then contained the nonprobating clause, and that the name of the executor was left blank, afforded no reason for refusing probate of the instrument in the form that it was then ex-

ecuted. *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055. The effect of the cancellation and the insertion of the name of the executor the next day, in the instrument itself, will be considered later. The further fact that two of the three subscribing witnesses to the will on the trial refused to testify that he was of sound mind at the time the instrument was executed was not of itself sufficient to warrant refusal of probate thereof, if his testamentary capacity was satisfactorily shown by the other attesting witness and evidence aliunde. *Morton v. Heldorn*, 135 Mo. 608, 37 S. W. 504; *Mays v. Mays*, 114 Mo. 536, 21 S. W. 927; *Holmes v. Holloman*, 12 Mo. 536; *Odenwaelder v. Schorr*, 8 Mo. App. 458.

His testamentary capacity having been thus shown prima facie on the trial, we are brought to the main question in the case: Was there any substantial evidence on the trial, that he did not possess such capacity, at the time the will was executed? The law of this branch of the case is aptly and tersely stated in *Sehr v. Lindemann*, 153 Mo., loc. cit. 288, 289, 54 S. W. 537: "Where a will is contested, it devolves upon the proponents to prove the execution of the will, that the testator was of the requisite age, and that he was sane. *Harris v. Hays*, 53 Mo. 90; *Benoist v. Murrin*, 58 Mo. 322; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807. This makes out a prima facie case, and it then devolves upon the contestants to establish incompetency or undue influence. By competency is meant intelligence sufficient to understand the act he is performing and the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Imperfect memory, caused by sickness, or old age, forgetfulness of the names of persons he has known, idle questions, or requiring a repetition of information will not be sufficient to establish incompetency if he has sufficient intelligence remaining to fulfill the above definition. *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 920; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Id.*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955. Mere opinions of witnesses * * * unaccompanied by any testimony showing any particular act or fact evidencing incompetency, do not make out a case of incompetency when the testimony shows that the testator 'knew what he was doing, and to whom he was giving his property.' *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510; *Riley v. Sherwood*, 144 Mo., loc. cit. 364, 45 S. W. 1077; *McFadin v. Catron*, 188 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117. * * * 'If there is any sub-

stantial evidence of incompetency or undue influence, the case should be submitted to the jury; otherwise it is the duty of the court to direct a verdict for the proponents.' *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; *Berberet v. Berberet*, 399, 33 S. W. 61, 52 Am. St. Rep. 634; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 433." To the same purport are the more recent cases of *Riggin v. Westminster College*, 160 Mo. 570, 61 S. W. 803; and *Wood v. Carpenter*, 166 Mo. 466, 66 S. W. 172.

It requires no very liberal application of these principles to the facts of this case to determine this issue. Dr. Wingo testified that after the removal of the testator to Henderson's his mind was not good, and Mrs. Henderson testified that between that time and his death "he was not at all times rational. Sometimes he acted like he knew everything, and sometimes he did not. He would lay there most of the time, and didn't seem to realize anything or care for anything. Didn't talk a great deal after we brought him to our house. He would talk about his cattle, about their being watered, and speak to my husband, and talk about his hogs." And there was some other evidence of like character, from all of which it might be said that there was evidence tending to prove that the testator's mental condition after his removal to Henderson's was not at all times good. But there was no substantial evidence tending to prove that he was not fully competent to make a will at the time the instrument in question was executed, or at any other time prior to his removal to Henderson's, unless it can be found in the evidence hereinbefore set out of the two recusant witnesses. As to this evidence little need be said. In a recent excellent work on wills it is said: "As matter of law, a person who, as a subscribing witness, goes upon the stand, and upon his oath asserts to be false that which at the execution of the will he, by a most solemn act, asserted to be true, deserves to be discredited, and is worthy of but little belief. Lord Mansfield was of the opinion that a subscribing witness impeaching his own act was deserving of the pillory. *Watson v. Shelly*, 1 Term R. 300." 1 Underhill on Wills, § 213, and note. And in this case, in which this evidence was inconsistent with and repugnant to every fact disclosed, whether of act done or word spoken in the preparation and execution of this instrument or attendant thereupon, as testified to by themselves and the other attesting witness, the court was fully warranted in treating it as wholly worthless. The court committed no error in directing a verdict for the proponents upon this issue.

3. Some objections are made to the rulings of the court in the exclusion of evidence. But as the case did not go to the jury, and this evidence is in the record, and in reaching our conclusions we have considered all the legitimate evidence in the records, these objections need not be noticed.

4. The only error in the record is in the form of the judgment. The will should have been admitted to probate in solemn form as it was executed, without the name of F. M. Kobbe in the last clause thereof inserted therein the next day after the will was executed. Such an addition could not be legally made without repudication. As to the nonprobating clause, it is only necessary to say that as that clause was of no legal force or effect whatever, and the will, in contemplation of law, would be just the same whether that clause was taken out or left in, the question whether that clause was legally canceled or not is one of no importance in this case. It may be said, however, that it has been, in effect, ruled in this state that a legal and material clause in a will may be so canceled under our statute. *Varnon v. Varnon*, 67 Mo. App. 534, citing *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32, and *Schouler on Wills*, 386, 397.

It follows from what has been said that the judgment of the circuit court should be modified by striking the name of F. M. Kobbe from the last clause of the will, and the judgment so modified should be affirmed, and it is so ordered. All concur.

STATE ex rel. CITY OF STANBERRY v. SMITH et al., Judges.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

APPEAL—DISMISSAL BY COURT OF APPEALS—ABSTRACT OF RECORD—FAILURE TO SET OUT JUDGMENT—COMPELLING REINSTATEMENT OF APPEAL—MANDAMUS—JURISDICTION OF SUPREME COURT—LACHES.

1. Under Const. art. 6, § 2, giving the Supreme Court "a general superintending control over all inferior courts," with power "to issue writs of habeas corpus, mandamus," etc., and section 8 of the amendment adopted in 1884 giving it "superintending control over the Courts of Appeals by mandamus, prohibition, or certiorari," the Supreme Court has authority to require one of the Courts of Appeals to hear and determine a cause over which it has jurisdiction.

2. An appeal should not be dismissed for failure to set out the judgment in the abstract of the record where the appellant has duly filed a certificate, as required by Rev. St. 1899, § 813, showing the day of the month and of the term when the judgment was rendered and the judgment itself, especially where the judgment itself is not challenged.

3. A third party recovered judgment against a city in the circuit court, and it appealed to the Court of Appeals. The appeal was dismissed, the mandate being sent down to the circuit court only a few days before the final adjournment of the Supreme Court at its April term, 1902. Application for mandamus to compel the Court of Appeals to reinstate the appeal was made at the October term of the

Supreme Court. Prior thereto the third party has instituted proceedings in the circuit court to enforce the judgment by mandamus against the city. The mandamus from the circuit court was continued to its December term. The alternative writ issued out of the Supreme Court in November. The rights of no third parties had intervened. *Held*, that the city was not precluded from having its appeal reinstated on account of laches.

4. The fact that the Court of Appeals had adjourned for the term in no manner affected the jurisdiction of the Supreme Court to issue a writ of mandamus directing it to reinstate an appeal which it had dismissed.

Original application by the state, on the relation of the city of Stanberry, for a writ of mandamus directed to Jackson L. Smith, James Ellison, and E. J. Broadbush, Judges of the Kansas City Court of Appeals. Writ granted.

This is an original proceeding in this court by relator to obtain a peremptory writ of mandamus directing the Judges of the Kansas City Court of Appeals to reinstate the cause of Nellie Campbell against the city of Stanberry, and to hear and determine an appeal in said cause, heretofore certified to said court and by it dismissed. The following summary of the facts will suffice for a proper understanding of the opinion:

In 1896 Miss Nellie Campbell brought her action against the city of Stanberry for damages resulting to her from a fall into an excavation in one of the public streets of said city, and recovered judgment against said city for \$2,500 at the September term, 1900, of the circuit court of Gentry county. From that judgment the defendant city appealed to the Kansas City Court of Appeals. At the September term, 1900, of the circuit court, after the motions for new trial and in arrest of judgment had been filed and overruled, leave was given defendant to file a bill of exceptions during the December term, 1900, of said court, and afterwards during the December term of said circuit court, and on the 22d day of December, 1900, the defendant filed its bill of exceptions, signed and sealed by the judge of said court. Thereafter, to wit, on the 8th day of February, 1901, and more than 15 days before the March term, 1901, of the Kansas City Court of Appeals, a certified copy of the record of the judgment of the circuit court, showing the term and day of the term, month, and year at which the same was rendered, together with the order granting the appeal to the Kansas City Court of Appeals, was filed in the office of the clerk of the said Court of Appeals. Afterwards the said cause was duly set down for hearing in said Court of Appeals on the — day of October, 1901, and continued by agreement until March term, 1902, of said court. Prior to said appeal the Kansas City Court of Appeals had adopted and promulgated certain rules of practice therein, among which was the following rule, numbered 15, in regard to abstracts of record: "In all cases the appellant or plaintiff in error shall

file with the clerk of this court on or before the day preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause setting forth so much thereof as is necessary to a full understanding of all questions presented to this court for decision." Said rule further provides that "the appellant or plaintiff in error shall also deliver a copy of said abstract to the attorney for respondent or defendant in error at least twenty days before the day on which the cause is docketed for hearing." Another rule of said court, numbered 18, provides: "If any appellant or plaintiff in error, in any civil cause shall fail to comply with the provisions of rule numbered 15, the court when the cause is called for hearing, will dismiss the appeal or writ of error, or at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15."

On the 25th of February, 1902, the appellant, the city of Stanberry, filed in the office of the clerk of the Kansas City Court of Appeals five copies of an abstract of record in said cause, which abstract contained:

First. The petition, the answer, and reply, the same being all the pleadings in said cause.

Second. The statement, as follows: Showing a history of the trial of the cause, and the finding of the verdict by the jury. Under the instructions of the court, the jury found a verdict for the plaintiff in the sum of \$2,500.

Third. Under the caption of "The Abstract of Record," a full and complete copy of the bill of exceptions as filed in the circuit court of Gentry county, including a statement that the cause was tried at the September term, 1900, of the circuit court of Gentry county, Mo., before Hon. Gallatin Craig, Judge, and a jury, and the following proceedings were had and done; said bill of exceptions including all the evidence in said cause; the objections and rulings, and the exceptions thereto; the instructions given and refused, and the exceptions thereto; the statement that the jury returned a verdict in favor of the plaintiff, assessing her damages at \$2,500, and that on the same day that said verdict was returned the defendant filed its motion for a new trial and in arrest of judgment, being set out in full; the action of the court in overruling said motion and the exceptions to said ruling, all of which is stated in said printed abstract to be contained in and forming a part of said bill of exceptions; and said abstract further stated that said bill of exceptions was allowed, signed, and sealed on the 22d day of December, 1900, and the signature of the judge of said circuit court, namely, Gallatin Craig, Judge, is printed in said abstract at the conclusion of said bill of exceptions. That after setting out said bill

of exceptions, and the signature of the judge thereto, the following was stated in said abstract of the record, to wit: Indorsed as follows: "Filed December 22, 1900. Dale S. Flowers, Clerk Circuit Court." That said motion for a new trial asked the court to set aside the verdict because against the law and the evidence, and for other reasons, and said motion in arrest states that the judgment upon the record is erroneous, and the court erred in overruling defendant's motion for a new trial.

Afterwards on said 3d day of March, 1902, said cause was argued before the Kansas City Court of Appeals on behalf of both appellant and respondent, and the said cause was thereupon submitted to said court. That afterwards, on the 7th day of April, 1902, said Kansas City Court of Appeals entered an order dismissing the said cause from said court on the ground as given by the court in its opinion hereinafter noted. Afterwards on the 10th day of April, 1902, and at the same term of said court, the appellant filed in said court a motion for rehearing of said cause and to set aside the judgment dismissing the appeal, and to reinstate the said cause on the docket of said court, which said motion the court afterwards on the 2d day of June, 1902, overruled, and the said court has refused and still refuses to set aside said dismissal or reinstate said cause, or to hear and determine the same.

The abstract of record above noted did not contain a copy of the judgment or date of rendition, or a recital in narrative form of its rendition, amount, and date, but the certificate required by the statutes of this state, to wit, section 813, Rev. St. 1899, filed by the appellant in said cause in the Kansas City Court of Appeals, did contain all of the facts required by that section.

On or about February 1, 1902, the city of Stanberry served on the plaintiff's attorney of record a copy of said abstract, together with a copy of appellant's brief and statement in the case. Respondent filed no counter abstract, and made no motion to affirm the judgment for failure to file the certificate of judgment or complete transcript, either before the day the cause was set for hearing or when it was called for argument, but in their brief counsel for respondent made the point: "The appellant's abstract of the record is fatally defective. It does not show any final judgment." On March 3, 1902, the cause was argued before the Court of Appeals and submitted to the court. On April 7, 1902, the Court of Appeals made an order dismissing the appeal in said cause, and in an opinion by the court assigned the following reasons:

"Per Curiam. The respondent contends that, as there is no final judgment as shown by the appellant's abstract, the appeal should be dismissed. It appears from the appellant's abstract that there was a trial before a jury and verdict for the respondent; that

a motion for a new trial was filed, which was overruled by the court; and that within the four days appellant filed a motion to arrest the judgment. But it nowhere stated in the abstract that a judgment was rendered, and there is no allusion to a judgment, other than that a motion in arrest was filed, overruled, and the action of the court in that respect excepted to. It is well settled that an appeal lies only from a final judgment (*Holloway v. Holloway*, 97 Mo. 639, 11 S. W. 233, 10 Am. St. Rep. 339); and the abstract should show such a judgment (*Mills v. McDaniels*, 59 Mo. App. 331). It follows, therefore, that the appeal should be dismissed, which is accordingly done. All concur."

Afterwards, at the same term, the appellant filed a motion to set aside the said order and reinstate the case, which motion the court overruled on June 2, 1902, and afterwards on November 26, 1902, applied to one of the Judges of the Supreme Court for an alternative writ of mandamus to the Court of Appeals requiring it to reinstate said cause. The return of the Court of Appeals, after stating all of the foregoing facts in substance, further pleads that it sent down its mandate, and that proceedings to enforce the circuit court's judgment by mandamus against the city council of Stanberry had been begun and were pending.

Aleshire & Benson, for relator. Peery & Lyons, for respondents.

GANTT, P. J. (after stating the facts). 1. The constitutional power of this court to require one of the Courts of Appeal to exercise its jurisdiction by hearing and determining a cause of which it has jurisdiction we regard now as fully settled. In addition to the jurisdiction conferred in the Constitution on this court by section 2, art. 6, giving it a general superintending control over all inferior courts, "and to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other remedial writs and to hear and determine the same," it has the special authority granted by section 8 of the amendment of the Constitution adopted in November, 1884, to wit, "superintending control over the Courts of Appeals by mandamus, prohibition, and certiorari." State ex rel. Bayha v. Phillips et al., 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476; State ex rel. Chicago, Rock Island and Pacific Ry. Co. v. Smith et al., at this term (not yet officially reported) 72 S. W. 692.

In this last case this court in banc considered the duty of the Court of Appeals to hear and determine an appeal which it had dismissed for the reason that "the abstract of the record does not contain the judgment or the date when it was rendered," and other grounds not mentioned in its opinion in this case. In that case it is true the appellant did state in narrative form that "at said December term, 1900, upon the return of the verdict, the court rendered judgment that the

plaintiff have and recover judgment of defendant the sum of one thousand dollars and the cost of this suit"; whereas in the abstract of record in this case the appellant failed to state the rendition of the judgment or its amount, and failed to set forth the judgment at all. In discussing the sufficiency of the abstract in the *Rock Island Case*, supra, Judge Brace, speaking for the court, said: "So that, of the several reasons assigned by the Court of Appeals for dismissing the appeal, the only one that had a show of support was that the abstract did not show the day of the month or of the term when the judgment was rendered—a matter wholly immaterial to the consideration of any question presented for decision in the case, and which, if desired for any purpose, was set forth in the certified copy of the record entry of the judgment filed in the beginning as the basis of all the proceedings in the Court of Appeals." In the errors assigned in this case, and the points urged by counsel of appellant for reversal, no error is pointed out in the judgment itself, but the errors assigned all related to the admission and rejection of evidence and the giving and refusing of instructions, and the judgment itself was a matter wholly immaterial to any point raised. While we fully agree with the Court of Appeals, as stated in its opinion, that an appeal lies only from a final judgment (*Holloway v. Holloway*, 97 Mo. 639, 11 S. W. 233, 10 Am. St. Rep. 339), we cannot subscribe to the statement that unless the judgment itself is set out in the abstract the appeal must be dismissed, where the judgment itself is not challenged, nor that when the appellant has duly filed a certificate, as was done in this case, showing the day of the month and of the term when the judgment was rendered, and the judgment itself.

This certificate, as Judge Brace says, is the basis of all the proceedings in the Court of Appeals, and in this court when an appeal is taken by the short method provided in section 813, Rev. St. 1899; and it has uniformly been ruled that an appeal would not be dismissed for a failure to set out the judgment in the abstract when such a certificate has been filed.

This certificate being on file, if it becomes necessary for any purpose to consider the judgment itself, it is an easy matter to read the certificate itself. So that while appellant might very properly have made a brief statement in narrative form of the rendition of the judgment and its amount, as was done in the *Rock Island Case*, supra, the reason of our conclusion in that case equally applies to the case before us, and, as the judgment of dismissal was based solely on this ground, we think the cause was improperly dismissed in this case also.

2. One further ground is urged by the respondent herein that was not presented in the *Rock Island Case*, and that is the laches of the appellant in presenting this applica-

tion. This is based upon the fact that the appellant waited until the mandate went down to the circuit court, and proceedings were there commenced to enforce the judgment by mandamus against the city, which were and now are pending in the Gentry circuit court. As to this point it is sufficient to say that the appellant availed itself of every known remedy to induce the Court of Appeals to reinstate the case in that court, and was utterly powerless to prevent the issuing of the mandate.

It will be noted that the rights of no third parties are involved in this proceeding. It remains a controversy between the original parties to this action. The mandate was sent down to the Gentry court only a few days before the final adjournment of this court at its April term, 1902, and this application was made at the October term, 1902, the next term after the mandate was filed in the circuit court. The mandamus from the circuit court was continued to its December term, 1902, and the alternative writ was issued from this court in November. The rights of the respective parties have not been changed, and the plea of laches should not prevail in the circumstances of this case. The fact that the Court of Appeals had adjourned for the spring term in no manner affects our jurisdiction. *State v. Lewis*, 71 Mo. 170; *State ex rel. v. Public Schools*, 134 Mo. 312, 35 S. W. 617, 56 Am. St. Rep. 503; *State v. Phillips*, 96 Mo. 570, 10 S. W. 182.

As all the other propositions are so fully discussed in the opinion of Judge Brace in the Rock Island Case in banc, we deem it unnecessary to extend this opinion to greater length. It results that a peremptory writ must be awarded to reinstate the appeal and hear and determine it.

All concur.

SAWYER-AUSTIN LUMBER CO. v. CLARK et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

MECHANIC'S LIEN—ENFORCEMENT—PETITION —MISDESCRIPTION—LIEN PAPER—SUFFICIENCY—CONTRACT WITH EQUITABLE OWNER— FAILURE OF TITLE.

1. Where a petition in an action to enforce a mechanic's lien described the boundary of the property as the south line of the street, instead of the north, but the remainder of the description was accurate, and located the land on the north side of the street, the error did not vitiate the description.

2. Assuming that a specific description of land in a petition to enforce a mechanic's lien was fatally defective, where the general description in the petition conformed to that given in the lien paper the specific description could be stricken, and the proceeding had under the general description.

3. A lien paper which, after correctly describing the dimensions of the lot on which the improvements were made, located the lot wholly on lot 19, when in fact it and the building projected about two feet over lot 18, as shown by the city plat, was sufficient to charge the build-

ing with a lien, and the owner and incumbrancers of the land with notice.

4. Under Rev. St. 1889, §§ 6705, 6706, providing that a person furnishing material or labor for a building or improvement on lands under contract with the owner or proprietor shall have a lien upon such improvements, and upon the land belonging to such owner or proprietor, on which the same is situated, to the extent of all right, title, or interest of the owner or proprietor of the building, a lien may be enforced against the land by one who furnishes material for a building pursuant to contract with a person in possession under a written contract for a conveyance on payment of the purchase price, provided the lien can be enforced during the life of the contract.

5. The fact that when a lien suit was tried the equitable owner of the land, with whom the contract for improvements had been made, had lost his interest therein by default in payment of the purchase price, cannot affect the materialman's right to enforce his lien against the building under Rev. St. 1889, § 6707, which provides that a mechanic's lien on a building shall be preferred to any prior lien or incumbrance or mortgage upon the land on which the building is erected.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by the Sawyer-Austin Lumber Company against Charles M. Clark and another. From a judgment for defendants, plaintiff appeals. Reversed.

Robert L. McLaran and Jared W. Young, for appellant. Lyon & Swarts, for respondents.

GANTT, P. J. On the 18th of February, 1898, S. J. Fisher contracted to sell to C. M. Clark a lot on the north side of Evans avenue, in St. Louis City, with a frontage of 26 feet and 9½ inches, and a depth of 165 feet. The lot was made up of 25 feet of the eastern portion of lot 19, and 1 foot 9½ inches of the western portion of lot 18, of city block 3732. Fifty dollars cash was paid on account of said purchase, and the balance of the purchase money was agreed to be paid 40 days thereafter. There was evidence tending to show that the purchaser was allowed 60 days' additional time to make this deferred payment. Plaintiff, under a contract with the purchaser, furnished lumber for the erection of a building on said lot, and brought this action to establish a mechanic's lien upon said building and the land upon which it stood. The improvement consisted of a two-story brick building, arranged as flats, which was 26 feet wide. It stood 7½ inches west of the eastern line, and 2 inches east of the western line, of the lot, which Fisher agreed to convey to Clark. The evidence tended to show that the lumber for whose price the suit was begun entered into the construction of said building, and was furnished for that purpose between from the 6th or 8th day of March to the 2d day of April, 1898. The lien account correctly stated the dimensions of the lot which was the subject of the contract between Fisher and Clark, but referred to it as part

¶ 4. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 75.

of lot 19 of city block 3732, when, in point of fact, it was composed and made up of the contiguous portions of lots 19 and 18, in the proportions specified in the contract between Fisher and Clark. After the introduction of the lien account, plaintiff moved the court to permit an amendment of the petition so as to conform its description of the property to the description given in the lien account, which plaintiff insisted could be done by merely striking out the specific boundary mentioned in the petition, which erroneously showed that the south, instead of the north, line of Evans avenue was the beginning point of the lot. The court overruled this motion, to which exception was duly saved. Thereupon plaintiff disclaimed any right to subject the land on which the building was situated to a mechanic's lien; the proof showing that, up to the time of the trial Clark, the purchaser, had not paid the balance of the purchase money, nor acquired title to the land, further than resulted from his contract with Fisher, the owner; but plaintiff insisted that it was still entitled to a lien against the building. The evidence showed that Clark was in possession of the lot under his contract to purchase it during the whole time of the accrual of plaintiff's account, and until the erection and completion of the building on said lot.

The cause was submitted to the court without a jury. Plaintiff requested the court to give the following declarations of law: "(1) The court declares the law to be that if the court believes from the evidence that defendant Clark was in possession of the land under and by virtue of a contract to purchase the same from defendant Fisher, the owner, and while in possession thereof began the erection of a building thereon, then said Clark had an interest in said land as owner, within the purview of the Missouri statutes, and could subject said building and his interest in the land to a mechanic's lien. (2) The court further declares the law to be that if the court believes from the evidence that plaintiff furnished material upon the building erected by said Clark on the land described in the plaintiff's lien and petition, and under a contract with said Clark, and that said material entered into and became a part of said building, and that thereafter plaintiff complied with all the statutory requirements for establishing a mechanic's lien, then plaintiff is entitled to such a lien on said building. (3) The court declares the law to be that if the court believes from the evidence that defendant Fisher, being the owner of lots 18 and 19 in block 11 of Evans Place, in city block 3732 of the city of St. Louis, entered into a contract of sale with defendant Clark whereby he agreed to sell to him the eastern 25 feet of said lot 19 and the western 1 foot 9½ inches of lot 18, and in pursuance of said agreement said Clark entered upon and took possession of said piece of land, and began the erection

of improvements thereon, then said lot of land is one complete and entire lot, as regards defendants, Fisher and Clark, and all those claiming through or under them. (4) The court declares the law to be that, although the court may find from the evidence that the building erected on the lot of land in question is situated on contiguous lots owned by defendant Fisher, plaintiff is nevertheless entitled to a mechanic's lien on the building situated thereon, if the lien papers are otherwise good." The court refused all of the foregoing declarations, and, at the instance of defendant, declared against the right of plaintiff to recover a lien, and accordingly gave judgment for defendant, from which plaintiff has appealed to this court.

This appeal has been transferred to this court by the St. Louis Court of Appeals, owing to the fact that one of the judges of that court deemed it in conflict with prior decisions both of that court and of this court. The opinion of the majority, by Judge Bond, is as follows:

"Respondents insist that there are such imperfections in the description of the property in the petition and lien as to justify the ruling of the court. The allegation in the petition that the beginning point in the boundary of the lot was on the south line of Evans avenue is shown to have been a mere error in the use of that term, when the term 'north' was meant, by a notation of the subsequent courses and distances completing the description of the lot. These showed that, starting from the beginning point, the course was north 165° 10'; thence east 26° 9½"; south 165° 10'; thence west to the beginning. This description would take in the width of the street, as the southern frontage, and a portion of the lot, which would be a patent error, since the vendor could not convey a public street. As this could not have been intended, and as the course of the measurements located the land on the north side of the street, it is demonstrable that the pleader intended to allege that the beginning point was on the north line of the street, and that by inadvertence or clerical error the word 'south' was inserted in lieu of the word 'north.' The use of a term in the description of land which the context shows was a mere mistake for another will not vitiate the description, if the substitution of the proper term will complete it. We therefore attach no importance whatever to the evident misuse of the word 'south' for 'north' in the description of the land given in the petition. Besides, if there had been any force in respondents' contention on this point, it would have been the duty of the trial court to have allowed appellant to strike out the specific description of the land set forth in its petition, and to have proceeded under the general description of the land given in the petition, which was in entire conformity with the full description of the land given in the lien paper. But respondents also contend that the

lien paper itself did not contain a sufficient description of the property, under the statute. The only objection which can be urged to its sufficiency is that, after giving correctly the full dimensions of the lot, the lien paper locates the lot in question wholly on what was known as lot 19 in the divisions of the city block, when in point of fact it projected 1' 9½" over lot 18, as shown by the plat of the city block. The only persons who could be affected by this inaccuracy of description were the owners or prior incumbrancers of the land. To each of these the description given in the lien paper furnished reasonable means of identification of the lot. As to Fisher, the owner, the recital in the lien paper of the exact measurements of the lot as set forth in his contract with Clark necessarily affected him with knowledge of its true location. As to prior incumbrancers, the description of the property given in the lien paper, if followed out, would have carried them to the spot where they would have discovered the house erected on lot 19, and that it projected over the contiguous lot. This fact would have afforded them further information that the owner of the building was in possession of some part of lot 18 under his contract with their grantor. In view of the distinct designation of the locality of the property thus afforded by the description thereof in the lien paper, and the further fact that appellant only claimed on the trial a right to subject the building alone to a lien for its demand, it is difficult to see any reasonable basis for the theory of respondents that the correct description of the dimensions of the property given in the lien paper was invalidated by the inaccuracy of locating the lot thus described 1' 9½" west of its eastern boundary line, when the situation of the building on the true location of the lot, and the contract in the hands of the owner of the building, who was in possession of the lot as truly located, would have informed any one seeking to locate the property described in the lien paper of its true and correct boundary line. Under the evidence in this record, the description of the property in the petition and in the lien paper was sufficient to meet the requirements of the statute, as against defendants, so far as to charge the building only with a mechanic's lien, if it can be held that appellant was entitled to that relief. But respondents insist that appellant had no contract with the owner of the land, and hence is not entitled to a lien against the building for the material which entered into its construction. The statutes governing the right of a materialman to charge the building into which his material has entered with a lien for its value afford the right upon the condition that the material is so furnished 'under or by virtue of any contract with the owner or proprietor of the land upon which the building shall be erected; and they extend the right both to the building and 'upon the land belonging to

such owner or proprietor,' and as to the latter (the land) 'to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of the building.' As to the building, the statute prefers the lien of the materialman to the lien of prior incumbrancers upon the land, and permits the sale and removal of said building in the enforcement of such lien. Rev. St. 1889, §§ 6705-6706, 6707; K. C. Hotel Co. v. Sauer, 65 Mo. 279; Crandall v. Cooper, 62 Mo. 478; Reilly v. Hudson, 62 Mo. 383; Seibel v. Slemon, 52 Mo. 363. In the case in hand the contract for the material was made between appellant and C. M. Clark, who had paid a part of the purchase money for the land upon which the building was to be erected, and was in possession under a written contract, executed by the holder of the legal title, to convey the land in fee to Clark upon the payment by him of the balance of the price. Under all the principles of law applicable to the transfers of title to real estate, Clark, by virtue of these facts, became vested with an equitable right or interest in the land, which entitled him, upon compliance with such contract, to a deed in fee. That it was the design of the statute to recognize as owner one who held the title, legal or equitable, which constituted him such under the rules applicable to conveyances of real estate, cannot be denied. The terms of the statute fully warrant this proposition, and such has been the construction uniformly given to it. O'Leary v. Roe, 45 Mo. App., loc. cit. 572; Jodd v. Duncan, 9 Mo. App. 417. It is clear, therefore, that the contract made by appellant with Clark, who was then the equitable vendee of the land, was, in the statutory sense, a contract with one who was an owner or proprietor of the land. The lien of appellant attached when its material was first put into the building. Both at that time, and when the last of its materials had been put into the building, Clark was in possession of the lot under an unexpired contract entitling him to a deed upon the making of certain specific payments in the future. Beyond question, the interest in the land so held by Clark was one which he might have conveyed or assigned at any time prior to the date fixed in his contract for the payment of the remainder of the purchase money of the lot. It was therefore such a title or interest as could be subjected to a mechanic's lien, provided the lien could be enforced before it should expire under the terms of the contract. The fact that, when the lien suit was tried, Clark had lost his interest in the land, cannot deprive appellant of the right to enforce its lien against the building. For the lien, having accrued, under valid statutory conditions, against both the building and the lot, was not lost, as to the one, because the interest in the other had become valueless.

"The cases cited by respondent (Planing Mill Co. v. Christophel, 60 Mo. App. 106:

State v. Halley, 71 Mo. App. 200) have no application. The former merely decided that the husband, who was not shown to be the agent of his wife, could not charge with a mechanic's lien a house which he had caused to be erected on her real estate. The latter case merely announced that a building erected on premises under a contract not shown to have been made with the owner or proprietor could not be made the subject of a mechanic's lien. On the other hand, in the case at bar, as has been seen, the contract for the improvement was made with an owner of the land, in the statutory sense. Hence, under the plain language of the sections cited, the materialman was entitled to a lien against both the building and the lot to the extent of Clark's interest in the latter. If his ownership had continued to the date of the trial of this suit, appellant might have subjected his title to the land, for whatever it was worth, as well as the building, to a lien for its material; but its right to subject the building alone is not conditioned in the statute upon the continuance of the title of the owner of the land at the time it contracted with him for the erection of the building, and hence appellant was not precluded from charging the building by the subsequent failure of Clark's title to the land.

"Neither is this conclusion affected by the point actually decided in *Ranson v. Sheehan*, 78 Mo. 668, where it was held that a lien could not be enforced against a building where the land on which it was situated was not described as required in the statute. It is true, in that case there are some remarks of Commissioner Phillips to the effect that the Supreme Court had held in a case like the one before him that a lien upon the building must always depend upon the obtention of a lien on the land, in support of which he referred to *Williams v. Porter*, 51 Mo. 441. He expressly says, however, that his personal views would be otherwise, under the plain language of the statute, if he were free to express it. It will be observed that the Commissioner apparently overlooked the later decision of the Supreme Court in *Kansas City Hotel Company v. Sauer*, 65 Mo. 279, where the view of the Supreme Court, as announced by Judge Sherwood, is exactly the reverse of that ascribed to it by the Commissioner. It will be further noted that Judge Sherwood, the only member of the court, as it was then constituted, who is now a member of that body, dissented in toto to the decision of Commissioner Phillips. Under these circumstances, the remarks in that case, beyond the point in judgment, cannot be held authoritative, opposed as they are to the latest previous decision of the Supreme Court, and being also in the teeth of the statute.

"The declarations of law requested by appellant are in accord with the views expressed in this opinion, and should have been given by the trial judge. For this error in

refusing them, and giving contrary instructions on defendants' behalf, the judgment herein is reversed, and the cause remanded."

Limited and guarded as this opinion is as to the right to a lien on the building into the construction of which plaintiff's materials were used, we think it is a proper construction of our mechanic's lien statute. It has often been held that this statute should receive a liberal construction, to effectuate its remedial purposes. We think, moreover, that it can be distinguished from *Ranson v. Sheehan*, 78 Mo. 668. The rights of innocent purchasers or subsequent incumbrancers are not involved, and, as pointed out by Judge Bond, the description in this lien was sufficient as to Fisher, who obliterated the lines of the original plat by the terms of his written contract to convey, and the prior incumbrancers would have had no trouble in locating the building by the lien paper; and as the plaintiff seeks to subject the building, only, to its lien, their incumbrance on the lot was not affected. We are of the opinion that it would be sacrificing substance to form to deny the lien under the facts disclosed. We think the opinion is in harmony with the decision of this court in *Press Brick & Machine Co. v. Quarry Co.*, 151 Mo. 519, 52 S. W. 401, 74 Am. St. Rep. 557. In this case, as in that, the owner has obliterated the lot lines, and the designation in the lien of the lot as the eastern 26 feet 9½ inches of lot 19 was sufficient to give notice of the particular land sought to be affected; but, as already said, the lien is not sought against the land itself, as Clark's title failed, and there is no such false description as to the building as could possibly mislead Fisher, who carved out the new lot and put Clark in possession, and, because of Clark's failure to pay, still owns the lot, and the owners of the deed of trust held their incumbrance long prior to the erection of the building.

We think the circuit court erred in refusing plaintiff's instructions and in giving defendants', and the judgment is reversed, and the cause remanded, to be proceeded with in accordance with these views. All concur.

BROWN et al. v. HARTFORD et al.
(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

ADVERSE POSSESSION—COLOR OF TITLE—TAX DEED.

1. A tax deed based on an assessment to one not the owner of the land, and which contains no recitals showing that the statutory requirements had been complied with, but instead states the conclusion of the collector that he had "advertised said real estate for sale according to law," is void on its face.

2. Defendants, in a suit commenced in 1898, claiming land by adverse possession under color of title, showed a deed from one who held a tax deed void on its face, and possession from July, 1870, to 1879 or the spring of 1880. They paid no taxes from 1880 to 1891, and the land was wholly vacant and unoccupied during

that time, except that in 1884 they got some wood from the land, and in 1888 tried, but failed, to rent it. In 1892 they leased it for five years to a tenant, who took possession. From 1879 to 1892 the land was unimproved, uncultivated, and practically unfenced. *Held*, that defendants failed to show title by 10 consecutive years of open, adverse, notorious, exclusive, and uninterrupted possession.

3. Rev. St. 1899, § 4266, providing that possession under color of title of a part of a tract of land, in the name of the whole tract claimed, and exercising the usual acts of ownership over the whole tract so claimed, is deemed possession of the whole tract, has no application where the claimant has not had possession of any part of the tract for the necessary period.

Appeal from Circuit Court, Dekalb County; A. D. Burnes, Judge.

Action by Stephen S. Brown and others against James C. Hartford and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Ejectment for the west half of the north-east quarter of section 33, township 58, range 30, in Dekalb county. The suit was instituted August 3, 1898, and the ouster laid as of March 1, 1895. Originally, Hartford was the sole defendant, but he disclaimed, and pleaded that he went into possession as the tenant of John and Rufus Carp, who claim to own the land, and thereupon they were brought in as codefendants, and filed a general denial. By direction of the court the jury found for the plaintiffs for the north 40, and, as the defendants did not except to or appeal from the ruling in this regard, the north 40 will not be further considered here.

The plaintiffs showed an unbroken chain of title from the patent of the United States, dated May 1, 1843, to themselves, and, in addition, a tax title dated June 1, 1882, for taxes, as to the south 40, for the years 1870, 1873, 1874, 1875, and 1876.

The defendants introduced a tax title, dated May 27, 1868, for taxes, for the year 1863, from the collector to J. B. Conley; a quitclaim deed from J. B. Conley to Geo. Conley, dated April 11, 1870; a quitclaim deed from Geo. Conley to B. F. Chisham, dated June 17, 1870, conveying the south 40; and a quitclaim deed from B. F. Chisham to Daniel Carp, dated July 14, 1870, conveying the south 40. The defendants are the sons of Daniel Carp, who lived on the land from July, 1870, when he purchased it, until September 13, 1872, when he died. The defendants also claim title by limitation. The testimony shows that the land is mostly rough, poor land, with deep ravines, and steep, rocky bluffs; that it was entirely denuded of timber by the Hannibal & St. Joseph Railroad, the former owner, for cross-ties, etc., used in the construction of its road in the winter of 1863; that a growth of small oak trees have since sprung up on the land, suitable only for fence posts and firewood; that Daniel Carp cleared and cultivated between three and five acres of the land, and lived on it in a cabin that was originally built by the woodchoppers who cut the timber for the

railroad while it owned it; that, when Daniel Carp died, he told his son John, one of the defendants herein, to stay there and take care of the family; that John remained there about a year and a half, and, finding he could not make a living there, he rented other farms in the neighborhood; that he rented the land in controversy to Wm. Moore and Jesse Whittaker, who stayed a year; then it was rented for a year to a man named Zercher; then it was rented to Bloom Reed; then to Geo. Estes; then to a man named Judd, who stayed part of one summer; then some one tore down the cabin that was on the place—there is some evidence that the defendant did it—and sold the timber. During the years from 1872 to 1879 or 1880 the defendant John Carp, who seems to have managed the affair for the defendants, rented various farms in the neighborhood of this land, and claims that when this land was not rented he used it in connection with the various farms he lived on, cut fence posts and firewood off of it, and sold timber that he cut from the land, and that he piled up the brush so as to let the grass grow and make the land available for pasturage. In 1879 or 1880, John moved to the edge of Caldwell county, and stayed there for two years, during which time no one seems to have been in the possession of the land. Then John moved back to a farm in the neighborhood, and says he again used the land to get fence posts and firewood therefrom. He remained a year, and then moved to another farm about two miles from this land, and his brother and brother-in-law got wood and posts from the land. From 1884 to 1890, John appears to have lived on the Smith place, which was about two miles from this land. In 1888 he leased it to Jack Curtis. In 1890 he moved to Caldwell county, about six miles from this land. In 1892 he leased it to the defendant Hartford for five years, and he put up fences around the land, and has been in possession ever since. The defendants showed that they or those under whom they claim, or who hold under them, paid the taxes for the years 1872, 1878, 1879, 1890, 1891, 1894, 1895, 1896, 1897, and 1898. The plaintiffs showed that they had paid the taxes for the years 1892 and 1893. In April, 1895, the defendant Rufus Carp wrote to the plaintiff Putnam, about some land. The letter is not in the record, so it is not clear what land it referred to. Putnam answered, saying, if Carp referred to the land in controversy here, he, Putnam, owned it, and Carp had no claim on it, but he would sell it to him for \$1,440. The tax deed from the collector to J. B. Conley, dated May 27, 1868 (under which the defendants claim), recited that the land was assessed to John Duff, and that the collector had "advertised said real estate for sale according to law, to pay and satisfy said taxes and the penalties."

Brown & Dolman, for appellants. Wm. Henry and Hewitt & Blair, for respondents.

MARSHALL, J. (after stating the facts). The tax deed to Conley was void on its face, because it contained no recitals showing that all the statutory requirements had been complied with. The statement in the deed that the collector had "advertised said real estate for sale according to law" was a mere conclusion of the collector, and not a recital of the statutory requirements which were necessary to give validity to the deed. *Burden v. Taylor*, 124 Mo., loc. cit. 21, 27 S. W. 349; *Loring v. Groomer*, 142 Mo., loc. cit. 8, 43 S. W. 647. In addition to this, the land was assessed to John Duff, who never had any title whatever to the land. At the time of the assessment and sale, the title was shown by the records to be fully vested in John L. Lathrop. Therefore that tax deed was insufficient to pass any title to Conley, and the defendants, who claim under him, got no title from him.

2. The defendants, however, claim title by limitation, and invoke the Conley tax deed as color of title. The defendants' father held under a quitclaim deed from Chesham, dated July 14, 1870, and Chesham held under a quitclaim deed from George Conley, who held under a quitclaim deed from J. B. Conley, the grantee in the tax deed. The defendants' father went into possession in 1870, and held it until his death on September 13, 1872. This defendant John Carp held the possession for a year and a half. This accounts for possession until the first quarter of the year of 1873. Then it was rented for a year to Moore & Whittaker. They left in the spring of 1874. Then it was rented to Zercher; that is, until the spring of 1875. Then it was rented to Reed, and then to Estes, and then to Judd; but it is not shown how long they remained respectively. About two years after that, the house was torn down. Then there was no one on the land for a while, but the defendant John Carp cut fence posts and firewood and sold some timber. In 1879 or 1880, the defendant John Carp moved to Caldwell county, where he remained for two years. During that time neither he nor any one for him was in possession of the land, and exercised no visible acts of ownership over it. The house was gone, and nearly all of the fences also. In fact, from 1879 to 1884 none of the defendants appear to have done anything to show a claim of any kind. The land was vacant, practically unfenced, and unimproved. The defendants were not in the visible possession of the land, and paid no taxes on the land between the years 1880 and 1891. In 1884 the brother and brother-in-law of defendant John Carp got wood off of the land. In 1888 John Carp tried to lease it to Curtis. In 1890 John moved again to Caldwell county, and, although he paid the taxes for 1891, he exercised no visible acts of possession, and, in fact, does not appear to have done anything about the land until 1892, when he leased it to the defendant Hartford for a term of five years. The plaintiffs

paid the taxes for the years 1892 and 1893, and thereafter from 1894 to 1898 the defendants paid them. The plaintiffs acquired title at the sheriff's sale under a judgment for taxes on June 1, 1881, and afterwards from the Hannibal & St. Joseph Railroad, the record owner, by a quitclaim deed, on November 18, 1882. The plaintiffs do not seem to have ever been in possession of the land, but in April, 1885, the plaintiff Putnam, answering a letter from the defendant Rufus Carp, notified him that his firm owned the land, and that Carp had no claim to it.

The sum of the whole matter, therefore, is that the defendant has shown possession of the land from July, 1870, to 1879 or the spring of 1880, and from 1879 or 1880 until 1884 there is a hiatus in the defendants' possession. There is a further hiatus from 1884 to 1888, and from 1888 (when John tried to lease to Curtis, but failed) until 1892, when he leased to the defendant, there is another hiatus. The result is that there is no evidence whatever in this record which tends to show that the defendants have ever been in the open, actual, visible, adverse, notorious, continuous, exclusive, and uninterrupted possession of the land for a period of 10 consecutive years. The longest time that the defendants have shown any kind of possession was from July, 1870, until 1879 or the spring of 1880, and, taken at its best, this does not show 10 full years. From 1879, or the spring of 1880, until 1892, when the land was rented to the defendant Hartford, the defendants have shown only two acts that evidences ownership, to wit, in 1884, when John's brother and brother-in-law got word from the land, and in 1888, when John tried, and failed, to lease the land to Curtis. There is no substantial evidence in the record showing that the defendants exercised any acts of ownership or set up any claim whatever, and they were certainly not in the actual, open, or visible possession, during that time, and paid no taxes from 1880 to 1891. The land was unimproved, uncultivated, practically unfenced, and, so far as there were any physical evidences on the land itself, it was vacant during those 12 years. The defendants have therefore failed to show title by limitation.

The fact that the defendants have color of title in the void tax deed to Conley does not materially affect the case. Under the statute (Rev. St. 1899, § 4266), possession under color of title of a part of a tract of land, in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, is deemed possession of the whole tract. But that does not apply here, for the defendants were not in possession of any part of the tract for the necessary period of time for the possession to ripen into a title by limitation.

The rule laid down by this court in construing this statute is thus stated in *Goltermann v. Schiermeyer*, 125 Mo., loc. cit. 302,

23 S. W. 619: "In cases like this, in which possession is taken in good faith under color of title or claim of right, it is held that to constitute an adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute." *Draper v. Shoot*, 25 Mo. 203, 69 Am. Dec. 462. It will be observed that this rule requires less to constitute adverse possession than is required of a mere trespasser, and more than is required of one in possession of a part under color of title to the whole tract.

All the authorities agree that the acts of possession must be visible and continuous for the requisite period in order to create the bar. *Sedgwick and Wait on Trial of Title to Land*, §§ 735, 737. It is not required that an act of possession should be done every day or month, or at any definite intervals, but they should be of such frequency and character as would at all times apprise the owner "that his seisin was interrupted, and that his title may be endangered." "It would be a new and dangerous doctrine," says Hough, J., in *Turner v. Hall*, 60 Mo. 275, "to hold that a possession under color of title may be discontinued after a year, or a month, or a week, and that thereafter the constructive possession of the land would follow the color of title instead of the true title." Judge Bliss says, in *Musick v. Barney*, 49 Mo. 463: "With the short limitation we have in Missouri, it would endanger property rights to permit a loose claim to land, with such acts of ownership only as might be exercised without attracting the attention of the real owner, and without actual occupation, to ripen into title." He says, further, that "the indications of the claim of possession should be so patent that he [the owner] could not be deceived."

In the cases of *Leeper v. Baker*, 68 Mo. 400, and *Mississippi County v. Vowels*, 101 Mo. 225, 14 S. W. 282, the adverse claimant had color of title to the whole tract, and actual possession of a part, and therefore constructive possession of the disputed tract, which only required the exercise of such acts as an owner of the whole tract would, under the condition, situation, and character of the land, have exercised. *Rev. St. 1889, § 6768.*

This case is cited and followed in *Ward v. Ihler*, 132 Mo., loc. cit. 382, 34 S. W. 251, *Hedges v. Pollard*, 149 Mo., loc. cit. 225, 50 S. W. 889, and *Brummell v. Harris*, 162 Mo., loc. cit. 405, 63 S. W. 497.

The same rule was reannounced in *Herbst v. Merrifield*, 133 Mo. 267, 34 S. W. 571, and, in addition, it was there pointedly and aptly said: "Possession, to constitute a disseisin against the owner of the legal title, when not actual, must generally be so notorious, by acts of assertion, that it may be presumed to have been known to the rightful owner. It should be so open and notorious that in passing by

or over his lands the owner could not reasonably be deceived. Acts of ownership by others than the holder of the legal title should not be held sufficient to constitute adverse possession, unless they were of such frequency and of such a character as would at all times apprise the real owner that his seisin was interrupted and that his title was endangered. Most dangerous results would flow from the permission by courts of titles by limitation to ripen in favor of those holding mere color of title, without actual occupancy, by acts of ownership so slight in and of themselves as not calculated to attract the attention of the real owner, or to indicate that his seisin (that follows his legal title) was interrupted. An occasional trespass by way of cutting timbers or digging a few loads of rock is not sufficient to amount to an adverse assertion of title against the true owner, in the absence of express notice to the owner of such assertion of ownership by the trespasser."

This suit was begun August 3, 1898, and as the plaintiffs have shown an unbroken record title, and as the defendants have not shown any valid record title nor title by limitation, the plaintiffs were entitled to a peremptory instruction, and the trial court erred in refusing to give it as asked. The judgment of the circuit court is therefore reversed, and the cause remanded to be proceeded with in conformity herewith. All concur.

MOORE et al. v. GUARDIAN TRUST CO.
et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

LANDLORD AND TENANT—ASSIGNMENTS AND SUBLEASES—RIGHT TO MAKE—REFUSAL TO PERMIT—EFFECT—RELEASE OF TENANT FROM LIABILITY—INDEMNITY FUND—PAYMENT INTO COURT—INTERPLEADER.

1. A board of trade, having determined to change its location, rented respondents' building for one year. The lease did not specify for what purpose the building was to be used, and contained no express covenant requiring the board to move into it. It did require respondents to change the four rooms on the ground floor into a trading room, which respondents did. The lease expressly granted the board power to sublet any portion of the premises without any restriction whatever. Thereafter, and before the board had taken possession, the owner of the building in which the board had been located made it a more favorable offer if it would remain there, agreeing to take the lease of respondents' building off its hands. Respondents immediately procured an injunction preventing the board from assigning the lease or subletting any part of the building to it. The board remained in the old building, and respondents' building remained vacant the entire year. *Held*, that in procuring the injunction, and in refusing to permit the board to sublet the building, respondents breached the lease and must stand the loss.

2. The original landlord each month paid to the board of trade an amount equal to the monthly rent of respondents' building, expressly stating that the payment was made to protect the board against loss and not for the

benefit of respondents. Held to be a mere indemnity fund, and, the board not being liable to respondents, it still remained the landlord's property, and could not be paid over to respondents.

3. The fact that the board paid the fund into court, and compelled the parties to interplead for it, could not give respondents any right to the fund.

4. The mere fact that the board, in leasing respondents' building, intended to move into it and establish its trading room there, and to sublet to its members, and that respondents expected this would be done, created no right in respondents to compel the board to do so, in the absence of an express provision in the lease.

5. Rev. St. 1899, § 4107, prohibiting a tenant for a term not exceeding two years from assigning his lease without the written consent of the landlord, does not prohibit him from subletting.

Appeal from Circuit Court, Jackson County; Edw. P. Gates, Judge.

Bill of interpleader filed by John W. Moore and others to compel the Guardian Trust Company, and George W. Jones and another, comprising the firm of Jones & Oglebay, to interplead for a certain fund. Decree awarding the fund to Jones & Oglebay, and the Trust Company appeals. Reversed.

This is an interpleader in equity for \$16,467.51. The plaintiffs compose the board of directors of the Board of Trade in Kansas City, a voluntary organization. The appellant is a trust company, and was formerly named the Missouri, Kansas & Texas Trust Company, and will be referred to herein as the "Trust Company." The respondents are George W. Jones and James H. Oglebay, comprising the firm of Jones & Oglebay. The purpose of the suit is to pay the fund into court, and to compel the Trust Company and Jones & Oglebay to interplead for it. They interpleaded for the fund, and on June 30, 1900, by consent of parties, the plaintiffs paid the money—less a fee allowed their attorneys, and the costs to that date—into court, and thereupon the court decreed the fund to Jones & Oglebay, and the Trust Company appealed.

The controversy is this: Prior to May 31, 1898, the Board of Trade occupied a part of the Exchange Building, on 8th and Wyandotte streets, of which Richard Gentry was the owner. Their relations became unpleasant, and the Board of Trade, and its members, as individuals, who had offices in the building, determined to move. The defendants Jones & Oglebay owned a building on Missouri avenue and Walnut street, called Temple Block, and the Board of Trade, on May 31, 1898, leased the building from Jones & Oglebay for one year from July 1, 1898, for a rental of \$16,000, with a privilege of a renewal for five years. The lessors were to furnish, free, heat, water, light, and elevator and janitor service, and to retain the offices then occupied by them. The lessors were to change "the four storerooms on the first floor into one room, in complete order for a trading room for the Board of Trade, to the satisfaction of the building committee of the second party, the portion of the cell-

ing over the trading hall corresponding with the open space above, the main entrance from the hall to the trading room to be between the two elevators." It was further stipulated that "the second parties shall have the privilege of underletting any portion of said premises during said term, and at its own expense, causing such changes, by way of partition or otherwise, as it may deem proper, under the supervision of one of the first parties." The lease expressed to be "upon condition, however, that no personal liability of any kind is assumed or created upon the part of any officer, director, or individual member of the said Board of Trade." Pursuant to the lease, the lessors notified all the tenants then in Temple Block to vacate on July 1, 1898, and made the changes on the first floor above provided for. The Board of Trade appointed a committee to fix the rental of the rooms in the building (Temple Block) other than those intended to be used by it, and they were all assigned by lot to the members.

The Trust Company, in June, 1898, acquired title to the Exchange Building from its former owner, Gentry, and at once set about to prevent the Board of Trade and its members from leaving the Exchange Building, and accordingly, on June 22, 1898, the Trust Company made a written proposition to the Board of Trade that, if it would remain in the Exchange Building for a term of five years, the Trust Company would assume the Jones & Oglebay lease, and, in addition, would not only charge no rent for the use of the trading hall or for the rooms used by the secretary of the Board of Trade, but would pay the Board of Trade a bonus of \$500 a month. Later on the same day, the Trust Company further, in order to make sure that the Trust Company would meet the assumption of the \$16,000 rental of the Temple Block, proposed to allow the Board of Trade to collect the monthly rents from the tenants in the Temple Block and keep them until the end of the month, and, if the Trust Company did not pay the rent on the Temple Block within 24 hours after it was due, to allow the Board of Trade to apply the rents so collected to the payment of the rent due for said Temple Block.

Afterwards on June 23, 1898, the Trust Company further wrote to the Board of Trade saying the proposition did not contemplate that all the members then occupying rooms in the Exchange Building should sign leases for five years, and further saying that the lease contemplated was to be without personal liability of the officers or members of the Board of Trade, and agreeing to rely upon the honor of the Board of Trade to keep its promises, "as Messrs. Jones & Oglebay relied upon to get their \$16,000 for a year, which will most certainly be paid by us and thus relieve the Board of Trade and all its members from any obligation of honor or otherwise to the owners of the Temple Block." This proposition was submitted to the mem-

bers of the Board of Trade on June 23, 1898, and was accepted by a majority vote of the members.

Thereupon, on June 24, 1898, the Trust Company wrote Jones & Oglebay as follows:

"Gentlemen: The undersigned having purchased the Exchange Building recently made a proposition to the Board of Trade for rental of portions of said building, and in said proposition agreed to assume the lease which you had made to the Board of Trade for the Temple Block for one year from July 1st, 1898. We would like to meet you with a view of ascertaining for what sum we can secure a cancellation of this lease, releasing the lessees from any liability to pay rent thereon. Or in the event that you would not care to negotiate or consider such a proposition, we will, of course, under our promise to the Board of Trade, be obliged to pay the rent and sub-let the Temple Block, and get whatever we can out of it.

"If you will kindly indicate a place and time where and when we can meet you and talk over this matter, we would very much like to have you do so.

"Missouri, Kansas & Texas Trust Company,
"By A. E. Stilwell, President."

To this letter Jones & Oglebay never made any reply. The attorney of the Board of Trade then prepared a lease from the Trust Company to the Board of Trade, which was executed by the Trust Company, but while said attorney was reading it to the officers of the Board of Trade, and before it was executed by them, Jones & Oglebay, on June 28, 1898, got out an injunction against the Board of Trade, restraining it from assigning or transferring or subletting Temple Block, or any portion thereof, except the basement, to the Trust Company, or to any person other than a member of the Board of Trade, or to one engaged in the grain or like business; and also restraining the board from "making any order, passing any resolution, or making any contract which would prevent or tend to prevent the said association (or members thereof) from locating its trading hall and officers in and otherwise using and occupying plaintiff's said building" (Temple Block). The lease which the Board of Trade was restrained from executing contained the provisions covered by the propositions of the Trust Company. Those that related to and bound the Trust Company, to assume the lease of Temple Block, and which gave the Trust Company any rights under that lease, were as follows:

"4. First party assumes the contract made by the second party on the 31st day of May, 1898, with George W. Jones and James H. Oglebay for lease of Temple Block, and expressly agrees to pay to said Jones & Oglebay the rent therein provided, said first party expressly waiving any and all questions as to the said contract to pay rent not being binding at law. First party further agrees to indemnify and hold harmless said board,

and each and every officer and member thereof, from any loss, damage, costs, attorney's fees and expenses by reason of any failure to comply with said contract as to said Temple Block, and by reason of not moving to Temple Block or by reason of any litigation arising out of or in any wise connected with either of said matters. Provided, however, that in any suit or suits instituted by said Jones & Oglebay against the board, its officers or members, the first party shall be in due time advised thereof, and through its attorneys shall be permitted to have the management and defense of said suits.

"The said first party shall pay the monthly rental on the Temple Block two days prior to its becoming due, and in default thereof the secretary of the board may collect sufficient of the rents of the Exchange Building to pay same, and after making such payment the balance shall be turned over to the first party.

"5. The second party further agrees either to assign to first party its said lease for the Temple Block, or to sub-let to the first party or to whomsoever it may designate, portions of said Temple Block as from time to time requested by the first party, and if sub-let to assign all rent to the first party, provided, however, that the board of directors of the second party, or its secretary, shall first approve the desirability of the tenant, and provided, further, that all persons now in said Temple Block shall be accepted as tenants if the first party so desires, it being understood that the first party shall agree and the first party does hereby agree to save the second party, its officers and members harmless from any and all liability or damages for making any of said sub-leases. The first party further agrees to pay the secretary of the second party the sum of twenty-five dollars (\$25.00) per month for looking into the question of the desirability of tenants so long as the lease for the Temple Block shall not be canceled by an agreement between Messrs. Jones and Oglebay and the Missouri, Kansas & Texas Trust Company, not exceeding, however one year."

On the 1st of July, 1898, Jones & Oglebay wrote to the Board of Trade, saying that they had made the changes required by their lease in Temple Block, and that said building "is now vacant and ready for occupancy by your association, and the full possession of the same and every part thereof except such rooms as were expressly excepted and reserved to us by the terms of said lease, is hereby tendered to your association to be used and occupied by them for the purpose of such business as is usually carried on and transacted by your association and the members thereof. And we hereby demand that you take immediate possession of said building for said purposes in accordance with said contract."

On the same day the Board of Trade re-

plied to said letter as follows: "Your letter of July 1st, 1898, received. The Board of Trade of Kansas City, Missouri, demands of you the possession and keys of the building known as the Temple Block, to be delivered to it pursuant to the terms of the written contract of date May 31st, 1898. The Board of Trade denies your right to make any conditional tender, or to change or alter the contract, or to limit any right of use given by it. Any failure on your part to comply with the terms of the contract will operate as a forfeiture thereof."

On the same day Jones & Oglebay wrote to the Board of Trade as follows:

"Gentlemen: Replying to your letter of this date, will say that, inasmuch as under the terms of the contract between you and us, we are required to operate the elevator and furnish heat, light, janitor service, etc., and are also entitled to retain our offices in the building we do not very well see how we could deliver to you the keys of the building, and, at the same time, comply with the terms of our contract.

"However, the keys to and possession of such portions of the building as you are entitled to the possession of, are ready for you at the building, and you can have the same by calling therefor; but the fact of our delivering to you the keys and possession of such portions of said building as you are entitled to under the terms of our contract must not be construed as a waiver, on our part, of our right to have your association occupy our building or of our rights in regard to any assignment or sub-letting of said building, or any portions thereof. Those are matters which, if we could not be able to agree in regard to them, must be settled by the courts.

"It is our intention to fully and fairly comply with the contract on our part, and if, at any time, you should be of the opinion that we are not thus complying with our contract, we would be glad to have you call our attention to the matter and specify wherein our failure consists."

Nothing more was done by either Jones & Oglebay or the Board of Trade looking towards the latter moving into Temple Block. On the 6th of August, 1898, the temporary injunction was amended so as to restrain the Board of Trade from making any assignment of the lease, and from making any subletting of any portion of Temple Block, excepting the basement, to any person not connected with the Board of Trade. On the 5th of November, 1898, the injunction was made perpetual, and the Board of Trade was enjoined from assigning or transferring the lease of Temple Block, or the rights and privileges of the Board under the lease to the Trust Company, either directly or indirectly. But the court found the issues for the defendant, "so far as they relate to the removal to, and occupancy of, said Temple Block by said Board of Trade." The

Board of Trade appealed from this judgment, and it is represented to this court that the appeal is now pending in the Kansas City Court of Appeals.

The Board of Trade remained in the Exchange Building, and Jones & Oglebay allowed Temple Block to remain vacant during the whole year, and, so far as appears from this record, made no effort to rent it, or any part of it. The Trust Company was never permitted to occupy or rent out any part of Temple Block. But, at the end of each month during the year covered by the lease of Jones & Oglebay to the Board of Trade, the Trust Company sent a check to the Board of Trade for \$1,333.33, and also for the \$500 bonus it had agreed to pay the board. Each remittance was in a letter of the following tenor:

"Dear Sir: In order to protect the Board of Trade and not for the benefit of Messrs. Jones & Oglebay, we herewith hand you our check in the sum of \$1,333.33, being one-twelfth (1-12) of \$16,000.00, the amount specified in the lease for the Temple Block, from Jones & Oglebay, over which lease there is now pending controversy. We desire to inform you that we have been prevented by Messrs. Jones & Oglebay, wrongfully as we think from securing any of the benefits, either directly or indirectly, from the rental of the Temple Block, and we consequently request that you preserve this money so that deductions may be made therefrom, if on final hearing the court of equity decided that Messrs. Jones & Oglebay had no right to restrain the Board of Trade and the undersigned from sub-letting portions of said block or otherwise disposing of said lease, and that the whole rent thereof should not be paid to them, but that the whole or portions thereof be returned to the undersigned.

"We also hand you check in the sum of five hundred dollars, due August 1st, on account of your retaining your trading hall and offices in Exchange Building.

"Yours truly,

"Missouri, Kansas & Texas Trust Company,
"By C. A. Braley, Attorney."

The Board of Trade accepted the money so paid, without question, and deposited it in a bank which allowed interest on the deposit.

On the 24th of March, 1899, the Board of Trade filed this suit, making the Trust Company and Jones & Oglebay defendants, alleging the facts substantially—though not fully—as here stated, and stating that the Trust Company had sent it a check for \$1,333.33 for each month beginning with July 1, 1898, and that it would continue to do so for the months of March, April, May, and June, 1899, under the same conditions, and asking leave to pay the fund into court, and that the defendants be required to interplead for it, which the defendants did. On June 30, 1900, the court, by consent of parties, ordered the Board of Trade to pay the \$16,000, with the interest it had earned, less

a fee for its attorney and certain costs of the case, into court, and, that being done, the Board of Trade was discharged. No question was made by the parties that at the time this suit was begun the Board of Trade had received only \$10,666.68, while the order was to pay the \$16,000, with interest, into court, and, as that was a consent decree, this fact will not be further taken into account in this court.

On the same day the court adjudged the fund to Jones & Oglebay. The reasoning upon which the learned trial judge based this finding is best expressed by the following excerpt from his written finding filed in the case, to wit:

"The payments of the Trust Company to the Board of Trade were made in pursuance to its contract with the latter. They were part of the consideration for which the Board of Trade remained in the Exchange Building, and the Trust Company had no more right to attach any conditions or protests to such payments than it would to the payment of the \$500 per month that it made to the Board of Trade for its own use and benefit. It is presumed to know that under the statutes of this state above cited it could acquire no rights under an assignment of the lease to them, except by the written consent of Jones & Oglebay thereto, and that Jones & Oglebay had a perfect right to entirely ignore the communication made to them by Mr. Stilwell on June 29, 1898, in regard to such an assignment or to a cancellation of the lease. The fund of \$16,000 in the plaintiffs' possession was acquired and is held under very peculiar circumstances. If the sole consideration for which it was paid by the Trust Company was the assignment of the lease to it, then Jones & Oglebay ought not, perhaps, to receive any of the fund unless they consented to such assignment, but, as above stated, I believe from the evidence that the main consideration was the agreement of the Board of Trade to remain in the Exchange Building, which it has done, and, the money having been paid, the contract has been executed, and the Trust Company has no claim upon it. The Board of Trade, I take it, is a partnership, and while, by the terms of the lease, none of the individual members were to be personally liable, still it does not follow that any property or money which the Board of Trade holds as partnership assets might not be. This \$16,000, it was agreed by the Trust Company, should be paid by it for the use of Jones & Oglebay, and thus relieve the Board of Trade and all its members from any obligation of honor or otherwise to the owners of the Temple Block. (See Stilwell letter of June 23, 1898.) It was creditable to the Board of Trade that it required such a promise from the Trust Company before it would enter into any agreement with it. The right of Jones & Oglebay, if any, to this fund does not arise out of any contractual relation with the Trust Company,

for none existed, but comes, if at all, from their right to be recompensed out of any property owned by the Board of Trade, no matter from what source derived. Holding, as I do, that Jones & Oglebay were ready and able to comply with the terms of the lease on their part, that they had discharged all their former tenants, had expended large sums in putting the building in a condition for the use of the Board of Trade, and that it remained unoccupied by tenants for the year for which the lease was to run, I am of the opinion that they are in equity entitled to the entire sum of \$16,000, and whatever interest it may have accumulated, less a reasonable attorney's fee to the attorneys of the plaintiff for filing the bill herein; and a decree in accordance with this conclusion will be entered herein."

From this judgment the Trust Company appealed.

Trimble & Braley, for appellant. Elijah Robinson and Stuart Carkener, for respondents.

MARSHALL, J. (after stating the facts). 1. Reduced to its last analysis, the case made is this: The Board of Trade, a voluntary, unincorporated association, had its place of business in the Exchange Building, as did also many of its 180 members. The landlord made himself disagreeable to them, so they determined to move. Accordingly, the Board of Trade leased from Jones & Oglebay the Temple Block for one year from July 1, 1898, with an option for five years more, at a rental of \$16,000, payable in monthly installments. The lease did not specify for what purpose the building was to be used, nor did it contain any express covenant or condition that the Board of Trade or any of its members should move into it or occupy it. But the lease did require the lessors to change the four rooms on the ground floor into a trading room for the Board of Trade. The lease expressly granted to the Board of Trade the right to underlet any portion of the premises, and to cause any changes it desired, by way of partition or otherwise, to be made, and provided no limitation as to the tenants or the business to be carried on therein. The lessors made the changes required by the lease, and notified the tenants then in the building to vacate, and the lessee appointed a committee to apportion and rent the offices in the building that would not be needed by the board, and the members of the board were the tenants contemplated and arranged for. This arrangement involved the Board of Trade in a liability (moral only, for all personal liability of the officers and members was expressly excluded by the terms of the lease) to pay \$16,000 a year rent for Temple Block, and to run the risk of making itself whole by subletting offices in the building. Before the 1st of July arrived, however, the Trust Company became the owner

of the Exchange Building, and it at once set about to prevent the Board of Trade and its members from leaving that building, and to this end it proposed to let the Board of Trade have the free use of the trading room, and certain rooms for its secretary, for a term of five years, and in addition to assume the lease on Temple Block, and to pay the Board of Trade a bonus of \$500 a month for staying in the Exchange Building. Also, to exempt the officers and members from all personal liability (inasmuch as the board was not only given rent free, but also a bonus of \$500 a month, this exemption amounted to nothing practically), and, further, to take the risk of the members of the board renting offices in the building. This arrangement secured to the Board of Trade quarters rent free and a bonus of \$6,000 a year, without running any risk of paying rent and making itself whole by subletting the building. Of course, this was a much more favorable arrangement to the Board of Trade than the renting of the Temple Block was, and it is not at all surprising that the board accepted it. On the other hand, it is not at all surprising that Jones & Oglebay were disappointed and vexed, nor that they felt angered at the Trust Company, as plainly evidenced by their refusal to answer the Trust Company's letter of June 24th, and by completely ignoring them, and by the institution of the injunction suit to prevent the Board of Trade from assigning the lease or subletting to the Trust Company. It is also not surprising that the Trust Company should desire to keep the Board of Trade in the Exchange Building, for it made the building and the surrounding property (in which the Trust Company appears also to have had an interest) more valuable and easier rented.

Self-interest manifestly prompted and moved all of the parties to act as they did. No other motive is apparent or shown. Each move the several parties made in the matter was to advance their own interests. Naturally, all parties seized every chance that seemed to be in furtherance of their interests. The usual result followed—there was much invoking of supposed technical rights. The letter of the 24th of June from the Trust Company to Jones & Oglebay informed them that the Trust Company had purchased the Exchange Building and procured the Board of Trade to remain there, and that the Trust Company had assumed the lease of the Temple Block, and desired to know on what terms they could secure its cancellation, or, if that could not be agreed upon, they would pay the rent and get what they could out of the building by subletting it. Jones & Oglebay did not answer this letter, but, on the contrary, procured an injunction against the Board of Trade, restraining the board from assigning or subletting the Temple Block, or any part of it, to the Trust Company, and also restraining the Board of Trade from subletting any part of it to any one except

members of the board, or persons engaged in the grain or other like business. Jones & Oglebay thereafter, on July 1st, notified the board that Temple Block was ready for occupancy, and tendered it to the board, "to be used and occupied by the members thereof for the purposes of such business as is usually carried on and transacted by your association and the members thereof. And we demand that you take immediate possession of said building for said purpose, in accordance with said contract." This qualified tender was not justified or warranted by the lease, for as the court finally found in the injunction case the lease did not obligate the Board of Trade to move into or occupy the Temple Block, and the lease contained an express power to sublet, but did not limit or restrict this to subletting to the members of the board, or persons engaged in the grain trade or like business. On the contrary, under the lease the board had full power to sublet any part of the building to any one it saw fit and for any purpose it chose.

The tender of July 1, 1898, therefore, amounted to nothing in law, and the board was perfectly right in its answer of that day, refusing to accept a conditional tender, and in demanding possession. Of course, that demand was meant and must be understood in the light of the lease, and did not include the rooms reserved by the lessors. The answer of Jones & Oglebay to this letter called attention to their right to occupy the rooms, and to their duty to furnish light, heat, power, and janitor and elevator service, and properly said that for that reason they could not turn over possession or the keys to the whole building, but tendered such possession and keys to such parts of the building as the lease of the Board of Trade gave the board a right to, but coupled this with a provision that it was not to be taken as a waiver of their claim that the Board of Trade must occupy the building itself, and must not assign nor sublet the building or any part of it, and saying these matters must be settled by the courts.

For the reasons already given as to the first tender, this tender was also unwarranted and insufficient, and of no legal effect. For it was conditional, and denied valuable rights to the board which were granted by the lease, but which Jones & Oglebay had effectually deprived them of by procuring the injunction.

The matter, therefore, finally resolves itself into this: The Board of Trade leased the Temple Block for a year, for \$16,000, but without personal liability of any of its officers or members, and without any provision in the lease requiring the board to move into it, or in any manner restricting or specifying the use that could or should be made of it, but with express power of subletting, no person or character of business being specified.

The Trust Company assumed this lease,

and tried to secure its cancellation, or to take possession and sublet as best it could. Jones & Oglebay's only answer to this was to procure an injunction against the board, restraining it from assigning or transferring the lease or subletting any part of the building to the Trust Company. It will be observed that the temporary injunction was much broader than the peremptory injunction, but both completely prevented the Trust Company from enjoying, directly or indirectly, any right or privilege under the lease. So that Jones & Oglebay took away a clear and unquestionable right that the board had, under their lease, to sublet either the whole or any part of the building to the Trust Company, and the Trust Company were deprived of the only benefit that it was possible for it to enjoy under the lease, and which formed a part—whether the principal or only the incidental is wholly immaterial—of the consideration to the Trust Company of its agreement to assume the lease. In other words, Jones & Oglebay have clearly failed to live up to the obligations of their lease to the Board of Trade, and, on the contrary, were guilty of a breach of it when they procured the temporary injunction prohibiting the board from subletting to the Trust Company, and yet they claim rent for the whole term of the lease. They do not claim it from the Trust Company, because they claim there never was any privity of contract between them. They do not rely upon the promise of the Trust Company to the board to assume the lease and to pay the rent, for, if they did, they would have to ratify and confirm the agreement between the Trust Company and the board, and this they have always refused to do; and the trial court properly held that Jones & Oglebay are not entitled to this fund by reason of any contractual relation.

But while Jones & Oglebay admit that they could not sue the officers or members of the Board of Trade for the rent reserved, and could not sue the Trust Company for the rent, because of the agreement to assume the lease, and while the trial court held that both of these propositions are true, still Jones & Oglebay claim that the money turned over every month by the Trust Company to the Board of Trade constituted a trust fund for their (Jones & Oglebay's) benefit, and therefore they are entitled to the fund. The trial court, however, after falling into the error of stating that that money was agreed by the Trust Company to be paid "for the use of Jones & Oglebay," and into the further error of holding that the Trust Company had no right to attach any conditions or protests to the money when it was turned over each month to the Board of Trade, and after holding that Jones & Oglebay could not maintain an action for the rent against the members of the Board of Trade because they were expressly exempted from liability, nor against the Trust Com-

pany because there was no privity of contract between them and the company, held that the fund was the property of the Board of Trade, and, as partnership assets, could be applied to the payment of the rent, notwithstanding the partners could not be held liable for the rent.

The trial court was in error in holding that the Trust Company paid this money to the Board of Trade for the use of Jones & Oglebay, and was also in error in holding that the Trust Company had no right to impress conditions or limitations on the money when it paid it to the Board of Trade.

The contract of the Trust Company with the Board of Trade was to assume the lease on the Temple Block, and, to make it certain that the company would pay the rent, the Board of Trade was given power to collect every month enough rents from the tenants in the building to cover the month's rent, and, if the Trust Company did not pay the rent to Jones & Oglebay within 24 hours after it was due, the board was authorized to apply the rents it had thus collected from the subtenants to the payment of the rent to Jones & Oglebay, but, if the Trust Company did pay the rent, then the board was to turn over the rents it had so collected to the Trust Company.

This arrangement did not contemplate that the Trust Company should pay the rent to the board "for the use of Jones & Oglebay," and that the board should turn it over to them. So there is no evidence to support the hypothesis upon which the trial court proceeded in holding that the Trust Company agreed to pay the money to the board "for the use of Jones & Oglebay."

The contract of the Trust Company with the board (consisting of the propositions of June 22d and 23d, which were accepted by the board) did not require the Trust Company to turn over the \$1,333.33 every month to the board, nor was the Trust Company under any legal obligation to do so. The board could only require the Trust Company to pay it to Jones & Oglebay, and, if they did not do so, could proceed against the Trust Company on its contract. Nor was the Trust Company under any legal obligation to protect the board or its members from loss by depositing this much money with the board every month. The Trust Company was under a legal as well as a moral obligation to the Board of Trade to protect it from loss on account of the Jones & Oglebay lease, but the Trust Company was under neither a legal nor a moral obligation to deposit with the board any sum whatever in advance of any loss suffered by the board, nor as an indemnity against such loss. The monthly deposits made by the Trust Company with the board were therefore voluntary. Being voluntarily made, and the money being the money of the Trust Company, that company had a right to impose any terms or limitations or

conditions upon the funds and the board's custody of the funds that the Trust Company saw fit. The Trust Company did expressly impose the conditions upon the deposits that they were made "in order to protect the Board of Trade, and not for the benefit of Messrs. Jones & Oglebay," and notifying the Board of Trade that Jones & Oglebay had wrongfully prevented the Trust Company from securing any benefits, either directly or indirectly, from the rental of the Temple Block, and directing the board to hold the fund until the courts could decide whether Jones & Oglebay had a right to enjoin the assignment of the lease or the subletting of the premises.

Thus the money was deposited by the Trust Company as an indemnity to the board against loss. It was in no sense a trust fund for the benefit of Jones & Oglebay, and such an idea or right was expressly excluded by the terms of the deposit. The board was not bound to accept the deposit of the money, but, if it accepted it, it could only do so subject to the terms and limitations impressed upon it by the Trust Company. If the board had not been willing to so take the deposit, it could and should have refused to accept it on those terms. But the board accepted the deposits just as made. The money, therefore, at all times remained the money of the Trust Company, held by the board as an indemnity against loss. The trial court was therefore in error in holding that the Trust Company had no power to impose any conditions upon the deposits or fund, and that the fund belonged to the board, and could be applied by the court to the payment of the rent under the lease from Jones & Oglebay to the Board of Trade, notwithstanding the members of the board were not personally liable. The money was at no time a trust fund for the benefit of Jones & Oglebay, nor was it at any time the partnership property of the Board of Trade, so that it could be sequestered and applied either at law or in equity to the payment of the rent under the lease of Temple Block. It was at all times the property of the Trust Company, and could only be used by the board to pay any obligation or liability the board was under to Jones & Oglebay under said lease.

Jones & Oglebay could not attach or seize or reach the fund, in law or in equity, to satisfy any claim they might have against the Board of Trade, for it was the property of the Trust Company. Neither could Jones & Oglebay claim or recover anything from the Trust Company, for there was no privity of contract or estate between them without Jones & Oglebay ratified the contract between the Trust Company and the board, and that they refused at all times to do.

The premises being true, the fact that the board paid the money into court, even by consent of the parties, did not change the character of the fund, the relations of the

parties, nor the rights of the parties respectively as to the fund. It was the money of the Trust Company that was paid into court, not the money of the board or of any one else. There was no apparent reason or pressing necessity for the board to take the matter into court at all, and less so for so doing four months before the expiration of the lease, and before it had the whole fund in its possession. If the board did not desire to hold the money as an indemnity, there was nothing to keep it from returning it to the Trust Company.

The case might be allowed to rest here, but there are other contentions which deserve attention and adjudication.

2. It is perfectly apparent that it was the intention of the Board of Trade to move into the Temple Block and establish its trading rooms there, and it was likewise its expectation and intention to sublet the offices in that large building, and doubtless it expected that the members of the board would be the subtenants. It is also the fact that Jones & Oglebay expected this would be done. But no such obligation, limitation, or restriction was embodied in the lease, and such intentions or expectations do not create any such rights. *Morgan v. Porter*, 103 Mo. 135, 15 S. W. 289. On the contrary, the lease did not require the board to occupy or so use the building, nor was there any express or implied limitation upon the power conferred by the lease upon the board to sublet the offices in the building. This being true, the board had a right to sublet to whom it chose and to use the building for any purpose it saw fit or not to use it at all. *Taylor v. Moffatt*, 2 Blackf. 304; *Howard v. Ellis*, 4 Sandf. 369; *Mayor, etc., v. Pattison*, 10 East, 136; *Brouwer v. Jones*, 23 Barb. 153; *Deforest v. Byrne*, 1 Hilt. 43.

Ordinarily, any lease may be assigned or transferred unless the power to do so is expressly denied by the terms of the lease. *Taylor's Landlord & Tenant* (8th Ed.) §§ 16, 402, 426. But, under our statute (section 4107, Rev. St. 1899), a tenant for a term not exceeding two years, or at will or by sufferance, is prohibited from assigning his term or interest without the written consent of the landlord. As to all other terms or holdings, the power to assign is an incident to the lease, and may be exercised by the tenant, unless expressly prohibited by the terms of the lease.

But, even conceding that the board had no power under the statute to assign this lease (and this is by no means free from doubt, because of the option for five years, in addition to the one-year term specified in the lease), nevertheless the board had a right to sublet any part of the premises, both under the general law and by the express terms of this lease. *Taylor's Landlord & Tenant* (8th Ed.) §§ 108, 109, 403. This right exists even where the lease contains an express prohibition against assignments. *Id.* § 403.

For there is an essential difference between an assignment and a subletting. Id. § 16.

In this instance, both the parties expected that the board would realize enough by subletting the offices in the building to totally or largely pay the rent it had agreed to pay. This was a most valuable right. When the Trust Company assumed the lease, a part of the consideration for carrying the burden of paying the rent was the right to recoup the loss by getting the rents from subtenants. Jones & Oglebay were advised of this fact, and prevented it from accruing to either the board or the Trust Company by procuring the temporary injunction restraining the board from assigning or subletting the lease to the Trust Company or to any one else except its own members or persons engaged in the grain or like business, and by securing the permanent injunction prohibiting the board from assigning or transferring the lease, or any rights or privileges of the board under the lease (which, of course, covered the right of the board to sublet) to the Trust Company. Having taken this stand and refused to allow the board or the Trust Company to occupy the building (except the basement), or to sublet any part of it for any other purpose than as a trading room or to its members or persons engaged in like business, they have no right to claim the rent reserved. Such conduct on their part constituted a breach of the lease, and they lost all right to hold any one or any one's property for the rent, and it is for their own wrong they must suffer. *Anvil Mining Co. v. Humbel*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; 7 Am. & Eng. Enc. Law (2d Ed.) p. 149.

For these reasons the judgment of the circuit court is reversed, and the cause remanded with directions to that court to enter a decree adjudging the fund, with the interest accumulated thereon, to the Trust Company, and to adjudge all the costs of the case against Jones & Oglebay. All concur.

LANGSTON v. CANTERBURY et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

ADMINISTRATORS — ACCOUNTING — CREDITS — PAYMENT OF CLAIMS NOT ALLOWED — EXPENSES FOR IMPROVEMENTS ON REAL ESTATE — TAXES — INSURANCE — ATTORNEY'S FEE — CHARGES — RENT FOR REAL ESTATE.

1. Rev. St. 1889, §§ 183-191 (Rev. St. 1899, §§ 184-193), provides that claims against the estates of intestates must be exhibited to the administrator, presented to the probate court for allowance, and established by proof. Rev. St. 1889, § 223 (Rev. St. 1899, § 224), declares that on every settlement the administrator shall show that every claim for which disbursements have been made has been allowed by the court, omitting the phrase "or shall produce such proof of the demand as would enable the claimant to recover in a suit at law" contained in Rev. St. 1879, § 230. *Held*, that an administrator, subsequent to the revision of 1889,

could not be allowed a credit for paying claims against the estate which had not been allowed by the probate court.

2. Const. art. 4, § 41, requires the General Assembly to revise all statutes of a general nature every 10 years. Sess. Laws May 15, 1889, provides for a revision of the statutes, and directs that the revision shall contain "all acts revised and amended or enacted during the present session of the General Assembly of a general nature," etc. *Held*, that the mere appearance of a section in the Revised Statutes is sufficient authority for treating it as the law on the subject, until it is shown to be incorrect by the files in the Secretary of State's office.

3. Rev. St. 1899, § 130, prohibits an administrator from controlling the real estate of the decedent, unless the probate court shall be satisfied that it is necessary to rent the estate for the payment of its debts. Section 131 authorizes repairs on houses in the possession of the administrator. Sections 100, 101, authorize the employment of labor to preserve the estate. A probate court directed an administrator to complete buildings commenced by the intestate in his lifetime, and to take charge of the intestate's improved real estate, and to insure the buildings thereon. There was no showing that the personal estate of the intestate was insufficient to pay the debts. *Held*, that the orders of the court were void, and the sums paid by the administrator to complete the buildings, to pay taxes, insurance, and repairs on the real estate could not be allowed in his settlement as credits, and the rents accruing after decedent's death collected by him could not be charged against him.

4. Under the express provisions of Rev. St. 1889, § 223, an administrator is entitled to a credit in his settlement for a reasonable sum paid by him for legal services.

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Proceedings for the final settlement of the account of S. F. Canterbury, as administrator of the estate of Thomas Johnson, deceased. From a judgment allowing the account, T. J. Langston, administrator de bonis non, appeals. Reversed.

Respondent Canterbury was the administrator of the estate of Thomas Johnson, deceased. Exceptions to his final settlement were filed by appellant, who is the administrator de bonis non. The cause was carried by appeal to the circuit court, where a final judgment was rendered showing a balance due the former administrator of \$12.37. In order to arrive at that balance, the court allowed the administrator credit for \$2,230.87 paid by him on two notes executed by the intestate in his lifetime, but which had never been allowed by the probate court; also \$6,933.25 paid by him to complete a building intestate had begun, but which was unfinished at his death; also sundry items for taxes and insurance on the real estate; and \$100 attorney's fees. The administrator de bonis non appeals from that judgment, and assigns for error the allowing of those credits to the administrator.

W. J. Orr, for appellant. James Orchard, for respondents.

¶ 4. See *Executors and Administrators*, vol. 22, Cent. Dig. § 448.

VALLIANT. J. 1. The requirements of our statutes in reference to the presentation and allowance of demands against the estate of a deceased person are so plain and unequivocal that one can scarcely misconstrue them. Claims must be exhibited to the administrator, presented to the probate court for allowance, and established by proof. Sections 183-191, Rev. St. 1889; same sections 184-193, Rev. St. 1899. Until a claim has been so allowed by the probate court, or established by judgment of a circuit or other court of competent jurisdiction, and classed by the probate court, an administrator has no right to appropriate any of the assets of the estate to its payment.

Section 223, Rev. St. 1889, which was in force when this administration was under way, the same being now section 224, Rev. St. 1899, declares that: "Upon every settlement, the executor or administrator shall show that every claim for which disbursements have been made has been allowed by the court according to law." There can be no two meanings to that.

In *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12, this court sustained the ruling of a referee in allowing an administrator credit for a demand that had not been allowed by the probate court, but which had been established before the referee by satisfactory proof. The same ruling was made in *Jacobs v. Jacobs*, 99 Mo. 427, 12 S. W. 457. Those cases, however, arose under the statute as it was in 1879, which was as follows: "Upon every settlement, the executor or administrator shall show that every claim for which disbursements have been made has been allowed by the court according to law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law." Rev. St. 1879, § 230. The amendment of that section, by striking out the last clause and reducing it to what we now have, is a very emphatic expression of legislative intent that nothing less than the allowance of the claim by the court would avail the administrator.

In *Springfield Grocer Co. v. Walton* (Mo. App.) 69 S. W. 477, our St. Louis Court of Appeals had before it the same question we are now considering, and, commenting on the amendment of section 230, Rev. St. 1879, per Barclay, J., said: "The alteration of the law in question was intended to make the allowance by the court an essential prerequisite to the payment of all ordinary demands against an estate."

The learned counsel for respondents challenge the authenticity of the statute as it now appears in the revision of 1899, and as it appears in that of 1889, and say that an examination of the session acts from 1879 to 1889, inclusive, shows no act of the Legislature amending section 230, Rev. St. 1879.

Our Constitution lays upon the General Assembly the duty to revise all statutes of a general nature at stated periods. Section 41, art. 4. A bill revising a statute must pass

regularly through the channels of legislation, but unless there is some special reason that it should be published in the volume of session acts, as, for example, that it passes with an emergency clause as to some new feature, it is not published except in the volume of the revised statutes. Those volumes are as authoritative as the volumes containing session acts, and, whilst it is possible for error or mistake to creep into one as well as the other, yet the verity of either cannot be questioned, except in the face of the original documents on file in the office of the Secretary of State.

The session of 1889 was revising session of the General Assembly. Among its acts was one entitled "An Act declaratory of the Revised Statutes of the state of Missouri, and their effect, and to provide for the collection, editing, printing, binding, publishing and distributing the same," approved May 15, 1889. Under the authority of that act the two volumes of our Revised Statutes of 1889 were compiled and published. The act required that the two volumes should contain "all acts revised and amended or enacted, during the present session of the General Assembly, of a general nature, except," etc. The general statutes, which are only revised and amended in revision at that session, were not published in the session acts, but only in the volumes of revised statutes which was authorized. A list of the general statutes revised, and, as so revised, inserted in the two volumes under the title "Revised Statutes of Missouri, 1889," is published in volume 2, p. 2229 thereof. In that list is the title, "Administration. Chapter 1." The appearance of section 224 in that connection is full authority for treating it as the law of the subject, until it is shown to be incorrect by comparison with the original files in the office of the Secretary of State.

To put the matter at rest, however, we will add that there is on file in the office of the Secretary of State an act of the General Assembly entitled, "An act to revise and amend chapter one of the Revised Statutes of Missouri of 1879 entitled: 'Of the administration of estates of deceased persons,' approved May 24, 1889," which shows that section 230, Rev. St. 1879, was amended in the particular above indicated, and as it appears in Rev. St. 1889, § 223; same, Rev. St. 1899, § 224.

The allowance of credit to the administrator for the payment of these two notes was in violation of the section just referred to, and was error.

2. There is no suggestion in the record that this estate in personalty was insolvent, that is, that it did not have ample personalty to pay its debts. There was, therefore, no necessity for drawing the real estate into the administration. The heirs could have taken immediate possession of their inheritance and have never been disturbed.

It is the right of an administrator to take-

possession of all the personal property left by the intestate without an order therefor from the probate court, because the title to the personalty, for the purposes of administration, vests in him; the distributees cannot take it until it comes to them in due course of the administration. But with real estate it is not so. It is familiar reading that an administrator cannot lawfully take hold of the real estate until thereto ordered by the probate court, and to this it may with equal force be added he cannot take hold of it even when the probate court so orders, unless the order is founded on the fact that the real estate is needed in the administration for the payment of debts. *Hall v. Bank*, 145 Mo. 418, 46 S. W. 1000; 2 *Woerner*, Am. L. of Adm'n (2d Ed.) p. 1152; *Burke v. Coolidge*, 35 Ark. 180; *Sumrall v. Sumrall*, 24 Miss. 258.

This court has decided that, whilst a judgment of a probate court in a cause within its jurisdiction is entitled to all the presumptions to sustain it that are given to a judgment of a court of general jurisdiction, yet, like a judgment of a court of general jurisdiction, it may be attacked even collaterally, if, when tested by its own accompanying record, it appears that the court had no jurisdiction. *Hutchinson v. Shelley*, 133 Mo. 400, 34 S. W. 838. In that case it was held that the judgment of a probate court ordering land to be sold for the payment of debts was void because the record of the court in the matter showed that the notice required by the statute had not been given. This was also held in *Young v. Downey*, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568. It is as essential to the jurisdiction of the probate court, in such case, that the record show that the order to take possession of or to sell the land is based on a showing that it is needed to pay debts, as it is that due notice of the proceeding be given. An order of the probate court to an administrator to take charge of real estate, not based on such a showing, is of no validity.

That the personal estate of an intestate is primarily all that an administrator has any authority over, and that the real estate descends to the heir subject to be drawn into the administration only when it is shown to be necessary to pay debts incurred by the intestate in his lifetime, are principles in the law of administration so well known that it would seem unlikely that an administrator would make any mistake in that respect. Yet not infrequently we find cases in which administrators, in good faith, have taken hold of real estate when they had no right to do so, and have expended money belonging to the estate in its improvement, and thus committed waste of assets. The disposition of courts to obviate hardships has led in some cases to an amplification of the principles of equity to shield the administrator where it was possible to do so. But courts have not, even to avoid a hardship, gone so far as to

say that an administrator may, even with the authority of the probate court, take possession of real estate when there is no showing that it is needed to pay debts. In *Byrd v. Governor*, 2 Mo. 102, the intestate had in his lifetime dug and walled a cellar as a first step in building a house on a lot he owned. The administratrix, after his death, finished the house with funds belonging to the estate. By order of the probate court the house and lot were sold to pay debts, and brought at the sale \$750. The value of the lot and cellar as left by the intestate did not exceed \$100. The suit was brought in the circuit court against Byrd, a surety on the administratrix' bond, and was submitted to the court under an agreement between the parties that Byrd was to be permitted "to make use of every equitable defense he may have." The court said: "As to the strict law of the case, there can be no doubt. The administratrix, in building the house, made a gross misapplication of the funds of the estate, and her sureties were liable for the waste committed. By the agreement, however, the defendant may well claim credit for the improved value of the estate, which had been applied towards the debts due by the intestate."

That decision was commented upon in *Merritt's Estate v. Merritt*, 62 Mo. 150, and the principle deduced "that executors and administrators stand in the position of trustees to those interested in the estates upon which they administer, and are liable only for want of due care and skill, and that the measure of care and skill required of them is that which prudent men exercise in the direction and management of their own affairs." In thus stating that principle as deducible from the *Byrd Case*, the court did not notice the fact that that case really turned on the agreement to allow the defendant to make use of any equitable defense he might have. That suit having originated in the circuit court, and being a suit on the bond, it does not touch the question as to the extent to which a probate court could apply technical equity principles in an administrator's settlement.

But the *Merritt Case* originated in the probate court, and, therefore, what is there said of the duty to apply principles of equity to administrators' settlements refers to probate courts. That decision, however, goes no farther than to say that where an administratrix, using the assets of the estate, carries on a business she had no lawful authority to conduct, the creditors have no right to charge her with the profits and refuse to credit her with the losses in the same transaction. In such case, if they treat her as a trustee in her own wrong, and claim the benefits of the transaction in which she has acted in good faith, though without lawful authority, they must state the account against her on equitable principles. In that case the administratrix had undertaken to carry on the business

of keeping a hotel, in which her husband was engaged when he died; she paid the rent for the hotel, for which the estate was liable under contract of the intestate, and she kept in use the furniture, which had been appraised at somewhat over \$11,000; this, when she ceased the business, she sold for \$20,000, of which she collected \$18,000, but failed to collect, because of the insolvency of the party, the remaining \$2,000. She made a loss in the hotel business, but did not attempt to charge that against the estate, but she did claim credit for the \$2,000. The court held that the rent was a proper debt to pay, because the estate was bound for it at all events, and that, if the creditors claimed the benefit of the advantageous sale of the furniture and received the benefit of the \$18,000 collected, they had no right to charge her with the \$2,000 which she could not collect. The court said: "The estate was benefited several thousand dollars by the course she pursued, and it would be too harsh an application of the doctrine, under the circumstances of this case, to say that she should bear all the loss, and the estate reap all the benefits resulting from her skill and care." That is as far as this court has ever gone in the direction of treating the settlement of an administrator in the probate court like the settlement of a trustee in a court of equity.

In *Van Bibber v. Julian*, 81 Mo. 618, the administrator had expended money in improvement of the real estate, and, in a proceeding by the creditors to subject the real estate to the payment of their debts, the heirs resisted on the ground that the creditors should pursue the administrator to recover the amount expended by him in the improvements, as for a waste of assets, before calling on the heirs to surrender the land. But the court held that the heirs could not withhold the land with the improvements from the creditors and send them to sue the administrator and his sureties for the money which he had unlawfully expended in making the improvements. That was a controversy between the creditors and the heirs.

Those cases may be taken as authority for the proposition that where an administrator, acting in good faith, has gone outside of his lawful bounds, and used money of the estate in carrying on a trade or other business or in improvement of real estate, if the profits of his venture are to be brought into the estate, he is entitled, as against those profits and within their limits, to credit for his unauthorized outlays. But they are no authority for saying that such outlays were lawful, or that the peculiar character of an administrator is merged into and lost in that of a general trustee. Applying the principles to be deduced from those decisions to the facts of this case, if the heirs, who are the exceptors here, object, as they have a right to do, to allowing the administrator credit for moneys expended by him in taxes and

improvements on the real estate, they cannot demand that he be charged in his settlement as administrator with rents received by him from the real estate. If one side of the account affecting the real estate is to be cut out, the other side must go also. We do not mean to imply that an administrator may not, under some circumstances, by unwarranted intermeddling with real estate, render himself liable to account as administrator for rents received, but what we now say is in reference to the facts of this case. And what we have just said of taxes applying only to such as have accrued since the death of the intestate, the statute expressly makes it the duty of the administrator to pay "all debts, including taxes due the estate or any county or incorporated city or town." Section 184, Rev. St. 1899. The word "debts" in that connection means debts due by the intestate at his death. Of course, it is the duty of the administrator to pay taxes which have accrued since the death of the intestate on property, real and personal, lawfully in his hands for administration, but the section just referred to concerns only debts which the intestate owed. Let us turn now to the facts of this case.

When the intestate died, he left in the course of construction, on a lot belonging to him, a building designed for a store and opera house. The walls of the structure were up, and the roof was on, but the floors, windows, doors, etc., were not in, and the building was otherwise unfinished. In reference to that, the probate court made this order: "It is ordered by the court that Sam F. Canterbury, administrator of the estate of Thomas Johnson, deceased, proceed as speedily as possible with the completion of said building, and in a manner that will be to the best interest of the estate, and that he finish and complete the lower story and basement in a manner as near as may be the original plan and idea of Thomas Johnson before his death, taking care to see that the same is done with as little cost as is practicable, considering the welfare of the estate, and that he complete and finish the upper room for an opera or hall room, and that the same be done economically and in a manner that the same will command the best rent obtainable, and that he use all the materials now on hand for that purpose, and buy other and necessary materials and employ necessary labor, and that he have judgment for all moneys by him expended." The court also made this order: "Ordered by the court that Sam F. Canterbury, administrator of the estate of Thomas Johnson, deceased, take charge of all the improved real estate belonging to the estate of Thomas Johnson, deceased, and that he proceed to collect the rents now due and to become due, and that he proceed without further order from this court to rent all property now vacant, or that may hereafter become vacant, to the best advantage of said estate, and to make

such arrangements in regard to further renting of said property as may seem best to him, so that the interest of said estate may be advanced." And this: "Now on this day comes the above-named administrator, and files his petition, wherein he states that said estate owns several brick business houses and other buildings of value, and for the protection of said estate said buildings should be insured against the loss or damage by fire, and he calls the attention of the court to the fact that there is no money in his hands belonging to said estate; and he therefore prays the court to make an order authorizing him to borrow sufficient money from time to time to keep said property insured. The court, after hearing said application and all the evidence relating thereto, and being fully satisfied that it would be to the interest of said estate, therefore orders and authorizes the said administrator to borrow or advance such sums of money from time to time as will be necessary to keep said property properly insured; provided, that said administrator shall not pay to exceed eight per cent. interest for such money, and said administrator shall have credit for all money so expended."

After these orders were made three of the heirs came into court, and moved to vacate the order authorizing the administrator to take charge of the real estate, on the ground that the record showed no ground for such order, and "that there are no debts due and owing by said estate, and the personal property of said estate was, at the date of said order, and is, more than sufficient to pay off and discharge all debts by said estate." The court overruled the motion. Under those orders the administrator took charge of all the real estate, paid out money for insurance, taxes, etc., and for labor and materials to finish the building. All of these acts were in disregard of the law. The evidence shows that he did this at the request of some of the heirs. That fact may furnish a basis for adjustment of the matter with the heirs, but it cannot enter into the consideration of the settlement of the administrator.

Respondents rely on section 100 or 101, Rev. St. 1899, for authority to do what was done. Those sections are a part of article 5, relating to the personal estate, and they have nothing to do with realty. The only authority in the probate court to order the administrator to take charge of the real estate for the purpose of collecting rents is section 130, Rev. St. 1899, and that is limited "for the payment of debts."

The next section, authorizing repairs on houses, etc., refers to real estate in control of the administrator after he has taken charge of it under the terms of section 130, and even the authority to make the repairs there permitted is guarded and allowed only when "the repairs can be done without prejudice to the creditors."

To the extent, therefore, that assets of

the estate have been used by the administrator to complete the building in question to pay for taxes, insurance, and repairs on the real estate left by the intestate, except taxes accrued before his death, there has been a devastavit, and the same should not be allowed to the credit of the administrator in his settlement. But, when those items are taken out of the account, any items of rent with which the administrator may have charged himself, accruing since the death of the intestate, must also be taken out.

3. The court properly allowed the administrator credit for a reasonable fee paid by him for legal advice and service. Section 223, Rev. St. 1899, authorizes such credit.

For the errors above pointed out, the judgment is reversed, and the cause remanded to be retried according to the law as herein expressed. All concur.

LAWYERS' CO-OP. PUB. CO. v. GORDON.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

TRIAL—SUBMISSION OF CAUSE—NONSUIT.

1. Where, in a cause tried to the court, at the close of the evidence of plaintiff the defendant filed a demurrer to the evidence, and at the close of the evidence of the defendant the court took the cause under advisement, and the parties were required to furnish briefs, there was a final submission of both the law and facts to the court; and under Rev. St. 1899, § 639, providing that plaintiff may take a nonsuit before the cause is finally submitted, but not afterwards, the granting of a nonsuit at the next term, after decision for the defendant was announced, was error.

2. Under Rev. St. 1899, § 695, providing that, in cases tried before the court, it shall not be necessary to state its findings, except generally, unless a special finding is requested, where a plaintiff desires to retain the right to take a nonsuit until after the questions of law are decided he should request a special finding thereon before the issues of fact are submitted.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

Action by the Lawyers' Co-operative Publishing Company against Webster Gordon. From an order setting aside a verdict in favor of defendant, and permitting plaintiff to take a nonsuit, defendant appeals. Affirmed by the Court of Appeals, and transferred to the Supreme Court. Reversed.

Curtis Haydon, N. T. Gentry, and E. W. Hinton, for appellant. W. H. Truitt, Jr., for respondent.

MARSHALL, J. This is an action of assumpsit, on account, to recover a balance of \$100 for goods sold and delivered to defendant at his request. The answer is a general denial, supplemented by a special plea that the plaintiff is a foreign corporation, and has never complied with the laws of this state re-

¶ 1. See Dismissal and Nonsuit, vol. 17, Cent. Dig. §§ 15, 16, 20.

specting foreign corporations, and therefore is not entitled to sue. Upon the trial the plaintiff offered the deposition of its treasurer, who testified to the state of the account; and the plaintiff then called the defendant, by whom it showed a written contract for the sale of the goods, and whose testimony further tended to show that the plaintiff had not performed its part of the written contract, and had not delivered all the goods contracted for and embraced in the account sued upon, and that he had paid for all the goods delivered, except, perhaps, two of the books, as to which he was uncertain. The record then shows the following order: "Now on this day comes the plaintiff by its attorney, and the defendant comes in person and by his attorneys, and, this case being called for trial, both parties answer 'Ready,' and, neither party requiring a jury, the issues herein joined are submitted to the court by oral consent in open court, entered on the minutes, and at the close of the evidence of plaintiff the defendant files demurrer to the evidence, and at the close of the evidence of defendant the court doth take this cause under advisement on the demurrer and evidence until next term, and the parties are required to furnish briefs in vacation. And thereafter, on the 13th day of February, 1900, during the regular February term, the court announced its finding and verdict for the defendant. And after the verdict was announced by the court, plaintiff asked leave to take a nonsuit, which the court refused to permit him to do." The plaintiff in due time filed a motion for a new trial, alleging, *inter alia*, error of the court in refusing to allow the plaintiff to take a nonsuit. Thereafter the court entered the following order: "Now at this day come the parties hereto, plaintiff and defendant, by their respective attorneys, and the motion heretofore filed by plaintiff to set aside the verdict in this cause, coming on to be heard, and being seen and heard by the court, is sustained, for the purpose of permitting plaintiff to take a nonsuit, whereupon plaintiff takes nonsuit. It is therefore ordered and adjudged by the court that the defendant have and recover of the plaintiff, the Lawyers' Co-operative Publishing Company, and W. H. Truitt, Jr., its security, all cost of this cause, and have thereof execution." The defendant saved proper exception to this ruling of the court, and filed a motion to set it aside, which being overruled, he appealed to the Kansas City Court of Appeals. That court affirmed the judgment below, but transferred the cause to this court, because one of the judges of that court deemed the decision to be in conflict with the decision of the St. Louis Court of Appeals in the case of *McLean v. Stuve*, 15 Mo. App. 317, and therefore, under section 6 of the amendment of 1884 to article 6 of the Constitution, this court has jurisdiction, and must rehear and determine the case as in case of jurisdiction obtained by ordinary appellate process.

The ruling of the trial court in sustaining the plaintiff's motion for a new trial "for the purpose of permitting plaintiff to take a nonsuit" is the vital point involved here. The Kansas City Court of Appeals affirmed this ruling on the ground that the trial court erred in refusing to allow the plaintiff to take a nonsuit, and corrected that error by the ruling in question. That appellate court cited two cases decided by it, in support of its decision, to wit, *Wilson v. Stark*, 42 Mo. App. 376, and *Mayer v. Old*, 51 Mo. App. 214. And counsel for plaintiff supplements these references with the case of *Lawrence v. Shreve*, 26 Mo. 492. It is said these cases lay down a different rule from that announced in *McLean v. Stuve*, 15 Mo. App. 317. But a careful analysis of these cases, and a differentiation of the facts in judgment, will show that there is no such difference between the decisions of the two courts of appeals in their prior decisions, and that no such conflict exists between such prior decisions of the two courts of appeals and the decision of this court in *Lawrence v. Shreve*, *supra*. Section 639, Rev. St. 1899, provides: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward." This statute has been in force since before the decision in *Lawrence v. Shreve*, 26 Mo. 492, which was in 1858, except that the words, "and not afterward" were added in the revision of 1865. Necessarily all of the cases have gone off upon an application of this statute to the facts in each case, and the construction of the meaning of the statute as to when a case is finally submitted. In *McLean v. Stuve*, 15 Mo. App., loc. cit. 320, it is said: "*The appellant complains that, after the parties had submitted their instructions to the court, the court took the questions of law thereby presented under advisement [the italics are superadded], and held them under advisement until a future term, when, without notifying the parties to be present, the learned judge came into court and rendered his decision upon these instructions, and at once gave judgment for the defendant, whereby the plaintiff was deprived of the opportunity of taking a nonsuit. If these were the real facts, the action of the court was erroneous. Lawrence v. Shreve, 26 Mo. 492. But it does not appear that these were the facts.*" (The italics are superadded.) The court then quotes the record entries, and shows that the court did not simply take the questions of law presented by the parties under advisement, as the plaintiff contended, but that the case was submitted to the court "upon the evidence and proofs adduced, and the court takes time to consider thereof." The court further points out that, if the plaintiff had not intended to finally submit the case upon both the law and the facts, he should have notified the court that he desired to submit only the questions of law, and that

he desired to take a nonsuit if the ruling of the court upon the law was adverse to him.

In *Wilson v. Stark*, 42 Mo. App. 376, the facts were that the case was tried and submitted, and taken under advisement by the court. No instructions were asked. Thereafter, on October 25, 1889, "the judge of the court was proceeding to announce its decision in defendant's favor, when, at the request of plaintiff's counsel, the finding and judgment were withheld, to permit plaintiff's counsel to prepare and submit declarations of law. Subsequently, and during the same term, to wit, November 1, 1889, the plaintiff's counsel did submit several instructions. The court immediately took up the cause and passed on the instructions, giving some and refusing others. Thereupon plaintiff asked leave to take a nonsuit, which the court denied, and proceeded, over the objections of the plaintiff, to enter a judgment in the cause." The Kansas City Court of Appeals held that it was error to refuse to allow the plaintiff to take a nonsuit under such circumstances. And that judgment of that Court of Appeals was manifestly right. For when the case was originally submitted no instructions were asked, and, when about to enter a judgment, the court, at the plaintiff's request, withheld the finding and judgment so as to permit the plaintiff's counsel to prepare and submit declarations of law. This was clearly a setting aside of the original submission, and a reopening of the case to let in matters that were not before the court when the case was originally submitted. Then, when the instructions were asked and ruled on, and before the case was again submitted to the court, the plaintiff asked leave to take a nonsuit, and the court denied the request. The plaintiff was clearly within the protection of the statute, and the ruling of the Kansas City Court of Appeals in reversing the judgment was correct. There is no conflict between this decision and that of the St. Louis Court of Appeals in *McLean v. Stuve*, 15 Mo. App., loc. cit. 320, for in the latter case it was clearly said the action of a court under such circumstances would be erroneous.

In *Mayer v. Old*, 51 Mo. App. 214, the case was tried before the court, the plaintiff adduced his evidence, the defendant demurred to the evidence, the court sustained the demurrer, and the plaintiff asked to take a nonsuit, with leave, but the court denied him such right, and entered a judgment for the defendant. There can be no room for doubt that the Kansas City Court of Appeals was right in holding the ruling of the trial court to be erroneous, for it is quite too obvious for discussion that the case never was finally submitted, and therefore the plaintiff had a right, under the statute, to take a nonsuit. There is no conflict between this case and the case of *McLean v. Stuve*, supra.

None of these cases, however, involved the

question that is present in the case at bar, for here the record says the case was tried, and "the issues herein joined are submitted to the court by oral consent in open court, entered on the minutes, and at the close of the evidence of plaintiff the defendant files demurrer to the evidence, and at the close of the evidence of the defendant the court doth take this cause under advisement, on the demurrer and evidence, until next term, and the parties are required to furnish briefs in vacation." Here there is a clear, final submission of both the law and the facts to the court, and the court took the whole case under advisement. Afterwards, at the next term, the court, without ruling upon the defendant's demurrer to the evidence, "announced the finding and verdict for the defendant." The record then says: "And after the verdict was announced by the court, plaintiff asked leave to take a nonsuit, which the court refused to permit him to do." Hence the plaintiff has not brought itself within the rule laid down in either or any of the said decisions of either of the courts of appeals. Therefore the plaintiff must find some authority from some other source to support his claim that there was no final submission of this cause, and that it was entitled to take a nonsuit. The plaintiff's counsel cites *Lawrence v. Shreve*, 26 Mo. 492, as affording such authority. Outside of what is said in the opinion, the facts in that case do not appear. The opinion of Napton, J., is as follows: "We think the plaintiff should have been allowed to take a nonsuit in this case. The statute says: 'The plaintiff shall be allowed to dismiss his suit, or take a nonsuit, at any time before the same is finally submitted to the jury, or the court sitting as a jury, or to the court.' When a case is tried by a jury, it has been the uniform construction of this law, in practice, to allow a party to get the opinion of the court upon the law of his case in the form of instructions, and then withdraw his suit if that opinion is unfavorable. The same opportunity ought to be afforded in cases where the court is permitted to decide the law and try the facts as a jury, if the parties request a declaration of the law from the court. In this case the court took the question of law under advisement, and when the decision was made the whole case was decided together, and no opportunity given for a nonsuit. The instruction given for the defendant was merely an instruction, upon the evidence, that the plaintiff was not entitled to recover; but the character of the instruction cannot vary the rights of the parties, and would rather seem to make it more imperative on the court to give the plaintiff an opportunity of determining whether he would proceed further with the case. The plaintiff cannot insist upon immediate determination of the law asked for by the instructions offered; but if the court takes them under advisement, proceeding

with other business, it would seem to be reasonable, where no day is announced, or by some rule of court established, in which the decision will be made known, that the parties or their counsel should be informed when the court is ready to determine the instructions. Any other practice would deprive plaintiff of the right given him by the statute to take a nonsuit at any time before the final submission of the case. The judgment will be reversed, and the plaintiff has leave to enter a nonsuit. The other judges concur." It will be observed, however, that that case is unlike the case at bar, for the reason that it is not stated in the opinion, and does not otherwise appear anywhere in the report of the case, that the whole case was never finally submitted to the court. It is distinctly stated in the opinion, "*In this case the court took the question of law under advisement* [the italics are superadded], and when the decision was made the whole case was decided together, and no opportunity given for a nonsuit." The case was tried before the court. At the close of the plaintiff's evidence the defendant demurred to the evidence. The court took the question of law under advisement. The question of law was whether the plaintiff had made out a prima facie case. The defendant had introduced no evidence. The whole case was not finally submitted to the court for decision. Such a submission was only a qualified submission, or, more properly speaking, it amounted only to a suspension of the trial until the court could decide whether the demurrer to the evidence should be sustained or overruled. It was in no proper sense a final submission. For if it had been overruled, the plaintiff was not entitled to an immediate judgment, but the defendant would have been entitled to introduce his defense. So, on the other hand, if it was sustained, the plaintiff was entitled to take a nonsuit, because the trial had never ended, and the case was never submitted. Therefore the decision in that case was clearly right, but it affords no precedent for the ruling in this case. Aside from this, however, what is said in that case and the other cases cited must be read in the light of the facts in judgment in each case, and remarks that were proper and pertinent in those cases might be most misleading if applied to cases involving different conditions. "In debt upon an obligation, upon demurrer, the case being argued, the opinion of the court was against the plaintiff, and rule given that judgment should be entered for the defendant, and the plaintiff prayed that he might be nonsuited; and because he had at the same term appeared, and argued by his counsel, and had prayed judgment, he could not be nonsuited the same term." 7 Bacon's Abr. tit. "Nonsuit," D, p. 219, with Am. & Eng. Dec. by Bouvier. The same author (page 220) says: "But after verdict, or after the cause has been

opened, he cannot become nonsuit but by leave of court." To the same effect the American annotator cites *Locke v. Wood*, 16 Mass. 318; *Hendrick v. Stewart*, 1 Overt. 476; and *Haskell v. Whitney*, 12 Mass. 49. In *Locke v. Wood*, supra, when the verdict was returned, and before it was recorded, the plaintiff moved that the verdict be set aside, and for leave to discontinue, which was denied, and the verdict was recorded; the trial court holding it to be in the discretion of the court to allow a nonsuit after a verdict rendered, and believing it to be dangerous to establish such a precedent. The plaintiff contended that a plaintiff was entitled to take a nonsuit or to discontinue at any stage of the action before judgment. "But the court were of opinion that there was no such right, and that after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance." In *Hendrick v. Stewart*, supra, it was said: "The case in *Haywood* is decisive that the nonsuit should be demanded after the jury return their verdict, and before it is recorded. Upon this last ground, we are of opinion that the motion was made too late, and that the rule must be discharged." In *Haskell v. Whitney*, 12 Mass. 49, it was held that after the parties had consented to a reference of the case, with a stipulation that a judgment might be entered upon the report, neither party could rescind the agreement, and that the plaintiff was not entitled to take a nonsuit. In a note to this case at pages 50, 51 will be found quite a collection of cases bearing upon the right of a plaintiff to take a nonsuit.

These cases, of course, are not controlling authority in this case, nor did they arise under statutes altogether like ours; but they serve to throw light upon the practice in this regard, and are valuable aids in construing the meaning of our statute as to when a case is considered as finally submitted to the court. In *Templeton v. Wolf*, 19 Mo. 101, after the evidence was closed, and the instructions had been given, the plaintiff asked leave to take a nonsuit, which the trial court refused. This court held such refusal to be error, and *Gamble, J.*, said: "The statutes of this state have always recognized the right of a plaintiff to take a nonsuit, and have limited its exercise to the time previous to the retiring of the jury to consider their verdict." By a parity of reasoning, the right to take a nonsuit in a case tried before the court without a jury should be limited to the time previous to the court taking the case under advisement for the purpose of deciding it. In *Wood v. Nortman*, 85 Mo., loc. cit. 303, a record of a previous trial was offered in evidence, from which it appeared that the case was tried and a judgment entered on October 1, 1877; that on October 8, 1877, the plaintiff moved to set aside the verdict, "stating as the ground

of the motion that the case was not submitted on the merits, but upon the question whether or not the plaintiff should be permitted to introduce further evidence in support of his case, and because it was understood by the court and the parties, before the judgment was rendered, the plaintiff might have the right of entering a nonsuit." The court sustained the motion, and permitted the plaintiff to take a nonsuit. The question became important in *Wood v. Nortman*, because, if the nonsuit was properly allowed, that suit was not barred by limitation, because, although it was not brought within the ordinary period of limitation, it was brought within one year after the nonsuit was taken in the former case. It was contended that, under the statute in reference to nonsuits, the court had no power, after the cause was submitted and the judgment was entered, to set aside the judgment and permit the plaintiff to take a nonsuit, but that the defendant was entitled to the benefit of the judgment he had obtained. In passing on this question, Norton, J., said: "It has been held that under the above section a nonsuit may be taken at any time before the jury retires, or before a final submission to the court, and after the law is declared. *Templeton et al. v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492. We think it apparent, from the ground relied on, and the reason given in the motion to set aside the judgment, as hereinbefore stated, that the judgment of the court, rendered on the 1st day of October, 1877, was prematurely rendered, and before the cause, according to the understanding of the parties, was finally submitted to the court; and the court must necessarily have so found when it sustained the motion, set aside the judgment, and permitted plaintiff to take a nonsuit. Under the circumstances of this case, as we have referred to them, the nonsuit was properly allowed. The court not only had the right, but it was its duty, if the facts were as stated in the motion, to set the judgment aside; and when set aside the case stood before the court as if no judgment had been rendered in the case, or trial had, and without any impairment of plaintiff's right to take a nonsuit." It will be observed, however, that this ruling was expressly placed upon the ground that there had never been a final submission of the whole case to the court, within the meaning of the statute, but only a qualified submission on suspension of the trial for the purpose of allowing the court time to decide an intermediate question of law, arising in the course of the case, but which did not necessarily go to the whole law of the case, and did not involve at all a judgment or finding of the facts. That case, therefore, is no authority in the plaintiff's favor in this case, but the logic and reason of it is all against this plaintiff. For here it cannot be denied that the whole case was finally submitted to the court, and the court was possessed of the whole case, without any

limitations or qualifications as to the terms or purposes of the submission; and this, too, without any instructions being asked by the plaintiff, and without either party asking that defendant's instruction be passed upon before the case be taken as submitted, and the application for leave to take a nonsuit was not made until after the court had announced its verdict and judgment upon the whole case. The fact that the court did not expressly rule on the instruction asked by defendant is immaterial in this case, for in entering judgment for defendant the court necessarily passed judgment on the law as well as the facts of the case. If the parties desire the law and the facts passed upon separately, they should ask declarations of law, and request the court to pass upon them before the case is finally submitted for adjudication. When they finally submit the case without so doing, it is competent and proper for the court to pass upon the law and the facts at the same time. It is proper to observe that section 695, Rev. St. 1890, provides, that in cases tried before the court, "it shall not be necessary to state its finding except generally unless one of the parties requests a special finding with the view of excepting to the decision of the court upon the question of law or equity arising in the case, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law." Here is an express statutory provision permitting the court, when a case is finally submitted, without the parties insisting upon the instructions being passed upon before submission to enter a general finding, unless one of the parties requests a special finding, and, in case of such a request, expressly requiring the court to state in writing the conclusions of law and fact separately. The conclusions of law and fact are here required to be found at the same time, either generally, or, if requested, specially.

It follows that the trial court erred in sustaining the motion for a new trial and in permitting the plaintiff to take a nonsuit after the whole case had been submitted, and after the court had announced its verdict and judgment; and therefore its order in that regard is reversed, and the cause remanded, with directions to set aside the order sustaining the motion for a new trial and allowing the plaintiff to take a nonsuit, and to overrule said motion, and to reinstate the finding and judgment heretofore entered by it in favor of the defendant. All concur.

MALLOY v. ST. LOUIS & S. RY. CO.
(Supreme Court of Missouri, Division No. 1,
March 18, 1903.)

CARRIERS—INJURY TO PASSENGER—PRIMA
FACIE CASE—EXCESSIVE DAMAGES.

1. In an action for personal injuries sustained in a railway collision, the negligence charged was that defendant "did, by the servants in charge of said car and its servants in charge

of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide." *Held*, that the rule that if, instead of pleading generally the relation of carrier and passenger, and the injury, and thus making out a prima facie case, plaintiff limits his right to recover to a specific act of negligence, he must prove such specific negligence, did not apply, and it was not necessary for plaintiff to show which servant so in charge of the cars was negligent.

2. The court, on appeal, will not set aside an award of damages as excessive unless the amount awarded shocks the judicial sense of right and justice.

3. In an action for personal injuries received in a collision between electric cars, plaintiff's evidence showed that his testicles, hip joint, kidneys, bladder, and spinal cord were injured, and that his abdominal wall was ruptured, compelling him to wear a truss. *Held*, that a verdict of \$7,000 was not excessive.

Appeal from St. Louis Circuit Court; W. B. Douglas, Judge.

Action by John Malloy against the St. Louis & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages for personal injuries sustained by the plaintiff while a passenger on one of the defendant's cars, near Ramona Park, in St. Louis county, on September 7, 1900, in consequence of a collision between the car upon which plaintiff was riding as such passenger and the Kinloch palace car, on which the president of the defendant was riding. The negligence charged in the petition is that the defendant "did, by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide." The answer is a general denial. The evidence shows that the plaintiff and his wife boarded one of the defendant's cars at Kinloch Park, in St. Louis county, on the evening of September 7, 1900, to be transported to the city of St. Louis; that he paid the fare for both; that his wife was seated, but, owing to the crowded condition of the car, the plaintiff was compelled to stand, which he did at about the fifth seat from the front of the car; that the car proceeded towards the city, and when it got near Ramona Park, and while it was running at a very rapid rate (varying, according to the witnesses, from 20 to 35 miles an hour), it collided with the president's private car, the Kinloch, in consequence of the two cars running in opposite directions on the same track at the same time. The collision occurred on a curve in the track, by which, and the underbush and small trees that were growing near the track, the view of the motormen on the two cars was obstructed so that neither saw the other in time to stop his car and prevent the collision, and neither knew prior to the instant before the accident that the other was on the same track. The plaintiff was seriously injured by the collision, the particulars of which will

be referred to in the course of the opinion. There were a verdict and a judgment for the plaintiff for \$7,000, and the defendant appealed, and assigns two principal errors, to wit, first, that the plaintiff failed to make out a prima facie case; and, second, that the damages are excessive—and of these in their order.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant. A. B. Taylor, for respondent.

MARSHALL, J. (after stating the facts).

1. Prima Facie Case. The defendant contends that the plaintiff failed to make out a prima facie case, and that the court erred in not ordering a nonsuit. The contention in this regard is that instead of pleading general negligence of the carrier, under which a prima facie case would be made out by simply establishing the relation of carrier and passenger, and the collision, the plaintiff predicated a right to recover upon the negligence of the defendant's servants in charge of the two cars, and then wholly failed to show that these servants were guilty of any negligence whatever; and the defendant claims that the exact point was decided in *Feary v. Railroad*, 162 Mo. 75, 62 S. W. 452. The rule of law is correctly stated in that case to be that if, instead of pleading generally the relation of carrier and passenger, and the injury, and thus making out a prima facie case, the plaintiff limits his right to recover to a specific act of negligence, he must prove such specific negligence, and is not entitled to the benefit of the general rule. The rule thus laid down is undoubtedly correct, but it does not have the effect claimed for it upon this case. In the *Feary Case* the plaintiff limited the negligence to the act of the motorman in allowing the lever to slip out of his hands, thereby causing the car to run down the incline. The defense in that case was unavoidable accident. The issues were thus sharply drawn. The jury found for the defendant, thereby finding that it was unavoidable accident. After thus taking his chances before the jury and losing, the plaintiff claimed he was entitled to recover under the general rule, which he had not invoked at any time until after the verdict. It was held that he was not entitled to thus change his position, but that, having elected to narrow the issues, he could not claim the benefit of the general rule after he had tried his case on the lines he had chosen and had lost. But the case at bar is by no means similar or analogous. The petition in this case charges that the collision occurred in consequence of the negligence of the defendant's servants in charge of the cars. In a restricted sense, that might mean only the motorman and conductor, because they are the only servants on the car. But in a more comprehensive sense, it might mean any servant of the defendant who was

in any way directly charged with the running of the cars. And as was held in *Rinard v. Railroad*, 164 Mo., loc. cit. 287, 288, 64 S. W. 124, a train dispatcher is directly charged with the running of the car, although he may not be on the car or near the place of accident; and his negligence in allowing two trains to run in opposite directions on the same track at the same time was the negligence of the company, and was as much the direct cause of the collision as would be the negligence of the engineers on the two trains. Here no particular servant is specified. It is true, it is limited to the servants in charge of the cars. But a collision could not be caused by a servant who was not connected with the running of the cars. A servant otherwise engaged might cause an accident, as by negligently throwing a switch, or removing or leaving an obstruction upon a rail, but no servant could cause a collision unless he was in some manner connected with the actual management of the movements of the cars. Therefore the charge in this case is just as broad and general as if it had been that the defendant was negligent in so running its trains as to cause a collision. But the result must be the same, whichever view be taken of the meaning of the petition, for if these two cars collided in consequence of the motormen, or either of them, running around the curve, where the undergrowth and small trees obstructed the view, at such a high rate of speed that they could not stop their cars in time to avoid a collision after they discovered each other on the track, as the jury may have found was the cause of the collision, the petition would undoubtedly have fitted the case. For in this view the collision would be caused by the negligence of the servants in charge of, and actually upon, the cars. Or if the train dispatcher or starter, or person whose duty it was to regulate the running of the cars, and to give notice of any such extra cars on the track, was negligent, the petition will fit that condition, and such negligence falls within the specification of negligence in the petition, and the defendant would be liable. Certain it is that the collision was caused by the negligence of some one or more of the defendant's servants who were in charge of the cars, in one capacity or another, and directly connected with their movements. It follows that the petition is as broad as is necessary to support a recovery in this case, and that, as it was not incumbent upon the plaintiff to charge the specific negligence of any particular servant, so it was not necessary for the plaintiff to show which servant so in charge of the cars was negligent, for the defendant was liable for the negligence of all such servants.

2. Damages. The defendant strenuously insists that the damages assessed are excessive, and cites many cases wherein a remittitur has been ordered because the court

deemed the damages excessive. In none of the cases cited, however, were the injuries of the same character or degree of those suffered in this case. The injuries, as shown by the plaintiff's evidence, are that his testicles were injured so that one of them would drop down from four to six inches, and he is compelled to wear a suspensory to keep them up; the abdominal wall was ruptured, causing his intestines to come out and drop into the scrotum, and in consequence he is compelled to wear a truss; his hip joint is injured, so that he is lame and suffers pain; his kidneys and bladder were injured, so that he could not pass his urine for 24 hours, and there was blood in the urine; and one of the most distinguished physicians in St. Louis testified he examined him a month before the trial, and that there was "very evidently injury to the spinal cord, and that it would probably be progressive and end in locomotor ataxia." The defendant expresses doubt as to the truth of the evidence of the plaintiff's witnesses in this regard, and points to the fact that the plaintiff himself testified that he was only confined to his bed for 15 days; that 4 weeks after he was able to leave his bed he went to work in the city fire department as a day watchman, and in a short time he resumed his former position as a fireman in the fire department, which he says is a position that required great agility and physical strength. The defendant also produced a most distinguished surgeon in St. Louis, who testified that he examined the plaintiff a few moments before taking the witness stand, and found that he had varicocele (that is, one testicle hangs lower than the other), but that 10 per cent. of the entire male population are afflicted in the same way; that nobody knows what causes it, but it is frequently or generally congenital; that the plaintiff was wearing a truss, but there was no occasion for him to do so; that he had a porous plaster on the back and one on the hip, but he found "no swelling, nothing abnormal, no diseased condition there"; that witness might have been bruised, but, "from his examination, witness stated that he did not see, feel, or hear anything wrong with the plaintiff at the present time, except that he appears to be nervous. There is no swelling, no enlargement, or anything wrong with him, except he has varicocele." The witness said that if the plaintiff had had concussion of the spine, or was suffering from that condition, it would not be possible, during the actual concussion, for him to discharge the duties of a fireman, "but three or four weeks afterwards the man might be able to get about and do that kind of work. The fact that the man is doing such work tends to show he has recovered—at least, that he is getting better." The result of the matter is this: The defendant's contention that the plaintiff could not do the work of a fireman if he had suffered an injury to the spinal cord is dis-

proved by the testimony of its own medical expert; the positive, direct, and unequivocal testimony of the plaintiff's attending physician as to the nature and extent of his injuries when he attended him for several weeks after the injury is contradicted by the equally positive, direct, and unequivocal testimony of the defendant's medical expert, who examined him during the course of the trial; and the testimony of the plaintiff's eminent surgeon, who examined the plaintiff a month before the trial, as to the evident injury to the spinal cord, and its probably disastrous consequences, is contradicted by the defendant's eminent surgeon, who says there is nothing the matter with his spine, except that he has a porous plaster on it. Manifestly, they cannot all be right in their diagnosis. That all of these distinguished and justly eminent physicians and surgeons are perfectly honest and sincere in what they say, there is absolutely no room to doubt. But it only serves to demonstrate that no human healer has ever been able to diagnose, beyond a doubt, every case, nor to read the workings of nature so as to be able to foretell what the exact result of an injury to the intricate machinery of the human organism will amount to or result in. As such eminent specialists differ so widely as to the injuries complained of, and as to their probable duration and permanency, it could not reasonably be expected that an appellate court could or would attempt to say which is right. The law commits the solution of such problems to the jury, subject, of course, to review and correction by the courts in cases of manifest and flagrant abuse of privilege, discretion, and duty on the part of the jury, which, however, is clearly not present in this case. Of course, there can never be any exact rule laid down by the courts for measuring damages for personal injuries. Accident insurance companies have a graduated scale of compensation for personal injuries, but that must necessarily be purely an arbitrary rule. Primarily the law leaves the question to the honesty and common sense of the jury. But because experience has shown that all juries do not assess the same amount for the same kind of injuries, the courts have been compelled to interfere occasionally. The criterion adopted in appellate courts is that the amount awarded shocks the judicial sense of right and justice. And even this is not an exact rule, for what might shock one judge might seem wholly inadequate compensation to another judge. This, however, is the result of human infirmity, and the fact that only finite minds are available to solve these problems of nature and administer human justice. The amount assessed in this case is large. But if the plaintiff's injuries are of the character, nature, and probable duration that his witnesses state, that amount is not at all shocking to the judicial sense of right and justice. In fact, it is not

more than a proper compensation for the impairment of his manhood, his health, and his ability to fight the battle of life, without allowing anything for his suffering and his medical expenses. On the other hand, if the defendant's showing is correct, the verdict is absurdly excessive. These considerations were met and answered by the jury and the trial judge. They were in a better position to solve the matter than an appellate court could possibly be. There is a sharp and irreconcilable conflict in the evidence. Under these circumstances, this court will not interfere.

3. The point that the amendment to the Constitution allowing nine jurors to return a verdict was never legally adopted, and therefore is not the law, and that the court erred in instructing the jury that nine of the jurors could return a verdict, was settled by the decision of this court in *Gabbert v. Railroad*, 70 S. W. 891.

These conclusions make it unnecessary to refer to other minor points urged by the defendant, as they depend upon and are covered by the principles here announced.

The judgment of the circuit court is affirmed. All concur.

HENNESSY v. ST. LOUIS & S. RY. CO.
(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

CARRIERS — COLLISION — INJURIES — EXCESSIVE DAMAGES — NEGLIGENCE — INSTRUCTIONS.

1. In a collision between electric cars, plaintiff was injured—sustaining a complete inguinal hernia, or rupture of the testicles—was compelled to wear a truss, and suffered great pain. *Held*, that a verdict of \$3,900 was not excessive.

2. Plaintiff was injured in a collision between an electric car on which he was riding and a car on which the president of defendant company was riding. The court refused to instruct that if, shortly before the president's car reached a certain point, its motorman asked the motorman on a passing south-bound car if the latter car was the last car out, and was answered that there was one more car, and defendant's president understood the answer to be that the car was the last one out, and, relying on said advice, gave orders for his car to proceed, and if the collision was due solely to the president's misunderstanding of such answer, and such misunderstanding was purely accidental, and did not constitute negligence, the verdict must be for defendant. *Held* properly refused, where the president himself testified that he knew there were nine cars on the road, and that only eight had passed.

3. The instruction was properly refused where the president testified that it was the duty of the manager of the road to regulate the running of the cars, and to notify motormen of the cars that were on the road.

4. The instruction was properly refused where the collision occurred on ladies' day at certain races, when the cars were crowded, and all the cars were needed to handle the crowds.

5. The instruction was properly refused: it appearing that the president's car was not a regular car on that part of the road, and there being nothing in the record to show that the

manager or any motorman knew it was coming out.

6. As the president knew there was another car out, which would come in some time that evening, it was negligence for him to run his private car at a high rate of speed around a curve where a coming car could not be seen, or to run it over that part of the road without taking proper precautions to prevent a collision with such incoming car.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action for personal injuries by Daniel S. Hennessy against the St. Louis & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This case is in all its essential features like the case of Malloy against this defendant (No. 10,732; just decided) 73 S. W. 159. The plaintiff was a passenger on defendant's car, and was injured in the same collision that injured Malloy. The pleadings are identical, except as to parties and the extent of the injury. The proofs are the same, except that in this case it appears that before the accident the president's car was on a switch, and that, when a car passed, the motorman on the president's car asked the motorman on the passing car if his was the last car, and he said "Yes." The said motorman on the passing car says he added "that there was one more car out there, but he did not know whether he [the said motorman] would meet it." The president of the defendant testified that he knew there were eight cars running between Suburban Garden and Kinloch Park, and one running between Kinloch Park and Florissant, and that after leaving Suburban Garden, and before the collision, his car passed eight cars; that he asked the motorman on the eighth car whether there were any more cars out, and he said "No," and he then directed the motorman on his car to go ahead; that it was the business of the manager of the road to know about the cars, and to give information to the men running the cars; and that the manager was at fault in this case in not doing so. The plaintiff's injuries consisted of a complete inguinal hernia; that is, a rupture of the testicles, so that one of them "comes down sometimes once and a half as big as his fist." At the time of the trial there was pus in the scrotum, which indicates that the rupture is a very bad one, and that an operation would be very dangerous at the plaintiff's time of life. He has had to wear a truss ever since, and suffers a great deal of pain. There was a verdict for \$3,900, and the defendant appealed. This court has jurisdiction, because the constitutionality of the jury law is called in question.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant. A. R. Taylor, for respondent.

MARSHALL, J. (after stating the facts).
1. What is said in Malloy v. this defendant as to the deficiency of the petition and the

correctness of the rulings of the court, and as to the measure and amount of the damages assessed, applies equally to this case. In this case, however, the defendant did not attempt to controvert the plaintiff's showing as to the nature or extent of the injuries. The injuries in this case do not appear to be as extensive or manifold as those in the Malloy Case, and the verdict is only a little over half as much. The verdict is for the right party, and the damages assessed are not excessive.

2. The refusal to give the following instruction asked by the defendant is assigned as error: "The court instructs the jury that if they believe from the evidence that shortly before the car Kinloch reached Ramona Park it was passed by a south-bound car of defendant, and that the motorman on said car Kinloch asked the motorman on the said south-bound car whether said south-bound car was the last car out, and that the said motorman on said south-bound car said that there was one more car out; and if you further believe from the evidence that Mr. Turner, president of the defendant company, riding on the Kinloch, understood said motorman on said south-bound car to say that his car was the last car out; and that Mr. Turner, relying on said advice, gave orders for the Kinloch to proceed beyond Ramona Park; and if you further believe from the evidence that the collision in question was due solely to Mr. Turner's misunderstanding of said motorman's remark, and that such misunderstanding on Mr. Turner's part, under all the circumstances in the case, was purely accidental, and did not constitute negligence on his part, as defined in other instructions herein—then your verdict must be for the defendant." This instruction was properly refused, for the following reasons: First, Mr. Turner, himself, testified that he knew there were nine cars on the road, and that only eight had passed him; second, Mr. Turner testified that it was the duty of the manager of the road to regulate the running of the cars, and to notify the motormen of the cars that were on the road; third, the accident occurred on ladies' day at the races at Kinloch Park, when the cars were crowded, and all the cars were needed to handle the crowds; fourth, the president's car was not a regular car on that part of the road, and there is nothing in the record to show that the manager or any motorman knew it was coming out on the road—it was running under the direction of the president himself; fifth, the president had no right to rely upon what the motorman of the passing car said, or what he understood him to say, about there being no other car out on the road, for he knew that there was another car still out on the road, which would come in at some time that evening, and therefore it was negligence to run his private car at a high rate of speed around the curve, where a coming car could not be seen, or to run it out over that part of the

road without taking proper precautions to prevent a collision with a car he knew would come in at some time in the evening.

Finding no error in the record, the judgment is affirmed. All concur.

BEYER et al. v. HERMANN et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

WILLS — TESTATRIX'S KNOWLEDGE OF CONTENTS—INSTRUCTIONS AFTER RETIREMENT OF JURY — MENTAL CAPACITY — EVIDENCE—ORDER OF INTRODUCTION — APPEAL — CONFLICTING EVIDENCE.

1. The requirement of the law that testatrix shall know the contents of the will is satisfied where, after a will was read and explained to her, a true copy was made, which she signed without reading or explanation thereof.

2. The finding of the jury, on conflicting evidence, that testatrix was of sound mind, will not be disturbed on appeal.

3. There is no error in the court's telling the jury, after their retirement, in answer to an inquiry, without affording counsel an opportunity to reargue, that it was not essential to the validity of the will that it be read to the attesting witnesses.

4. Testimony that testatrix, who did not find her brothers, and who left her property to others, was anxious to find her brothers, and eight days before execution of her will said she would leave them her property if she could find them, does not tend to prove any of the charges in the petition contesting her will that she was insane, or that the will was not executed according to law, or that it was procured by undue influence.

5. Refusal of the trial court to allow plaintiffs to introduce testimony in chief on rebuttal on the ground that they had just learned that witness would testify favorably to them, is in the sound discretion of the trial court.

Error to St. Louis Circuit Court; Jas. E. Withrow, Judge.

Action by Frederick W. Beyer and others against William Hermann and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

Willis H. Clark and John A. Gernez, for plaintiffs in error. W. R. Schery and Chas. E. Hannauer, for defendants in error.

MARSHALL, J. This is an action to contest the will of Anna Hermann, née Burger. The testatrix was married to defendant William Hermann on April 9, 1896, and the will was executed on the same day. She died on April 11, 1896. By the will she devised \$2,000 to her adopted child, Martha (really the child of her deceased daughter, Augusta Burger), and the remainder of her estate she bequeathed to her husband. The will is contested upon three grounds: First, that decedent was of unsound mind; second, that it was not executed in the manner required by law; third, that it was procured through the undue influence of the defendant, William Hermann. The plaintiffs are the half-brothers of the decedent, and for three or four years before the will was made had not been friendly with the decedent, growing out of differences arising from the settlement of

their mother's estate, among which was their charge that she had taken \$600 belonging to their mother, and in consequence they had not seen the decedent for three years before her death, and she did not know where they were, but it seems had advertised for them without success. There was a verdict for the defendants, and the plaintiffs appealed. The evidence will be referred to in the course of the opinion in connection with the several points discussed.

1. There is no substantial evidence to support the charge of undue influence, and therefore no further attention will be given to that branch of the case.

2. The second charge is that the will was not executed according to law. The plaintiffs claim that the justice prepared a will, and read it and explained it to the decedent, and that in attempting to sign her name to it she dropped the pen and blotted the paper, and thereupon the justice recopied the will, and, without reading or explaining the copy to her, it was executed, she making her mark, and the witnesses signing their names. The testimony of the justice is not altogether clear as to whether he read the will to the decedent after he recopied it or not. It is susceptible of the construction that he did, and also that he did not do so. But whether he did or not, it is uncontradicted that the copy was a true copy of the will that was spoiled by being blotted, and that the spoiled will was read and explained to her, and in fact was drawn as she directed. This being true, she knew the contents of the copy as well as she did of the first draft, and she declared to the witnesses, when she executed the copy, that it was her will. This fills the requirements of the law that she shall know the contents. *Berberet v. Berberet*, 131 Mo. 390, 33 S. W. 61, 52 Am. St. Rep. 634. She could not read written English, so she had to depend upon the justice to know the contents of the will. He could impart such knowledge to her either by reading the will or explaining its contents to her. In either case she would only know what he read or what he said about it. She would not know whether he read what was written or what he said he had written. Therefore she had to rely upon the integrity of the justice to read or explain correctly what he had written. No one else would know whether he had done so or not. This being true, it can make no difference in law that the copy was not read to her, for she would still be in the dark as to whether it was a true copy or not, and also whether either was as it was read or explained to be. The first draft was read to her, correctly, so the justice says, and so it must be taken, because no one else could know whether it was or not. The copy was a true copy of the first draft, whose contents she knew, so the justice says, and so it must be, for no one else could know whether it was or not. The whole matter, therefore, rests upon the integrity of the justice, and

there is no more reason for doubting that the copy is a true copy than there is for doubting that the justice (or any one who writes a will) read or explained it correctly and accurately. This charge must, therefore, fail, and the will be regarded as being executed according to law.

3. The remaining charge is that the testatrix was of unsound mind. On the case in chief the defendants proved the execution of the will, and showed by the testimony of the subscribing witnesses, Emma Loesch and George Sommers, the justice of the peace who wrote the will, that the testatrix was of the requisite age, was sane and knew what she was doing, what property she possessed, what disposition she was making of it, and who were the subjects of her bounty (*Sehr v. Lindemann*, 153 Mo., loc. cit. 288, 54 S. W. 537); that she knew of the plaintiffs, but said she did not intend to leave them anything, because she was not on good terms with them; but that she was very solicitous about the child Martha, and wanted to provide for her. The plaintiffs then showed by the testatrix's half-sister, Mrs. Lena Schergen, and her husband, George Schergen, that, in their opinion, the testatrix was of unsound mind on the day the will was made, although she gave Mrs. Schergen on that same day a pair of diamond earrings worth \$140, which she still had. The plaintiffs further showed by Anna E. Lattig that she saw the testatrix between 7 and 8 o'clock in the evening of the day the will was executed (the will was executed between 1 and 2 o'clock), and heard her talk to the little girl, Martha, about an operation (for dropsy) that had been performed on her four days previously, and what wonderful things another doctor had told her, and that "she looked wild, and was very weak," and, in her opinion, was of unsound mind. These were all the witnesses called by the plaintiffs who testified on the question of the sanity of the testatrix. The plaintiffs testified to the differences and estrangement between themselves and the testatrix, but said neither had seen her for three or four years before her death. On the other hand, the defendants showed by the testimony of Drs. George A. Krebs, A. C. Bernays, George Richter, Lawrence Thumser, and Adolph Schlosstein, who were attending her when she died, or had been attending her just before her death, or had assisted in the operation upon her, that she was of sound mind, and not at all irrational. Dr. Bernays said he saw her on April 10th, and she told him she had married the day before, and he joked her about it, and that she was then in her right mind. Dr. Krebs was her attending physician from April 4th to April 11th, when she died. He saw her every day. He said she was tapped on Sunday, April 5th; that the next day she felt better, and was able to sit up, and spoke of her plans for the future, and said she was "feeling fine"; that on Tuesday she was doing nicely, and he thought

she would get well; that Tuesday night her temperature rose, a slight erysipelas developed, and she complained of pain; that Wednesday morning she was better, and that evening "everything seemed pretty fair"; that Thursday, the 9th, the day the will was executed, she was doing well, but that evening she was a little delirious; that the first delirium he noticed was on the night of April 9th-10th; that Friday morning she was better, and in the afternoon she seemed well, but he did not like her condition, because her answers were given "in a slow, shiftless way, which gave indications that she was not mentally healthy"; that "Friday night the symptoms had become aggravated; she was delirious, and suffered pain. She continued this way until Saturday night, when she died." He further testified that on April 9th—the day the will was executed—"her mind was in good condition, at least until evening; the temperature came up about six o'clock." The defendants further showed by Henry Hermann, the father of the defendant William Hermann, that he had known the testatrix since 1892; that he saw her at her home on April 9th, about half past 8 in the morning; that she asked him if he had any objection to her marrying his son, to which he replied in the negative; that at her request he went, with his son, and got the license, and brought the justice of the peace; that the justice asked her if she wanted to be married, and she said she did, and that she also wanted to make her will; that she was very solicitous about the child Martha, and after the marriage and the execution of the will she said "she was satisfied everything would be all right," and that she was as "sound of mind as any man in this room" (meaning the persons in the courtroom). He also said he had known for a long time that his son was engaged to be married to the testatrix. The defendants also showed by the testimony of Mrs. Francis Neunahor, the defendant Hermann's sister, and of Mrs. Sophie Hermann, his mother, and of Mrs. Louisa Niehaus (formerly Loesch), the other subscribing witness to the will, that the testatrix was of sound mind when the will was executed. Mrs. Sophie Hermann said that after the marriage the testatrix told the child Martha not to call the defendant Hermann "Uncle Willie" any more, but to call him "Papa," and to be good, and obey him. The plaintiffs then showed by the testimony of George Schergen, Anna Lattig, and the plaintiff Fred Beyer, that Mrs. Sophie Hermann told them on the night of April 9th that the testatrix "had been out of her head all day." This Mrs. Hermann denied.

This was the case made. On the part of the plaintiffs three witnesses, Mr. and Mrs. Schergen and Mrs. Anna Lattig gave it as their opinion that the testatrix was of unsound mind. On the part of the defendants, five doctors testified that she was perfectly sane and rational before and until after the

will was executed, and four lay witnesses testified to the same effect. The great preponderance of the testimony therefore is that she was of sound mind. But this is an action at law, and the most favorable view for the plaintiffs that can be taken of the case is that the evidence is conflicting. This being true, the case was one for the jury. The jury found for the defendants. In such cases this court will not interfere with the finding of fact by the jury. *Gordon v. Burris*, 153 Mo. loc. cit. 230, 54 S. W. 546.

4. After the case had been submitted, the jury sent the following written communication to the court: "To the Hon. Judge Circuit Court, No. 3: We, the jurors in the case of *Beyers v. Hermann*, find that it will be utterly impossible for us to reach a verdict without instructions as to whether it is necessary to have will read to witnesses before attesting same." To which the court replied as follows: "Gentlemen of the Jury: In answer to your communication hereto attached, the court instructs you as follows: That it is not essential to the validity of a will that the will be read to the attesting witnesses, or either of them, either before or after they sign the same as such witnesses." This is assigned as error. It is not pretended that the law was incorrectly declared to the jury, nor could it be successfully so contended, for it is unusual, and altogether unnecessary, that attesting witnesses to a will should know the contents of the will. Nor is any injury to the plaintiffs pointed out. In fact, the burden of the complaint is that the point was "immaterial," "collateral," and was a "trivial matter of evidence." But it is claimed that by so instructing the jury without affording counsel an opportunity to reargue the case the decision of the case was made to turn upon a "trivial matter of evidence." The right, and, under proper circumstances, the duty, of the trial court to further instruct a jury, after the case has been argued and submitted, has been so recently and clearly decided in *Yore v. Transfer Co.*, 147 Mo., loc. cit. 686, 49 S. W. 855, that it is only necessary to refer to what is there said. Of course, if the further instruction puts a new or different phase on the case, counsel should be allowed to reargue the case as to that phase or branch of it. But in this case there was absolutely nothing for the counsel to argue under the further instruction. They could not discuss the correctness of the law declared, and under that instruction it was wholly immaterial whether it was or was not a fact that the will was read over to the witnesses, and therefore there was no question of fact that could be argued, and, in short, nothing whatever that was open to argument before the jury, and no fact to be found by the jury under that instruction. There was, therefore, no error committed by the court in this regard.

5. On sur rebuttal the plaintiffs called Mrs. Margaret Gaetner as a witness, explaining

to the court that she had been subpoenaed, but not used, by the defendants, and that they had just learned that she would testify to matters favorable to the plaintiffs, and asked leave to introduce her as a witness in chief on their behalf. The court refused to reopen the case, and confined the testimony of the witness to matters in rebuttal. The plaintiffs then asked the witness whether she had ever talked with the testatrix about her brothers. The court sustained an objection to the question, and the plaintiffs excepted. In their motion for a new trial this is assigned as error, and the affidavit of Mrs. Gaetner is filed, showing that about eight days before her death the witness talked to the testatrix about her brothers, and she said they had not been notified of her illness, and she did not know where they were, but had been trying to find them, and had advertised for them, but without success, and, "if they did not come it might be against their own interest, that if she could hear from them she would make her will and leave her property to them, but if they did not come she did not know what to do; that she visited the testatrix on April 9th, and was with her from 6:30 to 10 p. m., and found her very weak and ill, and "out of her head," and that she did not recognize any one in the room, and that Mrs. Sophie Hermann told her she "had been very bad, and had not known any one all that day." It will at once be apparent that so much of the matters here detailed as are not purely cumulative have no tendency to prove any charge in the petition against the validity of the will. If it be granted that the testatrix was anxious to find her half-brothers, and, eight days before the will was executed, said she would leave them her property if she could find them, that would not tend to prove that she was insane, or that the will was not executed according to law, or that the will was procured by the undue influence of her husband. But, on the contrary, it would tend to disprove the first and last charges of the petition. She did not find them, and she made another disposition of her property.

It is always within the sound judicial discretion of the trial court to reopen a case, or to allow testimony in chief to be introduced at a later stage of the trial, giving the opposite side an opportunity to meet and contradict it, of course; but, if such discretion is not wisely exercised, this court will correct it. *Jackson v. Railroad*, 118 Mo., loc. cit. 222, 24 S. W. 192; *State v. Smith*, 80 Mo., loc. cit. 520. But no such condition is here present. Nor is this case within the rule laid down in *Glenn v. Stewart*, 167 Mo. 584, 67 S. W. 237, for there the court refused to allow the witness to testify even in rebuttal.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur.

CURTIS v. McNAIR et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

**INJURIES TO SERVANT—SAFETY APPLIANCES
—DUTY TO PROVIDE—ASSUMPTION OF RISK—
CONTRIBUTORY NEGLIGENCE—PROMISE TO
REMEDY DEFECTS—EFFECT—DAMAGES—
MEDICAL ATTENDANCE—EXPENSES IN-
CURRED—PLEADING—INSTRUCTIONS.**

1. Where defendants had maintained a screen in front of a blast furnace to protect employes from molten material that was liable to shoot therefrom, and after repairs had been made to the furnace the screen was not replaced, and plaintiff was injured by molten material blowing from the furnace while in the performance of his duties, a plea in an action for his injuries that the absence of the screen and the danger were open, and could have been known to plaintiff if he had exercised reasonable care, and therefore he assumed the risk, was not sustainable.

2. Where the injuries to a servant arose solely from a risk which was incident to the business, and not by the negligence of the master, the servant's assumption of risk incident thereto was provable under a general denial.

3. Where defendants maintained and operated a blast furnace from which molten iron and other material were liable to be thrown without warning from the mouth of the furnace, and defendants had provided a screen in front of the opening, which screen had not been replaced after repairs had been made, and plaintiff was injured by molten metal flying from the furnace, defendants' failure to have the screen replaced constituted negligence sufficient to justify a recovery for plaintiff's injuries.

4. Plaintiff spoke to the foreman about replacing the screen, and the foreman answered that they would not blow the furnace hard until the screen was in place, whereupon plaintiff continued his work, and was subsequently injured by molten material flying from the furnace. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law, in continuing to work in the absence of the screen.

5. Where a servant in a foundry called the foreman's attention to danger in working in front of the furnace without the replacement of a screen previously used, the fact that the servant returned to work after receiving the foreman's assurance that the furnace would not be blown hard until the screen was replaced was sufficient evidence that he relied on the foreman's statement.

6. Whether the furnace was blown hard, or whether such hard blast caused the material to be blown out, was immaterial, in an action for such injuries, since the foreman's reply constituted an assurance that there would be no blow-out without a hard blast, which he promised not to make.

7. Where the evidence showed that the molten iron was forced out by atmospheric pressure forced into the furnace, and defendants' foreman testified that, the more pressure in the furnace, the harder it would blow out, a clause in an instruction making the danger of the plaintiff, if any, dependent on the degree of atmospheric pressure existing at any time within the furnace, was not objectionable as unsupported by the evidence.

8. An instruction that if the screen was necessary, and defendants knew it, it was their duty to have it in place, was proper.

9. An instruction that the jury, if they found for plaintiff, should include such damages as they should find he would be reasonably certain to suffer in the future therefrom, was not erroneous, as justifying a recovery for loss of time in the future.

10. Plaintiff is entitled to recover for obliga-

tions incurred for medical treatment, as well as for sums expended therefor.

11. It was not error for the court to modify an instruction that if, when plaintiff was injured, he had completed his work, and was on his way from the sample bed to a point behind the furnace, and while crossing the "run" plaintiff was injured, etc., and plaintiff could have reached the point behind the furnace by "going around the furnace," but selected the more dangerous route, in front of the furnace, he could not recover, by striking the words "going around the furnace," and substituting the words "by another route, not materially more inconvenient."

12. A requested instruction covered by other instructions may be properly refused.

13. An instruction that defendants were entitled to operate the furnace with or without a screen, and from time to time to remove the screen, and, if plaintiff's injury resulted from a danger naturally incident to his work about the furnace without a screen, he could not recover, was properly refused, as eliminating defendants' duty to use reasonable care to protect the servant, and substituting the danger incident to the business as the master saw fit to operate it for the danger incident to that kind of business when conducted with reasonable care for the servant's safety.

14. Plaintiff's arm, shoulder, back, side, and face were burned, and the flesh and skin sloughed off, leaving the blood vessels exposed, and some of the arteries were destroyed. The extent of the burn on the back was about 8 inches in width and 12 to 14 inches in length. He suffered great agony from October until the succeeding April, and there was evidence that the injuries would be permanent. *Held*, that a verdict for \$4,850 was not excessive.

Appeal from Circuit Court, St. Louis County; John W. Booth, Judge.

Action by Arthur Curtis against Charles A. McNair and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Defendants own and operate a blast furnace, and plaintiff, while in their employ, suffered serious personal injuries, which he alleges resulted from their negligence. The petition states in detail the character of the furnace, and the method of operating it. From this it appears that iron ore is put into the furnace, and when it has been reduced to a certain condition the molten iron is caused to flow out through an opening called the "iron notch" into receptacles provided for its further disposal. This flow of molten iron is driven out by a blast of air forced into the furnace. In this operation there was danger of particles of melted metal, hot ashes, and slag being suddenly and without warning blown out for a distance of 20 to 60 feet; and therefore, for the protection of the men employed in the work around the furnace, reasonable and ordinary care demanded of defendants that they should have an iron screen in front of the opening, but on the occasion in question there was no such screen. Plaintiff was employed to work around the furnace, and his duties called him to pass in front of this opening; and while he was doing so, in the exercise of ordinary care, there was a sudden blow-out of melted iron, hot ashes, and slag, striking him on the face, head, arms, legs, and side, and inflicting very

serious injuries. The negligence charged is the failure to provide a screen. The answer was, first, a general denial; then, a plea of contributory negligence, in which it was stated that for years prior to the occasion in question there had been an iron screen in front of the furnace to protect those who stood behind it from the hot iron and other materials which the furnace was accustomed to throw out, but that on this occasion the screen was not in position, and had not been for several days, and plaintiff knew, or by the exercise of ordinary care would have known, those facts, yet negligently walked in front of the opening while the furnace was in blast, and that that negligence directly contributed to his injuries. Then there is another plea in the answer, to the effect that the conditions surrounding the furnace and its operation as stated in the petition were open and obvious, and were known or would have been known to plaintiff if he had exercised ordinary care, and the danger, if any, of working around the furnace under those conditions, was also open and obvious, and was known, or by the exercise of ordinary care would have been known, to the plaintiff, and therefore it was a risk that plaintiff assumed. The reply was a general denial. The testimony on the part of the plaintiff tended to sustain the averments of his petition, and that on the part of the defendants tended to sustain the statements in their answer. We deem it necessary to refer only to the evidence bearing on the alleged contributory negligence of the plaintiff. He was there in the capacity of a common laborer; that is to say, he had been employed there for four or five years, and was familiar with the scene. But his work had been usually that of breaking ore in an adjoining room. Occasionally, however, he had been called into the furnace room to do the work of what was called a "furnace helper," and when that was so he was paid a furnace helper's wages, which were more than his ordinary wages. At the time of this accident he was working in the furnace room by order of the foreman, doing what is called taking samples. The total number of days, however, that he was engaged in work around the furnace, was 35 or 40, distributed through the four or five years of his employment there. His rank as a servant in the establishment was that of an ore breaker. It had been the custom of defendants for years to have the screen in place, but the furnace had been shut down for several weeks just before this accident, and in that interval the screen had been taken down; and when the furnace was started up again, which was three or four days before the accident, the screen was not put up, and the furnace was operated without it. The plaintiff was permitted to testify, over the objection of defendants, that he had called the attention of Mr. Craig, the foreman, to the fact that there was no screen in place, and that Mr. Craig said that they

would not blow the furnace hard until they put the screen up. Another witness testified to hearing that conversation, and there was no evidence to the contrary. It was after that conversation, and while the plaintiff was, in the performance of his duty, passing in front of the iron notch, that the blow-out occurred which threw the shower of melted iron, hot ashes, and slag on him, and caused his injuries.

At the close of plaintiff's testimony, and again at the close of all the testimony, defendant asked an instruction to the effect that plaintiff was not entitled to recover, which the court refused, and defendants excepted. The cause was submitted to the jury under instructions hereinafter discussed, a verdict for plaintiff for \$4,650 was returned, and there was a judgment accordingly, from which this appeal was taken.

Seddon & Blair and Robt. A. Holland, Jr., for appellants. Johnson, Houts, Marlatt & Hawes, for respondent.

VALLIANT, J. (after stating the facts). 1. The answer, as we have seen, was in three parts—a general denial, a plea of contributory negligence, and a plea that plaintiff had assumed the risk. The material averments in the plea last named are that the absence of the screen, and the danger, if any there was, arising from such absence, were conditions open and obvious, and known to plaintiff, or would have been known if he had exercised reasonable care, and therefore it is a risk he assumed. That is not a good plea. A servant assumes the risk of danger incident to the work he engages to perform, and, if he is injured as a result of that which was to be expected in the usual course of such work, the master is not liable. There are many kinds of business, the operations of which are attended with danger which cannot be prevented by ordinary care and precaution. When one engages in such business, and suffers from causes incident to its character, he has no legal remedy. In such case he suffers, not because of negligence of his master, but because of a danger incident to the business. But the only risk the servant does assume is of that which is liable to happen on account of the nature of the business, when the master has used reasonable care to avoid such a result. It is the duty of the master to exercise reasonable care, commensurate with the nature of the business, to protect his servant from the hazards incident to it. *Williams v. Ry.*, 119 Mo. 316, 24 S. W. 782; *Rodney v. Ry.*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; *Herdler v. Buck, S. & R. Co.*, 136 Mo. 3, 37 S. W. 115. This duty the law imposes on the master, and will not allow him to cast it off. It is contrary to public policy to allow the master to relieve himself by contract from liability for his own negligence. What the law forbids to be done

by express contract, it will not assist to be done by implying a contract. A risk which the law, on the ground of public policy, will not allow the servant to assume, it will not imply from his conduct that he has assumed. *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Settle v. Ry. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Pauck v. St. L. Dressed Beef Co.*, 159 Mo. 467, 61 S. W. 806; *Wendler v. People's H. F. Co.*, 165 Mo. 527, 65 S. W. 737. The servant never assumes the risk of the master's negligence. In a suit, therefore, by a servant against his master, in which the petition alleges that the plaintiff's injuries were due to defective appliances furnished by the master for use of the servant, the dangerous condition of which was known, or by the exercise of ordinary care would have been known, to the master, a plea which sets up that that condition was also known, or by the exercise of ordinary care on his part would have been known, to the servant, does not constitute a defense to the action on the theory of an assumption of risk by the servant, because the servant cannot assume to bear the consequences of the master's negligence. If the plaintiff's suffering was solely from a risk incident to the business, he cannot recover, because it was a risk he assumed when he undertook the service; and this fact the defendant may show under his plea of general denial, because by so showing he disproves the allegation of negligence on his part. A special plea that plaintiff assumed such a risk is unnecessary. But if the defect in the machinery is obvious or is known, or by the exercise on his part of ordinary care would have been known, to the servant, who continued nevertheless to use it until the accident occurred, those facts may be pleaded as going to constitute contributory negligence; and in such case, if the issue so tendered is found for the defendant, the plaintiff cannot recover, not because he has assumed the risk of his master's negligence, but because, notwithstanding the negligence of his master, the law will not allow him to recover when his own negligence has contributed to the result. The difference between assumption of risk and contributory negligence in this connection is this: If the fact that plaintiff saw that the screen was absent, and nevertheless continued in the service, amounts to an assumption of the risk, then it is an absolute bar to the action, regardless of the fact that the plaintiff, under the circumstances, might have been exercising the care which a man of ordinary prudence under like circumstances would have exercised, whereas, though he saw the screen was absent, yet if he continued his work under conditions that showed that he was nevertheless exercising such care as a man of ordinary prudence, in his place, would have exercised, he would not be guilty of contributory negligence. There was evidence in this case tending to show that the

conduct of the plaintiff under the conditions apparent was consistent with reasonable and ordinary care. The absence of the screen was within the observation of every one, yet not the plaintiff alone, but all the other men whose duties called them that way, exposed themselves in like manner; and even the foreman, Mr. Craig, testified that he had, during the three or four days in which the furnace was in blast without the screen, passed in front of the notch just as plaintiff did. In addition to that fact, under the issue of contributory negligence the plaintiff was entitled to have his conduct considered in the light of the assurance given him by the foreman that there would be no hard blast until the screen was put up. The obvious absence of the screen, the apparent danger, and the plaintiff's familiarity with the operation of the furnace, were all facts presented to the jury along with other facts proper to have been taken into account in the trial of the issue under the plea of contributory negligence, and the defendants had the full benefit of all of them. Nothing in this opinion said is intended to gainsay the proposition that, if a plaintiff's evidence should show that he deliberately went into danger that was so obvious that reasonable men could not honestly differ about it, the court should declare, as a matter of law, that the plaintiff was guilty of contributory negligence, and take the case from the jury. But that is not this case. The only issues properly in this case were those covered by the general denial and the plea of contributory negligence.

2. Appellants contend that the instruction asked by them in the nature of a demurrer to the evidence should have been given, for two reasons:

First, that there was no evidence of negligence on the part of defendants. The learned counsel demonstrate by reason and authority that a master is not liable as for negligence "for the reason alone that a safer mode might have been adopted or less dangerous appliances might have been employed." *Winkler v. Basket Co.*, 137 Mo. 396, 38 S. W. 921. And that: "It is the defendant's duty to furnish its servants with tools, appliances, and instrumentalities reasonably safe for the purpose for which they were used, but is not required to use the most modern or improved tools or appliances." *Holloran v. Foundry Co.*, 133 Mo. 47, 35 S. W. 260. That doctrine is well founded, but it is entirely consistent with the principle that it is the master's duty to furnish machinery and appliances that are as safe as reasonable prudence and ordinary care can make them—not the safest and best possible, but as safe and good as may be obtained by the exercise of such care as a man of ordinary experience and prudence engaged in such work usually exercises. We have already said that the degree of care to be exercised by the master in this respect must be commensurate with

the hazard naturally incident to the business. The Supreme Court of the United States have said: "Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence." *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. Counsel quote from *Winkler v. Basket Co.*, *supra*: "A master, as between himself and his servant, has a right to adopt his own mode of conducting his business, and to select the instrumentalities to be used therein." That is undoubtedly the master's right, within the limits of the rule above quoted, and the opinion in that case carries it no farther. If it was reasonably safe, within the bounds above specified, to run this furnace without a screen, then the defendants had a right to so run it, and they are not liable in this case. But who is to judge as to whether or not it was reasonably safe to run it without the screen? If the screen would add to the safety of the servants at work there, the evidence shows that it was a contrivance within the means of defendants to furnish without unreasonable effort. The answer admits and the proof shows that this screen had been a part of the equipment in defendants' works for years, and that it was designed by them for protection of certain of their employes working there against accidents of the very kind that resulted to the plaintiff's injury, and defendants' evidence shows that it was their intention to replace it soon. What better evidence could the plaintiff have produced to show that it was a contrivance that should have been furnished, and that it was within the reasonable means of defendants to have furnished it? The defendants' superintendent testified on cross-examination: "Q. Orders had been given to put up the screen? A. Yes, sir. Q. They had realized the importance of it by ordering it to be put up there? A. Yes, sir. Q. You realized that yourself—the necessity of having the screen there? A. Yes, sir; for the protection of the skimmer. I always make that qualification—for the man at the skimmer—because it can't protect the people far down the pig bed, because coke blows over the top of it. Q. It would protect anybody at the skimmer or near the skimmer? A. Yes, sir. Q. Or anybody passing directly in front of the runner? A. If it was blowing over the top it wouldn't." We cannot agree to the prop-

osition that there was no evidence of negligence of defendant.

The second ground on which appellants stand for their contention that the instruction for a nonsuit should have been given is that the absence of the screen and the danger liable from that cause were open and obvious, and known to plaintiff, or would have been known if he had used ordinary care; therefore he was guilty of such negligence himself in the matter as should preclude a recovery. The position taken on this ground is somewhat inconsistent with that taken on the first ground. Defendants cannot well say that the absence of the screen was no evidence of negligence, and yet say that the danger therefrom was so obvious as that plaintiff could not have failed to see it if he had used reasonable care. We are inclined to the view that the danger was obvious, and, if there was no other fact in the case, the court might have been justified in holding, on the plaintiff's evidence, that he was guilty of contributory negligence. But there was another fact in the case. Plaintiff, seeing that the screen was absent, and appreciating the danger, spoke to the foreman about it, and the foreman answered that they would not blow the furnace hard until the screen was in place. Thereupon the plaintiff went on with his work. It is argued that that testimony was illegal, because it was not averred in the petition that the plaintiff was lulled into security by the assurance of the foreman. In a petition in an action at law the plaintiff is not bound to anticipate an affirmative defense, and reply to it. The negligence which forms the bottom of plaintiff's cause of action is the failure of the defendants to provide a screen, thus exposing the plaintiff to unnecessary danger. The defendants answer by a plea of confession and avoidance, saying: "True it is, we did not furnish the screen, but you knew it, and knew the danger liable to ensue therefrom. Therefore you were guilty of negligence in continuing the service under those conditions." The testimony as to what occurred when plaintiff brought the subject to the attention of the foreman is simply responsive to the charge of contributory negligence; going, as it does, to show that, notwithstanding the plaintiff saw the danger, it was not negligence in him to continue the work. Defendants contend, however, that the evidence for plaintiff in this issue fell short of the mark in three respects, *viz.*, there was no evidence that the furnace was put to a hard blast, that such hard blast caused the blow-out, and that plaintiff relied on the assurance. As to the plaintiff's reliance on the assurance, the fact that he returned to his work after receiving the assurance is evidence from which his reliance might be inferred. As to whether there was a hard blast, and that caused the blow-out, it is immaterial, as affecting the question of plaintiff's conduct in returning

to his work after receiving the assurance. It might be conceded, for the sake of the argument, that the degree of force of the blast had nothing to do with producing the accident. The reply of the foreman to the plaintiff cannot be construed otherwise than as intended to make him believe that there would be no danger, because there would be no hard blast. It was not a conversation between two men on an equality with reference to the subject, but it was a servant receiving assurance from his master. The master intended to make the servant believe that if there should be no hard blast there would be no blow-out, and he promised there should be no hard blast. If in fact a hard blast had nothing to do with causing a blow-out, then the master deceived the servant by making him believe it did. If the blow-out would not occur without a hard blast, then the fact of the blow-out is evidence that there was a hard blast, and that the master did not keep his promise.

There was no error in refusing the instruction for a nonsuit.

3. The giving of the instructions as asked by plaintiff is assigned for error. The first instruction is: "(A) The court instructs you that if, from the evidence in the case, you believe that on the, or about the, 31st day of October, 1899, defendants were operating and controlling a furnace, and buildings in connection therewith, situate in the city of St. Louis; that said furnace stood at the north end of a room (of such buildings) known as the 'Casting Room,' on the floor of which room melted iron from such furnace was, in the ordinary course of the business there carried on by defendants, cast into pig iron; that in the furnace iron ores were melted, and the melted iron and slag were, in the course of defendants' business, drawn from the furnace by opening a hole therein, known as the 'Notch Hole,' located on the south side of the furnace, and facing toward the south end of such casting room; that, in the ordinary course of such business, upon the opening of said hole, iron, slag, ashes, and other heated matter was liable to run from said hole; that, to facilitate the drawing off from said furnace through said hole, heated air was, in the ordinary course of defendants' business, forced into said furnace in such manner as to create strong atmospheric pressure upon the contents of said furnace, so as to force the same strongly outward through said hole, and in such manner as to at times force and blow out from said furnace, through said hole, into said room, and toward the south end thereof, molten iron, slag, and other hot substances, so as to endanger employes of defendants engaged in said casting room on the south side of said notch hole; and if you further find that on the 31st day of October, 1899, plaintiff was in the employ of the defendants in said casting room, and that there was no screen in front of said notch hole to intercept melted iron, slag, or other

material that might be forced by such pressure through such notch hole, and this state of affairs had existed for three or more days, and that during that time plaintiff had occasion, from time to time, in the course of his employment by defendants, to pass in front of said notch hole in such a manner as to be exposed to danger of being burned by hot metal, slag, or other substances thrown from said furnace as aforesaid; and if you find that such danger would not have existed, had a proper screen to intercept such hot substances been then and there erected and maintained by defendants, and that the danger, if any, to which plaintiff was so exposed, was dependent, to a great extent, upon the degree of atmospheric pressure existing at any time within the said furnace, and tending to force its contents out through said notch hole, and that the extent of such pressure was not a matter within the observation of plaintiff, so that he could determine the amount or force thereof; and if the jury find that in said casting house defendants had, some ten feet or more in front of said notch hole, a place provided for the maintenance of a screen for the interception of such melted iron, slag, and other hot substances thrown out of such notch hole, and that it was necessary, and known to defendants to be necessary, for the safety of defendants' employes in said casting room, or of plaintiff, that such a screen should be there maintained, and that plaintiff, in the course of his employment, while said furnace was in operation, on October 31, 1899, from time to time, had occasion to pass in front of such notch hole, south of the point provided for such screen; and if you further find that George Craig was defendants' foreman, and, as such, had charge and control of the business, and of the employes of defendants in said furnace and casting house, and that plaintiff was aware that he was exposed to some danger, from the absence of such screen, in so passing in front of such notch hole, and called the attention of the said foreman to the absence of such screen, and that thereupon the said foreman said to him that they would not blow hard until the screen was put up; and if you find that afterward, on the said 31st day of October, at a time when said furnace was in operation, and plaintiff was, in the course of his employment aforesaid, passing in front of such notch hole, and south of the point so provided for such screen, a quantity of hot slag, ashes, or other material suddenly blew out from said furnace through said notch hole, and struck and burned plaintiff, and that, at the time of so being burned, plaintiff was exercising such care to prevent injury to himself as a person of ordinary prudence should have exercised under the like circumstances, and was relying upon the assurance, if any, of such foreman that they would not blow hard until the screen was put up—then the jury will find the issues for the plaintiff." The objections to this in-

struction pointed out in the brief for appellant are, first, referring to the clause, "and that the danger, if any, to which plaintiff was exposed, was dependent, to a great extent, upon the degree of atmospheric pressure existing at any time within said furnace, and tending to force its contents out through said notch hole," that there was no evidence on which to base it. It is argued that there was no evidence that the blow-outs were influenced by atmospheric pressure, but that they were caused by the notch being stopped up. We think counsel are mistaken on this point. In fact, the whole mode of operation disclosed by the evidence shows that the molten iron is forced out by atmospheric pressure forced into the furnace, and it would therefore seem to be unnecessary to hear evidence to show that the blow-out was influenced by the force behind it. Yet the defendant's foreman did testify: "Q. Now, Mr. Craig, what effect on that blow-out would the putting on of a heavy or light blast have? A. Of course, the more pressure in the furnace, the harder it would blow out." Second, it is objected that this instruction directs the jury, in effect, that if the screen was necessary, and defendants knew it, it was their duty to put it in place. We find no fault with the proposition under the undisputed facts of this case. The defendants' answer shows, and their evidence shows, that this screen was a part of their working outfit—designed to afford a reasonable guard against a danger incident to the business. The clause in the instruction criticised has reference only to that screen as usually used by the defendants, and what is there said does not undertake to impose on the defendants the obligation of absolute insurers of the safety of their men. The third objection is that the instruction does not require the jury, before finding for the plaintiff on the issue in reference to the assurance of safety given him by the foreman, to find that there was a hard blast, and that that was the cause of the blow-out. We have already discussed that question. The only other instruction given for plaintiff related to the measure of damages. It is as follows: "(B) The court instructs you, gentlemen of the jury, that if you find for plaintiff you should, in estimating his damages, consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence; the physical pain and mental anguish, if any, suffered by him on account of his injuries at the time of and since such injuries, as shown by the evidence; his loss of time, and such damages, if any, as you may, from the evidence, find it is reasonably certain he will suffer in the future therefrom; and you will find a verdict for such sum as, in your judgment, will, under the evidence, reasonably compensate him for such injuries, including compensation for such reasonable amounts, if any, as the evidence shows he has expended or obligated himself for

medical treatment." The objections offered to this instruction are two, viz., that "it entitled plaintiff to recover damages for his loss of time in the future," and that it authorized a recovery for "sums that he expended for medical treatment." These objections are founded on the idea that no claim is made in the petition for such items of damage. We do not understand the instruction to call for an estimate of loss of time in the future, but for damages which the jury may find that it is reasonably certain the plaintiff will suffer in the future. There is a statement in the petition that the plaintiff is permanently injured, and there was evidence tending to sustain that statement. As to items of expenses, the criticism of the instruction is that the petition does not allege that plaintiff has expended any sum, but only that he has incurred expenses. There is no difference, so far as the right to compensation in a case like this is concerned, between expending sums and incurring obligations. The plaintiff is entitled to recover for either. There is no error in the plaintiff's instructions.

4. At the request of the defendants, the court gave the following instructions: "(1) The court instructs the jury that the defendants were not insurers of the plaintiff against injury while in their employment, and that you cannot find a verdict for him merely because he was injured. (2) The court instructs the jury that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury, and that the failure to use such care directly contributed to cause his injury, then you will find for the defendants; and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same circumstances. (3) The court instructs the jury that, in considering its verdict, the jury should not be governed by sympathy for plaintiff because he met with an injury while in defendants' employ, or have any prejudice or feeling either in favor of or against the plaintiff or defendants, but the jury should only, in arriving at its verdict, be governed by the evidence and instructions of the court." And the defendants asked the following: "(4) The court instructs the jury that if you believe from the evidence that at the time plaintiff sustained his injuries he had completed his work of taking samples, and was on his way from the sample bed to a point behind the furnace, and that while crossing the 'run,' on his way to said point, the plaintiff was injured by cinders and other hot materials shooting from said furnace, and that plaintiff could have reached said point behind the furnace in perfect safety by going around the furnace, but, knowing the danger, selected the dangerous route in front of the furnace, then the plaintiff is not entitled to recover, and you must find your verdict for the defendants." The court refused that instruction as asked, but modified it by erasing the

words "going around the furnace," and writing in their stead "by another route, not materially more inconvenient." Defendants assign that modification for error. The court would have been justified in refusing that instruction altogether, and, even as modified, it is more favorable to defendants than they were entitled to. If one route was more dangerous than the other, or if one was a safe and the other a dangerous route, both equally available to plaintiff, and he, knowing the conditions, selected the dangerous route, that fact might have been brought into the case, by proper specifications, under the plea of contributory negligence; but, as it was, there was no such issue in the case. There was, as we have seen, a plea of contributory negligence, with specifications of the acts which defendants proposed to prove in support of the plea, but the route that plaintiff took was not one of the acts specified. The plaintiff was not called on by the pleadings to meet that issue. But even if there had been such a plea, there was nothing in the evidence to justify the submission of such a question to the jury. Of course, if the man had not gone the way he did, and at the time he did, he would not have been in front of the notch when the blow-out came, and would not have been hurt. But he was where his business called him, and going the way that was shortest and most convenient and the usual way. There were a number of other instructions asked by defendant and refused, which we deem unnecessary to copy in full here. Of these, No. 5 was a direction to the jury to disregard the evidence as to the assurance given the plaintiff by the foreman. We have said sufficient on that subject. Nos. 6, 7, 8, 9, and 10 were, in effect, reiterations of the defendants' theory of the assumption of the risk, which we have already considered. No. 11 was an instruction on contributory negligence, and was fully covered by No. 2 given at the request of defendants. No. 12 was as follows: "(12) The court instructs the jury that the defendants had the right to operate the furnace with or without a screen, and from time to time to remove the screen for repairs; and, if you believe from the evidence that the plaintiff was injured by reason of one of the dangers naturally and ordinarily incident to his working about the furnace without a screen, then he cannot recover, and you will find for the defendants." This instruction conforms to the theory contended for by the learned counsel, that the defendants had the right to conduct their business as they might see fit, but it leaves out of view the duty of the master to use reasonable care to protect his servant, and substitutes the danger incident to the business as the master sees fit to run it for the danger incident to that kind of a business when conducted with reasonable care for the safety of the servant. Instruction No. 13 is substantially the same as No. 4, which we

have already considered. We discover no error prejudicial to defendants in the giving or refusing of instructions.

5. It is insisted that the award of damages is excessive. The award was \$4,650. The testimony of the physician who attended the plaintiff was: "Well, he was simply horribly burned—his arm, shoulder, back, and side—and his face was slightly burned. The result of the burning, after the flesh had all sloughed out which was destroyed by the fire, had taken the skin and fasciæ down to the muscle, and then taken part of the muscle out, so the blood vessels were exposed, and some of the arteries were destroyed, so that it bled, and blood spurted out. I presume it was— Well, it must have been from one to a half inch on his arm and on his back. On the shoulder it wasn't so great. The extent of the burn was about eight inches on the back, in width, and about twelve or fourteen inches in length. * * * I treated him from the 29th of October until about the 1st of April. I went to see him the whole portion of that year, running up into the following year in February. Those wounds were in a horrible condition, and he was suffering with absolute agony." Asked as to the probable result, he said: "Well, of course, to say to any degree of positiveness, a man couldn't do it; but, inasmuch as that arm is in the condition it is, without any covering to the nerves, and the blood vessels are lying just underneath the skin, and the blood vessels, also—there is no flesh over them—and are simply covered by the skin, and no flesh over them visible to the naked eye; and an injury to a least degree to a nerve which goes to supply the blood vessels of that arm, and affords the irrigation, may destroy the use of the arm, if any of the nerves are injured, and it is liable to happen. Of course, if it should, it would be almost a permanent loss of the arm." In addition to this, and to the plaintiff's testimony as to his suffering, the court and jury saw the afflicted parts of the man's body. They were better judges of the extent of the damage, and of what would be a just compensation, than we are.

The judgment is affirmed. All concur.

JOHNSON v. ST. LOUIS & S. RY. CO.
(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE—PLEADING—EVIDENCE—INSTRUCTIONS.

1. The negligence charged by a petition in an action for injury to a passenger by derailment of a street car, alleging that the "running gear, that is to say, the wheels, axles, and other machinery, by means of which the said car ran along the said track, were defective and out of order, and unfit for the purpose of supporting the said car on the said track," and that though defendant knew, or should by the exercise of ordinary care have known, of such de-

fective running gear, it "ran the said car along the said track, and into said curve at a high rate of speed," was general and not specific negligence, so that there was no failure of proof by want of evidence of defect in the running gear of the car.

2. Evidence, in an action for injury to a passenger by derailment of a street car, held sufficient to authorize the jury to find that the car left the track because of defects in the flange of a wheel, and because the car was run around a curve at the usual rate at which sound cars are run around it.

3. Any generality in an instruction as to negligence is cured by the other instructions, which limit plaintiff's right to recover to the specific negligence charged in the petition.

4. Defendant is not entitled to an instruction that the jury must be guided solely by the evidence, and should not be governed by sympathy for plaintiff, nothing having transpired to indicate that the jurors were unmindful of their sworn duty.

Appeal from St. Louis Circuit Court; Jno. A. Talty, Judge.

Action by Mary Johnson against the St. Louis & Suburban Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages for personal injuries received by the plaintiff on November 17, 1901, near Raymond avenue, in St. Louis, while she was a passenger on one of the defendant's cars, in consequence of a derailment of the car. There was a verdict for the plaintiff for \$800, and the defendant appealed.

The negligence charged in the petition is as follows:

"Plaintiff states that on the 17th day of November, 1900, plaintiff was riding as a passenger on a west-bound car belonging to defendant; that at said time the running gear of said car, that is to say, the wheels, axles, and other machinery, by means of which the said car ran along the said track, were defective, and out of order, and unfit for the purpose of supporting the said car on the said track; that the said car was, at the said time, by reason of the said defective running gear, in a dangerous and unsafe condition, and unfit for the purpose of carrying passengers safely along said track; that the defendant, its officers, agents, and servants in charge of the said railway, and in charge of and operating said street car, knew, or by the exercise of reasonable care and diligence could have known, that the said running gear of the said car was then and there defective and out of order, and that the said car was in a dangerous and unsafe condition, and unfit for the purpose of carrying passengers safely along said track; that though the defendant and its said officers, agents, and servants knew, or by the exercise of reasonable care and diligence could have known, of the unsafe condition of the said car as aforesaid, they permitted the plaintiff, who was ignorant of the said unsafe condition, to remain on the said car without warning her of the danger of riding on the said car; and though the

defendant and its said officers, agents, and servants knew, or by the exercise of reasonable care and diligence could have known, of the defective running gear as aforesaid, they carelessly, recklessly, and negligently ran the said car along the said track, and into the said curve aforesaid, at a high rate of speed; that as the said car approached the said point aforesaid, that is to say, when the said car was at or near the intersection of Cabanne avenue and the said railway track, and between said Cabanne avenue and Raymond place, and on said curve of said track, because of the said defective running gear and because of the want, care, and precaution on the part of the defendant, its officers, agents, and servants in the premises, the said car left the said track, and, after running about 50 feet along the ties and ground, the said car ran against a large pole, erected about 6 feet to the north side of said track, striking the said pole with great force and violence."

The answer is a general denial.

The case made is this: The plaintiff became a passenger for hire on the defendant's car, at the corner of Sixth and Locust streets. The car proceeded safely and without trouble until it arrived at a point in West Morgan street, near the West End Post Office, where the tracks leave the public street and run on a curve onto the defendant's private right of way. In turning the curve the car ran roughly, bumped along, and created the impression that it was off of the track. The car was stopped, and the conductor and motorman examined the car. One of the passengers (James E. Crabb, who was a witness for the plaintiff) asked the conductor what was the matter, and he replied "that the flange of the wheel was broken." This witness further testified that "one of the wheels had apparently got off the rail. Looking out, I could see that it was bulging over the rail, but it was not sufficiently so to prevent the motion of the car, and the motorman said 'she will go,' and she went." The defendant complains bitterly because the witness was allowed to testify to what the conductor and motorman said about the car at that time. The car was started, and after running about 50 feet it was stopped, and a further examination was made. Then it was started again, and it ran with a "jumping motion," an "irregular movement," "which became marked at curves," with a "rocking motion," as the several witnesses described it. When the car reached Sarah street it was stopped. The conductor and motorman got off, and reported to an inspector the condition of the car. The three examined it, and the inspector said to the motorman and conductor, "Take her carefully," "Take it slow." The car proceeded at the usual speed until it reached Raymond avenue, and, as the motorman testified, "when they went around the curve at Raymond avenue the car was going eight or

nine miles an hour, just about the usual rate at which cars run around curves." The "irregular movement" of the car became very marked as it was turning the curve, and continued for about 50 or 60 feet, when the car left the track, ran about a car length on the cross-ties, then left the ties and ran into a 15-inch telegraph pole that stood about 6 feet from the track, and broke it down, and the plaintiff was injured.

The inspector who examined the wheel at Sarah street testified that he found a chip in the flange of one of the front driving wheels, about an inch and a half long and about an eighth of an inch thick; that such a chip would cause a roughness in the movement of the car in going around a curve, but that such a chip would create no danger of derailment, and he decided that the flange was large enough to hold the car on the track even with such a chip in it; that he rubbed the wheel off with his hand, and looked at it, and did not test it with a hammer, as they commonly do when a car is in the shed; that the wheel seemed to be perfectly sound, there was no evidence of any crack in it, and it was in perfect shape except for the chip. The master mechanic of the defendant testified that he visited the scene of the accident, and found about seven inches of the flange broken out, and that the pieces of the flange were found in the immediate vicinity; that there was no sign of an old crack in the pieces that were found, or of rust or any defects that would lead to a break; that such a chip in a wheel as that described would not create any danger of the car running off the track; that if the car was run at a high rate of speed such a chip would cause a slight jar, but in running slowly it would not be felt; that he had seen hundreds of cars operated with a chip of that size out of the wheel. This witness testified on cross-examination "that, if the chip was large enough to cause the car to rock in such a shape as to cause the motorman to call the inspector's attention to it, he would think it was dangerous." He further testified that he had found some of the pieces that had broken out of the flange of the wheel, 50 or 100 feet back of the telegraph pole, and that those pieces could not have been broken off of the wheel by running along the cross-ties.

It was further shown that from Sarah street to the curve where the accident occurred was a little over a mile and a quarter.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant. D. D. Holmes and B. J. Klene, for respondent.

MARSHALL, J. (after stating the facts).
1. The refusal of an instruction for a nonsuit is assigned as error. The point of this contention is that the plaintiff assigned specific negligence and failed to prove it; that is, that the plaintiff pleaded that the acci-

dent was caused by the defective running gear on the car, and the rapid running of the defective car around the curve, and that there is no evidence to show that such was the cause of the accident. And the rule laid down in *Feary v. Railroad*, 162 Mo. 75, 62 S. W. 452, is invoked.

This position is untenable. The negligence charged in this case cannot accurately be said to be specific. The petition charges that the "running gear, that is to say, the wheels, axles, and other machinery, by means of which the said car ran along the said track, were defective, and out of order, and unfit for the purpose of supporting the said car on the said track," and that although the defendant knew, or by the exercise of ordinary care could have known of, such defective running gear, it "ran the said car along the said track, and into said curve, at a high rate of speed." The motorman says he ran around the curve at the usual rate of speed, which was eight or nine miles an hour.

The plaintiff's evidence showed that the conductor said that the flange on the wheel was broken; that the inspector at Sarah street found a chip out of the flange on one of the front driving wheels, and told the motorman to "take her carefully" or "take it slow"; that the car was run for a mile and a quarter at the usual speed, and was running around the curve, at the usual speed of eight or nine miles an hour, when it left the track; that from the time the trouble was first discovered, at the curve from Morgan street to the defendant's private right of way, the car ran with a jumping or irregular, or rolling or bumping, movement; and that from Sixth and Locust streets to said point on Morgan street the car ran smoothly and without any such motion.

This evidence made out a prima facie case in favor of a passenger for hire against a carrier, whether the allegations of the petition be construed to be general or specific. There were abundant facts shown by the plaintiff's evidence for the jury to find that the defendant was guilty of negligence in running the car beyond Sarah street, and that the motorman was negligent in running the car at the usual rate of speed, especially around the curve, after the inspector at Sarah street had told him to run carefully or slowly. Such evidence is sufficient to authorize the jury to draw the inference that the car left the track because of the defects in the flange of the wheel, and because the car was run around the curve at the usual rate of speed at which sound cars are run around that curve.

The fact that the defendant's witnesses—the inspector and the master mechanic—testified that, in their opinion, it was perfectly safe to use the car with the flange in such condition, is immaterial when considering whether the case should have been taken away from the jury at the close of the plain-

tiff's evidence, or, in fact, at any time. For such opinions might or might not be accepted as reasonable or sound by the jury, and, in spite of them, the jury was charged with the duty of determining the cause of the accident, and the defendant wholly failed to enlighten the jury as to the cause of the accident, if it knew, or to advance any theory whatever for the accident. It contented itself with the said opinions of its experts. And the physical facts and painful results bore voiceless but persuasive evidence that the opinions were not reliable. But, aside from this, while the master mechanic said he had seen hundreds of cars operated with chips out of the flanges on their wheels as large as this, and that he considered it safe to run this car, he nevertheless testified on cross-examination that, if the chip in a flange was "large enough to cause the car to rock in such a shape as to cause the motorman to call the inspector's attention to it, he would think it was dangerous." And the evidence was that the chip in this flange caused the car to rock, and that the motorman called the inspector's attention to it, and, after examining it, the inspector told the motorman to go carefully, and he did not do so.

So that, even if all this evidence had been before the court when it passed on the instruction asked for a nonsuit, the court would have been compelled to hold that the plaintiff had made out a case that entitled her to go to the jury, and this, too, whether the negligence charged be construed to be general, or as specific as it is possible for any one to construe it. There is absolutely no evidence in the case from which the jury could find that the accident was caused by any other means, or was attributable to any causes, except those assigned in the petition. The instruction for a nonsuit was therefore properly refused.

2. The first instruction given for the plaintiff is complained of. The instruction faithfully follows the allegations of the petition, and limits the right of the plaintiff to recover to a finding that the accident was caused in the manner and by the means charged in the petition. The objection is that there was no evidence to support the instruction. What has been said in regard to the instruction for a nonsuit applies with equal force to this objection. The same is true as to the objections urged to the plaintiff's second instruction, which is nothing more than the complement of the first instruction.

3. The third instruction given for the plaintiff is assigned as error, on the ground that it predicates a right to recover for general negligence, whereas the petition limited the right to recover to specific negligence. As already pointed out, this is not the correct interpretation of the petition. The verdict is responsive to the issues joined, and the evidence shows that the accident was

caused by the acts of negligence charged, and there is nothing in the case from which the jury could have found that the accident was attributable to any other cause. And whatever generality the instruction complained of contained was fully cured by the first instruction given for the plaintiff, and the ninth, tenth, and eleventh instructions given for the defendant, which limited the plaintiff's right to recover to the specific negligence charged in the petition, and told the jury that the plaintiff was not entitled to recover merely because there was an accident and she was hurt. Those instructions cover the case, and speak for themselves. They are as follows:

Plaintiff's Instruction No. 1. "If the jury believe and find from the evidence in this case that on or about the 17th day of November, 1900, plaintiff was a passenger on a west-bound car of defendant; that on said date, while rounding a curve between Cabanne avenue and Raymond place in a northwestwardly direction, the car on which plaintiff was a passenger was being run at a high rate of speed, and that the said car left or jumped the track, and ran across the ties and along the ground for a space of about fifty feet, and against a large pole, with great force and violence, causing plaintiff's injuries described in the testimony; and that the said car left or jumped the track by reason of the flange on one of the wheels of said car being in a worn or broken condition, which rendered it unsafe and dangerous as a vehicle for the transportation of passengers; and that that condition, if you believe and find from the evidence it was in such condition, was known to the defendant, or its agents, servants, and officers in charge of said car and railroad, or could by the exercise of reasonable care and diligence have been known to them a sufficient length of time prior to said car's leaving the track to have prevented it so doing—if you believe and find these facts, then and in that event your verdict should be for plaintiff."

Defendant's Instructions: "No. 9. The court instructs the jury that the plaintiff can in no event recover in this case unless you believe from the evidence that she was injured, and that her injuries were directly due to negligence on the part of defendant's servants; and if you believe from the evidence that the injuries sustained by plaintiff were not due to negligence on the part of defendant's servants, but were due to mere accident or misadventure, then and in that case your verdict must be for the defendant.

"No. 10. The court instructs the jury that plaintiff is not entitled to recover in this case merely because one of defendant's cars was derailed by the breaking of the flange of a wheel. That if you believe from the evidence that the derailment of the car in question at the curve near Fairmont avenue

was due solely to the breaking off of pieces of said flange immediately in said curve, and that said breaking could not be foreseen or anticipated upon close examination by a competent inspector, then and in that case the defendant was guilty of no negligence in connection with the breaking of such flange, and you will find your verdict for the defendant.

"No. 11. The court instructs the jury that if you believe from the evidence that, when defendant's car reached Sarah street, it was examined by an inspector, who found that a small piece of flange of one wheel had chipped out; and if you further believe from the evidence that there was no danger of derailing on account of such portion of the flange being out of said wheel; and that it was impossible for defendant's said inspector to discover by examining said wheel, any defect that would lead a competent inspector to suspect or infer that other pieces of said flange would break out during the running of said car in its ordinary course to De Hodlamont; and if you further believe from the evidence that, after examining said car, the inspector told the motorman to proceed with said car, and that thereafter when said car was going around a curve at Cabanne avenue other and larger pieces of such flange broke out, and that thereby said car was derailed, then and in that case the defendant was guilty of no negligence, and your verdict must be for the defendant."

4. The error assigned, that the court directed the jury that nine of their number could return a verdict, is answered by the decision in *Gabbert v. Railroad* (Mo. Sup.) 70 S. W. 891.

5. Lastly, it is urged that the court erred in refusing an instruction, asked by the defendant, that the jury must be guided solely by the evidence, and should in no way be governed by sympathy for the plaintiff—nothing is said about sympathy for the defendant.

It goes without saying that the jury must be guided solely by the evidence, and not be influenced by sympathy. But it does not follow that a party litigant is entitled as a matter of right to have such an instruction given to the jury. It is equivalent to saying to the jury that "you are sworn to try the case according to the evidence adduced, and you must do your duty," when nothing had transpired to indicate that the jurors were unmindful of their sworn duty, or that they could be fairly suspected of an intention not to do their duty. Such an instruction is only proper under exceptional circumstances, after the jury has shown undue regard for or interest in a party litigant, and has evinced in some way a disregard of their sworn duty. If the case is tried before the court, and such an instruction is asked, the judge would have just cause to feel insulted, and the same is true as to any well-behaved jury. The fact that such an instruction was re-

fused in this case did the defendant no harm, for there is nothing in the record or the damages assessed that even tends to show that the jury was influenced by sympathy for the plaintiff in the slightest regard. This being true, it is the duty of this court not to reverse the judgment. Section 865, Rev. St. 1899.

Viewed from any standpoint, it is not perceived how the verdict could have been other than it was, or for any less sum than it was. The judgment is for the right party, and is affirmed. All concur.

MORAN v. STEWART.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

HUSBAND AND WIFE — ANTENUPTIAL CONTRACT — CONSIDERATION — JOINTURE — RENUNCIATION—CONDITION SUBSEQUENT.

1. Under Rev. St. 1899, § 2951, providing that, if any contract of jointure is made before marriage and during the infancy of the wife, the widow may, at her election, renounce such jointure, and have dower, an antenuptial agreement of jointure barring dower was not subject to renunciation by the widow where she was not an infant at the time of its execution.

2. Where an antenuptial contract of jointure between two persons contemplating marriage contained a provision for the intended wife's support only during widowhood, and not for life, it was insufficient, either as a legal or equitable jointure, to bar dower.

3. The limitation of a provision for the intended wife's support in an antenuptial contract to widowhood only was not a condition subsequent, so as to render the contract valid as a jointure, as such condition operates only on an estate already vested.

4. Where, at the execution of an antenuptial contract between an intended husband and wife, the intended husband owned 606 acres of land, in which the wife would have been entitled, under Rev. St. 1899, § 5246, at his death, to quarantine, homestead, and dower, or in lieu of dower to a child's share, which would have been one-third of the estate, there being two children, and the wife owned no property except her personal apparel, her agreement waiving all of such rights for the control, use, rents, profits, and possession of the homestead and plantation appurtenant thereto, consisting of 106 acres, for life or widowhood, for the consideration of the right to retain her property which she then had or might thereafter acquire, was not supported by a sufficient consideration, and was, therefore, insufficient to bar her dower.

5. A widow, by remaining in the mansion house given her by an antenuptial contract in lieu of dower, which was not supported by a sufficient consideration, until her dower was assigned did not elect to accept the provisions of the contract in lieu of dower.

Appeal from Circuit Court, Andrew County; A. D. Burnes, Judge.

Suit by Angle Moran against Samuel Stewart. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is a suit for dower by the plaintiff, the widow of David Moran, who died March 13, 1892, testate, seised of an estate of inheritance in the land, to wit, the S. E. quar-

¶ 2. See Dower, vol. 17, Cent. Dig. § 111.

ter of section 29, the S. W. quarter of section 28, the W. half of the S. E. quarter of section 28; the S. W. quarter of the N. W. quarter, and the S. W. quarter of the N. E. quarter, and the north half of the S. E. quarter of the N. E. quarter of section 28, township 60, range 34—containing 500 acres, more or less. Four thousand dollars damages for detention of dower are also claimed. The defendant is son of the deceased, adopted by deed dated April 17, 1889, which was long prior to his marriage to the plaintiff.

The defense is: That, in addition to the lands described in the petition, David Moran owned certain other lands described, amounting to 106 acres. That on February 5, 1891, being 30 years old, and David Moran being 70 years old, and they two contemplating marriage, entered into the following antenuptial contract:

"Marriage Contract.

"Article of agreement by and between David Moran, party of the first part, and Angie Fox, party of the second part, this 5th day of February, 1891. Witnesseth, that whereas, said parties contemplate entering into the marriage relation with each other. And whereas, each of said parties own property in their own right.

"Now, therefore, in consideration of the said contemplated marriage, it is mutually agreed that the said party of the second part is to retain as her absolute property free from any claim or right of her said husband, all the property, real and personal, which she now has or may hereafter acquire by inheritance or otherwise; that her said property shall not in any way become liable for her support while she shall remain the wife of the said party of the first part; that she shall have the right to sell, assign, transfer, convey or dispose of by will or otherwise of any or all of her said property as she may deem best.

"It is further mutually agreed, in consideration of said marriage that the second party waives and relinquishes all her marital rights under the laws of this state, and waives, releases, and quitclaims all her right of dower and homestead in all the property both real and personal which the party of the first part now owns or may hereafter acquire or own, and all claims for support, maintenance or dower and homestead which she would have against the estate of the said David Moran after his death in the event of her surviving him as his widow.

"It is further mutually agreed in consideration of said marriage and of the premises aforesaid, that said second party shall have the control, use, rents and profits and possession of the real estate hereinafter described, after the death of the said David Moran (if she survive him) during her life or as long as she shall remain his widow, to-wit: [Here follows a description of the 106 acres of land before referred to.]

"It is mutually agreed that said second party shall accept said interest in said real estate as full satisfaction of and in lieu of all claim for dower and homestead in any or all of the real estate of which said David Moran is now seized in law or equity, or may at any time become seized during coverture, he may have at death.

"That said David Moran shall have absolute control of all his property of every kind and description, except said 106 acre tract aforesaid, free from any claim of his said wife and sell, assign, transfer, convey and dispose of the same without her joining in any deed therefor. That he shall sell and convey the same by his separate deed or dispose of the same by will or otherwise as he may deem best. That it shall not be necessary for said second party to join in any deed, contract, or conveyance he may take to any real estate except the tract herein described. That said Angie shall pay the taxes and insurance on said real estate herein described after the death of the said David Moran (if she shall survive him) as long as she shall remain the widow of said David Moran and use said real estate under this contract, and her right to the use of said real estate shall terminate with her death or widowhood.

"Given under our hands and seals this 5th day of February, 1891.

"[Signed] David Moran. [Seal.]
 "[Signed] Angie Fox. [Seal.]"

Which said contract was duly acknowledged.

The defendant further pleads that the plaintiff accepted the provisions of the antenuptial contract, and after the death of her husband she entered upon the possession of the land therein described, and has ever since occupied, used, and enjoyed it, and hence she is concluded and estopped from claiming dower in the land described in the petition. The defendant further pleads that the plaintiff has received \$3,000, being one-third of the personal estate, and that the rents, issues, and profits of the 106 acres are reasonably worth \$500 a year. The defendant further pleads that within one year after the death of her husband she elected to take one-half of the real estate, subject to the payment of the debts of the deceased, in lieu of dower.

The reply admits that the plaintiff is in possession of the 106 acres of land, but alleges that it constituted the mansion house and messuages appurtenant thereto of her husband, and that she has continued to remain therein by virtue of her quarantine and homestead rights.

On the trial the defendant, over the plaintiff's objection, read in evidence the marriage contract and the widow's election; proved that the 106 acres of land was worth \$100 an acre, and that the rental value was \$400 a year, and that the plaintiff has been in the possession thereof since the death of her hus-

band. The plaintiff read the deed of adoption of the defendant by the deceased, and then introduced parol evidence showing that she was 30 and he 70 years old when they were married, and that prior to said marriage she worked in a millinery store in St. Joseph, and had no property other than her personal wearing apparel. The case appears to have been tried by the court without a jury, and at the request of the plaintiff the court declared the law to be that the election pleaded did not bar the dower claimed, but refused to declare that the marriage contract did not bar dower, and of its own motion declared the law to be that such contract barred dower, and entered judgment for the defendant. The plaintiff appeals.

Jas. F. Pitt, for appellant. J. W. Boyd, Booher & Williams, and P. Mercer, for respondent.

MARSHALL, J. (after stating the facts). The sole question presented by this record for adjudication is whether the marriage contract barred dower. The contract was made before the marriage between the plaintiff, who was then 30 years old, and David Moran, who was then 70 years old. This being true, the jointure intended to be provided was not subject to renunciation under the statute (Rev. St. 1899, §§ 2950, 2951), for the statute only gives the right of renunciation, if the contract be antenuptial, in case the wife was an infant at the date thereof, which was not true here. The statute therefore is inapplicable to this case.

It is contended, however, that, the plaintiff and the deceased being both *sui juris* when the contract was made, it is a good contract, and creates an equitable jointure. On the other hand, the plaintiff contends that the contract is void for two reasons: First, because, instead of making provision for the wife for life, it also limits the provision to her widowhood; and, second, because it is wholly without any consideration to the wife to support it. The defendant replies that, although the provision is limited to widowhood, still that is only a condition subsequent, and, as it is void because in restraint of marriage, it leaves the provision one for the life of the wife. Jointure is defined by Sir Edward Coke to be "a competent livelihood of freehold for the wife of lands or tenements, etc., to take effect presently or in possession or profit after the decease of her husband for the life of the wife at least." Coke on Litt. L. 1, c. 5, §§ 41, 36b. To make a perfect jointure, the following elements are necessary: "First, it must take effect for her life presently after the decease of her husband; second, it must be for the term of her life, or a greater estate; third, it must be made to herself, and to no other for her; fourth, it must be made, and so particularly expressed in the deed to be, in satisfaction of her whole

dower, and not of part of it only." Coke on Litt., *supra*; 10 Am. & Eng. Enc. Law (2d Ed.) p. 207; Saunders v. Saunders, 144 Mo., loc. cit. 488, 46 S. W. 428. When all of these requisites are not present, and it is still evident the husband did not intend the wife to have the provision made by him for her and dower also, she will be compelled, in equity, to elect between them, and this is known as equitable jointure. 10 Am. & Eng. Enc. Law (2d Ed.) p. 208. Equitable jointure exists notwithstanding the provisions of our statute. Logan v. Phillips, 18 Mo. 22; Johnson v. Johnson's Adm'r, 23 Mo. 568; Farris v. Coleman, 103 Mo., loc. cit. 361, 15 S. W. 767. Our statute, as well as the common law, contemplates that the jointure shall be "a provision for her support during life." And the same is true as to equitable jointure. The jointure in this case was limited to life or widowhood. The limitation to widowhood made the contract ineffective to bar dower, for the provision must be for her life, without limitation or qualification. In Mowser v. Mowser, 87 Mo., loc. cit. 440, this court said: "The widow must receive under it real or personal property as a provision for her support during life. It is against public policy to allow a man, by an agreement before marriage, which does not secure to the wife a provision for her support during life after his death, to bar her right to dower. The statutes sanction no such agreement." This case was cited and followed in Farris v. Coleman, 103 Mo., loc. cit. 361, 15 S. W. 767. This limitation of the provision to widowhood is in no sense a condition subsequent. A condition subsequent operates upon an estate already created and vested, and renders it liable to be defeated. Martindale on Conveyancing (2d Ed.) § 124. Here no estate vested at once in the wife. Jointure takes effect only upon the death of the husband. The law makes provision for the wife for life. The husband cannot curtail the bounty of the law by making a provision for her for a lesser period than her life that shall have the effect of superseding the provisions of the law.

2. But it is contended that this is a contract between two persons who were *sui juris* when it was made, and hence it is binding. "It has been frequently decided that an antenuptial agreement to which the intended wife, who is an adult, is a party, or to which she assents, whereby it is provided that for a sufficient consideration she will give up her right of dower constitutes a good bar to dower." 10 Am. & Eng. Enc. Law (2d Ed.) p. 209, and cases cited in note. But it has also been aptly said by Miller, J., in Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22, and quoted in 10 Am. & Eng. Enc. Law (2d Ed.) p. 210: "The surrender and release of rights to be acquired by the intended wife by the marriage relation must, however, be regarded with the most rigid scrutiny. * * * The relationship of parties who are about to

enter into the married state is one of mutual confidence, and far different from that of those who are dealing with each other at arms' length. This is especially the case on the part of the woman," etc. In *Logan v. Phillips*, 18 Mo., loc. cit. 28, Scott, J., said: "When a contract was made by a woman of full age before marriage, by which, for a sufficient consideration, she relinquished her dower in her future husband's real estate, it was sustained by courts of equity. Being *sui juris*, and free from the control of any one, it was not perceived why her contracts should not be binding, as well as those of all other adults." Scrutinizing the contract in this case, then, we start with the proposition that the plaintiff was *sui juris*, and had a legal right to make any contract she saw fit, but, as a corollary to this proposition, the contract must have a valuable consideration to support it, and the husband must not have overreached his wife in procuring it. The intended husband owned about 606 acres of land. The intended wife owned nothing, worked for her living in a millinery store. Under the law she would be entitled, at his death, to quarantine, homestead, and dower, or, in lieu of dower, to a child's share, which in this case would be one-third, the two adopted sons being entitled to the other two-thirds. Rev. St. 1899, § 5246; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962; *Moran v. Stewart*, 132 Mo. 73, 33 S. W. 443 (where other features of this controversy were formerly before this court). The marriage contract gave her, in lieu of all these rights, the control, use, rents, profits, and possession of the 106 acres of land (being the homestead and the plantation appurtenant thereto) for life or during widowhood. And the only consideration to her for entering into such a contract was that she should "retain as her absolute property, free from any claim or right of her said husband, all the property, real and personal, which she now has or may hereafter acquire by inheritance or otherwise; that her said property shall not in any way become liable for her support while she shall remain the wife of said party of the first part; that she shall have the right to sell, assign, transfer, convey, or dispose of by will or otherwise of any or all of her said property as she may deem best." In other words, he gave up his possible marital right to the possession of any real property she might thereafter acquire, for she had nothing at that time that was thus secured to her against his claims, and she gave up her right to quarantine until dower was assigned her, her homestead rights, and her dower right or in lieu of it a child's share in the whole 606 acres of land, and instead of all this was to receive under the contract the right to occupy and enjoy the 106 acres during life or widowhood. It is too clear to admit of discussion that there was no valuable consideration moving to her to support

this agreement, and that it was insufficient for this reason, also, to bar her dower. It is also clear that by continuing in the mansion house until her dower is assigned she did not accept the provision made for her by the contract.

For these reasons the judgment of the circuit court is reversed, and the cause remanded to be proceeded with in accordance herewith. All concur.

FINLEY v. BABB et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

DEED OF TRUST—EXECUTION—ACKNOWLEDGMENT—FORGERY—RECORD—NOTICE—SUBSEQUENT DEED—PRIORITY—FORECLOSURE—RIGHTS OF PURCHASER—LIFE ESTATES—TERMINATION—MORTGAGE—DEEDS.

1. Where, on appeal in ejectment, it was held that plaintiff was not entitled to recover, on the ground that a deed of trust under which plaintiff claimed was a forgery, but in a subsequent action it appeared that the alleged grantor, whose name was forged, held only a life estate in the land, and that before the bringing of such subsequent action the entire title to the land had descended to the forger, as remainderman, the decision of the prior action was not controlling of the subsequent one.

2. Under Rev. St. 1899, §§ 924, 925, providing that no conveyance not certified and recorded shall be valid, except between the parties and those having actual notice thereof, a recorded deed, to which one of the grantors' names and the acknowledgment were forged, was valid to convey the forger's interest in the land, as to all persons claiming under him, having actual notice of such conveyance prior to acquiring rights under other conveyances.

3. K. executed a deed of trust, to which he forged the signature and acknowledgment of one of the grantors; and 30 days thereafter another deed of trust was validly executed by all the grantors to plaintiff, who took without notice of the infirmity of the first deed. On foreclosure of the second deed, notice was given at the sale that the same was subject to the first deed, which the grantor whose name was forged was willing to ratify. Defendants purchased at such sale, and plaintiff, who was the cestui que trust in the second deed, subsequently purchased under foreclosure of the first deed. Held, that defendants by their purchase acquired all the rights of the cestui que trust arising from the second deed, as of the date it was executed and recorded, and hence the notice that the sale was subject to the rights of the holder of the first deed was ineffectual.

4. Rev. St. 1899, § 3113, providing that an instrument on record for one year shall operate as constructive notice thereof, whether acknowledged or not, has no application to rights acquired under a deed of trust recorded 30 days after a prior deed had been recorded, which was invalid by reason of the fact that the acknowledgment of one of the grantors thereto was forged.

5. Where a remainderman executed a valid deed of trust on his remainder, and the deed was foreclosed, his interest was thereby extinguished, and his subsequent deed thereof after the life tenant's death passed no title.

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Ejectment by Henry L. Finley against William Babb and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

M. Arnold and Joe W. Moore, for appellants. Boone & Lee, W. C. Russell, and Russell & Deal, for respondent.

MARSHALL, J. Ejectment for the northwest quarter of the southwest quarter of section 33, township 27, range 15, in Scott county. The petition is in the usual form, and the answer is a general denial. The plaintiff recovered in the circuit court, and the defendants appealed.

This is the second time the controversy between these parties for this land has come before this court. The first case is *Finley v. Babb*, 144 Mo. 403, 46 S. W. 165. The facts as they then appeared to this court are stated in the opinion to have been agreed to be as follows: "Mrs. Missouri Kirkpatrick was the owner of the land in dispute. On the 20th day of September, 1892, her son Lank Kirkpatrick made a trust deed on the land to Wm. Halloway, trustee for J. R. Hagan, to secure a note of \$300. This deed of trust was signed by Lank Kirkpatrick for himself, and he signed his mother's name, without her knowledge or consent, to the deed, and forged the justice's certificate of acknowledgment to the same, without the knowledge or consent of the justice or of his mother. This deed of trust was recorded September 27, 1892. The mother, while she did not authorize the signing of the deed, says that he did all of her business and frequently signed her name, and, had he asked her permission, she would have authorized him to sign her name, and as soon as she learned he had done so she was willing to ratify the act, and is now, and will acquiesce in the act so far as she and her interest goes; and this fact was known by all the parties to this suit before they purchased the land. On the 20th day of October, 1892, Missouri Kirkpatrick made a genuine deed of trust on the same land to Wm. Hunter, trustee for H. L. Finley, to secure \$695, recorded December 22, 1892. On December 8, 1894, the trustee sold under the last deed of trust. The trustee at the sale notified the purchaser and all bidders of the Hagan deed of trust, and that the sale was made subject to it, and that Missouri Kirkpatrick did not sign the Hagan deed of trust; that her name and the justice's was a forgery done by Lank Kirkpatrick, but that Missouri Kirkpatrick agreed to and would ratify the same so far as she was concerned. Malone & Vanausdale purchased at this sale for \$800 cash; deed recorded same day. On 6th day of March, 1895, the same land was sold under the Hagan deed of trust by the trustee, and at the sale the plaintiff purchased, with full notice of the other sale to Malone & Vanausdale. The defendants are in possession, and were when suit was brought. The rents are worth in cash one hundred dollars, net, per year. On the 29th of December, 1893, Missouri Kirkpatrick made a deed of

trust on the same land to a trustee for Malone & Vanausdale, to secure the sum of \$485.52, duly acknowledged and recorded the same day, and she then told said Malone & Vanausdale that it was the second deed of trust on the land."

Upon this showing, Division No. 2 of this court, per Burgess, J., declared the law to be as follows: "It is perfectly clear from the facts agreed upon that plaintiff was not entitled to recover in this action. In order to enable him to do so, it devolved upon him to show that he had the legal title to the land at the commencement of the suit, was entitled to its possession, and that defendants were then in the possession. 2 Greenl. on Ev. (15th Ed.) § 304; *Fleming v. Johnson*, 26 Ark. 421; *Daniel v. Lefevre*, 19 Ark. 201. The mortgage under which plaintiff claims title, being a forgery, was absolutely void, and no title by virtue of the sale under it passed to him. Nor could Mrs. Kirkpatrick, by any expressed willingness of hers to ratify that instrument and to acquiesce therein, made thereafter, cure it of its infirmity and make it a valid instrument. The only way that she could have done so was by the execution of a new mortgage in compliance with the statute, and this she could not have done so as to affect intervening rights. No verbal statements that she could have made would have passed the legal title to the land to plaintiff or any one else, and this it was necessary for him to have, in order to a recovery in this action. Plaintiff, having failed to show title to the land, or that he was entitled to its possession, was not entitled to recover."

It will be observed that it thus appeared to this court at that time that Mrs. Kirkpatrick was the absolute owner of the land in 1892. Such, however, it now appears, was not the real fact, for she had only a life estate, and the remainder was in her heirs, who at that time were Sherman, Hall, and Lank Kirkpatrick. Sherman died October 24, 1898, and Mrs. Kirkpatrick died January 21, 1899, and this suit was begun September 14, 1899.

The plaintiff, in addition to the above facts, offered in evidence the deed of trust aforesaid, dated September 20, 1892, and the trustee's deed to the plaintiff under the foreclosure thereof, dated March 6, 1895, and also a deed from Lank Kirkpatrick to O. F. Goodin dated March 16, 1899, and a deed from said Goodin to the plaintiff, dated October 25, 1899. The defendant introduced the deed of trust from Lank Kirkpatrick and wife and Mrs. Missouri Kirkpatrick to plaintiff, dated October 20, 1892, and also the trustee's deed at the foreclosure thereof on December 8, 1894, to E. J. Malone (one of the defendants herein) and J. H. Vanausdale, and also a quitclaim deed from Vanausdale to Malone; also a sheriff's tax title deed, which, however, need not be further referred

to, because the purchase price was returned to the defendant, and the sale was never completed.

The plaintiff claims that the decision on the former appeal is not controlling in this case, for the reason, *inter alia*, that although the deed of trust made by Lank Kirkpatrick for himself and in the name of and as and for his mother, Missouri Kirkpatrick, was void as a conveyance of Mrs. Kirkpatrick, who had only a life estate, still it was a good conveyance as to Lank Kirkpatrick's contingent remainder, and, as Mrs. Kirkpatrick's life estate had terminated by her death before the institution of this action, the plaintiff has now a good title to the share of Lank Kirkpatrick in the land; and, further, that at the time Lank Kirkpatrick and his mother made the deed of trust, on October 20, 1892, and at the time the defendants purchased at the foreclosure sale under that deed of trust, on March 6, 1895, Lank Kirkpatrick had only a contingent remainder in the land, and hence the contingent remainder of Lank Kirkpatrick passed to the plaintiff by virtue of the deed of trust of September 20, 1892, and the death of the life tenant on January 21, 1899, and not to the defendants by virtue of the deed of trust of October 20, 1892, and the death of the life tenant. Both parties concede that under the decision of this court in *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972, a contingent remainder is alienable during the continuance of the life estate, and, if the remainderman survives the life tenant, a good title will pass to the grantee or purchaser.

It will be observed that the deed of trust of September 20, 1892, was signed by Lank Kirkpatrick for himself, and that he also signed his mother's name to it, without her knowledge or consent. On the former appeal it was held that this made the deed void, and therefore the recording of it imparted no notice. So far as then appeared to the court, the fact that Lank Kirkpatrick had also signed the deed for himself was immaterial, because it did not then appear that he had any interest in the land, but that his mother owned it all. Now, however, it appears she had only a life estate, and Lank and his two brothers were the owners of the remainder, and since the former decision, and before this suit was begun, one of the brothers has died, and the mother has died, so that the life estate is now terminated, and the fee is vested in the remaindermen, or their grantees or assigns.

Lank Kirkpatrick signed both of the deeds of trust of September 20 and October 20, 1892, respectively. The acknowledgment to the first he forged. The second was duly acknowledged. The acknowledgment to the first being forged, it was not entitled to be recorded, and, under the statute, it imparted no notice to any one. Rev. St. 1899, § 924. But as to Lank Kirkpatrick, and as to all persons claiming under him who had ac-

tual notice prior to acquiring other conveyances of the execution by him of the deed of trust of September 20, 1892, that deed of trust is good, and is as effectual to convey his interest in the land as if it had been properly and legally acknowledged and recorded. Rev. St. 1899, § 925; *Strickland's Heirs v. McCormick's Heirs*, 14 Mo., loc. cit. 169; *Caldwell v. Head*, 17 Mo. 561; *Harrington v. Fortner*, 58 Mo., loc. cit. 473, 474; *Slemers v. Kleeburg*, 56 Mo. 196; *Black v. Gregg*, 58 Mo. 565; *Bennett v. Shipley*, 82 Mo., loc. cit. 453; *Chandler v. Bailey*, 89 Mo., loc. cit. 645, 1 S. W. 745; *Wilson v. Kimmel*, 109 Mo., loc. cit. 264, 19 S. W. 24; *Hannah v. Davis*, 112 Mo., loc. cit. 605, 20 S. W. 686.

The statute (section 925) provides: "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." As was said in *Harrington v. Fortner*, 58 Mo., loc. cit. 473: "The deed from Glassburner to Oliver, although the acknowledgment was worthless, was good as a common-law deed, and was, having been duly delivered, as valid and operative, to all intents and purposes, between the parties thereto, and those having 'actual notice thereof,' as though acknowledged with every statutory formality. 1 Wag. St. p. 277, § 26; *Caldwell v. Head*, 17 Mo. 561. The chief object of having a deed acknowledged is that it may be admitted to record, and thus impart constructive notice 'to all persons of the contents thereof.' But where actual notice exists, as is plainly the case here, all necessity for the constructive notice, which, under our registry act, is only imparted upon the due acknowledgment and filing for record of the deed, vanishes away."

The plaintiff in this case was the cestui que trust in the second deed of trust, dated October 20, 1892, and the defendants were the purchasers at the foreclosure sale thereunder on December 8, 1894. The defendants heard the notice that was given at that sale that the sale was to be subject to the first deed of trust, dated September 20, 1892, and that Mrs. Kirkpatrick ratified the wrongful act of her son in signing her name to the first deed of trust. On the other hand, the plaintiff herein, who was the cestui que trust under the second deed of trust, after recovering his debt by the foreclosure of the second deed of trust, became the purchaser of the land at the foreclosure sale under the first deed of trust, dated September 20, 1892, which foreclosure took place March 6, 1895. There is no pretense that, when the second deed of trust was made and executed, the trustee or cestui que trust had any actual knowledge of the first deed of trust. The pivotal question in this case, therefore, is whether the defendants, as purchasers at the foreclosure of the second deed of trust, and with the notice there given, took subject to the first deed of trust, or whether they ac-

quired all the rights that the holder of the second deed of trust had at the date of the execution and recording of the second deed of trust. In other words, the holder of the second deed of trust had no notice, constructive or actual, of the first deed of trust, at the time he loaned the money and took the second deed of trust, and therefore, as to him, the second deed of trust is unquestionably entitled to priority over the first deed of trust. Now, the question is, did the defendant acquire these rights of the cestui que trust under the second deed of trust, or did the notice that was given at the foreclosure of the second deed of trust have the effect of making the title passed by that sale subject to the first deed of trust, when the deed of trust under which that title was passed was entitled to priority over the first deed of trust while it was in the hands of the cestui que trust? The plaintiff would not have admitted, while he held the second deed of trust, that his deed of trust was subject to the first deed of trust. But since he collected his debt by foreclosing the second deed of trust, and since he has become the purchaser under the first deed of trust, he now contends that he has the better title. If a purchaser at a foreclosure sale of a mortgage or deed of trust takes title subject to any notice of any character as to the title to be conveyed by that sale that may be given at such sale, then the plaintiff has the better title. But if the purchaser at such a foreclosure sale acquires the title that was originally conveyed to the trustee and cestui que trust by the mortgage or deed of trust, without any limitations that may be attempted to be put upon such title by mere notice given at the foreclosure sale, then the defendants have the better title. The general rule of law is thus stated in 20 Am. & Eng. Enc. Law (2d Ed.) p. 1040: "As an assignee of a mortgage succeeds to the rights of the mortgagee, he is entitled to the same priority as against purchasers or other incumbrancers that the original holder of the mortgage would be entitled to, and in fixing such priority the date of the execution of the mortgage, and not that of the assignment, governs. * * * An assignment of a mortgage is subject to the same equities and rules that govern in the assignment of other nonnegotiable instruments, and the general rule is that the assignee succeeds to all the rights of his assignor arising out of or based upon the mortgage, but has no other or greater rights, and does not occupy any better position." If, therefore, the plaintiff had assigned his second mortgage to the defendants, they would undoubtedly have been entitled to the same priority over the first mortgage that the plaintiff had. After pointing out that the registry act was only intended to furnish means of knowledge of prior alienations, and that, as to those who have actual knowledge thereof, it is immaterial whether the prior alienations were recorded or not, the Am. & Eng. Enc.

Law (1st Ed.) vol. 20, p. 585 et seq., says: "It would seem that, where lien creditors are protected by the recording provisions, a creditor affected with notice of a prior conveyance before his lien attaches will take subject to such conveyance, and that is the doctrine which generally prevails. So a purchaser at an execution sale, where the lien of the judgment is not superior to an unrecorded instrument, can be in no more favorable position than the judgment creditor, if he has notice of a prior unrecorded conveyance. But the doctrine of notice will not prevent a purchaser with notice, taking from one without notice, from acquiring title as against a prior unrecorded instrument; and, conversely, a purchaser without notice from a person having notice of a conveyance prior to his own will be protected by the recording acts." The numerous cases cited in the notes fully sustain the rule laid down in the text. Among the cases cited is Funkhouser v. Lay, 78 Mo., loc. cit. 465, where it is said "that a purchaser with notice may protect himself by purchasing the title of a bona fide purchaser without notice. 1 Story, Eq. par. 409; Halsa v. Halsa, 8 Mo. 308; Lemay v. Poupenez, 35 Mo. 71. The reason of this rule is aptly expressed by Chancellor Kent, in Bumpus v. Platner, 1 Johns. Ch. 220, to be 'to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell.'"

The second deed of trust was made just a month after the first. The first deed of trust, not having been properly acknowledged, did not impart any notice to any one by reason of being recorded; and it is not shown that, when the plaintiff loaned his money upon the faith of the second deed of trust, he had any actual notice of the first deed of trust. Therefore the second deed of trust was entitled to priority while in the hands of the plaintiff. The defendants succeeded to the rights of the plaintiff under the second deed of trust, and are entitled to all the privileges and rights that the plaintiff had in the second deed of trust, including the right of priority aforesaid.

It is wholly immaterial that at the foreclosure sale under the second deed of trust the plaintiff or the trustee notified the bidders that the sale was to be subject to the first deed of trust, for if, as a matter of law, it was not so subject, or if it was not so subject while in the hands of the plaintiff—the cestui que trust therein—the giving of such a notice would not make it so subject; but the purchaser at the sale succeeded to all the rights, title, and interest conveyed and created by the second deed of trust. Therefore the defendants have a better title to the land than the plaintiff has.

It is further contended that under section 3113, Rev. St. 1899, the deed of trust dated September 20, 1892, was constructive notice after it had been on record for one year, whether it was acknowledged or not. This,

however, does not aid the plaintiff's case, for the deed of trust through which the defendants derive title was dated October 20, 1892, which was just 30 days after the forged deed of trust was executed, and the defendant's rights are related back to the conditions that existed on October 20, 1892. Hence the provision of the statute invoked cannot apply.

The conveyance of Lank Kirkpatrick to Goodin, and of Goodin to the plaintiff, after the death of the life tenant, does not help the plaintiff's case, for the reason that Lank Kirkpatrick parted with his remainder by his deed of trust dated October 20, 1892, and that interest became absolute in the defendants by virtue of the foreclosure of the deed of trust on December 8, 1894, and the death of the life tenant on January 21, 1899. Hence Lank Kirkpatrick had no interest of any kind in the land when he made the deed to Goodin on March 18, 1899.

The result is that the plaintiff has shown no title in himself, and no right to recover, and therefore the judgment of the circuit court in his favor is reversed; and, because no different showing could be made upon a trial anew of this case, the cause is not remanded. All concur.

MISSOURI & S. W. LAND CO. v. QUINN.
(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

COUNTIES—SALE OF LANDS—VOID ACTS OF OFFICERS—ESTOPPEL—LIMITATIONS.

1. 1 Wag. St. pp. 394-398, c. 40, art. 1, provides for the purchase by counties of land for county seat purposes; the reservation from sale of lots wherever necessary to erect county buildings, and sale of the residue by a commissioner appointed for that purpose; that when credit is given on such sale the purchaser shall give his note to the commissioner for the amount; and that, if default be made in the payment of the purchase money according to the tenor of such note, the lot shall be forfeited to the county, and the commissioner shall resell the same for cash at public auction. A commissioner sold two lots, taking notes for part of the purchase price, and on default in payment the county recovered judgment thereon, declared to be a lien on the lots, and they were sold on execution. *Held*, that such execution sale was void, and passed no title, since the maker of the notes had forfeited all his interest in the lots, and the county could not cause its own property to be sold to pay a debt due to itself.

2. The acts of the county officers in obtaining judgment and selling the lots under execution, being wholly unauthorized and void, and not a mere exercise of power in an irregular manner, the county was not estopped to dispute the validity of the sale, though it received the proceeds.

3. Rev. St. 1899, § 4285, provides that if any action shall have been commenced within the period of limitations, and plaintiff therein suffers a nonsuit, or after verdict for him the judgment be arrested, or after a judgment for him the same be reversed, he may commence a new action within one year thereafter. Plaintiff commenced an action to recover land, and after limitations had run, while such action was pending, he commenced a new action for the same cause, and two days thereafter suf-

fered a nonsuit in the first action. *Held*, that the last action was not protected by such statute; it having been commenced before, and not within one year after, the nonsuit.

Appeal from Circuit Court, Butler County.

Action in equity to assert an equitable title to land by the Missouri & Southwestern Land Company against Luke F. Quinn and another. From a judgment in favor of defendant Quinn, plaintiff appeals. *Affirmed*.

This suit was commenced by filing petition in the Butler county circuit court on July 23, 1898. It is necessary to a clear understanding of the questions involved in this case to quote the pleadings, which is done. Omitting the captions, they are as follows:

"Plaintiff says that it is a corporation duly organized under the laws of the state of Missouri, and doing business in the city of Poplar Bluff, Missouri. Plaintiff for cause of action says that heretofore, to wit, on or about the 12th day of February, A. D. 1871, the defendant the county of Butler, being the owner of the fee simple title to lots 110 and 112 in the original town of Poplar Bluff, Mo., sold both of the said lots to one Green L. Poplin; and on or about the same day the said Green L. Poplin executed and delivered to the county of Butler his certain promissory note for the sum of \$100, with John R. Poplin and John S. Varner as sureties thereon, which said promissory note was given for a part of the purchase money for said lot 110 above described. And also, on or about the same date, the said Green L. Poplin made, executed; and delivered to the said county of Butler his certain other promissory note for the sum of \$100, with John R. Poplin and John S. Varner sureties thereon, and which said note was given for a part of the purchase money for the said lot 112 as above described and set out. Copies of both of which said notes are herewith filed, marked Exhibits 'A' and 'B,' and prayed to be made a part of this petition. That afterwards, at, to wit, the May term, 1879, of the circuit court of said county, the said county of Butler proceeded to and did obtain a judgment on the said first-mentioned promissory note, and also a decree foreclosing the lien of the county on the said lot for the unpaid balance of the purchase money due them from the said Green L. Poplin to the county of Butler, which said judgment was, in conformity with the prayer of said petition, made a special lien on said lot 110, and special execution was ordered to sell said lot to pay said judgment; and that under said judgment and special execution the said lot was sold, and at the sheriff's sale was purchased by Theopholis H. Bradley, and the sheriff of said county, in pursuance to said judgment and special judgment, and the sale thereunder, made, executed, and delivered to the said Theopholis H. Bradley a deed to the said lot. A copy of which sheriff's deed is hereby filed, marked 'Exhibit C,' and asked to be taken as a part of this petition. And after-

wards, at, to wit, at the May term, A. D. 1879, the said county of Butler obtained a judgment on the second note above mentioned, and a decree of foreclosure of the said lien of the said county, for the unpaid balance of the purchase money due from the said Green L. Poplin to the said county of Butler; and by the said judgment the same was ordered to be a lien on said lot No. 112, and special execution was ordered to sell said lot to satisfy said judgment, and in pursuance to said judgment and special execution the then sheriff of Butler county proceeded to levy on and sell said last-mentioned lot, and did sell the same, and Theopholis H. Bradley was the purchaser thereof at said sale, and the said sheriff made, executed, and delivered to said Theopholis H. Bradley a deed, a copy of which is herewith filed, marked 'Exhibit D,' and made a part of this petition, conveying to him the said lot 112, in pursuance of said sale made under said special execution. That afterwards, to wit, on the 18th day of April, A. D. 1881, the said Theopholis H. Bradley sold said lots 110 and 112, afore described, to W. A. Kendall, and by his warranty deed of that date conveyed the said lots to the said W. A. Kendall for and in consideration of \$200 to him paid, a copy of which said deed is herewith filed, marked 'Exhibit E,' and prayed to be taken as a part of this petition. That afterwards, to wit, on the 3d day of July, A. D. 1883, the said W. A. Kendall sold said lots to the plaintiff herein, and the said W. A. Kendall conveyed the same, together with a large amount of other real estate, by his warranty deed of that date, to the Missouri & Southwestern Land Company, the plaintiff, a copy of which conveyance is herewith filed, marked 'Exhibit F,' and made a part of this petition. And from that time hitherto the said company has owned said lands. That all said conveyances above herein set out were duly placed on record on the land record of said county. That plaintiff has since that time paid the taxes, both state and county, on the same. That by reason of the said sale of the said lots to the said Green L. Poplin as aforesaid, and by reason of the said action by the said county of Butler, in bringing its said suit in the said circuit court against the said Green L. Poplin for the foreclosure of its lien upon the said lots for the unpaid balance of the purchase money of the said lots due to it from the said Green L. Poplin, and by reason of the said decree of foreclosure and special execution issued thereon, and the sale thereunder by the sheriff of the said county, and by reason of the said purchase of the said lots at the said sale by the said Theopholis H. Bradley, and by reason of the said deed from the said sheriff of the said county of Butler to the said Theopholis H. Bradley, he, the said Theopholis H. Bradley, became and was the owner of rights and equities which the said county of Butler had in and to the said lots, and became seised and pos-

sessed of a full and perfect equitable title to the said lots, and, while the bare legal title thereto remained in the county of Butler, yet the said county held the said title thereto as a trustee, and for the use and benefit of the said Theopholis H. Bradley and those claiming title thereto by, through, or under him; and that by reason of the said deed of conveyance from the said Theopholis H. Bradley to W. A. Kendall, and the said deed from the said W. A. Kendall to this plaintiff, it became seised and possessed of the full and perfect and equitable title to the said lots above described, and as such became and was entitled to the full use, possession, and enjoyment of the said lots. But plaintiff further says: That thereafter, to wit, on or about the 25th day of July, 1885, and on or about the 19th day of November, 1896, the defendant the county of Butler, by its officers and agents, well knowing the premises, and the defendant Luke F. Quinn, who had full knowledge and information of the aforesaid proceedings in the county court and in the circuit court as aforesaid, and with full knowledge of the claims and title of this plaintiff in and to the said above-described lots, did enter into a fraudulent and collusive arrangement with each other to cheat and defraud this plaintiff; and that in pursuance of the said fraudulent and collusive arrangement the county of Butler undertook to sell and convey to the defendant Luke F. Quinn the said lots above described and set out, that is to say, the said county of Butler, in consideration of \$50 to it paid by the said Luke F. Quinn, on the 25th day of July, 1885, by Charles W. Addy, its commissioner, made, executed, and delivered to the said Luke F. Quinn a deed purporting to convey to the said Luke F. Quinn the whole of said lot 112, in the said original town of Poplar Bluff. A copy of said deed is herewith filed, marked 'Exhibit G,' and asked to be taken as a part of this petition, and which said deed was by the said Luke F. Quinn filed for record in the office of the recorder of deeds of the said county, and is recorded in Book V, at page 355, of the Records of Deeds of the said county of Butler. And that on the 19th day of November, 1886, in further pursuance of the said fraudulent and collusive arrangement between the officers and agents of the said county of Butler, in consideration of the sum of \$50 paid by the said Luke F. Quinn, by its commissioner, Charles W. Addy, made, executed, and delivered to the said Luke F. Quinn another deed, purporting to convey to the said Luke F. Quinn the whole of lot 110, in the said original town of Poplar Bluff, a copy of which said deed is herewith filed and marked 'Exhibit H,' and asked to be taken as a part of this petition, and which said deed was by the said Luke F. Quinn filed for record in the office of the recorder of deeds of the said county, and is recorded in Book V, at page 470, of the Records of Deeds in the said

county. Plaintiff says: That by reason of the fact that the officers and agents of the county of Butler well knew of the proceedings of the said county of Butler against the said Green L. Poplin, and the sale of the said lots under the said special execution in favor of the said county, and the purchase of both of the said lots by the said Theopholis H. Bradley as aforesaid, the said county of Butler was estopped from claiming or asserting any title to or interest in the said lots, or either of them, and could convey no title to the said lots; and that the said Luke F. Quinn took the said conveyances from the said county of Butler with full knowledge of all of said proceedings by the said county of Butler against the said Green L. Poplin as aforesaid, and with full knowledge of the claim and title of this plaintiff in and to the said lots; and that the interest and title of this plaintiff in and to the said lots is paramount and superior to any claim or title which the defendant Luke F. Quinn may have in and to the said lots by reason of his said fraudulent and collusive conveyances from the defendant county. Yet, inasmuch as the said deeds from the county of Butler to the said Luke F. Quinn have been placed upon the records of the said county by the said Luke F. Quinn, they create a cloud upon the title of the plaintiff such as will prevent a sale of the said property by this plaintiff, and injure it in the enjoyment of its said property. Plaintiff further says: That the defendant Luke F. Quinn is now, and for some time past has been, in the possession of the said above-described premises, and, the title of this plaintiff being an equitable title, the said conveyances from the county of Butler to the said Luke F. Quinn constitute such an outstanding legal title in the said Luke F. Quinn as will prevent this plaintiff from maintaining its action of ejectment for the recovery of the possession of the said lots. So that this plaintiff is wholly without remedy in the premises, saving only in a court of chancery, where plaintiff's equitable title and claim to said lots may be properly adjudicated and enforced. Wherefore plaintiff prays that this honorable court will take cognizance of the matters and things herein alleged, and will by its proper decree adjudicate, determine, and declare the title of this plaintiff to be paramount and superior to any title or claim of the title which the defendants, or either of them, may have in and to the said lots, or either of them; and that the two deeds from the said county of Butler to the said Luke F. Quinn, copies of which are hereby filed and referred to as Exhibits G and H, respectively, be canceled, set aside, and for naught held, and the defendants Butler county and Luke F. Quinn, and each of them, divested of all the right, title, and interest, or claim of title, which they, or either of them, may have in and to the said lots, or either of them, and that the full legal title be vested in this plaintiff, free and clear from

claim, interest, or title of the defendants, or either of them; and that this honorable court will grant to this plaintiff its writ of possession; and that this plaintiff be granted such further and other relief as to equity and good conscience may seem meet.

"And for a further and other cause of action plaintiff says: That on the 1st day of January, 1889, it was the owner of and entitled to the possession of the following described premises, situate in the county of Butler, and state of Missouri, to wit: All of lot 110 and all of lot 112, in the original town (now city) of Poplar Bluff, Mo. And, being so entitled to the possession thereof, that the defendant afterwards, on the 1st day of January, 1890, entered upon the said premises, and unlawfully withholds from the plaintiff the possession thereof, to its damage in the sum of \$1,000. Wherefore it demands judgment for the recovery of the said premises, and for \$1,000 damages for the unlawful withholding of the same from the plaintiff, and \$10 for the monthly rents and profits from the rendition of the judgment until possession is delivered to the plaintiff, and for other proper relief."

Answer:

"Now comes the defendant Luke F. Quinn, and files this, his separate answer to the plaintiff's petition, leave of court first having been had, and says: He denies that Butler county sold to Green L. Poplin lots 110 and 112, or either of them, as in plaintiff's petition alleged. He admits that the county of Butler did sell to Luke F. Quinn the said lots at the time in the petition alleged, and received a patent therefor as alleged, and admits that the copies attached to the said petition are copies of the patents so received by him. He alleges that immediately after the said patents were delivered to him he went into the actual possession of the said lots, and has ever since that time been in the actual, open, and notorious possession thereof, and is now in the actual possession of the same; that since the making of the said patents, and the taking possession thereof as aforesaid, he has paid annually all taxes levied thereon, both state, county, and city taxes, has fenced and maintained fences thereon, erected buildings on lot 110 of the value of \$800, and on lot 112 of the value of \$800, and claims title to each of the said lots by virtue of the said patents. And for a further answer says: That the plaintiff has no existence in this state or anywhere else; that it has long since forfeited its corporate existence, and has no right to sue or to be sued under the laws of this state, or any other state or territory in the United States. Defendant further alleges: That the petition does not state any cause of action of which a court of equity has jurisdiction, but that, if the plaintiff has any cause of action, it is by and through an action at law. That each and every allegation in the said petition stated he denies, except those here-

in specifically admitted. He therefore asks the judgment of this court to be hence dismissed of this suit, with his costs; and defendant will ever pray," etc.

Replication:

"Now comes the plaintiff, and for replication to the answer of defendants herein denies each and every allegation of new matter therein contained."

The defendant Butler county withdrew its answer and interposed a demurrer to the petition, alleging that the petition stated no cause of action as against the said county, and that the county was not a necessary or proper party defendant in said cause. The court sustained the demurrer and dismissed the petition as to Butler county, to which plaintiff objected and excepted. And the cause proceeded against the defendant Quinn alone.

This is an action in equity to assert an equitable title to the lots in controversy, described as lots 110 and 112 in the original town of Poplar Bluff, Mo., and to have the legal title to the same vested in plaintiff, and to recover possession thereof. The facts upon which this relief is sought, as alleged in the petition and supported by the testimony, are about as follows: That on and prior to the 7th day of February, 1871, the county of Butler was the owner in fee simple of these lots. That on that day the county of Butler, by its duly authorized county seat commissioner, sold these lots to one Green L. Poplin, on a credit for 12 months, for the price and sum of \$100 each, and took Poplin's notes therefor, due 12 months after date, with John R. Poplin and John S. Varner as sureties. These notes were for \$100 each; one reciting that it was given for lot 110, and the other for lot 112. This sale was by the county seat commissioner reported to the county court, and by it approved on the 25th day of July, 1871. On November 30, 1877, the county court of Butler county made an order directing the county seat commissioner to bring suit on all notes in his possession belonging to the county seat fund, on which interest has not been paid. On April 9, 1878, Butler county, by its attorney and to the use of the county seat fund, filed its petition in the circuit court for said county against Green L. Poplin, John R. Poplin, and E. C. Lacks, as administrator of J. S. Varner, deceased, setting out the making and delivery of the above note given for lot 110, and alleging that same is still due and unpaid, that the same was executed as a part of the purchase money for said lot, and praying that the amount due and unpaid upon said note be decreed to be a lien upon the said lot, and that the same, or so much thereof as may be necessary, be sold to satisfy the amount due thereon. On the same day a petition containing the same allegations was filed against the same parties, but declaring on the note given by Poplin for lot 112. In both cases personal service was had upon John R. Pop-

lin, a non est return as to Green L. Poplin, and no return as to Lacks, administrator of Varner. Suit was afterwards dismissed as to Lacks. At the next term of the court orders of publication were made upon the non est returns against Green L. Poplin. These orders were duly published. At the May term, 1879, a decree was rendered in both cases, finding the amount due on one note to be \$198, and on the other to be \$188; that the equity of redemption of defendants in and to said lot be foreclosed, and that the same be sold to satisfy the debt, interest, and costs; and that a special fieri facias issue herein. On September 26, 1879, a special execution was issued in each of said cases, and both of these lots were levied upon under the separate executions; i. e., lot 110 under one execution, and lot 112 under the other. That thereafter the sheriff filed his report of sale, showing that on the 8th day of November, 1879, he sold lot 110 under said special execution to Theopholis H. Bradley for the sum of \$45; that Bradley paid the purchase money; and that he had applied \$22.40 to the payment of the costs, and the balance of \$22.60 to the payment of the debt mentioned in the execution. At the same time the said sheriff filed his report of sale, showing that he had sold lot 112 to Theopholis H. Bradley for \$49.05; that Bradley had paid him the purchase money; that he had applied \$22.25 to the payment of the costs, and the balance of \$26.80 to the payment of the debt mentioned in said execution. On November 13, 1879, the said sheriff executed and delivered to Theopholis H. Bradley a sheriff's deed conveying all interest of Green L. Poplin in and to lot 110 in the original town of Poplar Bluff. And on the same day the said sheriff made, executed, and delivered to said Theopholis H. Bradley a sheriff's deed conveying all interest of Green L. Poplin in and to lot 112 in said town. On April 18, 1881, Theopholis Bradley (unmarried) conveyed by general warranty deed to W. A. Kendall lots 110 and 112 in the original town of Poplar Bluff. On July 3, 1883, W. A. Kendall conveyed by quitclaim deed to Missouri & Southwestern Land Company, the plaintiff, lots 110 and 112 in the original town of Poplar Bluff. On November 19, 1886, Butler county, by C. W. Addy, commissioner, conveyed lot 110 in original town of Poplar Bluff to Luke F. Quinn, the defendant, in consideration of \$50; and on July 25, 1885, Butler county conveyed lot 112 in said original town to Luke F. Quinn, the defendant. On the 2d day of February, 1892, plaintiff commenced in circuit court of Butler county an action in equity to quiet title against Butler county and Luke F. Quinn, and praying that the said deeds from Butler county to Quinn be canceled and set aside, and the title to said lots vested in plaintiff. On this petition summons was issued and duly served, and defendants file answer, and the case was con-

tinued from term to term until the 25th day of July, 1898, when plaintiff suffered a voluntary nonsuit. And this action was commenced on the 23d day of July, 1898, or two days before the other suit was dismissed.

The testimony shows that about 1884 or 1885 W. A. Kendall built a small house on lot 110, and put in a tenant, and that the tenant remained about one year, when the house became vacant. Quinn took possession, put in a tenant, and ever since has kept a tenant in possession. The testimony further disclosed that respondent Quinn took possession of lot 110 in 1887, and lot 112 immediately after receiving his patent from C. W. Addy, commissioner of Butler county, which was in November, 1886; that Quinn claimed to be the owner of these lots, and had open, notorious possession for all this time, up to the time this suit was instituted. Upon this evidence, as heretofore indicated, this cause was submitted to the court, and its finding and judgment was for the defendant. Motion for new trial filed by plaintiff being overruled, this cause was brought here in due form by appeal.

E. R. Lentz, for appellant. L. D. Grove, for respondent.

FOX, J. (after stating the facts). The two lots involved in this suit were held by the county of Butler for county seat purposes, under the provisions of article 1, c. 40, pp. 394-398, of Wagner's Statutes. The county court of Butler county appointed a "commissioner of the seat of justice," as provided by section 11, Wag. St., heretofore referred to, and ordered him to sell these lots. While the order of the county court authorizing the county seat commissioner to sell the lots is not introduced in evidence, yet doubtless there was an order; for the commissioner in his report of sale recites the fact that he made the sale in pursuance of an order of the county court. The power and authority of the commissioner to sell the lots in suit, the title of which were invested in Butler county, is based upon section 14, p. 397, 1 Wag. St., which provides: "The tribunal transacting county business shall reserve from sale lots and squares of ground, wherever it may be necessary to erect county buildings, and shall, from time to time, order the sale of the residue, prescribing the terms of such sale, and the commissioner shall make such sales accordingly; and when the purchase money shall be paid in full, the commissioner shall execute a deed to the purchaser, as commissioner, for and on behalf of the county, conveying to the purchaser all the right, title and interest of the county to the premises so conveyed, and such deed shall be acknowledged and recorded as other deeds." It will be observed from the testimony in this cause that the commissioner sold these lots to Green L. Poplin on February 7,

1871, on a credit of 12 months; and the purchaser of these lots executed his notes, with approved security, payable in accordance with the terms of his purchase. The authority and power of the commissioner to sell the lots in dispute on a credit is founded upon section 15, p. 397, 1 Wag. St., which provides: "When any credit shall be given upon the sale of any lot for any part of the purchase money, the purchaser shall give his note or bond, with sufficient sureties, to the commissioner, for the use of the county, to secure the payment of each installment; and the commissioner shall deliver to the purchaser a certificate, describing the lots sold, the price, the amount paid, if any, the balance to be paid, when due and how secured." The testimony further discloses that Green L. Poplin did not pay these notes, or any part thereof, according to the terms of the sale made to him by the commissioner, Chas. S. Henderson, but made absolute default in the payment of the notes executed by him.

This leads us to the inquiry as to what was the force and effect of such default in the payment of such notes for the purchase money, according to their tenor and effect. Upon an examination of the statute under which these lots were held by Butler county, and in pursuance of which the commissioner derived his authority to sell, we find that a full and complete answer to the question as to the effect of the default of the purchaser in the payment of his note is given by section 17, pp. 397, 398, 1 Wag. St., which provides: "If default be made in the payment of the purchase money of any lot, or any part thereof, according to the terms of sale, or the tenor and effect of any bond or note given to secure the same, such lot shall be forfeited to the use of the county, and the commissioner shall resell the same, for ready money, at public auction, to the highest bidder, at the place of holding courts for such county for the time being, on some day during the sitting of the tribunal transacting county business, giving ten days' previous notice of the time and place of sale and the property to be sold, by advertisements put up at four of the most public places in the county; and, on receiving the purchase money, the commissioner shall make a deed to the purchaser, in the manner, and with like effect, as in cases of other sales under this chapter, and the purchase money shall be accounted for as other moneys received by the commissioner, and the amount thereof, after paying the expenses of the sale, shall be credited upon the bonds or notes of such delinquent purchaser; and if it be sufficient to pay the whole, such bonds or notes shall be canceled, but no part shall be paid to such purchaser, although there may be more than sufficient to satisfy the whole of the debt due by such purchaser, the commissioner shall proceed to enforce the payment of the residue, by suit." The contract of purchase of these lots by Green L. Poplin must be construed in the light of the provisions

of the statute under which it was made. The commissioner was a creature of the statute, and he could only sell these lots in the manner provided by it. Section 17, supra, expressly declared that the default in the payment of the notes should operate as a forfeiture of his purchase. As an indication of the extent of this forfeiture, it is provided upon a resale of the lots, even if upon such resale the lots should bring more than sufficient to pay the notes, "no part shall be paid to such purchaser." It will be observed, further, that this section, which provides for a resale of the lots at public auction, provides, also, in the last paragraph of said section, "if the proceeds of such sale shall not be sufficient to satisfy the whole of the debt due by such purchaser, the commissioner shall proceed to enforce the payment of the residue, by suit." This is the only provision which authorizes the commissioner to institute any proceeding to collect these notes. So far as this record discloses these lots were never resold at public auction as provided by section 17, heretofore referred to; and no payment had ever been made on the notes. All the powers of the commissioner are defined by law, and he has no others. He was only authorized to collect the residue of the notes, after reselling them, in accordance with the provisions of the statute. The order of the county court, requiring the county seat commissioner to institute suit upon these notes, did not confer upon him any additional power. The county courts are simply creatures of the statute, and their warrant of authority must be looked for in the statute. The law nowhere provided any authority in the county court to make this request of the commissioner. Hence this order of the county court was a nullity, and adds no force or effect to the action of the commissioner. If these lots had been resold as provided by law, and failed to bring the full amount of said notes, together with all interest thereon, then the commissioner was authorized to enforce the payment of the residue by a suit; and no order of the county court was necessary to give him this authority, for such power was conferred by the statute itself.

But we find that the commissioner, doubtless acting under the order of the court, instituted suits upon the two notes executed by Green L. Poplin for the lots in suit. These suits were instituted in the name of Butler county, to the use of county seat fund, against Green L. Poplin et al. Where he ever found the authority to institute a suit of that character and style we are unable to discover. However, he brought the suits, obtained judgments, executions were issued on the judgments, these lots were sold, and the parties through whom plaintiff claims purchased at the sale under the executions; and it is through this sale that the plaintiff claims to have an equitable title to the property in suit. The suits upon the notes of Poplin seem to be based upon the theory that But-

ler county had a vendor's lien on the lots for the unpaid purchase money. This contention cannot be maintained. Persons who convey real estate, or a county that makes such conveyance, the purchase money not being paid at the time, beyond dispute, would retain a vendor's lien for such unpaid purchase money, and a suit to enforce the lien would be an appropriate proceeding; but in the case at bar the county never made any conveyance of the lots, never parted with her title, and simply made a contract of sale, that could only ripen into a title when the notes were fully paid and the commissioner executed his deed under the provisions of the statute. We often see instances where grants are made, notes executed, and to secure the notes a conditional conveyance in the nature of a mortgage is made to the grantor; and upon the conditions being broken by the failure to pay the notes, the equity of redemption is foreclosed by a proper proceeding. But in this case the title never left Butler county. On the other hand, the statute, which is to be construed a part of the contract, at the time of the execution of the notes for the purchase of this land, provided that, if default was made in the payment of the notes, it should operate a forfeiture of the lots contracted for to the use of the county. It is apparent that Butler county had no vendor's lien to enforce. The statute under which the county seat commissioner procured his authority to sell the lots in suit clearly demonstrates that proposition. If it were necessary to assign other reasons why no such lien existed, we might simply add that the county, by taking the securities on the notes for the purchase money, waived such lien. *Boyer v. Austin*, 75 Mo. 81; *Emison v. Whittlesey*, 55 Mo. 258. It may be said that the circuit court, being a court of general jurisdiction, had the power to render the judgments offered in evidence. Let this be conceded for the purposes of this case. Yet if the court had no lien to enforce, and Poplin's purchase had been forfeited by the express provisions of the statute, then the sale under the executions issued in pursuance of the judgments passed no title to the purchaser, either equitable or legal. Whoever bought at such execution sale purchased at his peril. The doctrine of caveat emptor, with its full force and effect, is applicable to him.

It is earnestly insisted by appellant that the county of Butler, having ordered, through its agent, the county court, the institution of the proceeding upon the notes which resulted in the sale of these lots, and having received the proceeds of sale after the payment of costs, is estopped from denying that Green L. Poplin was the owner of said lots, or had such an interest in them as was subject to sale, under the executions. This contention cannot be maintained. It must be remembered that, when Poplin made default in the payment of the notes under the con-

tract of purchase, his contract of purchase was forfeited by the express terms of the statute, and Butler county had full title to the property; and the only purpose of the additional provision that the commissioner sell at public auction was to relieve the maker of the notes to the extent of applying the proceeds of such sale to the payment of his obligations. As an evidence that this was its only purpose, the statute provides that upon such resale at public auction, if the proceeds were more than sufficient to pay the notes, no part of such excess should go to the maker of the notes.

It is insisted that, these notes being for the use of the county, the county could maintain this action under the general statutes. Concede this to be true, so far as obtaining a judgment upon the notes. It will certainly not be contended that the officers of the county had the right, after obtaining the judgment, to sell the property of the county to pay its own judgments. The officers of the county had no authority to sell these lots, the title being in Butler county, to enforce a supposed or imaginary lien of the county; and their acts in this respect were void, and the county was not estopped by reason of such acts. This is not a case where the officers had the right to enforce a lien, and had the power to sell these lots to satisfy it, and simply undertook to exercise a power that they possessed, but exercised it in an irregular manner; but it is an effort to do an act that they never had any power to do. We are familiar with the principles announced in the cases cited by plaintiff; and this court, where the officers of a county have power to act, but act irregularly, and the county by its conduct and laches in asserting its rights, in an appropriate proceeding for that purpose to the prejudice of the rights of an individual, will rigidly enforce the doctrine of estoppel and laches. The cases of *Sturgeon v. Hampton*, 88 Mo. 203, and other cases cited by respondent, are applicable to the facts disclosed by the record in this case. The appellant, by virtue of the conveyances introduced in evidence, was subrogated to all the rights of the grantors in such conveyances. Its grantors, having purchased at the execution sales at their peril, acquired no interest in these lots, either equitable or legal; hence have no standing in this action.

This leaves us to the discussion of the only remaining proposition in this cause; that is, as to the application of the statute of limitations to the facts disclosed by the record before us. The testimony shows that in 1885 or 1886 the plaintiff's grantor, Kendall, took possession of lot 110, built a small house on it, and placed a tenant in possession. This tenant remained in the house about one year. The house became vacant, and the respondent Luke F. Quinn in 1887 went into possession, and has had open and notorious possession ever since, paying all

the taxes, state, county, and city, levied upon it. Respondent went into possession of lot 112 immediately after the execution and delivery of his deed from Butler county, through its commissioner, C. W. Addy, which was some time in 1885, and has remained in continuous possession, claiming title thereto, ever since, paying all the state, county, and city taxes levied upon said lot. On the 2d day of February, 1892, plaintiff commenced a suit against defendant to cancel and set aside the two deeds executed by Butler county, through its commissioner, to defendant Luke F. Quinn, for the two lots involved in this suit. This suit was continued from term to term until the 25th day of July, 1898, when the plaintiff took a voluntary nonsuit. On July 23, 1898, two days before the former suit was dismissed, the plaintiff commenced the present action. Section 4285, Rev. St. 1899, provides: "If any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff, or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him." This action, commenced on July 23, 1898, is beyond dispute, and is barred by the statute of limitation, unless the plaintiff falls within the protection of section 4285, supra.

In the case of *Briant v. Fudge et al.*, 63 Mo. 489, this section was discussed. In that case a final judgment was rendered, and a motion in arrest of judgment was filed, alleging as a ground why such judgment should be arrested that there was no sufficient service of the writ on the defendant. While said motion was pending, and before the order arresting the judgment was entered, the plaintiff in that suit commenced his new action. The court held that the new action thus commenced was within the protection of this statute; but in so holding it based such ruling on this principle, which was announced by Norton, J.: "The plaintiff, before the bringing of the present action, was thus explicitly notified by this motion of such an irregularity in the former judgment as made it necessarily voidable, and in anticipating the action which was finally taken by the court in sustaining it, and vacating the judgment and bringing another suit before the determination of the motion, may be considered as having admitted that the motion was well founded, and as

having abandoned all rights that might accrue to him under the judgment." It will be observed in Briant's Case, *supra*, that the learned judge reaches the conclusion from the fact that the action of the parties, as disclosed by the record, could appropriately be deemed that in effect the judgment had been arrested. In the case of Wood v. Nortman, 85 Mo. 298, the court, through Norton, J., says: "It is also insisted that the present suit was brought before, and not after, the nonsuit was taken, and for that reason plaintiff cannot claim the protection of said section 3239. This suit was brought five days after the motion to set aside the judgment, in order that plaintiff might take a nonsuit, and nine days before the motion was sustained and the nonsuit allowed. The suit was evidently brought, as was the suit in the case of Briant v. Fudge, in anticipation of the action of the court on the motion; and the fact was stated in the petition filed in this case, which was served on defendant the same day the motion was passed upon and the nonsuit allowed, that a nonsuit had been taken. This fact, in connection with the facts stated in the motion, was equivalent to a withdrawal of the prosecution of the first suit, and, as to the commencement of this suit and the nonsuit, brings the case under the operation of the principles laid down in the case of Briant v. Fudge, 63 Mo. 489." It will be noticed, in the case last quoted, that the ruling in that case was based upon the particular facts of that case disclosed by the record. What was done in that case, as was announced by the learned judge, "was equivalent to a withdrawal of the prosecution of the first suit" before the institution of the last. It is clearly deducible from those cases that, had not the particular conditions existed as disclosed by the record, the court would not have held that they were within the provisions of the statute mentioned.

In the case before us, we are confronted with an entirely different record. Nothing appears in this case, as did in the cases decided by Judge Norton, from which this court could say, in effect, that a nonsuit had been taken, or any motion or notice from which it could be anticipated as to what would be done in the case pending. It is no answer to this difficulty to say that the nonsuit was taken two days after the institution of this suit. The statute contemplates the institution of suits within one year after the nonsuit is entered. If the statute is to be construed as of any operative force, if a new action can be brought two days, or even one day, before the nonsuit is taken, then the principle can be applied to suits brought nine, ten, or eleven months before the nonsuit is entered. This position cannot be maintained. The new suit, to come within the protection of this statute, must be brought within a year after the nonsuit is suffered, and the record must dis-

close this fact, or such a state of facts as that the court would be authorized in holding that the conditions surrounding the particular case was equivalent to the sufferance of a nonsuit. In the suit before us there is not an indication that another suit is pending; no statement in the petition, as there was in the case of Wood v. Nortman, *supra*, that a nonsuit had been or would be taken; but, so far as the record discloses, is not a continuation of the old action, but is a disconnected and independent one. Respondent was in possession of lot 110 for 11 years, and lot 112 for 12 years; and we take it, from the statement in appellant's brief under point 12, that it is practically conceded, unless this present action falls within the protection of section 4285, *supra*, this action is barred by the statute of limitation. Appellant says upon the question of statute of limitation: "The case of Missouri & Southwestern Land Company v. L. F. Quinn and Butler County was begun in 1892, and continued on the docket until July, 1898, when a voluntary nonsuit was suffered. Plaintiff had one year from that time in which to commence another suit. The first suit was begun within ten years, and this suit begun before the other was dismissed. Therefore there is nothing in defendant's plea of statute of limitations. Rev. St. 1899, § 4285."

For the reasons herein expressed, we are of the opinion that this suit before us does not come within the protection of the statute as cited and contended by plaintiff, and is therefore barred by the statute of limitations. Entertaining the views as herein expressed, we are of the opinion that the action of the trial court, in finding the issues for the defendant and dismissing plaintiff's bill, was proper, and its judgment will be affirmed. All concur.

JOHNSON v. FRANKLIN BANK et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

SURETY—EXTENSION OF TIME TO PRINCIPAL—
EXECUTION OF NEW NOTES—TIME OF MATURITY—DELIVERY OF OVERDUE NOTE—AFFIRMANCE ON APPEAL.

1. A wife's separate property, incumbered to secure the husband's note, due in one year, is not discharged by the husband's executing notes to the same payee for the same debt, due before the expiration of the year, and pledging the secured note therefor; the effect of the transaction not being to extend time to the husband.

2. A note overdue by its terms when delivered is operative, not as an overdue note, but as one payable on demand; and hence the substitution of such a note for one overdue, to secure which the maker's wife has incumbered her separate property, is an extension of time to the husband which will release the security.

3. A right judgment in equity will be affirmed, though based on reasoning different from that justifying it to the Supreme Court.

¶ 3. See Appeal and Error, vol. 3, Cent. Dig. § 2408.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Bill by Mary P. Johnson against the Franklin Bank and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is a bill in equity to cancel a deed of trust dated March 10, 1896, covering lot 13 of block 25 of Gamble's Second subdivision of Rose Hill, in city block 3825, city of St. Louis (the same being the plaintiff's separate property), securing a note of the same date for \$5,000, made by her husband, payable at one year, to the order of J. L. Hauk, who was a clerk for the defendant bank, and acting for it in the transaction, and to enjoin the sale, assignment, or pledge of said note and deed of trust, and the foreclosure of the deed of trust. The gravamen of the plaintiff's case is that her separate property was surety for the payment of her husband's note, and that she and her property have become released and discharged by reason of the bank giving time to the husband to pay the debt. There is no controversy in the case as to the facts. The only differences are as to the legal effect of the acts of the parties. The case made is this: The plaintiff's husband, Moses P. Johnson, desired to borrow \$5,000 from the bank. He executed a note for that amount, payable at one year to the order of J. L. Hauk, who had no interest in the matter, and simply acted for the bank. To secure that note the plaintiff executed the deed of trust in question. The only thing that was asked her by the officers of the bank, when she went there to execute the deed of trust, was whether she was willing to give the deed of trust to secure her husband's said note, to which she replied in the affirmative, and thereupon executed the deed of trust, and left the bank. This was on March 10, 1896, and it is conceded that she had no knowledge or information about what was done by her husband and the bank thereafter until June or July, 1900. Instead of simply discounting the note that was secured by the deed of trust, the bank caused the husband to make his note for \$5,000, payable at 90 days, to the bank, and to pledge the note and deed of trust aforesaid as collateral security for the 90-day note. The bank says this was a mere matter of form and convenience, and so as to enable the husband to pay the debt before the maturity of his note secured by the deed of trust, and that the note secured by the deed of trust was the primary liability of the husband, and that the taking of the 90-day note, and pledging the note and deed of trust aforesaid as collateral therefor, did not have the effect of giving time to the principal, nor of releasing the surety, for that there was no extension of time. On the other hand, the plaintiff claims that the 90-day note was the primary obligation of the husband; that the money was loaned upon that note, and the note and deed of trust aforesaid were only pledged as collateral security; and that the

debt therefore matured in 90 days. At the maturity of the 90-day note, on June 11, 1896, a new note for 90 days was given, and the note and deed of trust aforesaid were again pledged as collateral security therefor, and the first 90-day note was marked "Paid" and surrendered. Upon the maturity of the second 90-day note, on September 11th, another 90-day note was given, and the same arrangement pledging the note and deed of trust aforesaid was made. On September 15th the same arrangement was made, except that the new note was payable at 30 days. On October 15 and December 17, 1896, the same arrangement was made, except the note was made payable at 60 days. On February 25, 1897, the husband paid \$600 on the note, and a new note was made to the bank for \$4,400, payable 1 day after date, and maturing March 1, 1897, and the note and deed of trust aforesaid were pledged as collateral security. At all said times the husband paid the interest then accrued on the loan. Thus the matter stood until February 8, 1899, when the husband gave the bank a new note for \$4,400, dated February 1, 1899, and payable 1 day after date, and pledged the note and deed of trust aforesaid as collateral security therefor, and the bank surrendered to him the note dated February 25, 1897. The husband at that time paid the interest up to February 1, 1899, and thereafter he paid the interest on the last note aforesaid until October 10, 1900, when he failed. In the meantime, however, the bank obtained from him an agreement that it should have a right to hold any collateral pledged to it for the payment of any indebtedness due by him to the bank.

In June or July, 1900, Mrs. Johnson, desiring to make a loan at a lesser rate of interest, went to the bank to learn the status of the note for which she had given the deed of trust as security, and was informed that the bank held the note and deed of trust as collateral security for whatever sum her husband owed the bank—whether it arose out of the original transaction of March 10, 1896, or not. On November 26, 1900, the bank addressed the following notice to the plaintiff: "Mrs. Mary Johnson, 5863 Plymouth Ave., City—Madam: Please take notice that we will, in conformity with the collateral agreement of Mr. Moses P. Johnson to his note we hold, proceed to sell on Wednesday, the 28th day of this month, at ten o'clock a. m., at our office, the \$5,000 note (balance due \$4,400 and interest from October 1, 1900) made by you and secured by D. T. to the highest bidder for cash, and in case we have to purchase the note ourselves, we will then proceed immediately to have the trustee in said D. T. advertise and sell the property under said D. T. Very respectfully, Franklin Bank, Louis Schmidt, Cashier." Thereupon Mrs. Johnson instituted this suit.

The position taken by the plaintiff, both here and in the lower court, is "that the orig-

inal ninety-day note was the primary obligation of Johnson to the bank; that Mrs. Johnson's real estate stood as surety for the payment of that note, and was discharged by the extension of the time of payment of said note without her knowledge or consent." This position concedes that the husband had the power to pledge the original note secured by the deed of trust as collateral security for the first 90-day note.

The defendant bank has now expressly abandoned any right to hold the deed of trust as security for any indebtedness of the husband to the bank, except the original \$5,000 note. And the theory and contention of the bank is that the original \$5,000 note, secured by the deed of trust, is the primary obligation of the husband to the bank, and that the several collateral notes given by the husband to the bank were mere matters of form and convenience, and in no manner affected the surety, for that all of those notes matured before the original note secured by the deed of trust, and therefore they did not extend the time for the payment of the debt, and that, as to the last collateral note, it was dated February 1, 1899, and was payable one day after date, and was not delivered to the bank until February 8, 1899, at which time it was past due, and hence it amounted only to the exchange of the overdue collateral note of February 27, 1897, for the overdue collateral note of February 1, 1899, and therefore there was no extension of time given the husband for the payment of the debt. The bank further contends that Mrs. Johnson knew nothing whatever about any of these collateral note transactions, was not a party to them, and hence she is not bound thereby, and therefore not released by virtue of these dealings and acts. The plaintiff replied to the bank's contention by saying that, if such matters be true, then the bank has no right to the original note or deed of trust, because the evidence shows that they were never negotiated to the bank, and it has never acquired the title to them, and therefore the deed of trust ought to be canceled.

The trial court entered judgment for the plaintiff as prayed, and the bank appealed.

Paul F. Coste, for appellants. Clinton Rowell, Joseph H. Zumbalen, and Joseph S. Laurie, for respondent.

MARSHALL, J. (after stating the facts). Mrs. Johnson's property was mortgaged to secure the payment of her husband's note for \$500, payable at one year. Neither she nor her property received any benefit for the loan. Her contract was therefore one of suretyship. *Vogel v. Lechner*, 102 Ind. 35, 1 N. E. 554; *Bank v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Trentman v. Eldridge*, 98 Ind. 525; *Hubbard v. Ogden*, 22 Kan. 363; *Wheelwright v. Loomer*, 4 Edw. Ch. 232; *Loomer v. Wheelwright*, 3 Sandf.

Ch. 155; *McCollum v. Boughton*, 132 Mo. 601, 30 S. W. 1023, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; *White v. Smith* (not yet officially reported) 73 S. W. 610. This being true, anything that would discharge a surety who was personally liable will discharge the property. *Brandt on Suretyship & Guaranty*, vol. 1 (2d Ed.) § 35.

The general rule is that "when time is given to the principal debtor by a valid agreement, which ties up the hands of the creditor, though it be for a single day, the surety is discharged." *Bank v. Leavitt*, 65 Mo., loc. cit. 565; *Stillwell v. Aaron*, 69 Mo., loc. cit. 542, 33 Am. Rep. 517, and cases cited; *White v. Smith* (not yet officially reported) 73 S. W. 610, and cases cited. Mrs. Johnson was not a party to any of the collateral notes, nor did she know anything about them until June or July, 1900. Those notes, therefore, are immaterial as to her, except as they may bear upon the question of giving time to her husband, and thereby discharging her property. Her contract was that her property should stand as surety for her husband's note for \$5,000, dated March 10, 1896, and payable at one year. She testifies that that was what she agreed with her husband and with the bank to do, and that she never gave her husband any authority to do anything else or to make any other contract, and that is what her contract expresses on its face as the sum and nature of her undertaking. The bank knew this before it accepted the deed of trust. Therefore any arrangement that was made between her husband and the bank, by way of collateral notes, was not material to her or her liability, except as it may have extended the time for the payment of the note her property was surety for.

It admits of no question that the taking of the several collateral notes, maturing before the maturity of the note that was secured by the deed of trust, did not have the effect of extending the time for the payment of that secured note, nor of tying the hands of the bank as against the right to sue on the secured note, and therefore it did not discharge the surety. But the taking by the bank on February 8, 1899, of the collateral note dated February 1, 1899, payable one day after date, raises quite a different question. The defendant contends that it only amounted to the bank exchanging one overdue note for another overdue note; that the note of February 1, 1899, did not take effect until it was delivered, on February 8, 1899, but that its maturity must be calculated from its date, and not from its delivery; and on this theory the bank contends that said note was overdue when it was delivered to the bank, and therefore the time for payment by the husband of the secured note was not extended. In support of this contention the defendant cites *Tiedeman on Commercial Paper*, c. 2, § 34b, p. 89, and 1 *Daniel on Neg. Inst.* (4th Ed.) § 65, where the doctrine is announced

that a note takes effect from its date, and not from its delivery. The text-writers cite in support of the rule announced the cases of *Powell v. Waters*, 8 Cow. 669; *Bumpass v. Timms*, 3 Sneed, 459; *Snaith v. Mingay*, 1 Maule & Selwyn, 87; and *Barker v. Sterne*, 9 Exch. 684. And bearing upon the same question, reference may also be had to the following authorities: *Woodford v. Dorwin*, 3 Vt. 82, 21 Am. Dec. 573; *Insurance Co. v. Leavenworth's Estate*, 30 Vt. 11; *Wells, Fargo & Co. v. Vansickle (C. C.)* 64 Fed. 944; *Collins v. Driscoll*, 69 Cal. 530 (where it is held that, while that is the rule, still the statute of limitations begins to run from the delivery, and not from the date, of the note); *Story on Prom. Notes* (7th Ed.) §§ 56, note, and 48; 1 *Parsons on Bills & Notes*, p. 49; *Carter v. McClintock*, 29 Mo., loc. cit. 468; *Welch v. Dameron*, 47 Mo. App., loc. cit. 227; 4 *Am. & Eng. Enc. Law* (2d Ed.) p. 203. But an examination of the cases cited shows that in every instance, except one, the delivery was made before the maturity of the note, calculating it from its date, and that in the one exception (*Woodford v. Dorwin*) the delivery was by a former partner after maturity, and seven years after the dissolution of the partnership, and for that reason the note was declared invalid. No practical difficulty is encountered under the general rule so laid down, for the delivery in such cases is made before the maturity of the note, however that maturity might be calculated. But here the maturity, calculated from the date of the note, was before the delivery of the note, and hence before it became an effective contract. So if the general rule be applied, the solecism would be presented of a contract running its allotted life, and maturing before it had any validity and before it had any life. No adjudicated case has met or settled this difficulty, and the only text-writer who notices it is *Parsons on Bills & Notes*, p. 49, where, after stating the general rule, the learned author says: "Thus, if a note payable in three months from date were delivered four months after date, it would be payable on demand." This must necessarily be the only rational rule to adopt—the only construction that will not involve the manifest incongruity of saying a life can be run before it is begun.

It follows that the note dated February 1, 1899, payable one day after date, but not delivered until February 8, 1899, was not an overdue note, but was a note payable on demand, and, as such, it extended the time to the husband for the payment of the secured note until demand, for, under the statute (*Rev. St. 1899, § 460*), demand notes are not deemed payable until presented or demanded, whatever may be the usage or custom here or elsewhere, as to which, see *Tiedeman on Commercial Paper*, § 298. No demand is shown to have ever been made on the husband to pay that note. Therefore the acceptance of that note amounted to an in-

definite extension of time to the husband to pay the secured note, which could only be made definite by making a demand. The plaintiff never knew of or consented to any extension of time, and therefore her property, as such surety, was discharged by the taking of that note.

The conclusion reached by the circuit court was right, although it was placed upon different reasoning from that here employed; but as the judgment below was for the right party, and as this is a case in equity, the judgment must be affirmed. All concur.

STATE v. HENDRICKS et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

CRIMINAL LAW—DYING DECLARATIONS—CORROBORATIVE STATEMENTS—ADMISSIONS—TRIAL—INSTRUCTIONS—ADMISSION OF EVIDENCE—APPEAL—BILL OF EXCEPTIONS.

1. Defendants in a murder trial requested an instruction requiring the state to establish defendants' guilt "so clearly and convincingly that the jury are convinced to a moral certainty" of their guilt, which instruction the court modified by substituting the words "beyond a reasonable doubt" for those quoted. *Held*, that this modification was proper.

2. Defendants, on trial for murder, requested an instruction that the jury, in ascertaining if the two defendants had a motive for the crime, consider all the "evidence in relation with the association, relations, and deportment toward each other" which the court gave after inserting the words "and the deceased" after "each other." *Held*, that this modification served to make it clear and less susceptible of being misleading.

3. Defendants asked an instruction on the sufficiency of evidence to warrant a conviction, requiring the state to prove their guilt "clearly and conclusively, to such a moral certainty that there is no reasonable theory upon which they can be innocent." The court modified this instruction by substituting the words "beyond a reasonable doubt" for those quoted. *Held*, that the change made was proper.

4. Defendants, on trial for murder, requested the court to instruct the jury that to them belonged the function of determining what weight, "if any," was to be given to the dying declarations of the deceased, if he had made any, which the court refused to do until it had stricken out the words "if any." *Held*, that this modification was proper.

5. An instruction that, to warrant a conviction upon circumstantial evidence alone, the testimony must be such that it is not only altogether "inconsistent with the theory of the defendants' guilt, but utterly and absolutely inconsistent with any reasonable theory of their innocence," was properly refused, where the court of its own motion gave an instruction defining direct and circumstantial evidence, and instructing the jury that, to prove a crime by circumstantial evidence, "the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants, and inconsistent with any reasonable theory of defendants' innocence."

6. Where there was some testimony in a murder trial in regard to verbal statements and admissions made by defendants, they were entitled to an instruction as to the consideration of this testimony.

7. Though an instruction as to admissions, asked by the defendants, was properly refused by the court, it being improperly worded, yet

the court should have given a correct one, and its failure so to do was reversible error.

8. In considering the dying declarations of a deceased, the jury are not to be governed by the same rule of caution that applies to the consideration of repetitions by witnesses of statements made by defendants, accused of his murder.

9. In the trial of persons accused of murder, only dying declarations of the deceased should be admitted, and to the jury should be submitted the question whether the declarations were in fact made.

10. Unless exceptions to the trial court's rulings on the admission of evidence appear in the bill of exceptions, they will not be considered on appeal.

11. Statements made by the victim of a homicide, at a time he believed death was impending and had no hope or expectation of recovery, are admissible as his dying declarations, though he lived some time afterwards.

12. The victim of a homicide, who was attacked near his home, struggled to his feet and walked through a gate into his house, where his wife met him and asked, "What is the matter?" To this he answered, "They have made their threat good," and said that the accused had pounded him, and narrated minutely how he reached the place where the assault was made, and all that was done by the accused and himself. *Held*, that these statements were not admissible as a part of the *res gestæ*, being merely a narrative.

13. Statements of a victim of a homicide, other than his dying declarations, are not admissible in corroboration of his dying declarations.

Appeal from Circuit Court, Caldwell County; J. W. Alexander, Judge.

Simon Hendricks and Jacob Hendricks were convicted of manslaughter in the fourth degree, and they appeal. Reversed.

On the 10th of July, the grand jury of Caldwell county, Mo., returned an indictment against the defendants for murder in the second degree. They were charged in that indictment with having killed one William C. Hipes on the 29th day of September, 1900. The defendants were jointly indicted and jointly tried. The first trial resulted in a hung jury. The second trial resulted in the conviction of both defendants of manslaughter in the fourth degree, and their punishment, assessed separately, at imprisonment in the penitentiary for a period of two years.

The facts, briefly stated, are these: On the evening of the 29th of September, 1900, the deceased was shopping in the business part of the town of Kidder, and at an early hour of evening started home. The defendants were observed in town at about that hour, and one of them was seen to look through a window into a store where deceased was at that time. Before the deceased had reached his residence he was assaulted and knocked down by two men. A young lady, whose home was situate on the street just opposite the place of the occurrence of the assault, heard the deceased say, "Why do you jump on me?" And she saw two men strike the deceased, who was doing what he could to defend himself. She heard an unknown voice say, "Take him off." But she was unable to identify the person making

this remark, as well as unable to identify the two men making the assault. After a considerable struggle between the parties another nearby window was raised, and the noise attracted the attention of the two men, and they ran away. The evidence shows that, when the deceased reached his home, his ears and nose were bleeding, and he had a wound on his head. It further shows that he, immediately on reaching his home, told his wife that Jake and Simon Hendricks were the parties who had beaten him. The deceased never recovered from the assault. It is shown that he complained continuously thereafter about a pain in his head, and that he died in June, 1901. A post mortem examination revealed the fact that there was a small abscess on the outside of the skull in the locality of the wound, and a much larger abscess on the inner side of the skull and immediately under the place where the blow was struck. It is shown that this abscess had suppurated, and afterwards saturated the brain. The testimony on behalf of the state tended to show that death was due to this abscess, and that the wound was the immediate cause of the abscess. It was also testified by one of the witnesses that on the morning after the deceased had been assaulted, the defendant Jake Hendricks was observed riding past the home of the deceased, and that he turned from the roadway, and that he closely scrutinized the ground where the assault occurred, as if looking for some lost article. It was further shown that during the afternoon of the same day both defendants were seen riding slowly by the home of the deceased, and one of them rode out of the main traveled road and closely scrutinized the ground in the locality where the assault was committed, as if seeking something lost. The other defendant kept on the main road. On the Monday morning following the assault it was discovered that the defendant Simon Hendricks had an injured hand, and that it was injured to such an extent that he was compelled to consult a physician for its treatment. The dying declarations of the deceased were introduced in evidence. The defendants, on their part, offered much testimony tending to show that the deceased had on frequent occasions declared that he was ignorant as to who made the assault on him and that he was unable to identify such persons. And the state, in rebuttal, offered testimony to substantiate the dying declarations. There was other testimony by defendant tending to show that they were not present at the time deceased was assaulted. The assault, from which it is charged that the victim in that case died, was committed on the 29th of September, 1900, and the deceased died on the 22d day of June, 1901.

As appellants challenge the correctness of the indictment, we will insert it, omitting the caption:

"The grand jurors for the state of Missouri,

summoned from the body of Caldwell county, impaneled, charged, and sworn, upon their oaths present that Simon Hendricks and Jacob Hendricks, late of the county aforesaid, on the 29th day of September, 1900, at the county of Caldwell, state aforesaid, then and there being, in and upon one William C. Hipes, then and there being, feloniously, willfully, premeditatedly, on purpose, and of their malice aforethought did make an assault, and with a dangerous and deadly weapon or weapons to these jurors unknown, which they, the said Simon Hendricks and Jacob Hendricks, then and there had and held in their hands, and against him the said William C. Hipes, then and there feloniously, willfully, premeditatedly, and of their malice aforethought did strike and beat with the dangerous and deadly weapon or weapons aforesaid, then and there feloniously, willfully, premeditatedly, on purpose, and of their malice aforethought did strike, wound, and bruise him, the said William C. Hipes, in and upon the head and face of him, the said William C. Hipes, then and there, with a dangerous and deadly weapon or weapons aforesaid, giving to him, the said William C. Hipes, in and upon the head and face of him, the said William C. Hipes, several mortal wounds, of which mortal wounds aforesaid the said William C. Hipes, from the 29th day of September, A. D. 1900, until the 22d day of June, A. D. 1901, in the county of Caldwell, and state of Missouri, of the mortal wounds aforesaid, died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Simon Hendricks and Jacob Hendricks him, the said William C. Hipes, at the time and place aforesaid, in the manner and by the means aforesaid, feloniously, willfully, premeditatedly, on purpose, and of his malice aforethought did kill and murder, against the peace and dignity of the state.

"Frank B. Klepper,

"Prosecuting Attorney.

"A true bill.

"W. S. Deem, Foreman of the Grand Jury."

Cross & Sons and Johnson & Son, for appellants. The Attorney General and C. D. Corum, for the State.

FOX, J. (after stating the facts). This cause was submitted to the jury upon the instructions given by the court (which, in the course of this opinion, will be given attention), and the jury returned verdicts of guilty of manslaughter in the fourth degree as to both defendants, fixing their punishment at two years in the penitentiary. They were both sentenced in accordance with the verdict. Motions for new trial and in arrest of judgment were filed, and by the court overruled, and the defendants in due time and form prosecuted their appeal to this court for review of the action of the trial court in the disposition of this case. When

this cause was first submitted the record was so defective that we could only review the record proper, as indicated by the opinion filed in this case February 3, 1903. That record has in all respects been corrected, the former opinion recalled, and we are now in a position to investigate the alleged errors complained of by appellants.

It is insisted by appellants—First, that the indictment is bad; second, that the court admitted incompetent and irrelevant testimony. These constitute, in the main, the vital contentions in this cause. As to the first contention, as regards the indictment, we still adhere to the opinion, heretofore announced in this case, that it contains all the necessary allegations to constitute the offense charged and is in harmony with approved precedents and forms. We have re-examined it, and see no reason to change or alter the conclusion reached.

It is next insisted that the instructions of the court were erroneous. More than 20 instructions were given in this cause and we will not burden this opinion by quoting all of them, but will only insert those of which complaint is made, and such other instructions as will indicate clearly the manner of presenting this case to the jury by the court.

Instructions Nos. 1, 2, 3, 4, 5, and 6 were the usual and approved instructions upon a charge of this character, and no complaint is urged as to them; hence there is no need of any comment upon them.

As we desire to make some reference to instruction No. 8 in the course of this opinion, we here insert it: "Instruction No. 8. Evidence is of two kinds—direct and circumstantial. Direct evidence is where a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts or circumstances in a certain case, from which the jury may infer other connected facts which usually follow according to the common experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct testimony of eyewitnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants, and inconsistent with any reasonable theory of defendants' innocence. If, therefore, you believe from the facts and circumstances proven in this case that the defendants, or either of them, on or about the 29th day of September, 1900, at the county of Caldwell and state of Missouri, did feloniously, willfully, premeditatedly, and of their malice aforethought make an assault upon one William C. Hipes with a dangerous and deadly weapon, and with such dangerous and deadly weapon did feloniously, willfully, and premeditatedly, and of their or his malice aforethought inflict upon him, the said William C. Hipes, in and upon the head and face, one or more mortal wounds or bruises, and from the effects of said wounds and bruises the

said William C. Hipes, at the county of Caldwell and state of Missouri, within a year and a day thereafter, did die, then you will find such defendant guilty of murder in the second degree."

For the same reason, we quote instruction No. 14: "(14) The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the deceased, William C. Hipes, on Wednesday, Thursday, or Friday preceding his death, made any statement relating to the assault alleged to have been made on him on the 29th day of September, 1900, as to the parties who made said assault or the manner in which said assault was made, they will take and consider such statement as the dying declarations of said William C. Hipes, and give them such weight as they may believe them justly entitled to in the light of all the other facts and circumstances disclosed in the evidence in the case. You should consider, however, that such statement or statements were not made in the presence of the defendants; that the declarant was not subject to cross-examination by the defendants, or counsel for them; that the jury had no opportunity to observe the manner of the deceased at the time such statement or statements were made; and that he is not subject to prosecution for perjury if such statement or statements, or any part of them, are untrue. If the jury believe from the evidence that the deceased, William C. Hipes, at any other times or time, made statements contradictory of or inconsistent with such dying declarations (if the jury believe from the evidence such dying declarations were made), such contradictory or inconsistent statements should be considered by the jury in determining the weight to be given to said dying declarations."

The defendants then asked the court to give the following instruction, which the court refused to give: "(4) The court instructs the jury that the defendants are presumed to be innocent, and this presumption attends them throughout the progress of the whole trial, until it is overcome by evidence proving their guilt beyond any reasonable doubt; and, before the jury can convict, the state must establish the guilt of the defendants so clearly and convincingly that the jury are convinced to a moral certainty that the defendants are guilty as charged." The court then modified and gave the above asked instruction as follows: "The court instructs the jury that the defendants are presumed to be innocent, and this presumption attends them throughout the progress of the whole trial, until it is overcome by evidence proving their guilt beyond any reasonable doubt; and, before the jury can convict, the state must establish the guilt of the defendants beyond a reasonable doubt that the defendants are guilty as charged."

The defendants then asked the court to give an instruction, to which the court added

the words italicized as below, and which instruction was as follows: "(5) The court instructs the jury that, when evidence fails to show any motive to commit the crime charged on the part of the defendant, this is a circumstance in favor of his innocence; and in this case, if the jury finds, upon a careful examination of all the evidence, that it fails to show any motive on the part of the defendants to commit the crime charged against them, then this is a circumstance which the jury ought to consider, in connection with all the evidence in the case, in making up their verdict. And, in order to ascertain a motive, the jury will take into consideration all the evidence in relation with the association, relations and deportment toward each other *and the deceased*, together with all the other evidence in the case."

The defendants then asked the court to give the following instruction, which the court at the time gave: "(8) The court instructs the jury that in criminal cases, even when the evidence is so strong as to demonstrate the probability of the guilt of the party accused, still, if it fails to establish beyond a reasonable doubt the guilt of the defendant in manner and form as charged in the indictment, then it is the duty of the jury to acquit."

The defendants then asked the court to give the following instruction, which the court refused to give: "(9) They are further instructed that the mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence support the theory of guilt, nor is it sufficient that, upon the doctrine of chance, it is more probable that the defendants are guilty than otherwise; but the state must go further to warrant the conviction of the defendants, and must prove their guilt, clearly and conclusively, to such a moral certainty that there is no reasonable theory upon which they can be innocent." The court modified the above instruction, asked by the defendant, and gave it as follows: "They are further instructed that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the theory of guilt, nor is it sufficient that, upon the doctrine of chance, it is more probable that the defendants are guilty than otherwise; but the state must go further to warrant the conviction of the defendants, and must prove their guilt beyond a reasonable doubt."

The defendants then asked the court the following instruction, which was then and there given by the court: "(10) The jury are further instructed that the presumption of the innocence of the defendants is not a mere form, which may be disregarded by the jury at pleasure, but that it is an essential and substantial part of the law of the land, and binding on the jury in this case; and it is

their duty to give the defendants in this case the full benefit of the presumption, and to acquit them, unless they feel compelled to find them guilty under the law and evidence, convincing them of their guilt beyond a reasonable doubt."

The defendants then asked the court to give the following instruction, which the court refused to do until it had struck out the words "if any," as italicized below: "(12) The court instructs the jury that to them alone belongs the function of determining what weight, *if any*, shall be given to the dying declarations of the deceased, if any were made by him. In weighing the declarations, the jury should take into consideration the facts that the defendants in this case were not present in person or by attorney when the statements were made, and that there was no opportunity for cross-examination of the deceased, and that there was no opportunity for the jury to observe the manner of the deceased at the time he made the statement, so as to detect malice or feeling of revenge or other improper motive that may have influenced him, and that the deceased was not subject to prosecution for perjury if he made false statements. And if the jury find from the evidence that the deceased had at other times made statements inconsistent with his dying declarations, these contradictory statements should be considered by the jury in weighing the dying declarations, and especially if such contradictory statements were made at a time when his blood was cool or his mind unaffected by passion or feelings of revenge."

The defendants also asked the following instructions, which were refused by the court: "(1) The jury are further instructed that, in order to warrant a conviction upon circumstantial evidence alone, the testimony must be of such a nature that it is not only altogether inconsistent with the theory of the defendants' guilt, but utterly and absolutely inconsistent with any reasonable theory of their innocence; that is, that all the circumstances in evidence must not only be inconsistent with the theory of the defendants' guilt, but the jury must also be satisfied beyond a reasonable doubt that all the facts are absolutely incompatible with the innocence of the accused upon any rational theory, and incapable of explanation upon any other reasonable theory than that of their guilt. (2) The jury are further instructed that the statements of the witnesses, purported to be repetitions made by the defendants, are liable to much imperfection and mistake, through a lack of clear and exact expression of the meaning by the party making the statement, and also through a misunderstanding by the witnesses of the statement actually made, or by them unintentionally altering or failing to remember some of the expressions actually used, whereby an effect is given to the statement in variance with what the party actually did say, and they are, therefore, instruct-

ed that while such purported repetitions of statements claimed to have been made by the defendants are admissible in evidence, yet they should be received and considered by the jury with great caution, and subject to close scrutiny, and given such consideration as they are entitled to in view of all the other evidence in the case. (3) The jury are further instructed that the statements of the witnesses purporting to be repetitions of the dying declarations of the deceased are liable to much imperfection and mistake, through a lack of clear and exact expression of the meaning of deceased, and also through a misunderstanding by the witnesses of the statements actually made by the deceased, or by them unintentionally altering or failing to remember some of the expressions used by deceased, whereby an effect is given to the dying declarations at variance with what the deceased actually did say; and they are therefore actually instructed that, while such repetitions of the dying declarations of the deceased are admissible in evidence, yet they should be received and considered by the jury with great caution and subject to close scrutiny, and given such consideration as they are entitled to in view of all other evidence in the case."

Treating these instructions in their regular order, our attention is directed to error complained of in the modification of instruction No. 4. It will be observed that this was an additional instruction, requested by defendant, to that already given by the court on the subject of doubt. The last clause of the instruction requested contains this language: "The state must establish the guilt of the defendants so clearly and convincingly that the jury are convinced to a moral certainty that the defendants are guilty as charged." The court simply made this change in that instruction: For the words "so clearly and convincingly that the jury are convinced to a moral certainty" it substituted the words "beyond a reasonable doubt." There was no error in this modification. The court simply did what it was appropriate for it to do, and made the instruction follow the old beaten path and conform to the recognized and approved form of instructions on that subject.

As to instruction No. 5, which is quoted in full, the court only added "and the deceased." An examination of that instruction will demonstrate that this addition did not change the meaning of the instruction, and did not in any manner alter its force or power; but, on the other hand, the little change made it clear and less susceptible of misleading the jury. The contention of error as to that modification is without merit.

The same can be said as to the errors complained of in the modifications of instructions Nos. 9 and 12. The changes were proper and in no way prejudiced the substantial rights of the defendants.

This brings us to the consideration of the

instructions requested by defendants and refused by the court.

Instruction No. 1, as offered by defendants, it will be observed, was upon circumstantial evidence. As to the contention of error upon this instruction, we will say that the court fully covered that subject in instruction No. 8, in which the attention of the jury was directly called to the rules that should govern them in reaching a conclusion upon circumstantial evidence. They were told, in instruction No. 8, "that the facts and circumstances in evidence should be consistent with each other and with the guilt of defendants, and inconsistent with any reasonable theory of defendants' innocence." The instruction requested was substantially the same, except the language was much stronger, and was inclined to be argumentative, which has never been approved by this court. There was no error in the court refusing the instruction requested on this subject.

As to the refusal of the court to give instruction No. 2, we will say that there was some evidence of witnesses respecting statements made by the defendants, or at least one of them. It is not for this court to say as to what influence the repetition of those statements by witnesses had upon the jury in reaching their verdict; but we do say that the defendants were entitled, to an instruction tending to guide and govern them in the consideration of this character of testimony. The instruction, as will be observed by an examination of it, was one of caution in the consideration of the repetition of statements made by the defendants. While these statements made by the defendants to other parties are competent, yet it has been ruled by this court that an instruction as suggested by defendants should be given. In the case of *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556, the instruction, as applicable to this case, which was fully discussed by the learned judge, was in this form: "Although the jury may believe from the evidence that defendant made statements to various persons concerning the manner or circumstances attending the death of his wife, still, if such statements were made casually, in the course of ordinary conversations, they should be considered with great caution, because of the liability of witnesses to forget or misunderstand what was really said or intended." The court in that case quoted approvingly a discussion of this point by Mr. Greenleaf: "On this point Greenleaf says: 'With respect to all verbal admissions it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfections and mistakes; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives

an effect to the statement completely at variance with what the party actually did say.' 1 Greenl. Ev. (14th Ed.) 200." In the case of *State v. Glahn*, 97 Mo. 679, 11 S. W. 260, this court, through Black, J., says: "It is usual and proper in cases like the present one to give the jury a cautionary instruction, directing them to consider the evidence of verbal statements and admissions of the defendant with care and caution, taking into consideration the liability of the witnesses to misunderstand and to misquote the words used." We are of the opinion that the instruction requested was properly refused. Its tendency is too much in the nature of a comment upon that character of evidence, and impresses us as being somewhat argumentative as to the weight to be attached to such testimony.

While the action of the court in refusing the instruction was correct, still we are confronted with the question as to what was the duty of the court in this respect, when the instruction, though improperly worded, clearly suggested the giving of a proper instruction. In the case of *State v. Lowe*, 93 Mo. 571, 5 S. W. 889, there was an instruction offered, not in proper form, and the court, through Sherwood, J., says: "If the instruction was not properly worded, it was the duty of the court, under our practice, to give a correct instruction on the point." The court in this cause, upon its refusal of the instruction offered by defendants, should have given a correct one. This was error. *State v. Davis*, 141 Mo. 522, 42 S. W. 1083; *State v. Taylor*, 118 Mo. 180, 24 S. W. 449; *State v. Sydnay*, 74 Mo. 390.

As to instruction No. 3, requested by defendants, it will be noted that appellants insist that the same rule should apply to the repetition by the witnesses as of the statements of the deceased. This is not true. The same reasons do not exist for applying the same rule to the repetition of dying declarations. Dying declarations are not to be classed with simply casual conversations of the defendants. These declarations are of a more solemn character, and are usually made only a short time before the witnesses are called upon to repeat them in the trial of the case. There was no error in the refusal of this instruction.

Instruction No. 14, based upon the dying declarations made by the deceased prior to his death, is perhaps unhappily drawn. There is no necessity for the naming of the days upon which the dying declarations were made. As this case is to be retried, we suggest that the court admit only such statements of William C. Hipes, as are made upon the proper foundation being laid, as are in fact dying declarations, and then submit to the jury the question as to whether such declarations were in fact made, and, if made, the rule that should guide them as to their weight and influence in reaching a verdict. This instruction was substantially correct.

except the criticism to which it is subjected as herein indicated.

This leaves us to the investigation of the last proposition in this case, as to the admission of incompetent and irrelevant testimony. Upon an inspection of the original transcript in this case, we find that the errors complained of in this respect, in many instances, are not properly preserved in the bill of exceptions. It must be remembered that, upon the admission of testimony, if the defendant desires to have the appellate court review the action of the trial court in admitting it, there must be an objection to the testimony, and, upon the objection being overruled, an exception must be taken at the time, and all this must appear in the bill of exceptions. As to some of the testimony the contention is preserved; but, as this case is to be tried again, we will briefly notice all the testimony admitted which appellants contend was inadmissible, regardless of the fact whether it is preserved or not. But we want it distinctly understood that, because we do this, it is not to be construed as an evasion of the long-established rule that the points for review must be properly preserved. We simply discuss it, that the trial court may have the benefit of our views upon the retrial.

We have examined very carefully all the testimony preliminary to the admission of the dying declarations. The physical condition of William C. Hipes, at the time he made the statements, is made clear by his attending physician, Dr. Cannon, which is supplemented by the testimony of his wife and other witnesses, who were with him before his death. This testimony indicated rather clearly that he had abandoned all hope of recovery. According to the testimony of his wife, he said frequently that he had to die, and discussed some details which he desired to be attended to in respect to his funeral. Wm. Drury testified that, in response to declaration to him "that he was looking a little brighter, he shook his head, and said, 'I have got to die.'" It is unnecessary to insert in this opinion all the testimony on that subject. We have read it in detail, and considered it carefully, and have reached the conclusion that no impartial mind can view this testimony in any other light than that Mr. Hipes, at the time of making the declaration, felt and realized that he was at death's door, and that dissolution was immediately about to take place. The fact that he did not die for some little time after the declarations were made does not affect the principle. It is not a question as to how long he lived after making the declarations; but, at the time he made them, did he believe that death was impending, and had all hope or expectation of recovery vanished? This is the test, and is more clearly announced in *State v. Kilgore*, 70 Mo. 546. There was no error in the admission of the dying declarations.

As to the testimony of Mrs. Hipes in reference to statements made to her by the

deceased, after being assaulted, we have reached the conclusion that those statements were inadmissible, not forming a part of the *res gestæ*. The difficulty occurred near the house of deceased. He was assaulted, and, as stated by Miss Cannon: "Well, he finally struggled to his feet, and walked on to his home, and went in at the gate, and walked up to the door, and either his wife opened it for him or he opened the door." His assailant had fled from the scene of the difficulty. Upon entering the house, his wife inquired of him, "What is the matter?" He said, "They had made their words good; that Jake Hendricks and Simon Hendricks had pounded him out there." Then Mrs. Hipes is permitted to tell what her husband narrated to her as to the entire details of the difficulty. That we may fully appreciate the point upon this contention, we here insert the question and answer of Mrs. Hipes: "Q. Tell the jury what he said, if anything—all he said how the fight occurred. A. Well, he said when he was coming from Colt's down; said he saw two men, and first thought it was students, but when they came closer he knew they were not, for they had slouch hats and old clothes; and said it was Jake Hendricks and Simon Hendricks. When he spoke to them, they struck in on the nose, and that struck him down; and he said that made him see stars like, and then the next lick he thought they knocked him down, and when he came to he was on his knees, and had his arm around one of them like that, and Jake was standing there, and Simon was pounding him on his head. He struck Simon in the stomach, and after that Simon told them to take him loose. He thought, by the way his arm felt, they struck him on the arm. Q. Who did he say said, 'Take him off?' A. Simon said that."

The trial court doubtless admitted this testimony on the theory that it was part of the *res gestæ*. We are of the opinion that this was error. Facts, to be admissible on the ground that they form part of the *res gestæ*, must not only be such occurrences as are contemporaneous with the main fact, but must be so closely allied to it as in contemplation of law to be a part of the act itself. In the case of *State v. Martin*, 124 Mo. 514, 28 S. W. 12, Gantt, J., very ably and clearly discusses the identical question involved in this contention. In that case the witness saw the person who was assaulted, heard his cry for police, saw him fall between two planks in the sidewalk, and heard him say, "I am fainting." "I am gone; catch me." Witness ran after a doctor. In the meantime an officer appeared, in the presence of the victim and another witness asked the man who had been stabbed, "Do you know who did it," and he answered, "Yes, two negroes; one a little yellow fellow." This statement was held in that case admissible as forming a part of the *res gestæ*. The learned judge, in discussing the admission

of this testimony, quotes approvingly the definition of *res gestæ* by Dr. Wharton, who says: "The *res gestæ* may be (therefore) defined as those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander. They may comprise things left undone, as well as things done. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself." 1 Wharton's Law of Evidence, § 259. This statement of the general rule has received the indorsement of this court. In the Martin Case the declarations of the person who was stabbed must be kept in mind. He first called for the police; then his exclamations: "I am fainting;" "I am gone; catch me." For the learned judge in that case bases his ruling as to the admissibility of the subsequent statement to the officer, who inquired of him "who did it," and is answered by the dying man, "Two niggers; one a little yellow fellow," that this last statement could well be deemed a part of the sentences he uttered immediately after the fatal stab was inflicted. Chief Justice Bigelow, in case of Commonwealth v. Hackett, 2 Allen, 136, says: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible." Judge Gantt, in the case of State v. Martin, supra, after reviewing all the cases, very appropriately says: "These cases sufficiently indicate the manner in which the courts apply the general principle which receives or excludes evidence as a part of the *res gestæ*, and are clearly distinguishable from those cases in which the narrative unconnected with the principal facts is universally rejected." The statement of Mr. Hipes, after walking from where he was assaulted through the gate into the house, was purely narrative; in fact, the first thing he said, in answer to the question of his wife, "What is the matter?" was in reference to a threat that had been made by the defendants, at least from the expression you would infer a threat; for he says, "They have made their word good." Then he proceeds to narrate minutely how he reached the place where the assault was made, and all that was done by the defendants, as well as himself. No one can read that statement and denominate it anything else than a narrative. It sounds just like the narrative of a difficulty months after it occurred. His statements must be taken as a whole. They cannot be separated, and say one part of it is a part of the *res gestæ* and the other is not. These statements should have been excluded.

We have now reached the last vital question in this case. The state called numerous witnesses, as it is contended, for the purpose of corroborating the dying declarations of the deceased. These witnesses were permitted to testify as to conversations had with the deceased prior to his death, from the next morning after the assault was made up to the time of his death. The deceased lived for nearly nine months after the assault, mingled with his neighbors and friends, and had the various conversations testified to by the witnesses. The defendants, after the dying declarations were admitted, introduced a number of witnesses who testified that the deceased, prior to his death, on different occasions, said to them that he did not know who committed the assault. The state acted upon the theory that this was an effort to impeach the testimony consisting of the dying declarations. It must be remembered that the testimony offered by the defendants, that the deceased made statements inconsistent with the dying declarations, had a double purpose: First, to lessen the weight and influence of the declaration by the deceased; and, secondly, as affecting the testimony of those who repeated the declarations, as indicating the improbability of the deceased having made such statements. The evident theory of the court, in admitting the testimony of the state, was that, after the testimony of the dying declaration, the state had the right to introduce the other conversations heretofore mentioned, as corroborating the dying declarations. We have reached the conclusion that this testimony as to these corroborative conversations is inadmissible. While it is true the authorities are somewhat in conflict upon the question involved in this contention, we are of the opinion that the weight of authority is against the admission of such testimony. Dying declarations in the outset are rendered admissible by reason of necessity. They are only admissible when made under the full belief that death is impending and every hope of recovery has vanished. To extend the rule to the admission of all his declarations, on the ground of corroboration of his dying declarations, is a long step toward abolishing the rule as to the foundation in the first instance before they are admissible.

If they are admissible to corroborate the dying statements, they are entitled to the same weight and force as the statements themselves. In the case of State v. Grant, 79 Mo. 114, 49 Am. Rep. 218, the court, through Sherwood, J., announced the doctrine that, if the testimony of a witness is attacked, it is then admissible to prove that the witness has made statements consistent with those made as a witness. The authorities are then cited to support the announcement of that doctrine. In the case of State v. Taylor, 134 Mo. 154, 155, 35 S. W. 92, the same learned judge very frankly recedes

from the position in the Grant Case, and says: "It seems the rule was stated too broadly in *State v. Grant*, 79 Mo. 114, 49 Am. Rep. 218, on that point, although warranted by the authorities there cited, which—at least *Henderson v. Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676 (overruled in *Craig v. Craig*, 5 Rawle, 91) and *Coffin v. Anderson*, 4 Blackf. 398—were founded directly or indirectly on *Lutterell v. Reynell*, 1 Mod. 282, which long ago ceased to be authority in England. *Rex v. Parker*, 3 Doug. 242." In the *Taylor Case*, the learned judge quotes approvingly the rules announced by Greenleaf and Wharton: "When speaking on this subject, Greenleaf says: 'But evidence that he [the witness] has on other occasions made statements similar to what he has testified in the cause is not admissible, unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause, in which case, it seems, it may be proper to show that he made a similar statement before that relation existed.' 1 Greenleaf Evid. [4th Ed.] § 469. * * * Wharton says: 'When a witness is assailed on the ground that he narrated the facts differently on former occasions, while on re-examination it is competent for him to give the circumstances under which the narration was made, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial.'" In the case of *Craig v. Craig*, 5 Rawle, 91, Chief Justice Gibson has the most logical discussion of this question that has attracted our attention. He says: "Though usually called confirmatory, these consistent statements are universally agreed not to be admissible in chief, but only to rebut other contradictory statements; and, if merely corroborative of the testimony in chief, why should they not be received before the credibility of the witness has been impeached? As rebutting, it cannot be pretended that they disprove the fact of contradiction, or that they remove the imputation of inconsistency." He held, in the last-cited case, that the testimony was inadmissible. To the same effect is the *Parker Case*, in which the case of *Lutterell v. Reynell*, 1 Mod. 282, was overruled, and it will be noted that the case of *Coffin v. Anderson*, supra, was based upon this overruled case. The North Carolina courts incline to the opinion that the corroborative statements, as in this case, are admissible. The later cases seem to be applying it only where the corroborative statements were made within a very short time after the difficulty occurred. We cannot, with the views we entertain on this disputed question, follow these cases. If these conversations are admissible as being corroborative, as was said in *Craig v. Craig*, supra, they are just as competent in chief as they are in rebuttal. When once admitted, they have the same force and influence

as though they were made under such circumstances as would in fact make them dying declarations. These conversations should have been excluded by the trial court.

Entertaining the views as herein expressed, this case will be reversed and remanded, and it is so ordered. All concur.

JOHNSTON et al. v. JOHNSTON et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

WIFE'S SEPARATE ESTATE—INVESTMENT—JOINT SECURITIES—ESTATE BY ENTIRETY—SURVIVORSHIP—RESULTING TRUSTS—FUNDS—IDENTIFICATION—MORTGAGES—PRIORITY—ACTION BY HEIRS—WITNESSES—COMPETENCY—CONTRACT OF DECEASED PERSON—OBJECTIONS—WAIVER.

1. Defendant and his wife loaned certain money to F., and thereafter defendant presented to F. an itemized account, signed and sealed by both defendant and his wife, which showed that the part advanced by the wife amounted to \$1,800. A note secured by a trust deed was taken for the entire debt, payable in two years to the defendant and his wife jointly. The trust deed was not foreclosed at maturity, nor until some time after the wife's death, when defendant purchased the property, paying \$85 cash and crediting the balance on the note. In a previous action defendant testified that the \$1,800 had been saved by his wife from housekeeping, etc., and that, though he had desired to borrow the same, she had refused; but in an action to enforce a trust in the wife's interest he testified that the money belonged to him. *Held*, that the evidence warranted a finding that the \$1,800 belonged to the wife, and not to defendant.

2. Estates by entirety in personal property may be created in Missouri, and as to such property the common law relating to estates has not been changed, except by the married woman's act, which has taken away the husband's common-law right to the wife's personal property and choses in action, except such as he had a vested right to reduce to possession before the passage of such acts.

3. Where a husband invested a portion of his wife's separate estate with his own money in a note secured by a deed of trust on real estate, payable to the husband and wife jointly, to the wife's knowledge and with her consent, such investment did not constitute an estate by the entirety with the right of survivorship in the husband, but each was entitled to a proportionate share of the securities.

4. Where a note secured by a deed of trust was given to a husband and wife jointly, the wife having contributed part of the funds secured thereby, and after the wife's death the husband foreclosed the deed and purchased the property, paying a small amount in cash and crediting the balance on the note, the wife's funds were sufficiently traced into the land so as to entitle her heirs to recover her proportionate share thereof.

5. Rev. St. 1899, § 4652, provides that, where one of the original parties to the contract or cause of action is dead, the other party shall not be permitted to testify in his own favor, or in favor of any party to the action claiming under him. *Held*, in an action by the heirs of a deceased wife to enforce a resulting trust against her husband arising from an investment of the funds of the wife's separate estate, the husband was an incompetent witness.

6. Where an incompetent witness, after objection, was cross-examined only as to matters to which he testified in chief, the objection to his competency was not waived.

7. Where heirs of a deceased wife, entitled to enforce a resulting trust as to her interest in certain land, permitted the title to stand in the name of her husband for several years, during which time the husband mortgaged the entire property to a bona fide mortgagee, the rights of the heirs were subject to the mortgage.

8. A bill to declare a resulting trust in land to the extent of the money contributed thereto by defendant's deceased wife was properly brought by the wife's heirs, and not by her administrator.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Bill by Anna Isabel Johnston and others against Daniel Johnston and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

This is a bill in equity, the purpose of which is to establish a resulting trust in favor of the plaintiffs in lots 13 to 16, inclusive, in city block 968, in the city of St. Louis, having an aggregate front, on the south line of Stoddard street, of 110 feet. The circuit court dismissed the bill, and the plaintiffs appealed.

The undisputed facts in this case are as follows: The plaintiffs are the children (and their husbands) of the defendant Daniel Johnston and his former wife, Mary Ann Johnston, née Fury. The defendants are the said Daniel Johnston and his third wife, Mary Ann Theresa Johnston, née Gheraty, and the Lincoln Trust Company. The defendant Daniel Johnston's first wife was a sister of his second wife, the plaintiffs' mother. The latter was a widow when Johnston married her in 1873. She died in 1885, intestate, leaving the plaintiffs as her only heirs. No administration was ever had upon her estate, and none was necessary, as it appears that she owed no debts. Prior to and on December 12, 1881, Ann Fury, the mother of Daniel Johnston's second wife, Mary Ann, and the plaintiffs' grandmother, owned the land in question as her separate property. Prior thereto, to wit, between July 27, 1877, and that date, Daniel Johnston loaned his mother-in-law, Ann Fury, or her husband, Michael Fury, \$2,206.08. His wife, Mary Ann Johnston, had also turned over to her father or mother \$1,800. Michael Fury then died, and Ann Fury was on December 12, 1881, a widow. On that date Daniel Johnston presented to his mother-in-law, Ann Fury, an itemized statement of the amount he had loaned or advanced to Michael Fury and Ann Fury, and what he claimed was due him as rent, amounting to \$2,206.08. To this statement was appended at the end thereof the following: "Add money advanced to Ann Fury, by Mary Ann Johnston, \$1,800. Total amount due by Ann Fury to Daniel Johnston and Mary Ann Johnston, as per above statement, on January 1, 1882, \$4,006.08. For which amount said Ann Fury has given her note, dated January 1, 1882, secured by deed of trust of date December 12, 1881." This was signed and sealed by Daniel Johnston and Mary Ann Johnston. The note was

payable to Daniel Johnston and Mary Ann Johnston, and the deed of trust securing the note described them as beneficiaries. The note was payable at two years, and there were also semiannual interest notes. At the time this settlement was had, and this note and deed of trust were executed, there was a prior mortgage on the land for \$5,000. Thus the matter stood when Mary Ann Johnston died in 1885. Daniel Johnston married his present wife in October, 1886. In August, 1893, the trustee under the deed of trust of December 12, 1881, being alleged to have removed from the state, Daniel Johnston procured the sheriff of St. Louis to be substituted as trustee, and caused him to foreclose the deed of trust, and at the sale Elizabeth Robeson, acting for Daniel Johnston, and not for herself, purchased the property and immediately deeded it to him. The bid was for \$5,000, but Johnston paid the sheriff only \$85 cash, and had the balance of the bid credited upon the note of Ann Fury to himself and his deceased wife. During the years 1884, 1885, and 1886 (which was partly before and partly after the death of Mary Ann Johnston), Daniel Johnston paid off the first deed of trust on the land, paying for that purpose, it is charged, \$7,350. He also paid the taxes on the land and other expenses incident thereto, and on the other hand has received the rents. On May 23, 1899, Daniel Johnston borrowed \$7,020 from the Lincoln Trust Company, and secured it by a deed of trust on the land. He tore down the house or houses that were on the land, and with the money borrowed from the trust company, and perhaps other money of his own, and, as he alleges, with \$3,000 of his present wife's money, he put up new buildings on the land. This suit was begun to the February term, 1900, of the St. Louis circuit court.

The only disputed fact in the case is whether the \$1,800 aforesaid was the money of Mrs. Mary Ann Johnston or of Daniel Johnston. He claims and testified that she never had any money, and his witnesses testified that they never heard of any property or money belonging to her. He testified upon the trial of this case that he "fetched home money to give to her father, so he could pay the mechanics as the cellar would be built, and as the joists were put on, and different payments to them, so she could have it to hand to him," and that it was his money, and that he only placed it in her custody to be handed by her to her father, for the purpose of paying for a house that her father was putting up on the land in question, which belonged to his wife, Ann Fury. On the other hand, the plaintiffs introduced a transcript of the evidence thereby preserved in the case of *Fredericka Schmidt et al. v. Daniel Johnston*, from which it appeared that he testified that his former wife, Mary Ann Johnston, advanced \$1,800 of the \$4,006.08 covered by the note and deed of trust

of Ann Fury, dated December 12, 1881; that he could not say exactly when she advanced it; that she told him the amounts she gave, and he lumped it all together and added it to his itemized account; that "she saved most of the money from housekeeping and such as that"; that she had no money except what she saved. And when his attention was called to the fact that in 1877 he himself was in the market as a borrower, and he was asked to reconcile that fact with his claim of having loaned his father-in-law \$4,000, he answered as follows: "A. There was a large portion of that she had saved previous to that, housekeeping money. Q. She would not let you use it, and preferred to have you borrow the money from Mr. Schmidt or your father-in-law? A. She had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him." This admission, together with the physical facts in the case, constitute the evidence upon which the plaintiffs rely to prove that the \$1,800 was their mother's money, and that such money had gone into the land, by reason of the purchase by the defendant of the land at the trustee's sale, and the crediting of the bid upon the note, and therefore they claim a resulting trust of nine-twentieths in the land.

Alex. J. B. Garesche, W. C. & J. C. Jones, and A. H. Roudebush, for appellants. Daniel Dillon, Jno. Dillon, and Henry Caulfield, for respondents.

MARSHALL, J. (after stating the facts). 1. The primary question presented by this record is whether the \$1,800 was the money of Daniel Johnston or of his wife, Mary Ann Johnston. If it was his, that is an end of this case. If it was hers, the foundation is laid for the plaintiffs' claim, and then other questions raised in the case must be passed upon. The defendant's contention that the money was his rests upon his testimony in this case that he "fetched" the money home and placed it in his wife's custody, to be by her turned over to her father to be used by him in paying for the building of a house upon the land involved in this case, which belonged to Ann Fury. He supplements his testimony with the testimony of others to the effect that his wife never had any money or property, or at any rate that they never heard of her having any, and they were intimate with her and her family affairs. On the contrary, the plaintiffs produced the testimony of Daniel Johnston himself, given in the case of Schmidt against him, a short time after the note and deed of trust were executed, wherein he swore that this \$1,800 was his wife's money, which she had saved "from housekeeping and such as that." And when his attention was called to the fact that in 1877 he was a borrower, and he was asked how that could be if

his wife had any money saved "from housekeeping and such as that," he replied that she would not let him have it because "she had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him." So that, so far as the direct testimony is concerned, it all rests upon what Daniel Johnston himself said about it. His first statement was made shortly after the transaction occurred, and was also made in the trial of a case wherein it was charged that the money was his, and not his wife's. His last testimony was made in the trial of this case. It may be said that both statements were in one sense statements in his own interest; but in another sense his first statement also contains some of the elements of a statement or admission against interest, and is therefore *prima facie* true. But if these statements offset each other, which is the utmost the defendant could possibly claim, then the case is left with only the statements of the defendant's witnesses, above set out, to the effect that, although intimate with Mrs. Johnston and her family affairs, they never knew or heard of her having any property or money, supporting the defendant's claim, while on the other hand are the physical facts in the case, which all support the plaintiff's contention.

Those physical facts are these: First. The itemized statement of account made by the defendant Johnston himself, upon which the settlement was made with Mrs. Ann Fury, and for the payment of which the deed of trust and note were executed, which distinctly recites the fact to be that the \$1,800 was "money advanced to Ann Fury by Mary Ann Johnston"; not money placed in Mrs. Johnston's custody by Daniel Johnston, to be by her turned over to her father, as he now claims, but "money advanced to Ann Fury by Mary Ann Johnston." This statement is signed and sealed by both Daniel Johnston and Mary Ann Johnston. It was made by him when his wife and her mother, Ann Fury, were alive, and knew whose money it was, and is of much more probative force than his self-serving statement, made upon the trial of this cause, after his wife and Ann Fury were dead, and therefore unable to contradict him or to tell their side of the transaction. Second. The next physical fact is that the note and deed of trust were made payable to Daniel Johnston and Mary Ann Johnston, his wife. The defendant tries to parry the effect of this fact by contending that he intended to create an estate or interest by the entirety, with the correlative right of survivorship, in the longest liver, and thus to make provision for his wife if he predeceased her, and, on the other hand, to preserve it all for himself if he survived her. If the \$1,800 was his money, it would have been most praiseworthy for him to make such a provision for his wife, and it would have been a legal and valid arrange-

ment. *Case v. Espenschied*, 69 S. W., loc. cit. 277. But the trouble is that the major premise of his syllogism is disputed, and is the very essential and vital point in this case, and no conclusion or deduction can properly or logically be drawn from such controverted premises; nor can the rule of law involved in the conclusion afford any evidence of the existence of the disputed premises. The effect of making the note and deed of trust payable to both, if the \$1,800 was the wife's money, will be discussed hereinafter; for if it was her money, and not his, the construction he puts upon this physical fact necessarily falls. Without such a construction, this physical fact, read in the light thrown upon it by the settlement and receipt aforesaid, tends strongly to support the plaintiff's contention that the \$1,800 was the wife's money, and also tends to indicate that, instead of each taking security for the amount each had advanced, they took the one note and deed of trust payable to the two for the aggregate amount of their advances, and without any idea of creating any right by the entirety, with its accompanying incident of survivorship. Third. The next physical fact is that, as long as his wife lived, which was for more than four years after the note and deed of trust were made, and was for about two years after the maturity thereof, he never foreclosed the deed of trust or set up any claim of a right by survivorship. If the deed of trust had been foreclosed during the life of his wife, there could be no possible right of survivorship. The portion of the money advanced by each would immediately have been payable to each, and the trustee would have been obliged to pay the share advanced by each to them separately. In other words, the fact that the note was made payable in two years is in itself persuasive evidence that the husband had no idea of making a provision for his wife if she survived him, and of retaining the fund by survivorship if he survived her. If the idea of making provision for his wife had been present in his mind at that time, he would most likely have had the note made payable to her alone, as was the fact in *Case v. Espenschied*, supra. And, when the fact that the note was made payable in two years is considered in connection with the last-mentioned consideration, it seems measurably certain that he expected that he and his wife would each get back, out of the security, the amount each had advanced, while they were both alive, and that by the foreclosure of the deed of trust, both being alive, all possibility of a right of survivorship would be cut off and cease.

It is not at all significant or important whether the wife saved this money out of "housekeeping and such as that," or whether the husband gave it to her in lump. No rights of his creditors are involved here, and therefore, as between them or their privies

in blood or estate, the gift by him to her made it as much her separate estate under the married woman's act of 1875 (*Laws 1875*, p. 61) as if she had received it as a gift from any stranger or had inherited it. *Bettes v. Magoon*, 85 Mo. 580; *Clark v. Clark*, 86 Mo., loc. cit. 123; *Thomas v. Thomas*, 107 Mo. 463, 18 S. W. 27; *Sanguinett v. Webster*, 127 Mo., loc. cit. 38, 29 S. W. 698. The physical facts, the record and statements of the husband and wife and of Ann Fury made when the settlement was had and the deed of trust and note were executed, and the conduct of the defendant since then, and especially in not foreclosing the deed of trust during his wife's life, even without taking into account at all the admissions of the defendant, point surely and convincingly to the conclusion that the \$1,800 was the wife's money, and not the defendant's.

2. The next question in this case is whether a right of survivorship exists in personal property. The defendant Johnston contends that the weight of authority is that such a right may be created and will be enforced, and in support of the contention he cites a great number of cases, of which *Allen v. Tate*, 58 Miss. 585, *Draper v. Jackson*, 16 Mass. 480, and *Abshire v. State*, 53 Ind. 64, are fair types. He also refers to *Schouler's Personal Property* (3d Ed.) § 150, and *Freeman on Co-Ten. & Par.* (2d Ed.) § 68. On the other hand, the plaintiffs claim that while, at common law, estates by the entirety existed, with the incident of survivorship, still, as between husband and wife, there could be no estate by the entirety in personal property, because the wife's personal property became the property of the husband immediately upon his reducing it to possession. The plaintiffs also claim that the cases cited and relied on by the defendant Johnston are not applicable to this case, because they were all cases where one party, either the husband or the wife, had advanced the whole consideration for the security or note which was made payable to both the husband and wife, and that as in cases of the purchase of land by the two, each furnishing their own funds for their part, and the title being taken in the names of both, so as to securities or notes, where each advanced a part of the consideration and the note was taken in their joint names, a tenancy in common, and not a joint tenancy or right by the entirety, will arise, and a court of equity will protect and decree the interest of each. In support of these contentions the plaintiffs cite many cases, among them *Wilcox v. Murtha* (Sup.) 58 N. Y. Supp., loc. cit. 784; *In re Albrecht* (N. Y.) 32 N. E. 632, 18 L. R. A., loc. cit. 331, 32 Am. St. Rep. 700; *Walt v. Bovee*, 35 Mich. 425. The defendant Johnston, however, calls attention to the note to the case of *In re Albrecht*, 18 L. R. A. 329, wherein it is said: "The above case does not seem to have any direct precedent, other than that cited in the opin-

lon." And in the opinion the court says no reported case has been found in that state where the same question was presented, but refers to *Wait v. Bovee*, 35 Mich. 425, as authority. Therefore the defendant Johnston questions the correctness of those cases, and claims they do not harmonize with the weight of authority.

The questions of law thus presented are not only interesting from a historical or philosophical point of view, but are most serious from a practical point of view, and a review of the law upon this subject is not only proper, but necessary. Speaking of joint tenants and the doctrine of survivorship, with respect to personal chattels as well as real estate, Chancellor Kent (Vol. 1, 14th Ed., p. 360 et seq.) says: "The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. The whole estate or interest held in joint tenancy, whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor, and vested in him absolutely. It passed to him free, and exempt from all charges made by the deceased co-tenant. The consequence of this doctrine is that a joint tenant cannot devise his interest in the land; for the devise does not take effect until after the death of the deviser, and the claim of the surviving tenant arises in the same instant with that of the devisee, and is preferred. If a joint tenant makes a will, and he then becomes solely seised by survivorship, the will does not operate upon the title so acquired without the solemnity of republication. The same instantaneous transit of the estate to the survivor bars all claim of dower on behalf of the widow of the deceased joint tenant. But the charges made by a joint tenant, * * * and judgments against him, will bind his * * * assignee, and him as survivor. The common law favored title by joint tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection. But in *Hawes v. Hawes*, 1 Ves. Sr. 13, Lord Hardwicke observed that the reason of that policy had ceased with the abolition of tenures; and he thought that even the courts of law were no longer inclined to favor them, and at any rate they were not so favored in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. In this country, the title by joint tenancy is

very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees. In New York, as early as 1786, estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes have reenacted the provision, and with the further declaration that every estate vested in executors or trustees as such shall be held in joint tenancy. The doctrine of survivorship incident to joint tenancy (excepting, I presume, estates held in trust) is abolished in the states of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Mississippi, Tennessee, North Carolina, and Alabama. In the states of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, Michigan, Illinois, and Delaware joint tenancy is placed under the same restrictions as in New York, and it cannot be created but by express words, and, when lawfully created, it is presumed that the common-law incidents belonging to that tenancy follow. The English law of joint tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi, and Maryland. The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate, so held by the husband and wife, affected by the statutes of partition. If an estate be conveyed expressly in joint tenancy to a husband and wife and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety. But, if the husband and wife had been seised of the lands as joint tenants before their marriage, they would continue joint tenants afterwards as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood that husband and wife may by express words be made tenants in common by a gift to them during coverture. Joint tenancy may be destroyed by destroying any of its constituent unities, except that of time."

Schouler's *Personal Property* (3d Ed.) p. 191, § 156 et seq., thus treats the subject: "As there can be no 'estate' in personal property, many of those technical distinctions which are made in the books between joint estates for life, in tail, or in fee have no ap-

plication to our present subject. But any interest which may be lawfully created in chattels, whether immediate or expectant, is itself susceptible of joint as well as sole ownership; and, as we take occasion to show the reader elsewhere, personal property may be limited in modern times to very much the same effect as lands, notwithstanding the natural and technical differences between them. Household furniture, merchandise, animals, and other movables of a corporeal character, may therefore be so vested in two or more persons as to constitute them joint owners thereof. There may likewise be joint owners of a promissory note, of a patent right, of a legacy of stock, of an insurance policy, of a bank deposit, and, in short, of any chattel, whether of a corporeal or incorporeal nature, whether in the nature of a chose in possession or of a chose in action, so long, indeed, as that chattel can be the subject of ownership at all, unless special reason to the contrary exists. Nor does the principle apply only to chattels personal; for chattels real, such as a lease for years, may be owned by two or more jointly. It is the fundamental principle of a joint tenancy that, while the parties constitute but one person, so to speak, as far as the rest of the world is concerned, with regard to themselves each is entitled to an equal share of the rents, income, and profits, so long as he lives; and, when one dies, the survivor takes the entire interest, to the complete exclusion of the heirs or personal representatives of the party deceased. This right of survivorship is the great clog upon property vested in joint owners, as distinguished from those who own in common; for it seems very unreasonable on the face of it that, while both are equally owners, the longest liver should have the whole. And the modern policy of the law, strengthened and enforced by numerous local statutes, is to regard property which has been given or sold, granted or devised, to two or more persons, without words indicating how it shall be held, as a tenancy or ownership in common, rather than a joint tenancy or ownership. And an exception, too, which has long been made in favor of trade or agriculture, is to regard the implements and stock used in any joint undertaking of this sort as exempted from the rule of survivorship, though here the modern principles to be applied are those peculiar to the law of partnership, which we shall examine hereafter. But it must be conceded that the policy of discouraging survivorship has been applied in practice more directly to lands than chattels; and this we have no doubt is mainly for the reason that a strict joint ownership (not a partnership) in chattels is seldom created, so as to occasion hardship or last any considerable length of time, except it be by will. The construction of wills involves chiefly the question of testamentary intent; and bequests and legacies, dependent upon the contingency of one or another's death, are by no means

unusual in various other connections. The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase. Subject to the exceptions made in favor of trade and agriculture, the rule has, it is true, been laid down that if personal property, whether of a corporeal or incorporeal character, be given to A. and B. simply, without the use of other words, they will be joint owners, having equal rights as between themselves during the joint ownership, and being with respect to third persons but a single individual in the legal sense. Whether, however, this would amount to a presumption in favor of survivorship, as against a quasi partnership in the property, the decided cases leave it rather difficult to determine; and the more so from the circumstance that the term 'joint ownership' is frequently used in an indefinite sense, so far as personal property is concerned, as it certainly ought not to be, consequently embracing both the technical joint ownership and the ownership in common. The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible; and in this country the incident of survivorship is destroyed by statute almost entirely, except in the case of legacies or devises, and where persons are appointed co-executors or co-trustees or co-guardians, or when one expressly creates the incident."

Dwight's Law of Persons and Personal Property, p. 458, after speaking of the general rule as to joint tenancy, says: "In creating a joint interest, it is a rule of construction that a grant of a chattel to two or more makes them joint tenants, rather than tenants in common. This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel. In this case, there is a tenancy in common."

Smith on Personal Property, p. 33, § 26, says: "The operation of survivorship in diverting the interest of a deceased owner from his next of kin, to whom it naturally belongs, is generally regarded as unreasonable and unjust, and hence is not favored by courts or legislatures. Numerous statutes have been passed, providing, in effect, that where property is given or sold, granted or devised, to two or more persons, without words expressly, or by necessary implication, creating a joint tenancy or ownership, it shall be held to constitute a tenancy or ownership in common, rather than a joint tenancy or ownership. And, in the absence of legislation on the subject, courts generally incline to a construction of instruments that will establish a tenancy or ownership in common, in preference to a joint tenancy or ownership." But the doctrine of survivorship is well adapted to executors, administrators, trustees, and others, acting in a fiduciary capacity, who

have the legal title, but no equitable interest in the property; and hence they are generally held and treated as joint owners.

Williams on Personal Property (4th Ed.) marg. p. 306, says: "Indeed, as a general rule, joint ownership is not favored in equity, on account of the right of survivorship which attaches to it. If, therefore, two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share advanced by him. And where the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured."

The author cites in support of the text the case of *Petty v. Styward*, 1 Rep. Ch. 57, 21 Eng. Rep., Full Reprint, p. 506. This is peculiarly applicable to the case at bar, for the facts are similar. The report of this case is as follows: "That the defendant Nicholas Styward and one Simeon Styward (whose executor the plaintiff is) lent £2,500 to Sir Thomas Glenham, £1,450 of the said money being the proper money of the said Simeon, and £550 residue was the defendant's money, and for security the said Sir Thomas Glenham mortgaged lands to the said Simeon afterwards, and the defendant Styward and their heirs, redeemable at a day prefixed upon payment of £2,630; that the said Simeon, before the day of redemption, made his will and disposed of the said £550, and there in recited that the £1,450 was delivered by him to the said defendant, his father, which appeared by a note under both their hands; and that, if the said lands should be redeemed by payment of the said £2,500, with interest, then the said £1,450, with its interest, should be delivered into the plaintiff's hands for the uses in the said will. The very day of redemption the said lands were redeemed, and the whole money and interest paid unto the defendant, which the said defendant claimeth by survivorship. This court is clearly of opinion that by equity in a case of this nature there ought to be no survivorship, in respect the same was but a mortgage, and the money was repaid at the day, and the note under both the said parties' hands, and the will of the said Simeon sheweth plainly a trust each in the other, and an intention that, if the money was repaid, either of them should have his money again, with interest, and decreed the defendant to pay to the plaintiff the £1,450 and interest so by him."

The rule thus laid down in Williams on Personal Property is quoted and adopted in Darlington on Personal Property, pp. 305, 306. See, also, Minor's Institutes, vol. 3, pt. 1, p. 31.

Thus it appears that at common law joint tenancies, with the incident of survivorship, obtained as to both real and personal prop-

erty, but that in a majority of the states of the Union joint tenancies have been abolished by statute absolutely, or the estate declared to be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy. The latter is the statute law in Missouri as to real estate (Rev. St. 1899, § 4600), except as to conveyances to executors, trustees, or husband and wife. Construing this statute, this court, per Black, J., in *Rodney v. Landau*, 104 Mo., loc. cit. 259, 15 S. W. 964, said: "The policy of the American law is opposed to survivorship, and that policy is clearly indicated in our statutes. While joint tenancies are not abolished in this state, still to create such a tenancy there must be an express declaration to that effect in the deed or will creating the estate."

It will be observed that under our statute executors and trustees and husband and wife are excepted from the requirement of the statute that the joint tenancy shall be expressly declared in the grant. The statute has been in this form since 1835, except as to husband and wife, and it was amended in 1865 so as to except husband and wife. *Russell v. Russell*, 122 Mo., loc. cit. 237, 26 S. W. 677, 43 Am. St. Rep. 581; *Lemmons v. Reynolds* (not yet officially reported) 71 S. W. 135. In *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, it was held "that the interest of a husband in land by the entirety could be sold under execution, but that his wife, surviving him, would take the entire estate." And in *Russell v. Russell*, 122 Mo., loc. cit. 237, 26 S. W. 677, 43 Am. St. Rep. 581, it was held that, "owing to this legal unity of husband and wife, it is said to be impossible, even by express words, to convey land to them, so as to make them tenants in common with each other." But it will be observed that the effect of the married woman's acts of 1875 (Laws 1875, p. 61), 1883 (Laws 1883, p. 113), and 1889 (Rev. St. 1889, § 6869) was not considered in that case, probably because the conveyance then undergoing adjudication was made before the passage of those acts. In *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342, the grant was made after the passage of the married woman's acts, and the court held that "the statute abolishes the legal unity between the husband and wife, which gave rise to estates by the entirety, but the estate itself has not been abolished." Perhaps a more accurate statement would be that since the passage of the married woman's act a husband and wife must be held to have the same right to hold a joint estate an estate by the entirety, with the incident of survivorship, that any other persons have, but that, under section 4600, Rev. St. 1899, a grant to the husband and wife need not be expressly declared to be a joint tenancy.

The sum of the matter, therefore, is that estates by the entirety may be created in Missouri, in personal as well as in real property, and between husband and wife as

well as between strangers, but that as to real property a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint tenancy, except as to grants or devises to executors, trustees, or husband and wife, which are excepted from the operation of the statute, and that as to personal property the common law has not been changed by statute except by the married woman's acts, which have placed a husband and wife on the same footing in this regard as any other persons; that is, the husband's common-law right to the wife's personal property and choses in action is taken away, except as to such as she had, and he had a vested right to reduce to possession, before the passage of the married woman's acts. *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788; *Id.*, 141 Mo. 574, 42 S. W. 1074.

3. The next question arising upon this record is whether an estate by the entirety existed in this case as to the note and deed of trust. The premises are that Mary Ann Johnston furnished \$1,800, and Daniel Johnston furnished \$2,206.08, and that they took the note of Ann Fury for \$4,006.08, secured by deed of trust, payable to Daniel Johnston and Mary Ann Johnston, and that both Daniel and Mary Ann signed the receipt for the note and deed of trust as a settlement of their respective claims. In *Scrutchfield v. Saunter*, 119 Mo. 615, 24 S. W. 137, *Seay v. Reese*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633, and *Hardware Co. v. Horn*, 146 Mo. 129, 47 S. W. 957, it was held that if the husband invested the money of his wife, acquired by her after the passage of the married woman's acts and in the manner specified in those acts, without the knowledge or written consent of the wife, in real estate, and took the title in their joint names, it did not create a joint tenancy or estate by the entirety, but that a court of equity would decree the wife a resulting trust in the land in the proportion that her money so invested bore to the total purchase price. This rule was followed in the case of *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, and the fact that after the unauthorized investment the wife learned of the fact and refused to join in a deed of severance of their respective interests was held immaterial. So that, notwithstanding the provisions of the statute (section 4600, Rev. St. 1899), this has now become a rule of law as well as of property in this state, so far as real estate is concerned.

The state of the law as to personal property is as follows: In *Shields v. Stillman*, 43 Mo. 82, it appeared that the wife owned separate real estate. She leased the land and took the rent notes payable to herself and her husband. She died, and the husband instituted a suit in his own name under the landlord and tenant act before a justice of the peace to recover the possession of the land,

and to recover the rent in arrear evidenced by two of the rent notes aforesaid. The defendant insisted that the husband was not entitled to possession of the land at all, because upon the death of Mrs. Shields intestate the land immediately descended to her daughter, including the rents reserved. The husband, however, claimed that, as the rent notes were made payable to him and his wife, the legal effect thereof was that they were payable to him alone, and that the rents were thus appropriated to his use by his wife's appointment. The court, however, held that the appointment was not to the husband alone, but to the husband and wife jointly, and hence the plaintiff's theory was untenable; but the court adopted a theory not suggested by either party, and held that the taking of the notes payable to the husband and wife made an estate by the entirety, and that upon the death of the wife the husband was entitled to the whole by right of survivorship, and accordingly held that the husband was entitled to a judgment for the notes, although he was not entitled to a judgment for the possession of the land. It must be observed, however, that this case arose before the passage of the married woman's acts, and that the wife furnished the whole consideration for the notes, and that the court did not put the decision upon the common-law right of the husband to reduce the wife's choses in action to possession, but treated it as if they were mere strangers to each other.

Counsel for defendant also cite many cases from other jurisdictions which hold that where either of the married couple, or where any one of two persons, furnishes the consideration for a note or mortgage or personal property, and makes the note or mortgage payable to both, or takes the title to the property in the names of both, an estate by the entirety will thereby be created in law. On the other hand, counsel for plaintiffs, while admitting that this is the rule of law if the whole consideration is furnished by only one of the two persons, denies that such is the law where each of the two persons furnishes a part of the consideration; and, in support of this contention, counsel cite *Wilcox v. Murtha* (Sup.) 58 N. Y. Supp., loc. cit. 784, *In re Albrecht* (N. Y.) 32 N. E. 632, 18 L. R. A., loc. cit. 331, 32 Am. St. Rep. 700, and *Walt v. Bovee*, 35 Mich. 425, where this distinction is made. It will be noted that *Petty v. Styward*, 21 Eng. Rep. Full Reprint, p. 506, lays down the same rule. *Schouler's Per. Prop.* p. 192, § 156, speaking of the right of survivorship, says: "The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase." And the same author (p. 193) says: "The modern rule in equity is certainly to defeat a joint tenancy

whenever it is possible." Dwight on the Law of Persons and Per. Pro. p. 458, says: "This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel." Williams on Per. Pro. (4th Ed.) marg. p. 306, says: "Indeed, as a general rule, joint membership is not favored in equity, on account of the right of survivorship which attaches to it. If, therefore, two or more persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share advanced by him." Darlington on Per. Prop. p. 305, adopts the rule thus stated by Williams.

Therefore, outside of this state, an exception to the general rule of the right of survivorship has grown up, in equity, where each of the two persons furnishes a part of the money with which the personal chattel is purchased, or which makes up the note or mortgage. In Missouri, since the passage of the married woman's acts, it has been uniformly held that, if a husband invests any of his wife's separate money acquired by her after said acts took effect and in the manner therein specified, together with money of his own, in real estate in their joint names, without her express written consent so to do, it will not create an estate by the entirety, but the wife will, by a court of equity, be decreed a resulting trust in the land to the extent represented by her money. In *Winn v. Riley*, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517, it was held that, if the husband takes his wife's money arising as aforesaid, and uses it in his business, his wife could treat him as her debtor or as her trustee, as she chose. In all of these later cases, except *Winn v. Riley*, the investment of the wife's separate money, with other money of the husband, was in real estate, while here it was in personal property. But this is an immaterial difference. For at common law there was no difference between the right of survivorship as to real property or as to personal chattels. And, as hereinbefore shown, section 4600, Rev. St. 1899, excepts grants to husband and wife, and leaves the rule as to them as it was at common law, so far as real estate is concerned, and the married woman's acts have abolished the common-law unity of the husband and wife, and placed married women, as to their separate personal, as well as their real, property, on the same footing toward their husbands, as any other persons occupy toward each other.

The result is that, not only in the other jurisdictions referred to, and according to the text writers quoted from, but also by the more recent decisions of this court, an estate by the entirety does not arise, nor does the right of survivorship exist, as to real estate, where the land is purchased by the husband without the wife's express written consent,

partly with her separate money and partly with the money of the husband, but the wife will be decreed a resulting trust in the land by a court of equity in the proportion that her money bears to the total purchase price of the land. There is no good reason why the same rule should not obtain where the wife's separate money is so invested in personal property. Under such circumstances it cannot be assumed or inferred that she intended to create a right of survivorship, for she did not act at all, but it was the unauthorized act of the husband; and, as he could not directly reduce her separate property to his possession or obtain title thereto without her express, written consent, so he could not indirectly do so by investing it in their joint names, and thus create a right by survivorship in himself. It will be noted that in all the cases cited the wife was ignorant of and took no part in the investment of her separate money with her husband's money, while in the case at bar the wife knew that the note and deed of trust representing their joint investment were made payable to her husband and herself, and consented to that arrangement, and signed the written settlement upon which the note and deed of trust were based and for the payment of which they were given. This case, therefore, is in this regard unlike any of the cases heretofore decided in this state, but falls within the exception to the general rules in reference to estates by the entirety heretofore quoted from the cases decided in other jurisdictions and from the text writers, to the effect that the right of survivorship does not obtain where each of the two persons contributes a part of the money invested, and that a court of equity will always decree to each his proportionate part of the investment. This exception, as herein pointed out and as stated by Schouler's Personal Property, rests upon the principle that it would be intolerable that the doctrine of survivorship should be applied where two persons bought and paid for goods and chattels together, and thus jointly acquired a title by purchase. The conclusion follows that under the circumstances of this case an estate by the entirety or a right by survivorship was not created, but that each was entitled to their proportionate share of the note and deed of trust. It also follows that, as the husband paid only \$85 in cash, and had the balance of the bid of \$5,000 credited upon the note, the money has been thus traced into the land, and that the heirs of the wife are entitled to the same interest in the land that they had in the note and mortgage; that is, the wife is entitled to a share equal to nine-twentieths thereof and the husband to the remainder.

4. Over the objection of the plaintiffs the husband was permitted to testify in his own behalf, and this is assigned as error. Section 4632, Rev. St. 1899, provides "that in all actions where one of the original parties to the contract or cause of action in issue and

on trial is dead or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him." The contract or cause of action in issue and on trial in this case was the note and deed of trust given by Ann Fury to Daniel Johnston and Mary Ann Johnston, and the rights of those two payees in the note and deed of trust, and in the land into which the money represented by the note and deed of trust had become merged by the act of Daniel Johnston. Mrs. Johnston was dead. Consequently, under the statute, Daniel Johnston was an incompetent witness. *Curd v. Brown*, 148 Mo., loc. cit. 95, 49 S. W. 990. The plaintiffs cross-examined him only as to matters covered by his examination in chief, and therefore they have not waived their right to insist on this objection. The record does not support the claim that the plaintiffs recalled him as their witness after he had finished testifying when called by the defendants. He was recalled to the witness stand after an adjournment of the court; but it appears that he was still on the stand undergoing cross-examination when the adjournment was had, and what took place afterwards was only a continuation of his unfinished examination.

5. Inasmuch as the plaintiffs waited from 1893, when the deed of trust was foreclosed, until 1900, when this suit was begun, and permitted the title to stand in the name of Daniel Johnston, their rights must be subordinated to the rights of the Lincoln Trust Company, that loaned the \$7,020 to him upon the faith of the whole property. But, as there must be an accounting in this case between the plaintiffs and Daniel Johnston, and as in that accounting all such questions must be settled, it is unnecessary to determine the rights of the plaintiffs and Johnston as to such matters of accounting at this stage of the proceedings.

6. The heirs, and not the administrator, are the proper parties to prosecute this action. This is a bill in equity to declare a resulting trust in land, and not an action to recover Mrs. Johnston's interest in personal chattels or for damages for a conversion of a chose in action, and therefore the heirs, and not the administrator, must sue.

For these reasons the judgment of the circuit court is reversed, and the cause remanded to be proceeded with in accordance herewith. All concur.

STATE ex rel. HOBART v. SMITH et al.,
Judges.

(Supreme Court of Missouri. March 4, 1903.)
SUPREME COURT—COURTS OF APPEALS—JURISDICTION—REVIEW OF DECISION ON CERTIORARI.

1. While, under Const. Amend. art. 6, § 8, the Supreme Court has a superintending con-

trol over the Courts of Appeals, and the power to issue writs of mandamus, quo warranto, and certiorari, and to hear and determine the same, certiorari brings up only the record, and jurisdictional defects apparent therein, and will not lie to review a judgment of the Court of Appeals on the merits.

2. Under Const. Amend. art. 6, § 8, defining the jurisdiction of the Courts of Appeals, and excluding the cognizance of constitutional questions therefrom, where an opinion of the Court of Appeals shows that in reaching its decision no constitutional questions were considered or involved, and it does not appear that the court in any way exceeded its jurisdiction, as defined in the Constitution, certiorari will not lie to review its decision.

3. Under Const. Amend. art. 6, § 6, providing that the Court of Appeals must certify a cause to the Supreme Court when any one of the judges deems its opinion contrary to a previous decision of the Courts of Appeals or Supreme Court, and that the last previous ruling of the Supreme Court shall be controlling authority on the Courts of Appeals, the fact that the Court of Appeals has not followed the rulings of the Supreme Court or of the Courts of Appeals will not entitle the aggrieved party to have its opinion reviewed on certiorari in the Supreme Court when no judge of the Court of Appeals deems the opinion contrary to such ruling or decision.

In Banc. Certiorari by the state, on relation of Byron F. Hobart, against Jackson L. Smith and others, Judges of the Kansas City Court of Appeals. On motion to quash. Motion granted.

On the 23d day of June, 1902, relator sued out before one of the members of this court a writ of certiorari, directed to respondents, Judges of the Kansas City Court of Appeals, returnable on the 14th day of October, 1902, alleging in the petition for said writ that the judgment of that court in affirmance of the court below, rendered June 2, 1902, was against numerous decisions rendered by the St. Louis Court of Appeals and by the Supreme Court; that the construction put upon section 2786, art. 6, c. 42, Rev. St. 1899, relating to the effect of the consolidation of business corporations, was contrary to the federal and state Constitutions, guarantying due process of law, and prohibiting the states from impairing the obligations of contracts, and that said court had proceeded irregularly and had exceeded its jurisdiction in a certain matter pending before them, wherein the Springfield Lighting Company was respondent and plaintiff, and Byron F. Hobart was appellant and defendant—commanding respondents that they cause to be certified officially to the Supreme Court all of the pleadings in said cause, with all their acts and proceedings in connection therewith, and in the meantime they proceed no further therein. The writ was duly served upon respondents on the 24th day of June, 1902. Thereafter, on January 27, 1903, respondents filed their motion to quash the writ and dismiss the cause upon the following grounds:

"(1) Because the writ was improvidently issued.

"(2) Because, upon the petition and return in this case, it fully appears that the Kansas

City Court of Appeals had full jurisdiction, under the Constitution and laws of this state, to adjudicate upon the matters involved in said case of *The Lighting Company v. Byron F. Hobart*, and acted throughout within its jurisdiction, and that there is no ground whatever upon which to base this proceeding.

"(3) Because the judgment and opinion of the Kansas City Court of Appeals was rendered and concurred in by all the members of said court; that no one of said judges certified or claimed that such decision was contrary to any opinion of either of the Courts of Appeals in this state or of this court; that there was no constitutional question raised or preserved in the trial court, and hence the judgment and opinion of the Kansas City Court of Appeals in that case is not reviewable by this court for any mere alleged errors of law committed by it.

"(4) Because the record in this case shows that the Kansas City Court of Appeals proceeded regularly within its jurisdiction in said cause, and that its action is not reviewable upon its merits or upon the law by this court; that review of the action of the Kansas City Court of Appeals in this proceeding, which, in effect, would constitute an appeal to this court, cannot be had through certiorari in cases like this, where the laws of the state expressly deny an appeal, and make the decision of the Kansas City Court of Appeals final."

The petition for the writ sets out the entire record in the original case, as well, also, as the opinion filed in the case by the Court of Appeals; but, for the purposes of a determination of this proceeding, it is only necessary to set out that opinion, as it contains a full and fair statement of the facts in the original case, and the reasons for the conclusions reached. It is as follows:

"It appears from the allegations of the plaintiff's petition that the Springfield Electric Lighting Company, the Springfield Gaslight Company, and the Metropolitan Electric Railway Company were each corporations created and organized under the provisions of article 8, c. 42, Rev. St. 1889, and that the first two of them were on the 30th of June, 1893, under the authority conferred by section 2786 of said article, consolidated and united under the name of the Springfield Lighting Company, the plaintiff. It further appears that some time prior to the said consolidation the said Metropolitan Electric Railway Company entered into a written contract with the said Springfield Electric Light Company whereby the former agreed and bound itself to furnish and supply the latter power to operate its lighting apparatus, as therein specified, for a period of ten years. It still further appears that at the time of the entering into said contract the said Metropolitan Electric Street Railway Company and Hobart, the defendant, entered into a certain bond, by which they bound themselves to pay the said Springfield Electric Light

Company the sum of three thousand dollars, conditioned that if said Metropolitan Electric Railway Company should do and perform, on its part, all the conditions required of it by the terms of said contract, fully and completely, then the said bond was to be void; otherwise to remain in full force. It is also further disclosed by the allegations of the petition that, at the time the said contract was entered into, the Springfield Electric Lighting Company was engaged in furnishing light both to the city and to individuals therein, and that after the creation of the consolidated company, the plaintiff, 'holding and enjoying all the rights, privileges, power, franchises, and property belonging to each of the incorporations out of which it was formed,' continued to furnish light to the said city and individuals therein, as the said Springfield Electric Light Company had done, and that the said Metropolitan Electric Railway Company supplied it with power, and otherwise complied with the requirements of said contract as it had done before the consolidation, until a certain named date, when it refused further compliance, etc. The defendant interposed a demurrer to the petition on the ground that it shows upon its face that the alleged bond upon which defendant was security was given to the Springfield Electric Lighting Company as obligee, while the plaintiff in this case is a separate and different legal entity. The court overruled the demurrer, and the defendant having elected to stand thereon, and declining to plead further, judgment was given for the plaintiff.

"The defendant, by his appeal, has brought before us for review the action of the trial court in overruling his demurrer to the petition. In support of the ground of such demurrer the defendant contends (1) that the defendant, as surety, bound himself to 'indemnify the Springfield Electric Lighting Company for the failure of the Metropolitan Electric Railway Company to supply electric power to that company, but did not bind himself to indemnify the plaintiff, another and different legal entity; and (2) that by reason of the amalgamation of the Springfield Electric Light Company with the Springfield Gaslight Company, and by which another company was formed, it was made impossible for the Springfield Electric Railway Company to furnish electric power to the Springfield Electric Lighting Company. If these contentions can be sustained, it is quite manifest that the demurrer should have been sustained, and whether or not they should be is to be determined by the construction placed upon the contract of suretyship.

"It appears that the rule prevailing in respect to ordinary contracts of suretyship is that the surety is the favorite of the laws, and has the right to stand upon the strict terms of his obligation. *Brandt on Suretyship*, § 97; *Bayless on Sureties*, 144, 145, 280. He cannot be carried beyond his contract. The contract made by the parties

must be judged of, and not another substituted in its stead. It cannot be varied without his consent, and a surety for a definite engagement shall not be extended to an indefinite one. *Ludlow v. Simond*, 2 Caines Cas. 1. It was declared by the Supreme Court of the United States in *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189, that 'nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he sustain no injury by a change in the contract, or that it even may be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and that variation is made, it is fatal.' In *State v. Medary*, 17 Ohio, 565, it is said that 'the bond speaks for itself, and the law is that it shall so speak, and that the liability of the surety is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and, if the words will not make them liable, nothing can. There is no construction—no equities against sureties. If a bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way in order that it may prevail.' The two last above excerpts were quoted with approval in *Nofsinger v. Hartnett*, 84 Mo. 549. And the case from which the former (*Miller v. Stewart*) is quoted has been referred to approvingly in *Lionberger v. Krieger*, 88 Mo. 160, and in *Blair v. Ins. Co.*, 10 Mo. 560, 47 Am. Dec. 129. The rule of strictissimi juris, as applicable to the interpretation of the contracts of sureties, was first announced in this state in the opinion of Judge Scott in *Blair v. Ins. Co.*, supra, and all the subsequent cases (cited in defendant's brief) have uniformly and unvaryingly followed it, so that it (the rule) may be said to have become firmly established in the jurisprudence of this state. And while the contract of a surety is to be construed strictissimi juris, which means that it cannot be altered without his consent, and that he is only bound to the extent that he thereby agreed to be so bound, yet, aside from this, it must be construed like any other contract; *id est*, according to the intention of the parties. *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Harburg v. Kumpf*, 151 Mo. 16, 52 S. W. 19.

"2. Up to the time of the consolidation there was a complete performance of the contract on the part of the Metropolitan Electric Railway Company. The noncompliance or default complained of took place after such consolidation, so that the question arising, and decisive of the case, is whether or not the defendant, under his contract of suretyship, is bound to indemnify the consolidated corporation (the plaintiff) against any

damage or loss sustained by it in consequence of the failure of the Metropolitan Electric Railway Company to furnish to it the electric power which it (the said Metropolitan Electric Railway Company) had agreed to furnish under its contract with the Springfield Electric Lighting Company. A corporation of the class to which the Springfield Electric Lighting Company belonged may, under the statute (section 971, Rev. St. 1899) change its name without in 'any wise affecting its rights, privileges, or liabilities,' but we have no such case here. But on the contrary the plaintiff is a legal entity created by the consolidation, under the statute (section 2786, Rev. St. 1889; section 1334, Rev. St. 1899), of two corporations whose business was of the same general nature. The plaintiff was the issue of this union, and cannot be said to be either the one or the other of them, any more than a child can be said to be either its father or mother. And the section of the statute last cited declares that the result of such consolidation shall be to create 'one consolidated corporation holding, enjoying all the rights, privileges, power, franchises, and property belonging to each.' The effect of the agreement of consolidation under the statute (section 1334) is, as we think, to transfer all the 'rights, privileges, and property' of each of the consolidating corporations to the new corporation. Included in this transfer was the contract between the electric railway and the electric light company, which carried with it, as an incident, the undertaking of the surety, the defendant, even though said undertaking was not in express terms transferred with the said principal obligation. The manifest purpose of the statute in such cases is to give the consolidated corporation the benefit of all the rights of every kind, including such as that here, and a right of action thereon. And this construction of the statute finds support in adjudications somewhat similar to this. *Cady v. Sheldon*, 38 Barb. 104; *Clafin v. Ostrom*, 54 N. Y. 581; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Waldron v. Harring*, 28 Mich. 493; *Bank v. Carpenter*, 41 Iowa, 518; Rev. St. 1899, § 540, and cases cited in note "b." In an English case—*Railway v. Cochrane*, 9 Exch. 197—where a surety executed a bond conditioned for the faithful service of a clerk of a railway company, and during the continuance of the service that company and another company were consolidated under a statute which provided that all bonds, etc., entered into in favor of the old companies, should be effectual in favor of the new, it was held that the surety was liable to the latter for the default of the clerk after the consolidation, since the undertaking of the surety was in no way enlarged by such consolidation.

"It has been held in this state that, where a consolidation of two or more railway companies had taken place under statutes somewhat analogous to that here, the effect of

such consolidation was to dissolve the corporations so consolidated, and to create a new corporation. *State v. Lesueur*, 145 Mo. 322, 46 S. W. 1075; *State v. Railway*, 99 Mo. 41, 12 S. W. 290, 6 L. R. A. 222; *Evans v. Railway*, 106 Mo. 594, 17 S. W. 489. Ordinarily the effect of the consolidation of two or more corporations into one would be to dissolve all of them and create a new corporation, unless there be something in the statute authorizing the consolidation providing that it shall have a different effect. In *Kinion v. Railway*, 39 Mo. App. 382, it was said that 'by the contract of consolidation all property belonging to the old companies, including their corporate privileges and franchises, transferred to the consolidated company, and there is nothing left to sustain the corporate life of the original corporations.'

* * * The old companies by their voluntary act completely merge their separate corporate existence, and, strictly speaking, a new entity is thereby formed. * * * Literally speaking, it is a new corporation, but substantially it is but the continuation of the old companies under the new name. *Evans' Adm'r v. Bank*, 79 Mo. 182. * * * Technically speaking, however, and for general purposes, it may be conceded that the consolidated company is a new corporation; but, touching the business of the old companies and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and that, to that extent, it ought to be regarded as a new corporation.' And a similar statement of the law is to be found in *State v. Garrouette*, 67 Mo. 445, and in section 956 of *Morawetz on Private Corporations*. In *Kinion v. Railway*, 39 Mo. App. 574, it was said: 'An examination of the decisions will, we think, show that in a judicial sense, and so far as regards any right of action that existed against either of the corporations prior to their being united, the effect of the consolidation is not more than a change of name. * * * The new corporation succeeds to the proprietary rights of the old without any new conveyances.' *Thompson v. Abbott*, 61 Mo. 176; *State v. Green County*, 54 Mo. 540; *Berry v. Railway*, 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371. In 1 *Thompson on Corporations*, § 365, it is stated to be the general rule that the new company succeeds to the rights, duties, obligations, and liabilities of the constituent companies, whether arising ex contractu or ex delicto. And so it has been held that such company succeeds to whatever rights each of the old companies possessed in respect to municipal aid, and that, where such aid had been voted to either of the constituent companies before the consolidation, it was entitled to the bonds. *Smith v. Clark County*, 54 Mo. 58; *State v. Greene County*, 54 Mo. 540; *Railway v. Marion County*, 36 Mo. 294; *Henry County v. Nicolay*, 95 U. S. 619, 24

L. Ed. 394; *Callaway Co. v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Scotland Co. v. Thomas*, 94 U. S. 682, 24 L. Ed. 219. And it has been held further that the new company is the heir to the obligations of the old, and, if the former refuse to carry out the obligations of the latter, the obligee can maintain an action against it for resulting damages. *Ins. Co. v. Railway*, 149 Mass. 214, 21 N. E. 364; 1 *Thompson on Private Corp.* § 382. No reason is seen why a consolidated business corporation, created under said section 1334, Rev. St. 1899 (section 2786, Rev. St. 1889), will not 'hold and enjoy all the rights, privileges, franchises, and property,' and be subject to all the liabilities, to the same extent as a railway company which is the result of the amalgamation of two or more companies, under section 2567, Rev. St. 1889, nor why what has been said by us in relation to the status of the latter will not apply as well to the former.

"From an examination of the numerous authorities to which we have been cited by counsel, we can reach no other conclusion than that, where two or more business companies are consolidated under section 1334, the constituent corporations become dissolved or extinguished, and that the amalgamated corporation is a new corporation, but that touching the business of the old corporations, and as to their respective debtors and creditors, the consolidated company is to be regarded as the continuation of the old companies under a new name, and that, as to the defendant, it is to be regarded as if it had been named as obligee in the bond in the first instance. The bond here must be understood and read in the light of the existing law. To consolidate is one of the statutory powers of business corporations, and parties contracting with them are presumed to know that such is the law of their creation. *Lionberger v. Krieger*, 88 Mo. 160; *Hanna v. Railway*, 20 Ind. 30. If the statute relating to the consolidation of business corporations were read into the contract of suretyship under consideration, as we think it should be (*Caston Stafford, Receiver*, etc. [decided by us at last term] 92 Mo. App. 182), then there is left to the defendant little or no ground for complaint. He could not then be heard to claim that the consolidation was not contemplated by the parties or provided for in the contract. When we view the contract of suretyship in its entirety (that is to say, with the provision of section 1334, Rev. St., read into it), we experience no difficulty in reaching the conclusion that the obligation of the defendant extended to the plaintiff, and covered the default of the Springfield Electric Railway Company occurring after the consolidation. By such contract it was, as we think, understood that the obligee therein was accorded the right and privilege to do the things authorized by that part of such contract as was supplied by the statute, or, in other words, the obligor by the con-

tract, in effect, said to the obligee, 'If you, in the course of your business, deem it for your interest to consolidate with another company and continue in business under a new name, you hereby have my consent to do so.' The consolidation and merger of the obligee may therefore be said to have been done with the consent and by the authority of the defendant. It results that if there was an alteration in the contract as to the name of the obligee, brought about in that way, it was made with the consent of the obligor therein given.

"It seems that after the consolidation took place the Springfield Electric Railway Company continued to furnish electric power to the new company as it had to the old. It not only supplied power, but made out bills, and collected the compensation allowed by the contract of the new company just as it had of the old. These acts of the parties afford a basis on which to rest the construction of the contract as made by us. Wharton on Contracts, § 653. *Crane v. Specht*, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562, was not where the change in the name of the obligee was brought about by a consolidation of two corporations. The change was doubtless accomplished under a statute like our section 971, Rev. St. It was held that the change in the name of the obligee corporation deprived it of the right to recover on the contract of guaranty given it by the defendant in its former name. Whether or not that case was rightly decided, we need not stop to consider, since it does not appear that there were any such statutory provisions applicable to it as those which have largely influenced our decision in this. The case most nearly like that before us is that of *Railway v. Harkins*, 149 Pa. 121, 24 Atl. 175. It was where one railway company, which had leased another, took a bond, with sureties, from one of its employes, and subsequently the two companies were consolidated under the statute, and, under a new name, the same business was continued. It was held that the sureties were liable for the employe's defalcation after the consolidation.

"After a full examination of the points and authorities urged upon our attention by the defendant, we have not been persuaded that the objections suggested in his demurrer to the plaintiff's petition were well taken, and it therefore follows that the judgment must be affirmed."

Thos. A. Sherwood and Adiel Sherwood, for relator. Jas. R. Vaughan, for respondents.

BURGESS, J. (after stating the facts). The first question with which we are confronted is as to whether or not certiorari can be resorted to for the purpose of having this court quash the judgment of the Court of Appeals, and remit the record to the circuit court, with instructions to sustain the

demurrer to the petition. While by the Constitution (sections 3 and 8 of article 6) the Supreme Court has a superintending control of the Courts of Appeals, and the power to issue writs of mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same, as a general rule certiorari only lies where a writ of error or an appeal will not lie, but does not lie as a matter of course in all cases where an appeal or writ of error will not lie. In this case neither a writ of error nor an appeal would lie, so that the judgment of the Court of Appeals is conclusive upon the relator unless the action of that court can be reviewed by this proceeding, and, if erroneous, corrected. Certiorari "only brings up the record, and can only reach errors or defects which appear on the face of the record of the tribunal to which it is issued, and which are jurisdictional in their nature" (State ex rel. Teasdale v. Smith, 101 Mo. 174, 14 S. W. 108; *Railroad v. State Board*, 64 Mo. 204; State ex rel. Mo. Pac. Ry. Co. v. Edwards, 104 Mo. 125, 16 S. W. 117; State ex rel. v. Dobson, 135 Mo. 1, 36 S. W. 238), and no error or defect appears from the record in this case. That the Court of Appeals had the sole and exclusive jurisdiction to hear and determine the appeal in the case in question, there can be no doubt. No other court had jurisdiction of that appeal, and when that court became vested with jurisdiction of the appeal it unquestionably had the right to render such judgment as in its opinion should have been given by the trial court (State ex rel. v. St. Louis Court of Appeals, 99 Mo. 218, 12 S. W. 661), even though erroneous; and its ruling, unless in excess of its jurisdiction, cannot be reviewed by certiorari. The only conditions upon which causes pending in the Courts of Appeal, of which they have jurisdiction, can be certified to the Supreme Court, are those provided for by section 6, art. 6, of the Amendments to the Constitution, entitled "Courts of Appeals," which reads as follows: "When any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term and not afterwards, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said Courts of Appeals." It is obvious that the case does not fall within either of those conditions. But the contention of the relator is:

"(1) That the decision of the court makes a contract for the appellant, which the appellant never made, and after making by construction a new contract for the appellant, which he never made and never intended to make, the court by its opinion and decision enforces that contract against the appellant, and thereby denies him due process of law and equal protection of the laws; violating section 30, art. 2, of the Constitution of Missouri, and the fourteenth amendment of the Constitution of the United States.

"(2) That the decision is in direct conflict with numerous decisions of this court and of the Courts of Appeals [citing them].

"(3) Because this court, in rendering its opinion and deciding this case, has not complied with the requirements of the Missouri Constitution, which vests jurisdiction, in this: This court, in deciding this case and writing its opinion, and entering its judgment herein, has not followed the last controlling decision of the Supreme Court of Missouri, and this court has, in deciding this case, made a decision contrary to the decision upon similar facts and similar questions of law decided to the contrary by the St. Louis Court of Appeals, and for both of these reasons this case should be transferred to the Supreme Court for final determination.

"(4) For the reason that this court holds that the provision of section 2786 of the Revised Statutes of 1889, which declares that the new corporation should have 'all the rights, privileges, powers, franchises, and properties belonging to each,' transfers to the consolidated corporation the right of one of the corporations to require a surety upon a bond running in favor of that corporation to respond to the consolidated corporation, when at the time of the consolidation of the two corporations there was no default upon the contract which the surety's obligation was given to secure; and thereby, without any authority, we submit, to justify such action, this court has made a contract for the surety which the surety never made, never intended to make, and has made the surety liable to a corporation which was not in existence at the time the surety signed his obligation, and compelled the surety to respond to a person to whom he never agreed to become liable and with whom he never made any contract, and therefore the court denies to the surety (the appellant in this case) due process of law and the equal protection of the law, and thereby deprives him of his property, contrary to the Constitutions of the United States and the state of Missouri, and particularly contrary to section 30 of article 2 of the Missouri Constitution and the fourteenth amendment of the Constitution of the United States, and thereby impairs the obligation of the contract between the surety (the appellant in this case) and the Springfield Electric Lighting Company, the corporation to which the surety agreed to become liable in the event, that the Metropolitan

Electric Street Railway Company did not perform the contract which the surety's obligation was given to secure, and contrary to the provision of the Constitution of the United States, which prohibits the impairment by any state, or instrumentality of the state, of the obligation of contracts. In short, this court, by its decision in this case, has made a contract for the surety, and is proceeding to enforce that contract; i. e., to say a contract which the surety never made, and never intended to make, and a contract not executed within the terms of section 2786 of the Revised Statutes of 1889, which clearly and plainly excludes any intention or purpose of the Legislature of this state to include among the rights which pass to the consolidated company the obligation of the surety and one of the companies which united to form the consolidated company, even if, under the Constitutions of the United States and state of Missouri, such a contract made by legislation would or could be upheld.

"(5) Because this court cites as an authority the case of *Railroad v. Cochrane*, 9 Wels., Hurl. & Gor. 197, and an English case, which was determined solely upon the provision of an act of Parliament which expressly provided that sureties and guarantors of any one of the companies which were authorized to be consolidated should be liable to the consolidated corporation authorized by said act with the same force and effect as if such obligation had been made directly to the consolidated corporation, when it is manifest that no act of any legislature in the United States would be constitutional which made any such provision, for the plain reason that such an act would impair the obligation of the surety's contract, and would be making a contract for him, which he never made and never intended to make.

"(6) Because this court holds that the surety, the appellant herein, was presumed to know of the statute which permitted the consolidation of business corporations, and for that reason must be conclusively presumed to have consented at the outset to the consolidation which was afterwards made, and, in addition, is conclusively presumed to have consented to the consolidation which produced the Springfield Lighting Company, the plaintiff in this case, and must be conclusively presumed to have consented to become liable to the new company by a default which occurred long after the consolidation. Manifestly, no such construction of the liability of the surety or such statute can be sound, as a matter of law. Using the same chain of reasoning, if an obligation in favor of A. B., an individual, should be sued upon by a partnership which was afterwards formed by A. B., simply because the surety must be conclusively presumed to know the law, and to know that A. B., the obligee named in this obligation, could enter into a partnership agreement with C. D. under the name of D. C. & Co., and thereafter could enforce the

obligation running in favor of A. B. in a suit brought by A. B. and C. D. in the name of the partnership.

"(6) Because the court holds that the mere fact that power was furnished by the Metropolitan Electric Railway Company to the plant in this case after the consolidation is a construction of the contract made by the surety, when, as a matter of fact and as a matter of law, the surety had nothing whatever to do with the acts of the Metropolitan Electric Railway Company, the plaintiff in this case, after the consolidation of the Springfield Electric Lighting Company and the Springfield Gaslight Company, whose consolidation brought about the new corporation, the plaintiff in this case.

"(7) The damages were assessed without a jury or its waiver, and the record so shows."

It is obvious from the opinion that no constitutional question was raised or passed upon by that court. But it is argued that the court, in its decision, makes a contract for the appellant which he never made and never intended to make, then enforces it against him, and thereby denies him due process of law and equal protection of the laws, violating section 30, art. 2, of the Constitution of Missouri, and the fourteenth amendment of the Constitution of the United States. It is manifest, however, that this is a misinterpretation of the opinion, and that it does nothing of the sort, but only construes the contract described in the petition, and holds that the bond sued upon, which was executed by the Metropolitan Electric Street Railway Company, with Hobart as surety, to the Springfield Electric Light Company, passed, under the provisions of section 1334, Rev. St. 1899, to the Springfield Lighting Company, upon the consolidation of the Springfield Electric Lighting Company and the Springfield Gaslight Company under the name of the Springfield Lighting Company on the 30th day of June, 1893. It is true, the court said *arguendo* in the course of the opinion: "If the statute relating to the consolidation of business corporations were read into the contract of suretyship under consideration, as we think it should be (Caston-Stafford, Receiver, etc. [decided by us at last term] 92 Mo. App. 182), then there is left to the defendant little or no ground for complaint. He could not then be heard to claim that the consolidation was not contemplated by the parties or provided for in the contract. When we view the contract of suretyship in its entirety (that is to say, with the provision of section 1334, Rev. St., read into it), we experience no difficulty in reaching the conclusion that the obligation of the defendant extended to the plaintiff, and covered the default of the Springfield Electric Railway Company occurring after the consolidation. By such contract it was, as we think, understood that the obligee therein was accorded the

right and privilege to do the things authorized by that part of such contract as was supplied by the statute, or, in other words, the obligor by the contract, in effect, said to the obligee, 'If you, in the course of your business, deem it for your interest to consolidate with another company, and continue in business under a new name, you hereby have my consent to do so.' The consolidation and merger of the obligee may therefore be said to have been done with the consent and by the authority of the defendant. It results that if there was an alteration in the contract as to the name of the obligee, brought about in that way, it was made with the consent of the obligor therein given." This was not, however, making a new contract for relator, nor constructing into the one executed by him a new or additional condition or obligation, but simply an interpretation of the contract in connection with the statute which was in force at the time the contract was entered into, and became a part and parcel thereof as much so as if it had been incorporated therein. *Havens v. Fire Insurance Co.*, 123 Mo. 408, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570; *Daggs v. Fire Ins. Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 883, 22 Am. St. Rep. 789; *Christian v. Insurance Co.*, 143 Mo. 460, 45 S. W. 268; *State ex rel. v. Keokuk & W. R. Co.*, 153 Mo. 157, 54 S. W. 559. Nor is there anything said in the opinion which by any fair interpretation can be construed as denying defendant due process of law or equal protection of the law, or that infringes upon rights guaranteed to him by the Constitutions of Missouri or of the United States, or that the court proceeded without or in excess of its jurisdiction. Relator relies upon the case of *State ex rel. v. Smith*, 152 Mo. 444, 54 S. W. 218, as sustaining his contention; but that case only holds that as a constitutional question was necessarily before the Court of Appeals for its interpretation, and through that interpretation the conclusion could only have been reached, the appeal was to the Supreme Court, and, as that court refused to certify the case to the Supreme Court upon proper application, this court would by mandamus compel it to do so. But as we have said, no such question is presented by the decision of the Court of Appeals under consideration, and therefore that case is not in point.

Nor will the fact, even if true, that the decision is in conflict with decisions of the Supreme Court, and the Courts of Appeals, or has not followed the controlling decision of the Supreme Court, or that it committed error in any other respect, in the absence of the want of or in excess of its jurisdiction, avail relator in this proceeding.

It is not for us to say, nor do we say, whether or not the Court of Appeals was

correct in its conclusions; but, whether right or wrong, the case is not before us for review. If those courts can be compelled, by writ of certiorari or otherwise, to send to this court the records in cases in which they have delivered opinions for review upon grounds such as are shown to exist in this proceeding, it is difficult to conceive of a case in which they could not be required to do so, and thus disregard the spirit and intention of section 6, art. 6, of the Constitution, *supra*, and the laws organizing these courts, by which they are made the final arbiters in all cases that come before them, of which they have jurisdiction, except as otherwise provided, by said section 6, art. 6, of the Constitution.

Our conclusion is that the writ was improvidently granted, and that the motion to quash should be sustained. It is so ordered. All concur.

HEMAN v. LARKIN et al.*

(Court of Appeals at St. Louis, Mo. March 8, 1903.)

JUSTICE OF THE PEACE—COMMENCEMENT OF SUIT—SUMMONS—DOCKET—EVIDENCE.

1. Rev. St. 1899, § 3850, provides that suits before a justice of the peace shall be deemed commenced upon delivery of the writ to the constable. Section 568 provides that the filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be deemed the commencement of a suit. *Held*, that in respect to suits in justices' courts section 3850 controls, so that they cannot be deemed commenced until the writ is delivered to the constable.

2. Rev. St. 1899, § 3844, prescribes what entries a justice of the peace shall enter in his docket, but does not require him to enter when a summons is delivered to the constable. *Held*, that it is not competent to show by an entry in a justice docket the time when a summons was delivered to an officer.

3. When a constable has neglected to indorse on a writ the date it was delivered to him by a justice, and none of the officers through whose hands it has passed could state this from memory, it was competent to show the custom prevailing in the justice's office with reference to the issuance and delivery of writs, for the purpose of establishing that a writ was delivered before a named date.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Harry F. Heman against Mary C. Larkin and others. From a judgment for plaintiff before a justice, defendants appealed to the circuit court. Judgment therein for defendants, and plaintiff appeals. Reversed.

Hickman P. Rodgers, for appellant. Geo. W. Lubke, Jr., for respondents.

BLAND, P. J. This is an action to enforce a special tax bill which is dated December 8, 1897, for improvements in the city of St. Louis. The tax bill runs in favor

of the plaintiff, a contractor, who (according to the recital in the tax bill) did certain work necessary for repairing a sidewalk in one of the city streets. The tax was assessed in the usual way against the adjacent property to pay for said work. This suit was brought against the owners and lessee of the land charged with the alleged lien of the tax bill. The latter is founded on provisions of the charter of the city of St. Louis governing the doing of such work. One of these provisions is as follows: "Any bill that is not entered 'satisfied' within two years after its date, unless proceedings in law shall have been commenced to collect the same within that time, and shall be still pending, the lien shall be destroyed and of no effect against the land charged therewith." Charter of St. Louis, 1876, art. 6, § 26; Rev. St. 1899, p. 2514, § 26.

The defense in the case at bar is that the suit was begun too late to comply with the terms of the law just quoted. Defendants claimed, and the trial court adjudged, that the lien of the tax bill had expired before the proceedings in this cause had "been commenced."

Plaintiff had special judgment before the justice. An appeal was taken therefrom to the circuit court, where a trial anew was had. The tax bill was offered and read in evidence. It was sufficient to charge the property in question with the lien, unless the latter had expired by reason of delay in commencing the suit.

Evidence was submitted by plaintiff tending to show that his statement of claim was filed December 5, 1899, before Justice Spalding, in one of the judicial districts of the city of St. Louis, and that summons to defendants was issued thereon upon the same day. The language of the justice's docket entry as it appears in the transcript is as follows: "Summons writ issued to Constable Ben F. Brady, the 5th day of December, 1899, returnable the 20th day of December, 1899, at 7 o'clock, a. m." On the back of the summons is a printed blank, intended, when completed, to show the time when the writ was received by the constable. In this instance the receipt remains a mere skeleton, with blanks unfilled. The first writ was returned unexecuted by the constable. Later writs were served as to some defendants, and appearances entered as to the rest. The result of this appeal, however, turns on the true date of issue of the first process mentioned. The later writs were beyond the period of limitation.

Defendants insist that the first writ did not reach the constable within the two years of the life of the lien defined by the charter provision already quoted. At the close of the trial the court gave a peremptory instruction denying plaintiff any recovery. Judgment followed accordingly, and this appeal was taken from it after the necessary moves to that end in the circuit court.

*Former opinion, 70 S. W. 907, withdrawn.

1. The leading question is, was the suit brought within two years from the date of the bill, the term which the charter marks for the duration of the lien? The organic law applicable to St. Louis differs in phraseology from that of Kansas City on this point, and fixes the commencement of the period of limitation rather more definitely than does the law of our sister city. *Folks v. Yost*, 54 Mo. App. 55. Here the tax bill is dated December 8, 1897. The suit was filed December 5, 1899. But when was the suit "commenced" within the meaning of the law? One section of our statutes bearing on this question is as follows (Rev. St. 1899, § 3850): "Suits may be instituted before a justice of the peace, either by the voluntary appearance and agreement of the parties or by process; and the process for the institution of a suit before a justice shall be either a summons or an attachment against the property of the defendant; if by agreement, the action is deemed commenced at the time of docketing the case; if by process, upon delivery of the writ to the constable to be served; and he shall note thereon the time of receiving the same." The foregoing provision is found in the act governing proceedings before justices. The general Code of Civil Practice contains another enactment bearing on the same subject (Rev. St. 1899, § 566): "The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit." But, in respect to the commencement of suits in justices' courts, section 3850, *supra*, controls, and they are not deemed commenced until the delivery of the writ of summons to the constable. *McGrath v. The St. L., K. C. & C. R'y Co.*, 128 Mo. 1, 30 S. W. 329; *Turner v. Burns*, 42 Mo. App. 94; *Hornsby v. Stevens*, 65 Mo. App. 185. Section 3850 requires the justice to issue the summons to the constable of the township in which the justice granting the writ resides, or in which the defendant or one of the defendants resides, etc. Section 3861 prescribes the form of the summons to be issued by the justice. The first sentence of this form reads as follows: "The State of Missouri, to the constable of — township, in — county, greeting." Section 3844 requires the justice to keep a docket, and in this docket he is required to enter: "First, the titles of all causes commenced before him, second, the time when the first process was issued against the defendant, and the particular nature thereof," etc. In *Brown v. Pearson*, 8 Mo. 159, and *Palmer v. Hunter*, Id. 512, it was held that the docket of the justice is evidence only of such matters as he is required by law to place therein. In the case at bar, the time when the first summons issued by the justice was received by the constable not being noted on the writ, as required by section 3850, the plaintiff sought

to prove the date of its delivery by secondary evidence. He offered in evidence the justice's docket, which contained an entry that the writ was issued to Ben F. Brady, constable, on December 5, 1899. The court excluded this docket entry. It is contended by plaintiff that this was error; that the word "issued" imports delivery. We think that while the word in some connections does convey the meaning that the thing issued was delivered, we do not think it has that signification as used in the docket entry of the justice, but that it was used in the sense of "directed to." But, even if the entry should be construed as a notation on the justice's docket that he had delivered the writ to Brady, it is not evidence of the fact, for the reason that it is not an entry required by law to be made by the justice in his docket. A parallel question was before the Supreme Court in *Gott v. Williams*, 29 Mo. 461, where it was important to establish the date of the lien of an execution issued by a justice. The law then, as now, made an execution issued by a justice a lien on the defendant's personal property from the date it was received by the constable, and the law required the constable to indorse on the execution the date it came into his hands. The constable had failed to perform this duty. To supply this omission, an offer was made to prove the date of the delivery of the writ to the constable by an entry in the justice's docket. The circuit court excluded the docket entry as evidence. In speaking of this ruling the Supreme Court, through Napton, J., said: "It is not material whether the exclusion was proper or not, since, had it been introduced, it could not have established the fact sought to be proved by it, nor was it any evidence of it."

2. Plaintiff offered evidence tending to prove a uniform and regular custom of the clerk of the justice's court, who prepared the writs issued by the justice, in respect to the issuance of writs and of the manner of their delivery to the constable; which evidence, on objection of defendant, was excluded. Plaintiff proved by a deputy constable that the constable and deputies took the writs issued by the justice out of a drawer of the clerk's desk daily, morning and evening, but that no memorandum was kept of the dates when they were received. Plaintiff had filed his petition for suit in time to keep his lien in force. A summons was promptly issued by the justice. The date of the delivery of the summons to the constable is not made to appear on account of the omission of the constable to indorse on the summons the date of its reception by him; therefore the primary evidence of the delivery of the writ is wanting, and cannot be made to appear. When this is the case, the law, in the absence of a statute or a rule making a particular piece of evidence the only evidence to prove a particular fact, ordinarily admits the best attain-

able secondary evidence to prove the fact in issue. None of the officers through whose hands the writ passed were able to state from memory the date of its delivery. In this situation the plaintiff undertook to show inferentially, from the custom prevailing in the office of the justice, that the writ was delivered in time to keep alive the plaintiff's lien. In *Blodgett v. Schaffer*, 94 Mo., loc. cit. 670, 7 S. W. 436, the Supreme Court said that it was competent for an officer to testify to the custom of his office and the manner of the discharge of its duties. It was the duty of the justice to deliver the writ to the constable, and it seems to us that if it was the custom of the office to place writs, as soon as they were issued, in a particular drawer of a particular desk, known to the constable and his deputies, and that these officers daily took from this particular drawer the writs they found in it, as one of the deputies testified they did, these facts should have been admitted as evidence tending to show that the writ was delivered to the constable not later than December 6th, and in time to keep alive plaintiff's lien.

The judgment is reversed and remanded.

REYBURN and GOODE, JJ., concur.

HILLEMANN v. GRAY'S POINT TERMINAL RY. CO.*

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

RAILROADS—KILLING STOCK—UNFENCED RIGHT OF WAY—RAILROAD YARDS—DIRECTING VERDICT.

1. Rev. St. 1899, p. 730, § 2867, relieves from the burden of proving negligence the owner of cattle killed by a train at a point other than a public crossing, where the right of way is not inclosed by a lawful fence. In an action for an animal killed in the defendant company's yards in an unincorporated town, plaintiff's witnesses testified that, if the yards were fenced, as the town was divided into two parts, the fence would interrupt intercourse between the sections, seriously incommode the public, and greatly interfere with the operation of the road. *Held*, that the court erred in not peremptorily instructing for the defendant.

Appeal from Circuit Court, Scott County; H. C. Riley, Judge.

Action by Henry Hilleman against the Gray's Point Terminal Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. Miller, for appellant. Kelly & O'Brien, for respondent.

REYBURN, J. This is a suit commenced before a justice of the peace in Scott county to recover damages for the value of a bull killed by defendant in the operation of its railroad. On appeal to the circuit court a trial was had before a jury, which rendered

a verdict for plaintiff, and defendant has appealed to this court.

The statement set forth that on the 16th of June, 1900, defendant was operating a railroad in Kelso township, Scott county; that on that day a Jersey bull, owned by plaintiff, valued at \$65, was run over and killed by the engine and cars of defendant; that the place at which the bull went upon the railroad and was killed was not at a point where the railroad was inclosed by a lawful fence, nor at the crossing of any public highway; and that the animal went upon the railroad and was killed at a place where the defendant might have lawfully erected and maintained fences on the sides of its railroad sufficient to prevent animals from getting on the road, but had failed to erect and maintain such fences, whereby the plaintiff had sustained the damages. The evidence in the case was brief, substantially undisputed, and established that Graysboro, an unincorporated town at the terminus of defendant's railroad on the Mississippi river, was divided into what was called "Graysboro" and "Graysboro Addition" or "Gray's Point," or the "Old Town" and the "New Town." Graysboro, not being legally organized, had no town government, no streets laid out, but there was a wagon road running along the defendant's main track through its yards to the depot, which road, however, was not a public road, and there was a crossing near the depot used for wagons and the people going to and from the depot and from one part of the town to the other. The animal was killed in the yards of defendant, and its value and the place where it was killed were not disputed. The section of the statute under which this action is brought imposes no obligation upon a railroad to fence anywhere, but was intended to hold out an inducement for the railroads to fence their track where it was not deemed absolutely necessary to compel them by law to do so. Section 2867, Rev. St. 1899, p. 730. While the act does not require the railroad company to erect any fence, yet it relieves the plaintiff in a suit for damages for stock killed from the usual burden of proof of negligence, except where such accident occurred at a portion of the railroad inclosed by a lawful fence, or at the crossing of any public highway, and makes proof of the fact of the injury, and that the road was not fenced at the place of its occurrence, a prima facie case against the railroad. A railroad may fence or not, in its discretion; but if it fails to fence where it may properly do so, its action in such regard is at its own risk, under peril of the application of this statute, dispensing with proof of negligence if stock be injured. *Trarks v. R. R.*, 58 Mo. 45; *Wymore v. R. R.*, 79 Mo. 247; *Young v. R. R.*, Id. 336. In the construction of the statutes relating to fencing by railroads, the courts have excepted by necessary intentment from their

*Rehearing denied March 17, 1903.

application such grounds as are required to remain open for the use of the public and the transaction of the business at the railroad depot or station. *Morris v. Ry.*, 58 Mo. 78; *Johnson v. Ry.*, 27 Mo. App. 379; *Russell v. R. R.*, 26 Mo. App. 368; *Lloyd v. R. R.*, 49 Mo. 199. Under this section a railroad cannot arbitrarily determine for itself the question whether a space uninclosed, claimed for station use, depot purposes, and switch limits, was necessary for the convenient and safe transaction of its business and for the accommodation of the public; but where evidence has been introduced tending to show that the railroad might have fenced its road where the plaintiff's animal strayed upon its railway track without causing inconvenience to the railway or to those having business to transact with it, or to the public at such point, the jury should determine the question of the necessity of the land uninclosed for such uses. *Straub v. Eddy*, 47 Mo. App. 189. But in the case under consideration there was no such evidence, and, while it is the province of the jury to determine all questions of fact, it is likewise the province of the court to determine all questions of law, especially whether there is any evidence entitling the submission of issues of fact to the jury. *O'Malley v. R. R.*, 113 Mo. 319, 20 S. W. 1079; *Boland v. R. R.*, 36 Mo. 484. The plaintiff submitted the testimony of but two witnesses, the first of whom (a son) stated he resided and did business at Gray's Point at the time of the killing of the bull, and that, if the railroad yards were fenced in, neither he nor his neighbors could get out without climbing a barbed-wire fence, and the people living outside would have to climb two barbed-wire fences to get to his place of business, and that the business of the town could not be transacted, if the railroad was fenced, without new roads; that there were about 55 families in the town of Graysboro, living on both sides of the railroad, and that he did not know whether it was practicable to fence up the yards and switches. The remaining witness offered by plaintiff stated that the depot of defendant was on the edge of the right of way and the track along the edge of the platform; that the town was divided into Graysboro and Graysboro Addition; the addition to Graysboro was on the east side of the main track of the railroad, and Graysboro proper on the west side; that in June, 1900, there were 300 or 400 people living there, and a good many people living north of the depot; that, if the fence was built as suggested, the people could not get to and from the two towns without climbing the barbed-wire fence; that they could neither get in nor out, and that they could not get freight to or from the railroad depot, and that there were stores on both sides of the depot, and the two parts of the town would then be without communication with each other; that

the road running east of the main track was the only way for people to get to and from Graysboro and to and from the depot, although it was not a public road, but was in common use, and the only means of getting to and from the town; that a person could not get to Graysboro if the fence was built around as indicated by the plaintiff; and that, if the road was fenced, a new road might be built to get to the old town, but access to the new town would be cut off. This, the plaintiff's testimony, conclusively establishes that no fencing could have been made at the place where the animal was killed without the serious inconvenience of the public in the transaction of its business, and in the communication between the two sections of the town, as well as interfering with the operation of the railroad and its business with the public. The trial court therefore erred in not withdrawing the case from the consideration of the jury by giving the instructions asked at the close of the evidence, and its judgment will accordingly be reversed.

BLAND, P. J., and GOODE, J., concur.

MUNROE v. HERRINGTON.

(Court of Appeals at St. Louis, Mo. March 8, 1903.)

JUSTICES' COURTS—NOTICE OF APPEAL—SUFFICIENCY.

1. Under Rev. St. 1899, § 4074, requiring appellant from a judgment of a justice of the peace to serve a notice of appeal, stating that an appeal has been taken from the judgment therein specified, a notice of appeal stating the style of the cause and name of the justice rendering the judgment is not defective because of failure to state the date of the judgment, in the absence of any showing that more than one judgment was rendered by the same justice between the same parties.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action by O. M. Munroe against M. F. Herrington. From a judgment for plaintiff, defendant appeals. Reversed.

The case is here on a full transcript. The abstracts of the record made by defendant (appellant) are somewhat deficient, but not so much so as to authorize the court to sustain plaintiff's motion to dismiss the appeal.

The suit was on a promissory note, and originated before W. A. Hill, a justice of the peace in Jefferson county, Mo. On the 27th day of April, 1901, Justice Hill rendered judgment against the defendant by default. On the 6th day of May following, defendant filed with the justice his affidavit and bond for an appeal. The appeal was duly allowed, returnable to the September, 1901, term of the Jefferson county circuit court. At the September term, 1901, the cause was con-

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 587.

tinued—according to the judge's minutes, "by order of the court"; according to the record entry made by the clerk, "by agreement of the parties." The entry by the clerk, however, was evidently a mistake, as shown by the judge's minutes and other evidence that was introduced. At the January term, 1902, and on the 13th day of said month, plaintiff moved the court to affirm the judgment of the justice on the ground that defendant had failed to serve him with notice of the appeal, in writing, 10 days before the beginning of the second term of the court after the appeal had been taken, as required by section 4074, Rev. St. 1899. In opposition to the motion, defendant offered and read in evidence the following notice of appeal, and return thereon:

"Before Willis A. Hill, Justice of the Peace within and for Central Township, Jefferson County, State of Missouri. O. M. Munroe, Plaintiff, v. M. F. Herrington, Defendant. You are hereby notified that I have taken an appeal from the judgment of the justice in the above-entitled cause to the circuit court of the county of Jefferson. This 25th day of November, 1901. M. F. Herrington, Appellant."

"State of Missouri, County of Jefferson—ss.: M. F. Herrington, of lawful age, being duly sworn, on his oath says that he served the within notice on O. M. Munroe, therein named, in the county of Jefferson, state of Missouri, at De Soto, by delivering to him a true copy thereof, on the 25th day of November, 1901. M. F. Herrington."

Defendant also offered and read in evidence the following affidavit:

"Sam Byrns and J. F. Green, being duly sworn, on their oath state that they are the attorneys for the defendant in the above-entitled cause; that they have examined the papers and record in the case of the plaintiff against the defendant, and have been advised by the defendant on the facts concerning the execution and transfer of the note which is the basis of the action in said cause, and have advised said defendant that they believe he is not liable in said action on said note; and further state that they believe that said defendant has a complete and perfect defense in said cause against the alleged cause of action of the plaintiff. Sam Byrns. J. F. Green."

"Subscribed and sworn to before me this 17th day of January, A. D. 1902. A. T. Brewster, Clerk of the Circuit Court."

The court adjudged the notice of appeal insufficient, and affirmed the judgment of the justice. Defendant's motion to vacate the order affirming the judgment of the justice and for new trial being of no avail, he appealed.

Byrns & Green, for appellant. E. J. Bean, for respondent.

BLAND, P. J. (after stating the facts). The only question presented by the record

for decision is whether or not the notice of appeal was sufficient. The statute (section 4074, Rev. St. 1899) requires that such notice be in writing, "stating the fact that an appeal has been taken from the judgment therein specified." The notice given by defendant stated the style of the cause in which the judgment appealed from was rendered, and the name of the justice who rendered the judgment. The only defect, if any, in the notice, is an omission to state the date on which the judgment appealed from was rendered. This omission could not have raised a doubt in defendant's mind as to what judgment the appeal was taken from, unless he had recovered more than one judgment against the defendant, at or about the same time, before Justice Hill. He offered no evidence that any judgment other than the one appealed from had been rendered by Justice Hill in his favor against the defendant. The fair inference is that he had recovered but the one judgment—the one from which the appeal was taken.

The purpose of the statute, in requiring notice of an appeal from a justice's court taken subsequent to the day on which the judgment was rendered, is to apprise the successful party of the fact that an appeal has been taken. The statute prescribes no specific form of notice, and we think that a notice is good if it sufficiently describes the judgment appealed from to reasonably identify it, and informs the successful party that his adversary has appealed. Such a notice would be a substantial compliance with the statute, and would meet the demands of justice. The law requires nothing more.

We think the notice of the appeal was sufficient, and reverse the judgment and remand the cause, with directions to the circuit court to set aside its judgment and to overrule the plaintiff's motion to affirm. All concur.

CITY OF LEBANON v. GORDON.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

MUNICIPAL CORPORATION — DRUNKENNESS — RIGHT TO PUNISH — DISTURBANCE OF THE PEACE — OFFENSE AGAINST STATE LAW.

1. Under Rev. St. 1899, § 5957, conferring on the mayor and board of aldermen of cities of the fourth class power to enact all ordinances not repugnant to the Constitution and laws of the state, and which are deemed expedient for the good government of the city, the preservation of peace and good order, etc., a city of the fourth class may punish the exhibition of one's self in public in a drunken condition, though the Legislature has not made it an offense against the state.

2. A city of the fourth class may punish a disturbance of the peace, though it is also punishable as an offense against the state law.

Appeal from Circuit Court, Laclede County; Leigh B. Woodside, Judge.

¶ 2. See Municipal Corporations, vol. 35, Cent. Dig. § 1312.

William Gordon was prosecuted in the police court of the city of Lebanon for the offenses of drunkenness and disturbance of the peace, and from a judgment for the accused, entered on quashing the complaint, the city appeals. Reversed.

The plaintiff filed the following complaint before John A. Pond, police judge of the city of Lebanon, a city of the fourth class, to wit:

"The City of Lebanon, Missouri, Plaintiff, v. William Gordon, Defendant. John Curn, being duly sworn, on oath states that William Gordon, on or about the 27th day of July, 1901, and within the corporate limits of the said city of Lebanon, did then and there unlawfully and willfully violate sections Nos. 1 and 28 of Ordinance No. 172, entitled and concerning misdemeanors, by then and there violating section 1 of said Ordinance 172, by then and there being drunk and intoxicated upon the streets and public places of the said city of Lebanon, Missouri. This affiant further states that the said William Gordon on the said date, and within the said corporate limits of the said city of Lebanon, Missouri, did then and there unlawfully and willfully violate section 28 of said Ordinance 172, by then and there disturbing the peace of a neighborhood of said city of Lebanon by loud and unusual noise, and by loud, offensive, and indecent conversation, and by threatening and by quarreling and by challenging. This affiant further states that the said neighborhood was near the principal business part of the said city, being on and near Commercial street, in said city, and near the block in which the post office is situated and kept—contrary to said ordinance made and provided, and against the peace and dignity of the said city of Lebanon. [Signed] John Curn."

"John Curn makes oath and says that the facts and allegations contained in the foregoing complaint are true, according to the best knowledge, information, and belief of affiant. Subscribed and sworn to before me this 16th day of August, 1901. J. A. Pond, Police Judge City of Lebanon, Mo."

A trial was had before the justice, resulting in a conviction and a fine of \$1, from which defendant appealed to the circuit court. After the cause reached the circuit court, defendant moved the court to quash the complaint, assigning the following grounds therefor: "First. Because the defendant is prosecuted upon a criminal information for a misdemeanor before a police judge, and a city of the fourth class has no authority to institute criminal proceedings or prosecute a person for a criminal offense. Second. Because the defendant is accused in said complaint with being intoxicated or drunk, and drunkenness is not an offense, except as defined by the statute, and the complaint in this case does not define an offense under the law. Third. Because the said complaint charges defendant with a misdemeanor, in disturbing the peace of a neighborhood in said

city of Lebanon, and said charge is in the language of the statute defining a misdemeanor by disturbing the peace, and such offenses are triable alone on indictments or information in the justices' courts or circuit courts of the state and said police judge had no authority to try the same. Fourth. Because the offenses with which the defendant is charged in said complaint, if offenses, are misdemeanors, as defined by the statute, and can only be tried upon an information or indictment, and the police judge of the city of Lebanon had no authority to try said cause. Fifth. Because there is no authority in the statute for the passage of Ordinance No. 172." The court sustained the motion to quash, discharged the defendant, and entered up judgment for costs against the city. Plaintiff filed timely motions for new trial and in arrest of judgment, which were by the court overruled. Plaintiff duly appealed.

J. P. Nixon, for appellant. Farris & Mayfield, for respondent

BLAND, P. J. (after stating the facts). 1. The circuit court seems to have been of the opinion that a city of the fourth class is without power to pass an ordinance making it a misdemeanor for one to exhibit himself in a public place in a city in a drunken condition, for the reason that the Legislature had not seen fit to make it an offense against the state for one to publicly exhibit himself while in such condition. Section 5957, Rev. St. 1899, among other powers, confers upon the mayor and board of aldermen of a city of the fourth class power to "enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order," etc. In *Green City v. Holsinger*, 76 Mo. App., loc. cit. 569, the Kansas City Court of Appeals, speaking through Ellison, J., said: "That drunkenness in the public places of a municipality is a matter of police regulation there can be no doubt. The mere fact that the power to suppress drunkenness is specifically stated in some charters does not signify that it is not embraced in the general provision as to police power contained in charters which make no specific mention of such offense." In *City of Gallatin v. Tarwater*, 143 Mo., loc. cit. 45, 44 S. W. 751, the Supreme Court said: "The exhibition of one's self in a condition tending, in and of itself, to degrade the public morals, to annoy and inconvenience the citizens in the discharge of their daily duties, and to destroy the peace, comfort, and good order and well-being of society, is an offense which is the proper subject of police regulation, and has been so regarded, both in this country and England, ever since the reign of James the First;" citing many authorities. Such being the case, there can be no doubt of the authority of the mayor and board of aldermen of a city of the fourth class to pass an

ordinance to punish the offense, under the general power to pass such ordinances as "shall be deemed expedient for the good government of the city, the preservation of peace and good order." etc.

2. The third ground of the motion to quash would deny to cities of the fourth class power to punish for the commission of any misdemeanor which was at the same time punishable under the laws of the state. This is not the law, and never has been, in this state. *City of St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663. On the contrary, the law is that an acquittal or conviction under a city ordinance is no bar to a prosecution for the same offense by the state, and, vice versa, a conviction or acquittal under a state law is no bar to a prosecution for the same offense by a city. *State v. Muir*, 86 Mo. App. 642, approved in 164 Mo. 610, 65 S. W. 285.

The judgment is reversed and the cause remanded. All concur.

KIMBALL v. ST. LOUIS & S. F. R. CO.
(Court of Appeals at St. Louis, Mo. March 3, 1903.)

RAILROADS—KILLING STOCK—RIGHT OF WAY—FENCES—PUBLIC ROADS—PLACE OF KILLING—PRESUMPTION—EVIDENCE—QUESTION FOR JURY.

1. Where there was evidence that plaintiff's cow got on defendant's railroad track through a defective right of way fence, and was subsequently found dead at a point where the railroad crossed a public highway, a short distance from where she escaped, the presumption that the cow went on the track at the point where she was found could not be entertained.

2. Where a witness saw plaintiff's cow on defendant's right of way, inside the cattle guards, and the cow was traced through an opening in an insufficient right of way fence to within 20 feet of the cattle guards, and she was subsequently found dead in the highway, it was a question for the jury whether she was not killed on defendant's right of way, though defendant's engineer testified that she came onto the track from the highway.

3. Where a cow escaped from a field onto a railroad right of way through a defect in the fence, of which the railroad had notice, the railroad was responsible for double damages for killing the cow, though she passed from the right of way to a public road, and thence onto the railroad crossing.

Appeal from Circuit Court, Lawrence County; H. C. Pepper, Judge.

Action by J. H. Kimball against the St. Louis & San Francisco Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Parker, Woodruff & Skinner, for appellant. Lipscomb & Syzer, for respondent.

Statement of Facts and Opinion.

GOODE, J. Action to recover double damages for the killing of respondent's cow by one of appellant's locomotives on August 9, 1900. The cow was pastured in a triangular

field held by N. C. Davis as a leasehold, and the morning of the day she was killed was driven to the pasture by plaintiff's children, where she was seen that morning by a witness named Leftwich, who later in the day saw her on the railroad right of way. The pasture contained about three acres of land, and was bounded on the west and south by public wagon roads, intersecting at right angles; the pasture being in the northeast angle of said wagon roads, and inclosed on its northwest side by the appellant's right of way, which ran across both the wagon roads and around the pasture, subtending the angle formed by the intersection of the roads as the arc of a curve. The public roads were separated from the pasture by good fences, and where the railroad cut those roads were good cattle guards, with wing fences extending from them on either side to the right of way fences. The latter fences were made of wires and fastened to posts, and there is evidence in the record to prove that one or more places between the two cattle guards and some of the wires were broken loose, and others sagged, so that an animal could get out of the field and on the right of way. As stated, the respondent's cow was in the pasture field the morning she was killed, and was afterwards observed grazing outside of it on the right of way, and between the two cattle guards which bounded the curved track at the north and south crossings of the railroad and the two wagon roads. That she escaped from the field through a defective place in the fence was shown by her tracks being near such a place; and the tracks, and other indications of her presence, such as cropped grass, were traced from there southward along the right of way to within 20 feet of the south crossing, where the public highway ran east and west. There the steps ended in a slight excavation of the earth, as though all her feet had been bunched, and had dug up the soil. The cow's carcass was found on the south side of said east and west highway, and west of the railroad track.

It is the contention of the respondent that the animal was struck at the spot where her tracks stopped, and where the ground was torn up, 20 feet inside the cattle guards, and carried or hurled by the pilot of the locomotive through the cattle guard into the public road, where she was found dead. The railway company contends, and the engineer whose engine killed the cow so swore, that she came onto the track at the crossing of the east and west public road, just as the train approached the crossing, and barely had her fore feet over the west rail when the engine struck her.

The main issue of fact between the parties, and which the court submitted to the jury, is whether the cow went on the appellant's track at the time she was killed through the defective fence separating the right of way from the pasture, or whether she had previously gotten out of the pasture

and into the public road, and, while grazing along the latter, strayed onto the railway track.

The circuit judge instructed the jury that, if they found from the evidence that the cow entered on the company's track at a point where it crosses the public road, the respondent could not recover; that the law presumed she came on the track where her body was found, and it devolved on the respondent to show to the contrary by the weight of evidence. The court further instructed that though the jury believed the cow passed out of the pasture through an opening in the fence on the company's right of way, and, before the approach of the train that killed her, then passed from the right of way to the public highway, and further believed that at the time she was struck by the engine she was in the act of going on the track where it crosses the public road, the verdict should be for the railroad company—a charge, it seems to us, too favorable to the appellant. An instruction was given that the company must have known of the defective state of the fence where the cow left the pasture, or had the opportunity to know of it by proper diligence.

An animal found dead on a railroad track, as the apparent result of a collision with an engine, is presumed, in the absence of explanatory evidence, to have gone on the track where found. *Pearson v. R. R. Co. (K. C.) 83 Mo. App. 548.* But if the evidence shows where an animal got on the track, then whether the railroad company is liable for double damages depends, not on where it was killed, but on where it went on the railroad; that is, on whether it went on where the company was legally bound to maintain a lawful fence, but failed to perform that duty, or at a point where it was not bound to fence, as at a public road crossing. *Fraysher v. Railroad (St. L.) 66 Mo. App. 573; Ehret v. Railroad (K. C.) 20 Mo. App. 251; Moore v. Railroad, 81 Mo. 499.* In the case in hand the presumption above mentioned does not arise, because there is testimony on the question of where the respondent's cow went on the track, and the fact was to be found from the testimony bearing on it.

None of the above propositions is gainsaid by the appellant; its position being that the only competent evidence on the issue of where the cow entered the track and was struck was the positive testimony of the engineer that she came on at the highway crossing, and the circumstance that her carcass lay in the public highway. But we think there was evidence for the jury to weigh that she entered the right of way through the defective fence between it and the pasture, and was killed without having gone on the highway, and while still grazing on the appellant's track, inside the cattle guards. Leftwich saw her in there. She was traced by sundry signs from the opening in the fence to within 20 feet of the south

cattle guard. There the ground looked like she had planted herself to receive a blow, and there the signs of her grazing stopped. It was certainly a circumstance of some force that her tracks went no further, and could neither be traced forward nor backward from that point.

We are not able to yield assent to the charge of the lower court that the company was not liable if the cow escaped from the pasture through a defective place in the fence, wandered onto the public road, afterwards entered the railroad track at the crossing, and was there killed. That proposition seems not to be sound law. *Snider v. Railroad, 78 Mo. 465; Warden v. Railroad (K. C.) 78 Mo. App. 664.* If the cow got out of the field, through a broken place in the fence, of which there is proof the section foreman had notice, we think the company is responsible in double damages for killing her, even though she passed to the public road from the right of way first, and thence to the crossing.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

BRACKEN v. MILNER et al.

(Court of Appeals at St. Louis, Mo. March 8, 1908.)

FRAUDULENT CONVEYANCES — SUBSEQUENT CREDITORS — MARRIED WOMEN — PURCHASE OF HUSBAND'S PROPERTY AT EXECUTION SALE — MORTGAGES — JUDGMENTS — COLLATERAL ATTACK.

1. Where an insolvent, who has fraudulently contracted debts which he cannot pay, conveys property to his wife in fraud of existing creditors, such conveyance is also fraudulent as to subsequent creditors.

2. Where a wife with her own funds purchases her husband's land at execution sale, without collusion, she acquires a good title; in which her husband has no interest which can be subjected to the payment of his debts.

3. Where a mortgagor took up the mortgage with money furnished by a third party, and thereafter turned the mortgage over as collateral security for a loan, he had an equity in the mortgaged premises which might be subjected to the payment of his debts, subject to the prior lien of the holder of the mortgage.

4. A judgment cannot be collaterally attacked on the ground that it was rendered in vacation without consent of the parties.

5. The judgments of the federal courts are entitled to equal rank and presumption of regularity as judgments of the state circuit courts.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Suit by J. P. Bracken against Jas. R. Milner and others. From the judgment, both parties appeal. Affirmed.

H. C. Milner is the wife of James R. Milner. In 1884, James R. Milner, in consideration of love and affection, conveyed to his wife, lot No. 94 and south 24 feet of lot

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 632.

No. 98, Harwood, Lisenby & Boyd's addition, in the city of Springfield, Mo. In 1894 A. W. Howell obtained a judgment against James R. Milner for \$461 in the Greene county circuit court. An execution was issued upon this judgment, and levied upon the above-described real estate, as the property of James Milner. After the levy the property was advertised for sale under the execution. Before the day of sale, Mrs. Milner bought the judgment with her own funds, and had it assigned to her. On the advice of her attorney, she permitted the property to be sold on the execution, and at the sale bid it in, and received a sheriff's deed therefor, which deed, together with the one made to her by her husband in 1894, she caused to be placed of record. The property was incumbered by a mortgage to secure a note of \$1,500. It appears that Judge Rassieur, of St. Louis, furnished Milner with money to take this mortgage up, and that it was taken up by James R. Milner, but was not satisfied of record; that afterwards James R. Milner used it as collateral security to obtain a loan from the Holland Bank at Springfield; and that it was in pledge to said bank on the day of trial to secure money borrowed by James R. Milner. It appears that Judge Rassieur had had some dealings with Milner concerning some mining property at Aurora, Mo., out of which he had made considerable money, and that he had let Milner have money as a gratuity to help him out of his financial troubles. James Milner made his wife a gift of 19 shares of the stock of the Sphalerite Mining Company (a corporation), of the par value of \$1,900. On October 5, 1900, plaintiff recovered in the United States Circuit Court for the Southern Division of the Western District of Missouri a judgment against James R. Milner for \$1,800, which is in full force and effect. An execution was issued on this judgment, and returned by the marshal of the district nulla bona. After this return was made, plaintiff brought this suit in the Greene county circuit court against Milner and wife to subject the above-described real estate and shares of stock to the payment of the judgment. After hearing the evidence the court entered a decree subjecting the 19 shares of mining stock to the payment of plaintiff's judgment, and found that the \$1,500 note and mortgage to be the property of James R. Milner, and subjected it, also, to the payment of plaintiff's debt—subject, however, to the rights of the then holders of the same—and found the other issues in favor of Mrs. Milner. After taking the usual steps to preserve their exceptions, both parties appealed.

White & McCammon, for appellant. Heffernan & Heffernan, for respondent.

BLAND, P. J. (after stating the facts).
1. The evidence is that James R. Milner as early as 1880 was a real estate and loan

agent, and as such had fraudulently converted money and property of his clients to his own use, and in this manner became indebted to them, and continued to be indebted to divers persons, and was in 1881 insolvent, and has continued insolvent down to this time, so that there is no question that the voluntary conveyance of real estate to his wife in 1884 was fraudulent, in law, as to his existing creditors; and we think that it was also fraudulent as to his subsequent creditors, for the reason that where one has fraudulently contracted debts which he cannot pay, and then makes a voluntary conveyance of his property, and thereafter contracts other debts which he cannot pay, the reasonable inference is that he intended by his voluntary conveyance to hinder and delay his subsequent as well as his existing creditors.

2. The title acquired by Mrs. Milner at the sheriff's sale and by virtue of the sheriff's deed presents quite another proposition. In answer to a question as to where she got the money to buy the judgment, she said: "I can tell you exactly. For two successive years before this I had business, city and out of town, a great deal—an unusual amount of original painting; and I was so fortunate as during those two years to make several larger sales than I ever have done since. One sale was a \$700 one. It was not all paid to me in money, but was partially. There was another one of \$150 just in the winter preceding this. That was a screen for Mrs. O'Day." She further testified that before she married Milner she had been a teacher in Drury College at a salary of \$1,500 per annum, and previous to that had been a teacher in the Kirksville Normal School for three years at the same salary, and had laid by some of the money. The cashier of the bank where she kept an account testified that on the day she purchased the judgment she had to her credit in the bank \$510.35, and that on the succeeding day her account was overdrawn by 15 cents. Her attorney testified that the judgment was purchased with her own money; that James R. Milner did not furnish a penny of it, and had nothing whatever to do with the transaction.

Had this purchase by Mrs. Milner, under these circumstances, been on an execution issued against some person other than her husband, and of land not owned by him, it would not be pretended that her husband acquired any legal or equitable interest in the land purchased. The relation she bore to Milner did not preclude or disqualify her to buy his lands, or his interest in lands, at a sheriff's sale; and if she did so with her own money, and without collusion with her husband to buy it to protect him from his creditors, the sale is as valid, and vested in her as good a title, as if the purchase had been of lands belonging to a stranger; and we think Mrs. Milner, under the evidence, acquired by her purchase at the sheriff's sale

a good title against both Milner and his creditors.

3. It is admitted by defendants that the 19 shares of mining stock should be subjected to the plaintiff's debt.

4. In respect to the \$1,500 note and mortgage, the evidence is reasonably satisfactory that James R. Milner took it up with money furnished him by Judge Rassieur; that he afterwards used this mortgage as collateral security for money borrowed by him for his own purposes. In such circumstances, he has an equity in the mortgaged property which is available in payment of the debts to his creditors, subject, however, to the prior lien of the Holland Bank, to which Milner pledged the mortgage as security for money loaned.

5. On the trial, counsel for defendants, for the purpose of impeaching the judgment plaintiff recovered against James R. Milner in the United States Circuit Court, offered and read in evidence the judge's minutes, the evidence of the clerk of the United States Circuit Court, and correspondence between counsel for defendants and the judge who rendered the judgment, which evidence, counsel claims, tends to show that the judgment was not rendered during a term of the United States Circuit Court, but that the cause was taken under advisement by the judge on the day the court adjourned for the term, and the judgment was afterwards rendered in vacation, without the knowledge or consent of defendant Milner or his counsel. This evidence was excluded by the court, and this ruling is assigned as error by defendants. A judgment may be collaterally attacked for one cause only, to wit, for the purpose of showing that the court that rendered the judgment had no jurisdiction of the subject-matter of the suit, or had not acquired jurisdiction of the person of the defendant; and the want of jurisdiction must ordinarily be made to appear from the records and proceedings in the cause. The minutes kept by the judge and the clerk may, at a term subsequent to the trial at which the judgment was rendered, be used for the purpose of correcting an error of the clerk in entering the judgment, or for the purpose of entering a correct judgment when the wrong one had been recorded, or for the purpose of entering a judgment *nunc pro tunc* where the clerk omitted to enter any judgment at all upon the records, but can never be used in a collateral proceeding to show error or mistake in the judgment itself, or to contradict the date or the term of the court at which the judgment purports to have been rendered. The judgment is the conclusion of the whole matter, and all the proceedings anterior to it are concluded by it, and the text of the judgment is the evidence which must control as to everything written into it. *Polleys v. Black River Co.*, 113 U. S., loc. cit. 84, 5 Sup. Ct. 869, 28 L. Ed. 938; *Kostenbader v. Kuebler* (Pa.) 43 Atl. 972, 85 Am. St. Rep. 783; *Lovitt v. Russell*, 138 Mo. 474, 40 S. W. 123; *State v. Wear*, 145 Mo. 162,

46 S. W. 1099. The judgment of the federal courts are entitled to equal rank and presumption of regularity as judgments of the circuit courts of this state. *Wonderly v. Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474. In *State v. Wear*, supra, it was held: "Where a judgment recites a state of facts not shown by the previous records of the case, such judgment cannot be inquired into in a collateral proceeding unless such facts were jurisdictional." In *Railway Company v. Warden*, 73 Mo. App. 117, it was held that a court of equity has no authority to overhaul the records of any other court for any error of law or fact committed by that court, and that any attempt to do so is necessarily collateral.

We think the court did not err in excluding the offered testimony collaterally attacking the judgment of the federal court. The judgment rendered by the circuit court, we think, is supported by the great weight of the evidence, and is affirmed.

REYBURN and GOODE, JJ., concur.

BASKOWITZ v. GUTHRIE.

(Court of Appeals at St. Louis, Mo. March 8, 1903.)

JUSTICE OF THE PEACE—CHANGE OF VENUE—JURAT TO AFFIDAVIT—EXPIRATION OF NOTARIAL COMMISSION—FAILURE TO STATE EFFECT—APPEAL TO CIRCUIT COURT—WAIVER OF REFUSAL—REVERSAL OF JUSTICE'S JUDGMENT.

1. Under Rev. St. 1899, § 8835, providing that every notary public shall have a prescribed seal, and shall "designate in writing in any certificate signed by him, the date of the expiration of his commission," it does not invalidate an affidavit for a change of venue from a justice, so as to warrant the refusal of the change, that the notary before whom it was made omitted from his certificate the date of the expiration of his commission.

2. Rev. St. 1899, § 3972, provides that either party in justice's court shall be entitled to a change of venue on making affidavit that on account of the bias of the inhabitants of the township he cannot have a fair trial; and section 3973 provides that on the filing of the affidavit the justice must allow the change. *Held*, that after the making of such an affidavit a judgment for plaintiff was a nullity.

3. Where a defendant in justice's court, in an action in which the amount involved is below the original jurisdiction of the circuit court, appeals to that court from an adverse judgment and from the justice's denial of his application for change of venue, he does not waive his right to insist on the refusal of the change as error by appearing and consenting to continuance of the cause, the jurisdiction of the circuit court over the subject-matter being merely derivative.

4. Under its general power of supervision over inferior courts, it is competent for the circuit court to vacate the judgment of a justice rendered after refusal of the change of venue, and send the cause back with directions to grant the change.

Appeal from St. Louis Circuit Court; Seldon P. Spencer, Judge.

Action in justice's court by Sam Baskowitz against O. B. Guthrie, doing business as

the Guthrie Manufacturing Company. From an order of the circuit court made on appeal by the defendant from an order refusing to set aside an order vacating the judgment and remanding the cause to the justice, plaintiff appeals. Affirmed.

This cause was taken to the circuit court by appeal from a justice's court.

The justice's transcript (omitting caption and certificate) is as follows:

"Suit on an account; demand \$39.97. Account filed and summons issued to Constable E. J. Morrissey November 28, 1899, returnable December 12, 1899, at 7 a. m. Summons returned executed; case called for trial December 12, 1899, at 7 a. m. Prayer for change of venue filed; not granted because affidavit not complete. Plaintiff appeared; defendant, though duly called, comes not, and makes default. The justice waited three hours, and defendant still remaining in default, the justice heard the evidence and finds for the plaintiff in the sum of \$40.47. It is therefore adjudged by the justice that plaintiff recover from defendant the sum of forty dollars and forty-seven cents for his debt and cost of suit. Execution issued to Constable E. J. Morrissey, December 12, 1899, returnable according to law.

"Now, on this the 21st day of December, 1899, comes the defendant and files his affidavit and bond, praying an appeal, with Mississippi Valley Trust Co. as surety. Bond approved and appeal granted; case transmitted to circuit court, city of St. Louis, with all papers in the cause and transcript of docket.

Judgment	\$40 47
Justice	2 65
Constable	2 15
Levy	1 00
Watchman	18 50
Transcript paid	1 00"

The application for a change of venue, which the justice overruled (omitting caption), is as follows:

"Oscar B. Guthrie, the defendant in the above named cause, makes oath and says that he can not have a fair and impartial trial before the above named justice, before whom said cause is now pending, on account of the bias and prejudice of the inhabitants of the district thereof, and he therefore prays a 'change of venue' to other justice having jurisdiction thereof, in accordance with the statute in such cases made and provided.

"Oscar B. Guthrie, Defendant.

"Sworn to and subscribed before me, this 9th day of December, 1899.

"[Seal.] John B. Edwards,
"Notary Public,
"City of St. Louis, Missouri."

In the circuit court, defendant moved that the judgment of the justice be vacated, and the cause be remanded to the justice with directions that he grant a change of venue of

the cause. On the hearing of the motion, the notary (Edwards) testified that he was commissioned as a notary on the 1st day of March, 1898, for four years. The court sustained the motion, entered an order vacating the judgment of the justice, and remanded the cause to him with directions that he award the change of venue theretofore applied for. An unavailing motion to set aside this order was made by plaintiff, whereupon he appealed.

Montague Punch, for appellant. John F. Green, for respondent.

BLAND, P. J. (after stating the facts).

1. For the reason that the notary omitted to designate in writing on his jurat to the application for change of venue the date of the expiration of his commission, it is contended by appellant that there was no evidence that the application for change of venue was sworn to, and that the justice correctly denied the application. Section 8835, Rev. St. 1899, reads as follows: "Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public,' the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence." This statute makes the official signature and seal of a notary the evidence of his official acts, without reference to the designation in writing of the time of the expiration of his commission. In *K. C. & S. E. Ry. Co. v. K. C. & S. W. Ry. Co.*, 129 Mo. 62, 31 S. W. 451, it was held that the omission of a notary to designate the time of the expiration of his commission did not invalidate his certificate to the acknowledgment of a deed. In *Windmill Co. v. Baker*, 49 Kan. 434, 30 Pac. 472, under a statute like ours, the Supreme Court of that state held: "The fact that a notary public, before whom a claim of lien is verified, fails to add after his official signature the date of expiration of his commission, does not render such lien void." The court (at page 440, 49 Kan., and page 473, 30 Pac.) said: "The statute requiring such addition on part of the notary does not attempt to avoid the affidavit taken by the notary on account of such omission." Neither does our statute attempt to avoid the certificate of a notary for his omission to designate the date of the expiration of his commission, and we hold that the affidavit to the application for change of venue was sufficiently authenticated.

2. The application for the change of venue

of the cause was in strict compliance with the statute (section 3972, Rev. St. 1890). The next succeeding section (3973) made it the imperative duty of the justice to award a change of venue to a justice of some district where the inhabitants were not so prejudiced against the defendant that he could not have a fair trial therein; and when the application for the change of venue was filed before the justice he had no further jurisdiction in the cause except to grant the change of venue (section 3973, *supra*), hence his judgment was an absolute nullity. *Jones v. Pharis*, 59 Mo. App. 254.

3. The affidavit for the appeal was from the judgment, from the ruling of the justice on defendant's application for a change of venue, etc. After the transcript had been filed in the circuit court and the cause docketed there, the defendant appeared and consented to several continuances of the cause. Plaintiff contends that by his appeal from the judgment of the justice, and by his general appearance to the cause in the circuit court after the appeal had been granted, he thereby conferred on the circuit court jurisdiction to hear and determine the case. There might possibly be some force in this contention if the cause was one of the class over which the circuit court had original jurisdiction, but the amount sued for is below the original jurisdiction of the circuit court, hence that court could not obtain jurisdiction in any other manner than through the justice by the appeal. Its jurisdiction of the subject-matter was derivative; therefore, if the court through which it was attempted by appeal to confer jurisdiction had no jurisdiction, none could be conferred on the circuit court. *Planing Mill Co. v. Short*, 58 Mo. App. 320; *Ina Co. v. Foster*, 56 Mo. App. 197; *Reinhardt v. Kempf*, 72 Mo. App., loc. cit. 650.

4. It is competent for a party to confer jurisdiction in a court of his person, but he can neither by consent nor conduct confer on a court jurisdiction of the subject-matter; the law alone confers this jurisdiction. *Parker v. Zeisler*, 139 Mo. 298, 40 S. W. 881; *Johnson v. Detrick*, 152 Mo. 243, 53 S. W. 891.

Under its general power of supervision over inferior courts, it was competent for the circuit court to vacate the justice's judgment and send the cause back to the justice with directions to grant the change of venue.

The judgment is affirmed. All concur.

ASHBY v. ELSBERRY & N. H. GRAVEL ROAD CO.

(Court of Appeals at St. Louis, Mo. March 8, 1903.)

TURNPIKES—WIDTH OF ROAD—DUTY TO REPAIR—LIABILITY TO TRAVELERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. Rev. St. 1889, § 2696, requires gravel road corporations to construct a road not less than 20 feet wide, including side drains. *Held* that,

in the absence of evidence showing a necessity for the construction of a road of less width at a particular point, a gravel-road company is obliged to maintain a safe road for travel of the width of 20 feet.

2. A private corporation operating a road for toll is under obligation to maintain in reasonably safe repair whatever parts of its road it keeps open or permits to be used for travel.

3. The failure of a gravel-road corporation to maintain a road of the width of 20 feet, as required by Rev. St. 1889, § 2696, constitutes negligence for which a recovery may be had by a person whose injuries result from such failure.

4. Evidence showing that the road upon which plaintiff was driving was narrow, and consisted of an embankment unguarded on either side except by wires strung on posts, and that plaintiff was injured by her horse taking fright and overturning her wagon at the side of the road, sufficiently tends to show that the proximate cause of the injury was the narrow and defectively guarded condition of the road.

5. Where the bad repair of a highway is the proximate cause of an injury to a person driving on it, the corporation maintaining the highway is liable for such injury, although the fright of the horse from the presence of cows on the road is also a contributory cause.

6. It is not negligence for a person knowing the defective condition of a road to travel over it to her home, unless the road is so dangerous that a person of common prudence would decline the risk.

7. It is not negligence in a corporation maintaining a turnpike to allow cows to occasionally stray on the road from intersecting cross-roads, and graze along its borders.

Appeal from Circuit Court, Lincoln County; *E. M. Hughes, Judge*.

Action by Anna L. Ashby against the Elsberry & New Hope Gravel Road Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dudley, Wheeler, Powell & Dyer, for appellant. Norton, Avery & Young, for respondent.

Statement of Facts and Opinion.

GOODE, J. The appellant is a corporation organized under article 4, c. 42, of the Revised Statutes of 1889, and owns and operates a gravel road running between the towns of Elsberry and New Hope, in Lincoln county, a distance of five miles. The respondent received a personal injury on said road in June, 1900, while driving a horse hitched to a spring wagon. She was going to her home from Elsberry, in company with her little daughter, about 6 o'clock in the evening, and the horse she was driving became frightened by two cows on the road, one of which jostled the horse, and caused him to shy to the south side of the road, partially capsizing the wagon, which was prevented from overturning by falling against a post. Plaintiff's arm was broken, besides other injuries she received, and this action was instituted to recover damages therefor, respondent charging in her petition that the appellant company was negligent in permitting cows to graze along the road and obstruct the free passage of vehicles thereon; also in not making the roadway of the statutory width at the point

where the accident occurred, but constructing it much narrower, with a raised track in the center and steep declivities at the side, so that a wagon driven on one of the banks, or forced there by an emergency, would turn over. The accident occurred just east of a bridge over a gully or branch, and the testimony shows the driveway for some distance east of the bridge was from 12 to 14 feet wide, and consisted of an embankment several feet high, unguarded on either side by anything but wires attached to posts. This construction was doubtless adopted to raise the roadbed to the level of the bridge, which the testimony shows was about 16 feet in width. It appears the entire length of the road had been fenced by the owners of abutting farm lands, except where cross-roads intersected. Cattle occasionally strayed on the pike from the intersecting roads, were tolerated there, and allowed to graze along the borders of the pike; particularly cattle belonging to a farmer of the name of Sada-white, to whom the cows belonged which frightened respondent's horse. As stated, the contention of the respondent is, and so she charges in her petition, that permitting cattle to run along the road was a negligent act, which obstructed travel, and rendered it dangerous. Further, that the statutes required the roadbed to be 20 feet in width, whereas it was much less than that where the respondent was hurt; that her injuries were due to the narrowness of the roadbed and the steepness of its sides, or at least that those circumstances directly contributed to cause her injury.

Appellant contends respondent was guilty of contributory negligence in having an umbrella hoisted to shelter her from a falling shower, which prevented her from seeing ahead and properly handling her horse; also that the appellant was not bound to keep a gravelled roadbed 20 feet wide, but only one of sufficient width to accommodate ordinary travel, and that where the respondent was injured the road was sufficiently wide and perfectly safe.

There was contradictory evidence on the issue of respondent's contributory negligence, as there was likewise testimony to prove the construction of the roadway where she was hurt was unsafe on account of its narrowness and sloping sides. One witness, at least, testified two wagons could not pass there.

The errors assigned relate to the instructions given and refused. Several instructions were given at the instance of appellant, the purport of which was that the respondent was bound to exercise ordinary care and reasonable prudence in driving along the road, and that she could not recover if her injuries were the result of her own carelessness, or her carelessness contributed to cause them, whatever the negligence of the appellant may have been. The instructions given concerning appellant's duty in regard to its road charged that appellant was bound to keep it in safe

condition for travel over a width of 20 feet, and this view is said to be erroneous.

The statute under which the appellant incorporated required it to construct a road not less than 20 feet wide, the roadbed to be well rounded, with side drains not less than 20 inches deep, and a sufficient number of culverts or under-drains to prevent the passage of streams of water over the road. Rev. St. 1889, § 2696. The appellant company obtained a franchise from the state, which empowered it to exercise the right of eminent domain, and collect tolls, on the condition that it complied with those provisions of the statutes. It was bound to construct a road not less than 20 feet wide, including side drains, along the whole route, wherever it was possible to do so. We do not say the statutes require the road to be so uniformly of the width of 20 feet that the topography of the ground traversed might not sometimes excuse a less width; but we find nothing in the evidence before us to show it was indispensable to have the road narrower than 20 feet at the particular point where respondent was hurt. Nor was the theory propounded in the appellant's instructions that it was forced to build the road narrower there; but, to the contrary, its theory was that, whatever the character of the ground, it was not bound to make a safe roadbed 20 feet wide, but only one wide enough for use—an inadmissible defense, we think.

Much is said in appellant's brief about an alleged error of the trial court in holding it was incumbent on the company to keep the road covered with gravel for the width of 20 feet, but it is sufficient to say in response to that argument that no such ruling was made nor instruction given. The jury were simply told, as above stated, that it was the duty of appellant to keep its roadbed in such a condition as would be safe for public use at all times, and maintain a safe roadbed not less than 20 feet wide. That is what the statutes require, barring the space which may be needed for side drains, which is not important in the present case. We cannot see what force the statutory provision that a graded road shall not be less than 20 feet wide has, unless it means the road shall be fit for travel over that width. It does not mean, of course, nor does any one contend it means, the road must be covered with gravel over its entire surface. The track, which we apprehend may be less than 20 feet in width, and still the law be complied with, is required to be made of macadam or gravel. But this by no means implies that no attention need be given to making that part of the 20 feet not gravelled safe and usable. The entire width must be safe, whether macadamized or not, is the view we take of the law.

Whatever may have been the rule at one time in this state in regard to the duty incumbent on a municipality, or on a private corporation operating a road for toll, to keep in safe repair only such parts of a street or

road as the public can conveniently get along with, the law now is that it must keep whatever part it opens for use or permits to be used reasonably safe. *Walker v. City of Kansas*, 99 Mo. 647, 12 S. W. 894; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404; *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513. The appellant company invited travel and collected toll throughout its road's entire length, and was bound to keep it in good condition throughout. The instructions given by the court on that point are satisfactory, while those asked by the appellant and refused left entirely out of view the statutory obligation to make the road not less than 20 feet in width.

Failure to perform a duty enjoined by statute constitutes negligence which affords a right of action to any one injured thereby. *Drain v. Railroad*, 86 Mo. 574; *McNown v. Id.* (K. C.) 55 Mo. App. 585; *Hanlon v. Id.*, 104 Mo. 381, 16 S. W. 233; *Gratiot v. Id.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Karle v. Id.*, 55 Mo. 476; *Easley v. Id.*, 118 Mo. 226, 20 S. W. 1073; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451. If the respondent, while herself exercising ordinary care, sustained damage because of the negligence of the appellant company in not making its road of the requisite width, she was entitled to maintain her action on that ground, and it could not properly be excluded from the consideration of the jury, as the requested instructions sought to do. It was necessary for her, however, to adduce testimony tending to show the defective condition of the road was a proximate cause of her injuries—to connect the accident with the appellant's nonperformance of duty. *Karle v. Railroad*, supra; *Kelley v. Railroad*, 75 Mo. 138; *Holman v. Railroad*, 62 Mo. 562. That such testimony was adduced cannot be doubted after reading the record; for there was, as stated, evidence to show not only that the road was narrow, but that its sides were steep, where plaintiff was hurt; and the inference might well be drawn that, if it had been safely guarded, or of the proper width, she would have escaped the partial overthrow of her vehicle and the consequent injuries to her person.

Another point raised by the appellant is that the accident was not due to the condition of the road, but to the encounter with the cows. No doubt the collision of one of the cows with the horse was a cause of the casualty, but, as we have said, there was testimony to warrant the inference that it would not have resulted seriously but for the state of the road at that place. We agree with appellant that the presence of the cows on the road raised no inference of negligence against it, but we do not concede the law in this state to be what it was declared to be in some cases cited by the appellant, to wit, that, if an accident occurs on a highway, partly on account of the bad repair of the road, and partly on account of some other

circumstance, such as the fright of a team, the injured party has no case for damages against the corporation or municipality whose duty it was to keep the road in repair. The law of Missouri, as laid down in several cases not materially different from this one, is that, if the bad repair of the street or highway proximately contributed to produce the injury, the party charged with keeping the street or highway in repair is responsible, although there was another contributory cause. *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Vogel v. West Plains (St. L.)* 73 Mo. App. 588. In some of these decisions the cases relied on by the appellant were examined, and their doctrine rejected.

Another point made for reversal is that the respondent knew the condition of the road, and, if it was dangerous, she was guilty of negligence in traveling over it, which precludes her recovery. The road was the way to her home, and she had the right to take it, unless it was so dangerous that a person of common prudence would have declined the risk; which no one will assert, refuted as it is by all the testimony. We suppose this point is not seriously made. *Loewer v. Sedalia*, 77 Mo. 431; *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941.

The first instruction given at the instance of respondent predicated as negligence on the part of the company which would authorize a recovery the toleration of cows on the road, along with its alleged negligence in not maintaining the road in proper condition. As said, there is nothing in this case to show it amounted to negligence to let cows stray on the road from cross-roads to the extent they did. In fact, we do not see how they could be kept off. Said instruction should not have been given, as it was likely to mislead the jury, and induce them to think the appellant was answerable in damages to the respondent if her injuries were caused by the cows, even if the jury found from the evidence the road was all right, and had nothing to do with causing the accident.

On account of giving said instruction, the judgment must be reversed, and the cause remanded to be retried. It is so ordered.

BLAND, P. J., and REYBURN, J., concur.

MELTON v. ST. LOUIS & S. F. R. CO.
(Court of Appeals at St. Louis, Mo. March 3, 1903.)

RAILROADS—INJURIES OF TRAVELERS—TRAIN SIGNALS—NEGLIGENCE.

1. Plaintiff, in an action against a railroad company for negligent injuries, was driving along a highway parallel with the track, when

his horses were frightened by an approaching train about a quarter of a mile from one crossing and a half a mile from another, causing him to be thrown to the ground. He had not crossed the track at the crossing behind him, and did not intend to do so at the one ahead of him. *Held*, that the failure to give the statutory crossing signals did not make the company liable in damages to him.

2. No negligence could be imputed to the company for the failure of the train to give signals at the place of the accident.

Appeal from Circuit Court, Newton County; H. C. Pepper, Judge.

Action by John Melton against the St. Louis & San Francisco Railroad Company to recover damages for negligent injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Parker & Woodruff, for appellant. Horace Ruark, for respondent.

REYBURN, J. Between 9 and 10 o'clock a. m. on the 26th of November, 1901, a clear, cold morning, John Melton, the plaintiff, was driving on the main public road leading from Neosho to Carthage. This road and the railroad of defendant for a distance run almost parallel to each other in an easterly and westerly direction, the public road being north of and at the point where the plaintiff was injured, so close to the railroad that it extends to the fence along the right of way of the defendant. About a quarter of a mile west of the place of the accident a road crossed the railroad track, and between a quarter and half a mile east of the same place another road also crossed the railroad and its right of way. Plaintiff was traveling eastwardly, and had not crossed the western crossing behind him, and did not intend to cross at the east one, which he was approaching. He was in a buggy with the top up, and the side curtains down, driving along at an ordinary or moderate gait, expecting, as he contended, to be advised by signals of the approach of any trains that might happen to pass in either direction, and by the obstruction of intervening timber he could not see a train over a hundred yards ahead. A train came by rapidly from the east, his horses became frightened, his buggy was overturned and broken, and he sustained the injuries complained of. The evidence showed that the train failed to give any signals when approaching the place in the public road where the accident occurred, and likewise failed to give any signals at either crossing. From a judgment by default before a justice of the peace in Newton county the defendant appealed to the circuit court, where, a dismissal being entered as to the first count, the case was tried before a jury on the second count of an amended statement, as follows:

"For another and further cause of action plaintiff states that the defendant is now and at all times hereinafter mentioned was

a corporation authorized to do business in the state of Missouri, and engaged in running and operating a railroad through Newton county, Missouri; that at a place where said railroad runs through Neosho township in said county said railroad runs alongside and parallel with the traveled public highway leading from the city of Neosho to the village of Diamond in said county, and that said place is dangerous to persons traveling upon said highway with teams by reason of the liability of horses to become frightened and run from locomotives and trains of cars upon said railroad, and for the reason that at said place and upon the opposite side of said public highway from said railroad, and running parallel with, and alongside the same, is a creek with steep banks, known as 'Shoal Creek,' so that there is no means of escape for frightened teams; that trains coming from the northeast upon said railroad are invisible to persons traveling upon said public highway, and in or near said dangerous place, all of which was well known to the defendant; that on the — day of —, 1901, plaintiff was traveling along said public highway with a team of horses, and while in the exercise of due care and caution upon his part, and while at said dangerous place, his team became scared and frightened at a locomotive and train of cars upon said railroad in charge of the agents and servants of defendant, so that they broke and destroyed plaintiff's buggy and threw plaintiff to the ground, causing him great injuries in his chest and back, and causing him to suffer great pain and mental anguish, and rendering him incapable of laboring; that the agents and servants of defendant in charge of said train negligently and carelessly failed to ring the bell upon said engine or sound the steam whistle, or give any other signal or warning of their approach; that said signal or warning could have been easily given by the agents and servants of defendant in charge of said engine, and, if so given by said engine or those in charge thereof before reaching said dangerous place, plaintiff would have heard the same, and escaped therefrom and secured his team; that the said injuries to plaintiff were so caused by negligence and carelessness of defendant in failing to give any signal or warning of the approach of its train to said dangerous place. Plaintiff states that he is damaged in the sum of two hundred and fifty dollars, for which he asks judgment and for costs."

At the close of plaintiff's case, defendant asked an instruction in the nature of a demurrer to the evidence, as follows: "The court instructs the jury that under the pleadings and the evidence the plaintiff is not entitled to recover, and the verdict should be for the defendant"—which instruction the court refused to give, and, no testimony being offered on behalf of defendant, duly instructed the jury, which returned a verdict

for the plaintiff, from which, after unsuccessful motions for new trial and in arrest of judgment, defendant has appealed.

As the statutory precautions requiring signals to be given by the engine of a railroad train approaching a crossing of a public street or highway have been held in this state, as well as in other states, to be intended for the warning and protection of persons crossing or intending to cross a railroad over a street or public road by giving such persons upon the public highways notice of an approaching train, respondent, under the conditions presented, and at the place of the accident, was not within the protection of the statute, and proof of omission by appellant's train to whistle and ring at the eastern or western crossing in obedience to the law did not render it liable for the damages sustained by him. *Burger v. Railway*, 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379; *Bell v. Railroad*, 72 Mo. 50; *Elliott on Railroads*, par. 1264, pp. 1985-6.

A railroad company is required by law to operate its trains with due and proper care, and exercise a proper degree of prudence and caution to avoid injury either to passengers or the outside public, but the public in turn must use proper care to avoid injury. Additional to the signals by bell and whistle prescribed by the statute at crossings of public thoroughfares, under proper circumstances, and in compliance with the high degree of care imposed by law on railroads to operate their trains so as to avoid injury or danger, railroads are required to give other warnings to the public, as is established by the class of decisions cited on behalf of respondent, requiring railroad trains stopping or dividing at a public highway to give notice when about to move or be again united. *Burger v. Railway*, supra; *Schmitz v. Railway*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

But the principles recognized in these and similar cases lack application to the case under consideration. The claim of plaintiff that if the statutory signals had been given at the eastern crossing he would have been warned of its approach, and escaped to a part of the highway not so near the railroad track, is illogical, remote, and but conjectural. If the train as it approached respondent had been emitting signals continuously by whistle and bell, the peril of plaintiff would have been but increased; the probability of his horses taking fright but made greater. Defendant had the lawful right to operate its trains on its own tracks, and was not responsible for injurious consequences unless promoted by its negligence. Neither by statute nor in the exercise of proper prudence, nor by the high degree of care exacted from it, was any duty imposed on appellant to give any signals at the place of the accident, and no negligence could be imputed to it for failure to give warning of the approaching train by reason of the close

proximity and paralleling of its right of way to the public thoroughfare. *Elliott on Railroads*, supra; *Favor v. R. R.*, 114 Mass. 350, 19 Am. Rep. 364; *Lamb v. R. R.*, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449.

The demurrer to the evidence should have been sustained, and the judgment is accordingly reversed.

BLAND, P. J., and GOODE, J., concur.

VANDOLAH v. McKEE*

(Court of Appeals at St. Louis, Mo. March 8, 1908.)

GAMING—WAGER—LIABILITY OF STAKEHOLDER—DEMAND—SUFFICIENCY.

1. Rev. St. 1899, § 3431, provides that a stakeholder shall be liable to the party placing a bet in his hands, both before and after the determination thereof, and delivery to the winner shall be no defense; provided that no stakeholder shall be liable afterward unless a demand has been made of him previous to the time agreed on for the determination of the bet. *Held*, that a written notice served on a stakeholder reciting, "I hereby notify you not to pay my part of the bet made on the election of the governor * * *, held by you as stakeholder, made on October 19, 1900, with one R.," dated, and signed by the other party to the wager, was a sufficient demand within the statute to charge the stakeholder.

Appeal from Circuit Court, Clark County; Edwin R. McKee, Judge.

Action by James Vandolah against Albert McKee. Judgment for defendant, and plaintiff appeals. Reversed.

Davis & Whiteside, for appellant. W. T. Rutherford, for respondent.

Statement of Facts and Opinion.

GOODE, J. Plaintiff and one Ragsdale laid a wager on the result of the election pending in the autumn of 1900 for governor of Missouri—plaintiff betting, it is alleged in the statement, \$50 that Alexander M. Dockery would not receive 30,000 majority over Joseph Flory for governor; Ragsdale betting the same amount that said Dockery would receive that majority. McKee was the stakeholder in whose hands the respective parties put the money wagered. After the election, Vandolah first claimed all the money, as he admitted, but swore that afterwards, when a dispute arose between him and Ragsdale as to the exact terms of the wager, he demanded back the part he had put up, which McKee denied, and testified that no demand whatever was made on him by Vandolah for the return of the latter's part of the money until he (McKee) had paid the entire sum in his hands to Ragsdale. On the 27th day of November the following notice, claimed to be a demand within the meaning of section 3431, Rev. St. 1899, was served on McKee:

"To Albert McKee, Notice: I hereby no-

*1. See *Gaming*, vol. 24, Cent. Dig. §§ 63, 72.
*Rehearing denied April 12, 1908.

tify you not to pay my part of the bet made on the election of the governor of the state of Missouri, held by you as stakeholder, made on the nineteenth day of October, 1900, with one Ragsdale.

"Dated this twenty-seventh day of November, 1900.

"[Signed] James Vandolah."

McKee paid all the money to Ragsdale the next day after the service of said notice. Later, Charles Hiller, as attorney for Vandolah, demanded the return of the latter's \$50, but McKee swore that said demand, which is the only one he admits was made for Vandolah's stake, came after he had turned over the money to Ragsdale. He said, however, that he intentionally gave Hiller the impression that he still had the money in his possession when the latter said he would sue if Vandolah's part was not returned, and when McKee knew Hiller was making the demand as the basis of an action. McKee's conduct was equivocal, and might, perhaps, have estopped him to deny he still had the money when Hiller demanded Vandolah's stake. But no such contention was made, both sides adopting the theory that a demand on McKee must have been made while he in fact had the money in his hands, and we think a demand was conclusively shown. It stands undenied and undisputed that McKee still had Vandolah's money when the foregoing written notification was served on him, forbidding him to pay it over to Ragsdale. Was said notice a sufficient demand to enable Vandolah to sue for and recover his stake?

Whether used to designate a claim or a legal right, or in the sense of a request to another to perform a duty, the word "demand" is of extensive significance. In the latter sense a demand may be made or preferred by the use of any words which the person addressed understood, or ought to have understood, as a request for performance. *Kiefer v. Carrier*, 53 Wis. 404, 10 N. W. 562; *Truax v. Parvis*, 7 Houst. 333, 32 Atl. 227. It is sometimes equivalent to, or at least may be sufficiently made by, a notification to the person addressed of the other party's claim; and we think that is the meaning of the word in our statutes on gaming. In fact it was so adjudged by this court in the case of *Weaver v. Harlan*, 48 Mo. App. 319, wherein it was said: "The only construction which we think can be placed on this section, if the spirit and policy of the statute are not lost sight of, is that a stakeholder will not be liable to an action if he delivers over the money or other thing bet to the winner, after the determination of the bet, and before he has notice from the loser not to do so. The matter contained in the proviso is not well expressed, but any other construction would be out of harmony with other portions of the section, and against the clearly expressed intention of the legislature in other sections of the

law. If a stakeholder, after the determination of the bet, and in the absence of notice from the loser, delivers the stakes to the winner, it would be unjust to hold him liable. It is to such a case, and none other, that the exception applies."

The present case is indistinguishable, on principle, from the one just cited and is controlled by it. A formal demand for the return of the money was not contained in the notice, but it was sufficient to render McKee liable, as he paid the money in disregard of the notice.

The judgment is therefore reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

MONUMENTAL BRONZE CO. v. DOTY.
(Court of Appeals at St. Louis, Mo. March 3, 1903.)

SALE OF MONUMENT—WARRANTY—INSCRIPTIONS—DEMAND OF ADMINISTRATOR—SUFFICIENCY—WITNESS—COMPETENCY.

1. Where a monument was warranted as represented in the vendor's circulars, which stated that "white bronze" was a trade-name for purified zinc, there was no representation that the monument should be bronze.

2. Where the order for a monument provided for the inscription, "The Lord is My Shepherd I shall not want," and the word "fear" was written in pencil under the word "want," it will be presumed that the word "fear" was inscribed on the monument in obedience to the purchaser's order.

3. A demand against an administrator, who had waived service of notice thereof, showing the balance due and demanded, to which was attached the contract and order under which the claim arose, was sufficient.

4. In an action against an administrator for the price of a monument furnished under a contract with deceased, plaintiff's agent who made the sale was competent to prove her signature to the contract; having testified that his knowledge of her handwriting was acquired aside from the contract, from letters he had received from her.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by the Monumental Bronze Company against Thomas Doty, administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Fry, for appellant. Jesse Barnes, for respondent.

Statement of Facts and Opinion.

GOODE, J. All the facts of this case may be found stated in the opinion delivered on a former appeal. *Monumental Bronze Co. v. Thomas Doty*, Adm'r (St. L.) 92 Mo. App. 5. On the second trial the evidence was not materially different from what it was on the first, except that we find in the appellant's abstract the following recital: "Plaintiff read in evidence a number of circulars advertising the white bronze monuments, in which it was stated that it was a trade-name for refined and purified zinc, with the surface

finished with sand-blast process. It is called 'white bronze' to distinguish it from copper or antique bronze. Its color is a light gray. White bronze differs from zinc in color and texture, as steel differs from iron. It is pure metal, like gold. It resists the effects of the weather for all time. It is heavier than granite, and cheaper. It takes the place of granite and marble for monumental work, because it is more enduring and produces more artistic work, and is less expensive. It looks like granite." In the previous opinion we held that the contract showed on its face that the only warranty the respondent made in regard to the monument was that it should be in every respect as represented in respondent's circulars, and that, as the circulars were not introduced in evidence to prove what was represented, there was neither proof of a warranty nor of a breach. What was relied on principally on the former appeal was that the company warranted the monument to be of white bronze, which warranty was broken, because it was of zinc. The above recital from the abstract of the contents of the circulars containing the representations on the faith of which Elizabeth Doty purchased shows there was no representation that the monument should be of bronze, but, on the contrary, a statement that "white bronze" was a trade-name for purified zinc; hence as the monument corresponded exactly, in respect to material, with the representation, there was no breach of warranty in that regard.

As to the defense based on one of the inscriptions reading, "The Lord is My Shepherd I shall not fear," instead of the true quotation from the Psalm, "The Lord is my Shepherd I shall not want," we repeat what we said in the former opinion, namely, that the written contract or order for the shaft contained both the words "fear" and "want," and, in the absence of evidence that the word "fear" was incorrectly inscribed, the presumption is that it was used in obedience to the order of Miss Doty; and there was no evidence the company departed from her order in preparing the inscription.

It is contended by the appellant that the account sued on was insufficient to warrant the reception of any evidence to prove it. The case originated in the probate court on the following demand, with waiver of service by the administrator of Elizabeth Doty, and appended to the demand the order and contract for the monument:

"Bridgeport, Conn., September 16, 1899.		
"Miss Lizzie Doty, Mexico, Mo., in Account with		
"The Monumental Bronze Company.		
"White Bronze Monuments, Statuary, Portrait Busts, Medallions, Etc., Etc.		
To balance		
July 17. To Mdse.	\$384	00
Aug. 22. By Cash	64	00
Balance	\$320	00

"I, Thomas Doty, administrator of the estate of Miss Elizabeth Doty, deceased, do hereby waive the service of any notice on me of the presentation of the above demand to the probate court of Audrain county for allowance against said estate. Thomas Doty, Administrator, by Fry & Clay, Attorneys."

No formal pleadings are required in the probate court, and, if the demand is filed in such form as to unmistakably disclose the nature of the transaction that gave rise to it, that is enough. *Sublett v. Nelson*, 38 Mo. 487; *Williams v. Gerber* (St. L.) 75 Mo. App. 18. The contract itself, which is set out in the former opinion, shows fully the undertakings of the parties and the amount the deceased was to pay, while the account to which it was attached shows the balance due and demanded by the company. Appellant would have been entitled to a fuller statement by way of written notice (Rev. St. 1899, § 197), had he not waived notice altogether. It must be taken that both he and his attorneys, who signed the waiver, considered themselves sufficiently apprised of the nature and extent of the respondent's demand without a further statement of the facts, which is, of course, the object the statute aims at. The account and contract made a sufficiently clear cause of action or demand for a judgment thereon to be a bar to any further proceeding by the respondent on the same claim.

The court permitted Paul Schmidt, who acted as agent for respondent in making the sale to the deceased, to identify her signature to the contract, excluding all the rest of his testimony. Schmidt testified his knowledge of the handwriting of the deceased was acquired outside the contract he made with her, from letters she had written to him. We think he was competent to prove her signature. *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Kuhn v. Insurance Co.* (K. O.) 71 Mo. App. 306. Her signature, however, was not disputed.

No defense was shown to plaintiff's demand, which was proven by documentary evidence, and the circuit court rightly instructed the jury to return a verdict in its favor. The judgment is affirmed.

BLAND, P. J., and RHEYBURN, J., concur.

JEANS v. MORRISON.*

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

MUNICIPAL CORPORATIONS — IMPOUNDING STRAY ANIMALS — ORDINANCES — JUDGMENT — REPEAL OF ORDINANCE — NONRESIDENT OWNER — SETTING ASIDE VERDICT.

1. Under the express provisions of Rev. St. 1899, § 5959, cities of the fourth class are empowered to regulate or prohibit the running at large of horses and other animals; to provide for the erection of suitable pounds, pens, and

*Rehearing denied March 17, 1903.

buildings; and to enforce rules governing the same.

2. An ordinance made it unlawful for the owner of horses, mules, or asses to permit the same to run at large inside the corporate limits, and provided that, if such animals were found at large, they should be restrained by the marshal in a suitable place. It further provided for notice to the owner, and that, on failure to pay the costs incurred, the animal would be sold under judgment of the police judge, etc. A subsequent ordinance referred to the preceding ordinance, but, besides horses, mules, and asses, made it unlawful for the owner of sheep, fowls, swine, or poultry to suffer the same to run at large, and provided for impounding, notice, judgment, and sale according to the provisions of the prior ordinance. *Held*, that the second ordinance did not operate to repeal, but to enlarge the scope of, the first.

3. An ordinance provided that on due proof that an animal had been found running at large and impounded, and that proper notice had been given, the police judge should make and enter on his record an order for the sale of the animal to pay the costs and expenses; reciting the facts and specifying the items of cost. An animal was impounded, and the items of cost were entered on the margin of the judgment. *Held* a sufficient compliance with the ordinance.

4. An ordinance providing for the impounding and sale of animals found running at large within the corporate limits is a valid police regulation.

5. An animal found running at large within the city limits may be impounded, though the owner is a nonresident of the city.

6. An appellate court may set aside a verdict where it is manifestly arbitrary and dictated by prejudice.

Appeal from Circuit Court, Newton County; H. C. Pepper, Judge.

Replevin by R. M. Jeans against D. B. Morrison. Judgment for plaintiff, and defendant appeals. Reversed.

John T. Sturgis, for appellant. James H. Pratt, for respondent.

Statement of Facts and Opinion.

GOODE, J. The marshal of Neosho, Mo., a city of the fourth class, took up a mare which was straying about the city on July 5, 1901, and put her in the city pound. He afterwards published notice for 10 days of the impounding of the animal; giving an accurate description of her, by printed handbills posted in the hall of the courthouse, in the post office of the city, and in several other places; likewise sending out several of the notices by mail. The handbills stated where the stock pound was, to wit, at Brown's Livery Stable, at the southeast corner of the public square, described the mare as a small roan sorrel mare, small white spot on forehead, about five years of age, slender build, and about 14½ hands high, which is the way she is described by the plaintiff in his statement in this case. The handbills also notified the unknown owner that unless he claimed the animal from the pound, and paid the costs of her keep and of the proceedings connected with her restraint, in 10 days from July 5, 1901, she would be sold under judgment of the police judge of the city, and the

proceeds applied to the payment of said costs. No owner appeared to claim the animal in the time fixed. So, on the 16th of July, Pearman, the marshal, made oath before the police judge of the impounding of the animal (describing her), of the notices he had published, and that no owner had appeared to show cause why she should not be sold. Thereupon the police judge entered an order directing the marshal to sell the mare to the highest bidder, for cash in hand, at public vendue, giving notice of the time, terms, and place of sale by handbills posted as required by ordinance, and to pay out of the proceeds of the sale the costs of impounding, keeping, and feeding the animal, and of the proceedings in the action to sell, and to turn the remainder of the proceeds into the treasury of the city for the owner of the animal. On the margin of the judgment was an itemized statement of the fees and costs which had accrued for the restraint and care of the mare and the sale. The marshal forthwith gave notice by handbills that he would sell the mare July 22, 1901, between the hours of 9 o'clock in the forenoon and 2 o'clock in the afternoon, at the southeast corner of the public square in the city of Neosho, at public vendue, for cash in hand, to pay the costs of detention and of the subsequent proceedings; the notice containing an accurate description of the mare. Sale was accordingly made on the day named in the notice, and the animal was bought by one Brown, who subsequently sold her to Reagan, who, in turn sold her to defendant, Morrison, in whose possession she was discovered by the plaintiff some time in September, 1901, and this action of replevin instituted to recover her from Morrison.

The mare strayed from the owner's farm in May, 1901, and was at large until she was impounded, in July. When taken up she was in bad condition, very thin in flesh, and with swollen legs; owing, it is said, to the dry weather. Jeans looked for her when she escaped from his premises, and, in the course of his search, made inquiries; but he testified he made no inquiry at the Neosho Stock Pound, nor asked where the pound was, though he visited Neosho.

Two ordinances of said city were introduced in evidence; the first being Ordinance No. 36, enacted August 3, 1897, which made it unlawful for the owner of horses, mules, or asses to permit the same to run at large inside the corporate limits of Neosho, and outside the inclosure of the owner or person having them in charge. Said ordinance also provided that, if any such animals were found at large inside the city limits, it should be the duty of the marshal to restrain them in a suitable place to be procured by said marshal under an order of the board of aldermen, which place should be known as the city stock pound; that such animal or animals should be safely kept therein until disposed of as provided by the ordinance. As to the disposition of the animals which might

¶ 5. See Municipal Corporations, vol. 26, Cent. Dig. § 1320.

be impounded, the ordinance provided that the owner should be notified by written or printed handbills posted in the courthouse and post office, as the most public places in the city; that the notice should contain a true description of any animal restrained; that the owner, if known—otherwise the unknown owner—should be notified to claim or take the animal from the pound, the locality of which should be designated; and that the owner should pay the costs incurred, or the animal would be sold under judgment of the police judge of the city to pay the same. Another section of the ordinance provided that on proof made before the police judge that an animal had been found running at large in the city and impounded, and that 10 days' notice of its impounding had been given, said police judge, unless the owner or person having the care of the animal showed good cause to the contrary, should make and enter on his record an order for the sale of the animal to pay the costs and expense of keeping it and of the restraint proceedings; reciting the facts and specifying the items of costs. The ordinance also provided that the police judge should certify to the city marshal a copy of every judgment of that kind, on receipt of which the marshal should give five days' notice by written or printed handbills posted in the courthouse and post office, describing the animal, and the time, terms, and place of same, and thereupon should sell it, for cash in hand, at public vendue, to the highest bidder. Another ordinance (No. 220), adopted April 26, 1898, referred to the preceding ordinance (No. 36), but, besides horses, mules, and asses, made it unlawful for the owner of sheep, fowls, swine, or poultry to suffer the same to run at large within the city limits; providing, also, for their impounding, and for notice, judgment of sale, and sale, according to the provisions of Ordinance No. 86. The plaintiff identified the mare as his property, swore she strayed from his farm on the date mentioned, and that he looked for her in Neosho and elsewhere, and then rested. The defendant put in evidence the city records in regard to the impoundage and sale of the animal.

For the plaintiff the court instructed the jury that if they believed from the evidence that, at the commencement of this action, plaintiff was the owner of the property in controversy, and had a right to the immediate and exclusive possession thereof, they would find the issues for the plaintiff; also that, unless the jury believed from the weight of the evidence that in impounding the animal the city marshal complied with the law in every particular (that is to say, gave the required notice under the law), they would find the issues for the plaintiff, if they believed he was the owner of the animal when it was taken up. For the defendant the court instructed substantially as follows: That if the mare was found running at large in Neosho, near the public square, and was

taken up by the marshal and placed in the stock pound at Brown's Livery Stable, near the southeast corner of the square; that the marshal posted two or more of the notices read in evidence (one in the hall of the courthouse, and another at the post office) for at least ten days; that afterwards the police judge of the city rendered the judgment in evidence, and certified the same to the marshal, who thereupon posted at least two copies of the notices of sale read in evidence at the places mentioned at least five days before the sale, and afterwards sold the animal to the highest bidder, for cash, at the time and place stated in the notices, no one having claimed her meanwhile—then the purchaser at the sale got a good title, and the verdict should be for the defendant. The court also instructed that the said ordinances were valid, and empowered the marshal to take up and restrain any horse running at large inside the city, and to impound and sell it, and if, in so doing, the provisions of the ordinances were complied with, the purchaser obtained a good title. Further, that if the jury found the mare in question was running at large in the city, and was impounded by the marshal, and notices were posted as the ordinances required, judgment rendered by the police judge in the manner prescribed by the ordinances, and the mare was then advertised and sold as provided in the ordinances, the sale was valid, and the purchaser thereat got a good title.

The jury returned a verdict in which they found that at the commencement of the suit plaintiff was the owner and entitled to the immediate possession of the property in controversy, and assessed his damages for her taking and detention at \$1. From the judgment entered on said verdict, the defendant appealed.

Cities of the fourth class in Missouri are empowered to regulate or prohibit the running at large of horses and other animals; to provide for the erection of suitable pounds, pens, and buildings, and enforce rules governing the same. Rev. St. 1899, § 5959; *Sherrell v. Murray* (St. L.) 49 Mo. App. 233; *McVey v. Barker* (St. L.) 92 Mo. App. 498. The ordinances enacted to carry out this charter power were valid, and must be upheld and enforced.

It is said by the plaintiff that the second ordinance operated to repeal the first one; but this is not true, because the second distinctly refers to the first as still in force, and directs a sale of any animals or poultry taken up and impounded in accordance with the provisions of the first ordinance. The manifest purpose of the second ordinance was to enlarge the scope of the first one by directing the impounding, not only of horses, mules, and asses, but of sheep, swine, and poultry. There is no clash between the two regulations, and both were in force at the time plaintiff's mare was taken up.

A point is made about there being three

city pounds, but the evidence on this point shows there was only one on the day the mare was impounded, and for some time before, and that it was located at Brown's Livery Stable, in the southeast corner of the public square. The marshal was authorized to provide for a pound, and when the change was made he tacked a notice on the door of the old one, which stated where the new pound was. There is nothing in this point technically. As to its bearing on the merits, suffice to say the plaintiff himself testified that when he was hunting for his mare he never went near the city square, nor asked where the stock pound was, nor if there was a pound, but contented himself with inquiring for his property in the outskirts of the city.

It is said the order of the police judge to make the sale failed to recite the items of cost. Said items were entered on the margin of the judgment, which is the place where cost items are usually noted by a magistrate, and we think the law was sufficiently complied with in that regard.

Both the notices of impoundage and the notices of sale published by the marshal were complete. They described the mare, told the site of the pound in which she was detained, and in all respects fulfilled the ordinances, so far as we can see. That the sale of the mare pursuant to the aforesaid proceedings passed title to the purchaser, who in turn passed title to the defendant as the final purchaser, there can be no doubt, under the authorities *supra*, and under all the decisions we have run across that deal with the sale of impounded stock by virtue of municipal ordinances. Such police regulations are regarded as indispensable to the safety of the inhabitants, and the cleanliness and the convenient use of the streets of cities. Stray animals cannot be permitted to run at large in city streets, for they cause accidents and annoy and alarm people. Indeed, cases are not lacking in which stray stock in public streets are treated as a public nuisance, which the authorities have the right to abate. *Spitler v. Young*, 63 Mo. 42.

Neither does it make any difference that the owner of this particular animal was a nonresident of the city of Neosho. He may not have been subject to the fines and penalties provided by the ordinances, but, when his mare strayed into the corporate limits of the municipality, she was subject to impoundage, as well as the stock of residents. *Spitler v. Young*, *supra*.

Notwithstanding the conclusiveness of the evidence, and that no single issue of fact was contested, and notwithstanding every fact was positively proven which the jury were instructed they must find in order to render a verdict for the defendant, they rendered one for the plaintiff. In support of this ver-

dict it is contended the jury had the right to weigh the testimony of the witnesses for the defendant, and disregard it if they thought it unworthy of belief, and cases are not lacking which may be plausibly argued to support that position. *Gannon v. Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. The case just cited, like all others, must be dealt with according to the facts it presented to the court which decided it. The general doctrine therein maintained we consider sound, and would be obliged to follow it if we thought otherwise; but that doctrine must not receive an unreasonable extension, or it will become fraught with mischief and promote miscarriages of justice. In the case in hand the contention that the verdict of the jury must be allowed to stand, because they were the triers of the fact, and might disregard the contradicted testimony for the defense, is equivalent to saying the jury had the right to disbelieve the marshal's testimony that he took up the animal within the city limits, that he impounded her, that he sold her, or that he published the notices. But none of those matters was at all contested at the trial; plaintiff insisting, as we gather, on but three points: That the ordinances were in conflict, and that the one last passed repealed the other; that the judgment of the police judge was invalid because it did not contain a specification of the costs; that the owner had the right to claim his property because the city pound had been changed. There is no merit in either of these points, in our opinion, for reasons above stated; and, having so ruled, we do not think *Gannon v. Gaslight Co.*, *supra*, forces us to uphold the verdict on the possibility that the jury may have disbelieved the city marshal as to the matters above mentioned. Moreover, that authority does not undertake to annul the doctrine that a trial court may set aside a verdict and grant a new trial when the verdict found was against the weight of the evidence, and that an appellate court may do likewise when the verdict was manifestly arbitrary and dictated by prejudice. It is clear, beyond doubt, to our minds, that the impounding of plaintiff's mare, and all the proceedings leading to the sale, were regular and valid; that a good title passed to the purchaser at the public sale, and from him to his grantee, and thence to the defendant. We cannot, therefore, allow the defendant to lose the property so acquired, on what seems to us the wholly unwarranted verdict of the jury, rendered in disregard of the court's instructions and of the evidence before them.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

DORTON v. BURKS et al.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

MUNICIPAL CORPORATIONS—IMPOUNDING STRAY ANIMALS—NEGLIGENCE OF OWNER.

1. Where a city of the fourth class has the power, under its charter, to take up and impound stray animals found within its borders, it may do so, whether such animals escape by reason of the owner's negligence or not.

Appeal from Circuit Court, St. Francois County; Jas. D. Fox, Judge.

Replevin by William Dorton against W. R. Burks and another. Judgment for plaintiff, and defendants appeal. Reversed.

Benj. Marbury, for appellants. Abernathy & Gossom, for respondent.

Opinion.

GOODE, J. This is an action of replevin instituted by respondent Dorton against appellant Burks, marshal of the city of Farmington, and against the city of Farmington itself, to recover possession of a cow which had been taken up by the marshal while straying inside the city limits, and placed in the city pound, by virtue of an ordinance authorizing that action. The cow had strayed once before into the city limits and had been impounded, on which occasion Dorton had paid the costs of her restraint, whereupon she was restored to him. She strayed again during the latter part of December, 1900, and, being found inside the city, was taken up by Burks the marshal, about the 1st of January, and Dorton notified. Instead of paying the costs this time, Dorton demanded that the cow be delivered to him forthwith, declining to pay anything. Burks offered to release her if Dorton would pay the expense of taking her up, but, instead of doing so, the latter instituted an action to recover possession, and succeeded in obtaining a verdict in the court below.

Farmington is a city of the fourth class, and this case is in no material respect different from *Jeans v. Morrison* (St. L.) 73 S. W. 235, or two other cases which were formerly decided by this court. *Sherrell v. Murray*, 49 Mo. App. 233; *McVey v. Barker*, 92 Mo. App. 498.

The court instructed the jury on the theory that the city of Farmington had no right to impound the animal and hold her until the expense of her detention was paid unless she escaped from the farm of the respondent (some four miles from the city) through his carelessness. Such is not the law. An owner may not be liable for penalties prescribed by an ordinance for allowing stock to run at large inside the limits of a city unless he is guilty of some negligence; but a city of the fourth class, under its charter power, has the right to take up and impound stray animals

when found within its borders, whether they escaped by the owner's negligence or not. *McVey v. Barker*, supra. The defense to this action was complete, and plaintiff was not entitled to recover possession of his cow until he paid the reasonable cost of impounding and keeping her.

The ordinance of the city of Farmington which directs the sale of impounded stock calls for a very short notice of the date of sale, and does not provide for an order of sale by the police judge or any other tribunal. There might be some question whether said ordinance is reasonable, as to the notice of sale and proceedings anterior thereto, if there had been a sale of the animal. That point, however, is not involved on this appeal, because no sale took place, as Dorton instituted his replevin suit while the cow was still in the pound.

The judgment is reversed, and the cause remanded, to be disposed of in conformity to this opinion.

BLAND, P. J., and REYBURN, J., concur.

FRANK v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

STREET RAILWAYS—INJURIES AT CROSSINGS—NEGLIGENCE—ISSUES FOR JURY—CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN—EVIDENCE—CREDIBILITY OF PLAINTIFF'S TESTIMONY.

1. In an action against a street railway for injuries to a teamster, whether defendant was running its car at an excessive speed, and neglected to slacken speed on approaching a crossing, or was guilty of negligence in not having a headlight and failing to sound the gong, *held*, under the evidence, to be questions for the jury.

2. In an action against a street railway company for injuries to a teamster, plaintiff's testimony that he stopped to look and listen for cars, but did not see the one that struck him, was not so incredible that it should have been disregarded, when the evidence of the motorman himself was that he could not see more than five feet ahead of his car, and there was evidence that the gong was not sounded.

3. Negligence of plaintiff which does not contribute to his injury will not bar a recovery.

4. There is no absolute duty incumbent on one who is about to cross a street railway track to stop, as well as to look and listen.

5. In an action against a street railway company for injuries to a teamster, an instruction that, in ascertaining whether plaintiff stopped to look and listen, the jury should consider all the facts and circumstances, and the testimony of other witnesses, as well as that of the plaintiff, was proper, without further charging that they were not bound to believe plaintiff's own testimony.

6. A party cannot complain of a clause in an instruction given of the court's own motion, which was contained in an instruction given at such party's request.

Appeal from Circuit Court, St. Louis County; J. W. McElhinney, Judge.

¶ 3. See *Negligence*, vol. 37, Cent. Dig. §§ 23, 113.

Action by Henry Frank against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Kiskaddon & Mathews, for appellant. Baker, Holtkamp & Mudd, for respondent.

Statement of Facts and Opinion.

GOODE, J. The appellant's street car collided with a two-horse wagon, on which the plaintiff was sitting, at the intersection of Victor and Ninth streets, in the city of St. Louis, October 30, 1899. The accident occurred early in the morning, between half past 6 and 7 o'clock, while the plaintiff was driving the wagon, loaded with lumber, eastward on Victor street.

The evidence shows Victor street runs east and west, and Ninth street north and south; also, that there was a curve in Ninth street about 150 feet below the crossing of the two streets, so that one driving onto Ninth from the west would have his vision obstructed somewhat by the houses on its west side, so as to prevent his seeing a car coming along said curve until he had advanced some distance into the street.

The negligence charged is the failure to give warning by ringing the gong of the car, or to have a headlight burning, failure to slacken the speed of the car when approaching the crossing, and running at too high a speed.

The defense of contributory negligence was interposed, the answer charging the plaintiff drove onto the track in such close proximity to the car that it was impossible for the motorman to check the car soon enough to avoid a collision.

There was much testimony that the morning was very foggy, and that a person could see only a short distance, and some testimony that the fog had about cleared up when the collision occurred. There was also much testimony that the car was running at a slow speed, and some that it was running fast. The testimony was about evenly balanced as to whether the motorman sounded the gong. Some passengers on the car, and persons near when the accident happened, swore the gong was not sounded at all, while the motorman and other witnesses swore it was constantly sounded as the car approached Victor street. No headlight was burning. Some witnesses swore the car ran 30 feet past the wagon after striking it, but the motorman swore it only ran four or five feet past.

Plaintiff testified that before driving on the track he not only stopped his wagon, but got off and went ahead to look for a car, but neither saw nor heard one; that he resumed his position on the wagon, and drove rapidly onto the track, in order to cross before a car came along, and that he did not see or hear one until he was struck. He testified also that there was another wagon just ahead of his, the driver of which also stopped before

venturing across the track. The motorman swore the fog had lifted just before he started on his run, but when he approached Victor street he could see only a few feet ahead; that there were intervals of fog and bright spots all the way up Ninth street, but the fog was pretty thick at Victor, and that he could not see more than four or five feet ahead as he approached it. On this account he was running slowly and ringing his bell constantly, because that was all he had to depend on. He said his car was not making more than four or five miles an hour, and that he had only a glimpse of plaintiff sitting on the bounds of the wagon before he ran into him.

Besides instructing as to the conventional definition of the words "ordinary care," and the elements of damage to be considered if the finding was for the plaintiff, the court told the jury, in the first instruction given for the plaintiff, that if the morning was unusually foggy, and the car ran against the plaintiff through the negligence of the servants operating it in not giving warning of the approach of the car at the crossing of Victor and Ninth streets by ringing the gong, or not burning the headlight, or the failure of the motorman to slacken the speed of the car as he approached Victor street, if the jury believed from the evidence that either of said acts or omissions occurred, and further believed the same constituted negligence by which plaintiff was injured, while he was exercising ordinary care and prudence for his own safety, their verdict should be in his favor. That although the jury believed the plaintiff did not exercise all the care in his power for his safety, but that he did not fail to use care to such an extent as to directly contribute to cause his injury, and further believed the accident would not have occurred but for the defendant's negligence, if the jury found the defendant was negligent, the verdict must be for the plaintiff.

For the defendant the court instructed: First, if the jury believed the motorman, on account of the fog, was running at a slow speed, and continually sounded his gong, and kept a good lookout for any one on the street, and did all he could to avert the accident, and if, notwithstanding all precautions, the density of the fog prevented the latter from seeing the plaintiff in time to stop the car and avert the collision, the verdict must be for the defendant. Secondly, if the morning was foggy, so that the view of an approaching car was obscured, and there was a curve south of the intersection of the two streets, and plaintiff was familiar with the locality and knew of the curve, it was his duty, before attempting to cross the track, to exercise greater care than he would have been bound to use if the morning had been clear and there had been no curve in the track. Further, if the jury believed he failed to take such precautions as an ordinarily prudent person would have taken under such circumstances, and in consequence of the failure

came into collision with the car, he could not recover. Thirdly, that though the jury might believe the motorman did not slacken speed at the approach of Victor street, but was running at a great speed, yet if they found it was foggy, and plaintiff, by the exercise of ordinary care, considering the fog, might have seen or heard the approaching car in time to avoid a collision, the verdict must be for the defendant.

Of its own motion, the court instructed the jury that if they believed from the evidence the morning was very foggy, so the view of approaching cars was obstructed at the intersection of Victor street with the railway track, it was the duty of the plaintiff, before attempting to cross the track, to look and listen for an approaching car, *and to stop, if to stop was necessary in order to see and hear*, and, if he failed to do so, and drove his wagon on the track in such close proximity to the car that the defendant's servants were unable to avert a collision, the verdict must be for the defendant. Further, that, in determining whether plaintiff did stop and look and listen, the jury must take all the facts and circumstances into consideration, and the testimony of the other witnesses, as well as the testimony of the plaintiff himself. Said instruction was like one requested for the defendant and refused, except the italicized words, which were inserted by the court, and the omission of a clause that the jury were not bound to accept the testimony of plaintiff. The essential difference, about which a point is made here, is that the instruction as asked by the defendant charged the jury unqualifiedly that it was the duty of the plaintiff to stop, whereas the one given by the court only bound him to stop if the jury found it was necessary to do so in order to see and hear.

The court also gave an instruction, of its own motion, that, if the morning was foggy and the view obscure along defendant's track, it was the duty of defendant's motorman to exercise greater prudence in running his car so as to avoid colliding with persons on the street, but also his duty to run so as to deliver passengers at their destinations as nearly on time as the circumstances would permit; that the motorman had a right to assume persons approaching the track would exercise greater care than if the morning was clear, and if the jury believed the motorman, on account of the fog, ran slower than usual, *at such a rate of speed as was reasonable under the circumstances*, constantly sounding his gong and keeping a good lookout for persons on the track, *and did all in his power to avert the accident*, yet, notwithstanding these precautions, on account of the density of the fog did not see plaintiff's wagon until too late to avoid a collision, the verdict must be for the defendant, even though the jury believed plaintiff stopped to look and listen before driving

on the track, but failed to see or hear the car approaching. Said instruction was like one requested by the defendant, except the italicized words, which were inserted by the court.

At the close of plaintiff's testimony the defendant had requested an instruction in the nature of a demurrer to the evidence, which was overruled.

The jury returned a verdict for the plaintiff, assessing his damages at \$2,500. Judgment was entered accordingly, and an appeal taken to this court.

Appellant contends the demurrer to the evidence should have been sustained, because no actionable negligence on the part of its carmen was established by the respondent's evidence; that there was neither evidence of an excessive rate of speed, nor of failure to slacken the speed of the car as it approached the crossing, and that it was not negligence to run without a headlight or without sounding the gong.

There was some evidence of excessive speed considering the obscurity caused by the fog, as there was also evidence of neglect to slacken the speed as the car approached the intersection of the two streets. It is true, having no headlight did not constitute negligence as a matter of law; neither did failure to sound the gong. There was no absolute requirement that a headlight should be burning at that time of day, nor that a gong should be sounded. This only shows, however, that there was no such breach of a mandatory duty by the carmen as justified the court in instructing that negligence on the part of appellant had been established. But taking into account the difficulty of seeing but a few feet ahead in the fog, as testified to by the motorman and other witnesses, the failure to have a headlight burning or to sound the gong were facts for the jury to weigh, and from which they might infer negligence. Actionable negligence may often be properly found by the triors of the facts when the acts relied on to establish it are not necessarily nor always negligent acts, but such as may constitute negligence under given circumstances. The question in this and most similar cases is: Did the carmen use such precautions to avoid injury to persons on the street as ordinary prudence demanded, all the circumstances considered? *Brown v. Railroad*, 50 Mo. 461, 41 Am. Rep. 420; *McMahon v. Express Co.*, 132 Mo. 641, 34 S. W. 478; *Tetherow v. Railroad*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973.

The Supreme Court held an instruction was rightly given that the motorman should have sounded his gong, and was guilty of actionable negligence if he omitted to do so, in a case where the car was approaching a crossing much used by school children, when the conditions were such that the motorman's gaze was obstructed. *Schmidt v. Railroad*, 163 Mo. 645, 63 S. W. 834. That

decision is precisely in point; but in the present case the trial court, instead of arbitrarily instructing to that effect, referred to the jury the issue of whether a warning should have been given by sounding the gong.

It will be observed from the recital of the contents of the first instruction that the learned circuit judge did not charge the jury that any of the alleged acts of negligence amounted to negligence, but left it to the jury to say: First, whether the appellant was guilty of any of the acts or omissions; second, whether, if so, those omissions constituted negligence; third, whether they caused any of the injuries received by the plaintiff; fourth, whether the plaintiff was at the time exercising due care. That was a careful and correct charge.

The rule that the testimony of a party will be disregarded and held for naught when the physical facts and surroundings show it is impossible for his testimony to be true is invoked against the testimony of respondent that he stopped to look and listen for cars but did not see the one that struck him. The most cursory glance at the evidence in this case shows the physical facts were such as not to discredit, much less refute, respondent's testimony. Take the evidence of the motorman, for instance. He swore that at the instant of the collision he could not see more than four or five feet ahead. If that be true, it is equally true the respondent could not see the car when he looked. And if the gong was not sounded he could not hear it. There is no merit in this assignment, and it is overruled.

Several instructions of correct form were given as to the effect of contributory negligence on the part of respondent, and the jury must have understood that if respondent was not taking ordinary care of himself when he was hurt he had no case, though the third one given for the plaintiff was somewhat awkwardly drawn. But it undoubtedly stated the law in declaring that any negligence of which the plaintiff might have been guilty would not bar a recovery unless it contributed to produce the accident.

Appellant insists the jury ought to have been told, without qualification, that it was respondent's duty to stop, as well as to look and listen. We think, however, the court's amendment of the appellant's instruction, which bound the respondent to stop in case it was necessary to do so in order to see or hear, was accurate. There is no absolute duty incumbent on a person about to drive or walk across a railroad track to stop before doing so; and, while circumstances may arise, perhaps, which will justify a court in declaring a plaintiff was negligent if he did not stop, the general rule, and the one applicable to the present case, leaves it to the jury to say whether it was necessary for him to stop in order to use, to the best advantage, his eyes and ears. What a per-

son is bound to do before he crosses a railroad track is to employ all the precautions which common prudence dictates to prevent a casualty, and whether he uses those precautions is to be ascertained by the jury from a consideration of the facts. *Dlauhl v. Railroad*, 139 Mo. 291, 40 S. W. 890.

There is slight, if any, testimony in this case that respondent could have any better seen or heard the car by stopping; and that he did stop, as he testified, there was nothing tending to disprove. At all events, it was for the jury to say whether that precaution was indispensable. *Russell v. Receivers A. T. & S. F. R. R. (K. C.)* 70 Mo. App. 88; *Donohue v. Railroad*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; *Kelly v. Railroad*, 88 Mo. 534; *Petty v. Railroad*, Id. 306; *Stepp v. Railroad*, 85 Mo. 235; *Huckabold v. Railroad*, 90 Mo. 557, 2 S. W. 794; *Johnson v. Railroad*, 77 Mo. 546; *Tabor v. Railroad*, 46 Mo. 353, 2 Am. Rep. 517; *Baker v. Railroad*, 122 Mo. 533, 26 S. W. 20.

The instructions imposed on the respondent the duty of not only looking and listening, but of using care proportionate to the danger of the surroundings and the difficulty of detecting a car, which we think is all the law requires. He had to take only reasonable precautions to avoid injury. *Winters v. Railroad*, 99 Mo. 517, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. Rep. 591.

The court told the jury that, in ascertaining whether or not plaintiff did stop to look and listen, they should take into consideration all the facts and circumstances of the collision, and the testimony of the other witnesses, as well as the plaintiff's own testimony. The appellant complains because that charge was not given in the form requested by it, to wit, that the jury should take into consideration all the facts and circumstances of the collision, together with the testimony of the other witnesses, but were not bound to believe plaintiff's testimony. The jury was entitled to weigh the plaintiff's testimony as well as all other in the case, and it should not have been invidiously commented on, as the appellant requested. The court's charge was correct.

As to the clause contained in one of the instructions given by the court of its own motion, that, if the jury found, among other facts, the motorman did all in his power to avert the accident, we merely state that the first instruction requested by and given for the defendant contained exactly the same words.

On the whole, this case appears to us to have been referred to the jury with exceptionally careful, lucid, and accurate instructions, and, as the controversy involved contradictory evidence, it was one for the jury's determination.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

SMITH v. ROGERS et al.

(Court of Appeals at St. Louis, Mo. March 3, 1908.)

EXECUTION—CLAIM BY THIRD PERSON—BOND OF INDEMNITY—RIGHT TO DEMAND—VALIDITY—DESCRIPTION OF PROPERTY.

1. Rev. St. 1899, § 4043, which provides that if a constable levy an execution, and one other than the defendant claims the property, the constable, before proceeding to sell, shall take from the plaintiff a bond of indemnity, authorizes the constable to demand a bond, though he has previously attached the property in the suit in which the judgment on which the execution is based was rendered.

2. Where a constable has levied an execution, and the property is claimed by one other than the execution defendant, and the constable threatens to release the property unless given a bond of indemnity, such a bond, given him under the circumstances, is a good common-law obligation, and not invalid for duress.

3. Where, in attachment, the engine levied on was a "Russell" engine, and a bond of indemnity given the constable before sale on execution described the engine as a "Birdsall" engine, the variance did not invalidate the bond; the engine being otherwise described in the bond the same as in the constable's return, and the evidence showing that the engine taken in attachment was the one which the bond was given to protect the officer in selling.

Bland, P. J., dissenting.

Appeal from Circuit Court, Newton County; H. C. Pepper, Judge.

Action by John H. Smith, on the relation of John T. McElhaney, against John A. Rogers and others. From a judgment for defendants, plaintiff appeals. Reversed.

Lyman W. White, for appellant. O. L. Cravens, for respondents.

Statement of Facts and Opinion.

GOODE, J. John A. Rogers, one of the respondents, instituted an action of attachment before a justice of the peace in Newton county against James Lewis. A writ of attachment was issued and levied by the appellant, John H. Smith, at that time constable of the township, on a certain boiler and engine, and nothing else. Constructive service was had on Lewis, and the action proceeded to a special judgment in favor of Rogers against the property attached. A special execution was issued and delivered to the constable, whereupon a notice verified by affidavit was served on him by Benjamin Eiseman, who claimed to own the attached property as the assignee of John T. McElhaney. Rogers as principal, and J. M. Rush as surety, then executed an indemnity bond to the constable, reciting the claim of Eiseman, and the service of the written notice by the latter, verified by affidavit according to law, and covenanting to hold the officer harmless against all damages and costs which he might sustain in consequence of the seizure and sale of the property, reciting, furthermore, the issuance of the execution, and that it had been levied on the engine and boiler. The constable, being thus indemnified, sold

the property. Afterwards an action was begun on the bond by McElhaney, as successor of the rights of Eiseman, who had been discharged as assignee.

Besides agreeing to indemnify the constable, the obligors in the bond agreed to pay and satisfy said Benjamin Eiseman, assignee of said J. T. McElhaney, or any person or persons claiming title to the property, for all damages which he or said person or persons might sustain in consequence of the seizure and sale. The court below held no action could be maintained on the bond. The bond was intended to be a statutory one made in conformity to the provisions of section 4043 of the Revised Statutes of 1899, and was in all respects sufficient to satisfy the requisites of a statutory bond, provided a bond is authorized by the statutes in the circumstances in which this one was given.

Respondent contends that, inasmuch as the property had been previously seized under a writ of attachment, no bond of indemnity could be required by the constable, as the statute only provides for the giving of such indemnity in cases when executions are issued on a general judgment; citing in support of this contention certain Missouri cases, and principally relying on *State v. Koontz*, 83 Mo. 323, in which it was held that there is no statutory provision for the exaction of an indemnity bond by an officer charged with the execution of a writ of attachment, to save him harmless from damages which may be entailed by the levy of such a writ on property claimed by some one else than the defendant in the action.

The present controversy presents itself to us, after a careful study of the evidence, in a different light from that in which it is viewed in the briefs. It is treated by the counsel of the respective parties, for the most part, as though the bond had been given as a protection to the officer in levying the writ of attachment; but in fact it was not given until after there had been a final judgment in the attachment action and a special execution issued thereon. Then it was that McElhaney's assignee, Eiseman, served notice on the officer that he claimed the property, which act caused the officer to demand indemnity of the attaching plaintiff, and this bond to be executed by him. It was, therefore, a bond given to indemnify an officer against loss on account of levying an execution on personal property claimed by a stranger to the judgment, and is within the intention of the statute above mentioned, unless the circumstance that the property had already been seized by virtue of a writ of attachment excludes it from the statutory provision.

Inasmuch as the engine and boiler were already in the custody of the law, there could, of course, be no seizure under the writ of execution; that is to say, no actual caption—no taking the property by virtue of that writ. Neither was a seizure necessary

to make a good and effectual levy. Where a subsequent levy of a writ is made by the same officer who levied a prior one, no overt act is required of him in making the subsequent levy. *State v. Curran* (St. L.) 45 Mo. App. 142. Besides, the bond itself recited that the execution had been levied, and the obligors therein ought not to defeat a recovery thereon because of a defective return. *State v. Goodhue* (St. L.) 74 Mo. App. 162; *State v. Williams*, 77 Mo. 463; *Hundley v. Filbert*, 73 Mo. 34.

One point for decision, then, is whether the statute in question authorizes the taking of a bond by a constable to indemnify him from loss in proceeding to sell under an execution, and to indemnify a claimant of the property, if he had previously seized said property by virtue of a writ of attachment; and this point seems never to have been determined by any appellate court in this state. *State v. Koontz*, supra, merely establishes that an officer with a writ of attachment is bound to decide whether he ought to levy on certain property as belonging to the defendant when a third party asserts title to or ownership of it, and has no right to exact of the attaching plaintiff an indemnity bond, and, in default of one being given, to release the property to the claimant; and that if he does release it, and it turns out the property actually belonged to the defendant, the plaintiff may maintain an action on his official bond for the wrongful release. The opinion says, and very properly, that the Legislature had failed to provide an indemnity in the case of attachment proceedings, and that an officer charged with the execution of a writ of attachment must act or refuse to act at his peril. That decision is altogether different from the proposition that if an attachment cause has gone into judgment, and an execution has been issued on the judgment, and then a verified notice is served on the constable by an outside claimant of the property, the constable may not take indemnity against possible loss in proceeding under the execution. The property has not yet been sold, and hence may be released in kind to the owner; the constable answering, of course, on his bond for damages for any injury occasioned by the levy of the attachment writ. We can perceive no sound reason whatever why the same indemnity may not be taken by an officer, when acting in obedience to an execution issued on a judgment in an attachment action, that he is entitled to take when the execution is issued on a judgment in any other form of action. Usually the judgments in attachment cases are the same in form as other judgments; that is, they are general judgments. Such is always true when personal service is had on the defendant.

The construction of the statute relied on by the respondent amounts to this: an officer is entitled to the protection of a bond like the one declared on in all cases where he has

to sell property under execution except those aided by writ of attachment—a construction which would ingraft an exception on the statute unjustified by its language, and apparently not contemplated by the Legislature. Nothing in the statute lends support to such a view, unless it be the words "if a constable levy an execution on any goods"; the point being made that the seizure was under the writ of attachment, and therefore there was no levy by virtue of the execution. But this is too narrow a view, and would tend to unduly restrict the meaning of the law, and defeat, to some extent, its purpose. The word "levy," used in section 4043, which relates to executions issued by justices of the peace, and the words "seized by virtue of an execution," in section 3183 of the chapter on Executions, mean, by fair intendment, we think, such levy or seizure, either actual or constructive, as the situation of the property permits. If it is already in the custody of the law, because previously seized under a writ of attachment, a levy or seizure under a subsequent execution in a mode adjudged to be sufficient to give a lien on the property and enable the officer to sell it is also sufficient to bring into operation the statutory provisions in regard to a demand for indemnity by the officer if notice is given of outside ownership. We do not find that any case in this state has held or intimated that an officer charged with the service of a special execution on a judgment in an attachment case may not protect himself in this way, but only that there is no statutory authority for taking protection against damages on account of the levy of the writ of attachment itself on property belonging to a stranger. This is true because the Legislature has made no provision to protect officers levying writs of attachment. Ample provision, however, has been made for their protection against loss on account of levying executions and making sales thereunder, and we see no reason to say the Legislature, either by expression or implication, has prohibited an officer from availing himself of the security when he is charged with an execution in an attachment case.

Nor does the language or purpose of the statute support the contention that it was not intended to provide relief where a plaintiff insists on a sale of property which a third party claims under a special execution. What proviso or principle requires the remedy to be confined to levies under general executions? The statute confers it on a constable who levies an execution on any goods or chattels, if any person other than the defendant in the execution claims such property. Rev. St. 1899, § 4043. If the intention was to exclude special executions from the force of the act, we must presume apt words to indicate the intention would have been employed. An execution is any writ, either general or special, which is issued pursuant to law by a court, or a clerk thereof, to en-

force a judgment, usually by a seizure and sale of the judgment debtor's property; and property levied on under authority of a special execution may be claimed by a stranger to the suit as well as if levied on under a general one.

In this case the claim was made as soon as the owner knew the engine had been seized, which was not for some time after the attachment writ and the execution had been levied. An argument may be built against the constable's right to require security on the theory that a special execution following an attachment, like a writ of replevin, commands the officer to whom it issues to levy on designated property, and fully protects him against a subsequent action. *Boyden v. Frank*, 20 Ill. App. 169; *Murfree on Sheriffs*, sec. 104c. The two writs are not issued in altogether similar circumstances, for the replevin writ issues because a plaintiff claims possession of certain personal property and backs his claim by proper legal steps to enforce it, whereas a special execution follows a special judgment in an attachment suit because the sheriff or constable seized property as the defendant's and made his return to that effect; so that in attachment suits on constructive service, if a stranger's property is seized, the officer's own wrongful levy of the attachment writ is the cause of his being directed to make the judgment by levying on and selling the same property. The view that the officer may release the attached property on notice of an adverse title after judgment, unless he is indemnified, if a general execution happens to follow the judgment, but may not if the execution is special for lack of personal service on the defendant, is wholly technical and without support in reason, for the officer is equally responsible to the true owner for a wrongful levy in both cases, and has as much need of indemnity in one as in the other.

It has been held that a sheriff or constable selling attached property under a writ commanding him to do so to save the property from perishing is not protected by the writ against a claim for damages by the true owner who was not a party to the action. *State v. Hadlock* (St. L.) 52 Mo. App. 297. The force of such an order to sell particular goods can only be distinguished from that of a replevin writ by the fact that the original erroneous attachment was the officer's own tort, showing that a subsequent writ in rem does not protect if the original seizure was tortious.

But the statute providing for the taking of indemnity is for the benefit of owners of property wrongfully seized, as well as of officers; and, if an officer is fully protected by process commanding him to levy on and sell particular articles, an owner subjected to a wrongful seizure on process issued against some one else is not. Nor can he be accorded the full protection of the statute in question if we eliminate the right to require in-

demnity when the execution is special; and we think that neither the language of the statute itself nor previous decisions on it compel that interpretation. For my part, I think the bond good as a statutory one.

It is good as a common-law obligation. The validity of the bond sued on in this case does not depend exclusively on whether the constable was empowered by the statute to demand security, which was the only question involved in *State v. Koontz*, supra, where a bond was refused and the officer released the attached property. It is true the defendants executed the instrument in suit on the constable's threat to release the engine; but that threat did not constitute duress, and therefore, legally regarded, the execution of the instrument was voluntary, and created a binding obligation, unless prohibited by the policy of the law. Indemnities and offers of rewards to officers are sometimes held for naught in the interest of good administration; as where they are indemnified against loss that may befall them from violating a plain duty, such as refusing to proceed with a writ (*Harrington's Adm'r v. Crawford*, 136 Mo. 467, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653); or where they are promised a reward for doing a plain duty, as to exercise diligence in striving to apprehend a criminal (*Klick v. Merry*, 23 Mo. 72, 68 Am. Dec. 658; *Thornton v. Railroad* [St. L.] 42 Mo. App. 58), though the latter ruling seems to be questionable. But the doctrine is otherwise where there is a disputed right, and an honest doubt fairly arises as to what course ought to be pursued (*Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83); and it is settled beyond question that when goods about to be seized or already seized as belonging to a defendant are claimed by some one, and the title is doubtful, an indemnity given by the plaintiff to the levying officer is valid (*Waterman v. Frank*, 21 Mo. 108; *Stewart v. Thomas*, 45 Mo. 42; *Flint v. Young*, 70 Mo. 221; *Stanton v. McMullen*, 7 Ill. App. 328; *Moore v. Appleton*, 26 Ala. 633; *Piereson v. Thompson*, 1 Edw. Ch. 212; *Ives v. Jones*, 55 Am. Dec. 421; and cases cited in notes).

In *Barnes v. Webster*, 16 Mo. 258, a case somewhat like the present one, in which the validity of a voluntary bond was challenged, it was said: "It is useless to cite authorities that this bond, although voluntary and not authorized by any statute, is good as a common-law bond. All bonds, though voluntary, if they do not contravene public policy nor violate any statute, are valid and binding on the parties to them." As to the validity of informal indemnities not complying with the statute, see, also, *Williams v. Coleman*, 49 Mo. 325; *Palmer v. Shenkel* (K. C.) 50 Mo. App. 571; *Smith v. White* (K. C.) 48 Mo. App. 404; *Rubelman Hdwre. Co. v. Greve* (St. L.) 18 Mo. App. 6. Far from the indemnity given in this case offending our public policy, it was strictly in accord with it, for the policy

of this state is, as shown by its legislation, to have officers and owners indemnified in such instances; and, if there has been an omission to provide by statute for exacting indemnity in every contingency, parties are not forbidden to voluntarily furnish it, nor their obligations, when voluntarily assumed, denounced as void. "It is a wholesome doctrine, and very full of comfort," that they may give indemnity; and this ruling is according to the law in other states. *Knight v. Nelson*, 117 Mass. 458; *Smith v. Osgood*, 46 N. H. 178; *Dewitt v. Oppenheimer*, 51 Tex. 103; 1 *Shinn on Attachment & Garnishment*, sec. 203; *Waples on Attachment & Garnishment*, p. 147, and cases cited. Indeed, in many jurisdictions the decisions are that at common law the sheriff or constable might require security before levying the attachment.

On the whole, we are of the opinion that the instrument in suit is a valid contract, and that the cause should be tried on that assumption.

Respondent makes the further point that the notice and bond misstated the name of the manufacturer of the engine, the one actually levied on being a "Russell" engine, and the bond and notice calling for a "Birdsall" engine; that, therefore, there can be no liability on the bond by reason of the strict and literal construction given to the obligations of sureties. But the most extreme ruling ever made to exonerate that class of obligors from responsibility on their contracts (and some are extreme to the verge of absurdity) would hardly meet this case. Only one engine was levied on, and it is otherwise described in the officer's return as a ten horse power engine, just as it is in the bond itself. All the witnesses, and everybody concerned, agree that the very engine taken under the writ was the one which this bond was given to protect the officer in selling, and the one which *Elseman and McElhaney* claimed the latter owned. It was all the property taken by the constable. The bond could have been intended by the makers of it to induce him to sell only one engine, and to protect him in selling only one, namely, the one he had seized and which was in his possession; and they will not be excused from responsibility because they misnamed it. This point had been heretofore adjudicated. *State v. Benedict* (St. L.) 51 Mo. App. 642.

It follows from these considerations that the judgment ought to be reversed, and the cause remanded, which is accordingly ordered.

KEYBURN, J., concurs.

BLAND, P. J. I dissent, and, for the reason that I deem the majority opinion in conflict with *State v. Koontz*, 83 Mo. 323, request that the cause be certified to the Supreme Court.

DINKINS v. CRUNDEN-MARTIN WOOD-ENWARE CO.

(Court of Appeals at St. Louis, Mo. March 8, 1908.)

GARNISHMENT — NONRESIDENT DEBTOR — COURTS—JURISDICTION — STATUTES — CONSTRUCTION—PROPERTY COVERED—DEBTS ACCRUING BEFORE ANSWER—FUTURE WAGES—EXEMPTIONS—RIGHTS OF GARNISHEE—JUDGMENT—EVIDENCE.

1. A resident who was a judgment creditor of a nonresident was entitled to enforce the judgment by garnishment against a resident debtor of the debtor in the Missouri courts.

2. Where garnishment was on final process in aid of the collection of a judgment of which the court took judicial notice, it was not necessary for the plaintiff to introduce the judgment in evidence against the garnishee.

3. Where the earnings of a judgment debtor between the date of service of a garnishment and the filing of the garnishee's answer amounted to more than the amount the garnishee was ordered to pay, after allowing a credit claimed by it, the judgment rendered against such garnishee was not excessive.

4. Rev. St. 1899, § 3436, provides that notice of garnishment shall attach all personal property, credits, etc., which the garnishee has in his possession or owes at the time of service, or which may come into his possession or be owing by him between that time and the filing of the answer. Sections 3445 and 3446 require the plaintiff in garnishment to exhibit interrogatories at the return term of the writ, and authorize the garnishee to answer in six days after the filing thereof, if the term continue that long, or during the term if it does not, unless the court otherwise orders. *Held*, that sections 3445, 3446, did not limit the indebtedness attached by garnishment to such only as accrued prior to the return term of the writ, without regard to when the interrogatories were answered, but that under section 3436 any indebtedness accruing up to the time of answer was within the garnishment.

5. Where an answer of a garnishee alleged that nothing was owing to defendant, who was the garnishee's servant employed at a monthly salary, on the ground that defendant kept constantly in debt to the garnishee by overdrafts for expenses and salary, but showed that after the garnishment, and before answer, the garnishee permitted defendant to overdraw his salary from month to month for nearly a year and a half, the garnishee was liable.

6. Under Rev. St. 1899, § 3435, authorizing an exemption of 30 days' wages to an employé where he is the head of a family and a resident of the state, such exemption cannot be allowed to a nonresident.

7. The exemption from execution of 30 days' wages to a resident employé who is the head of a family, provided by Rev. St. 1899, § 3435, is a privilege personal to the debtor, and cannot be asserted by the debtor's garnishee.

8. Under Rev. St. 1899, § 3436, providing that notice of garnishment shall attach all credits, etc., which the garnishee has at the time of the service of the notice, or which may come into his possession at any time before the filing of the answer, wages of the debtor which were unearned at the date of the notice of garnishment, but which were earned and accrued before the filing of the garnishee's answer, were subject to the garnishment.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Lynn H. Dinkins against the Crunden-Martin Woodenware Company, garnishee. From a judgment in favor of plaintiff, the garnishee appeals. Affirmed.

C. H. Kern, for appellant. Bland & Cave, for respondent.

Statement of Facts and Opinion.

GOODE, J. At the February term, 1900, of the St. Louis circuit court, Lynn H. Dinkins recovered judgment against Frank E. Gottselig for the sum of \$1,688.40 and the costs of the action. Since that time Dinkins has been endeavoring to collect the judgment by garnishment proceedings against the appellant, the Crunden-Martin Woodenware Company, by which Gottselig, the judgment debtor, has been employed as a salaried salesman. Other phases of the contest have been presented and decided by this court on two former appeals. *Dinkins v. Crunden-Martin Woodenware Co.*, 90 Mo. App. 639; *Id.*, 91 Mo. App. 209. The present controversy is the same one considered on the first appeal, and arose from the citing of the respondent as garnishee on June 7, 1900, the execution by virtue of which it was summoned being returnable the first Monday of the following December. Interrogatories were exhibited by the respondent December 5th, when, on the garnishee's motion, the whole proceeding was quashed on the ground that it was void because the garnishee was summoned to appear at the second term of court after service, instead of the first one. An appeal was taken to this court, which reversed the judgment, and remanded the cause with the direction that it be proceeded with in the usual course. Pending that appeal, it seems another writ of garnishment was sued out, which was the one involved in the second appeal. After this cause was remanded, the garnishee filed an answer to respondent's interrogatories February 25, 1902, and thereupon respondent filed a motion, in the nature of a demurrer to the answer, for judgment on the pleadings, which motion was sustained, and judgment entered by the court below on April 28, 1902. The court found that at the date the answer was filed the appellant had in its possession \$2,300 belonging to defendant Gottselig, and ordered that within 10 days from the date of the judgment it pay said sum into court, or so much thereof as might be necessary to satisfy the judgment, interest, and costs. From that order the garnishee took this appeal.

The interrogatories exhibited were in substance these: (1) Did the garnishee, at the date of the service of the writ, have in its possession, custody, or charge any goods, chattels, money, or effects belonging to Gottselig? (2) Was it, at the service of the writ or at the time of the answer, indebted to Gottselig? (3) Was it at either time bound in a contract to pay Gottselig money which was not yet due? (4) Was not Gottselig in appellant's employ when it was served, and has he not since continued in its employ?

The first two interrogatories were answered in the negative; but to the last two a conditional affirmative answer was given, set-

ting out the nature of the contract between Gottselig and appellant. This answer stated that, when the garnishee was notified, Gottselig was in its employ under a verbal contract, the terms of which were that he should be paid \$100 a month at the end of each month in the state of Mississippi, where he resided as agent of appellant, or in Louisiana, those two states being the territory in which he traveled as salesman. The answer further stated that Gottselig was authorized by the contract to draw on appellant at all times for such money as he needed to expend in promoting appellant's business, and for no other purpose; but that at the end of each month he had the right to take out of the funds remitted to him the sum of \$100, or the amount of his salary for that month. Gottselig deducted \$100 each month from June to December, both inclusive, for salary, but during all of said months he is alleged to have been largely indebted to the appellant on account of money remitted to him beyond the sum of his actual expenses and salary, so that during no month was the appellant in his debt, but during all of them Gottselig was in appellant's debt. In other words, as we understand the answer, Gottselig continually overdraw. The answer states that on the 1st day of January, 1901, the contract was changed by raising Gottselig's salary to \$125 per month, payable at the end of each month, as before, in the state of Mississippi, of which he was a resident, or in Louisiana. In other respects the contract continued as before. The answer avers that thereafter during each month the money which Gottselig drew, and which was remitted to him for expenses and salary, largely exceeded those items, and that at no time was appellant in his debt, but he was in appellant's debt, and when appellant answered he owed it \$629.49 on a balance of accounts, and the further sum of \$105 on account of a judgment against appellant as garnishee in favor of Dinkins, which it had satisfied; also for \$20 attorney's fee allowed appellant for answering. The answer further states that appellant allowed Gottselig to retain and convert, out of the money remitted to him, his monthly salary each month, because it knew Gottselig was the head of a family, wholly insolvent, and therefore entitled to an exemption against Dinkins' judgment to the amount of \$300 under the statutes of the state of Missouri; that appellant credited Gottselig with his salary on its account with him, knowing the salary was exempt from garnishment; and pleads the exemption in defense of this proceeding. It is further stated that all money remitted to Gottselig after service of garnishment was in response to drafts made by him on the Crunden-Martin Woodenware Company on account of his anticipated expenditures as agent and salesman, and that none of said remittances became the property of Gottselig. It is alleged that appellant was not at

any time indebted to Gottsellig from the service of the garnishment to the date of answering, except as above stated; wherefore appellant prays it be discharged. The \$105 and the attorney fee, for which a credit is claimed in the answer, pertained to the second garnishment proceeding, which was the cause disposed of in 91 Mo. App. 209.

The motion filed by the respondent for judgment avers that the answer of the garnishee, the substance of which has been quoted, shows Gottsellig earned a salary under his contract with the garnishee to the amount of \$2,300, and that said sum was paid to him by the garnishee, between the date of service and the filing of the answer.

1. The jurisdiction of this garnishment proceeding to collect a debt due to a nonresident of the state from a resident of it is properly entertained by a court of this state. *Wyeth, etc., Mfg. Co. v. Lang*, 127 Mo. 342, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626.

2. It was unnecessary to introduce in evidence the judgment in favor of respondent against Gottsellig in order to show respondent was a creditor of the latter, and had duly established his demand, because, as this garnishment is on final process, it is a mere aid to the collection of said judgment, of which the court took judicial notice. *Spengler v. Kauffman* (St. L.) 43 Mo. App. 5. If the appellant wished to question the judgment on appeal for any reason, it should have put it in evidence.

3. A computation of the salary earned by Gottsellig between the service and the filing of the answer will show the judgment was not excessive; for his earnings amounted to more than the amount appellant was ordered to pay, after allowing the credit which the latter asked on account of the sum paid on the second garnishment.

4. The argument that the garnishment took effect only on such indebtedness as accrued from the appellant to Gottsellig prior to the return term of the writ is unsound. In many jurisdictions—perhaps in most—notification to a garnishee makes him responsible to the judgment creditor for only property, effects, or credits belonging or owing to the judgment debtor at the time the garnishee was summoned. But that is not the law in Missouri, as our statutes provide that notice of garnishment shall attach all personal property, credits, etc., which the garnishee has in his possession or owes at the time of service, or which may come into his possession or be owing by him between that time and the filing of the answer. *Rev. St. 1899, § 3436*.

An ingenious effort is made to impose on that section the construction that the garnishment binds the garnishee only as to debts owing or property held by him at the answering term, whether in fact an answer be filed or not. Two other sections (3445 and 3446) require the garnishing plaintiff to exhibit interrogatories at the return term

of the writ, and the garnishee to answer in six days after interrogatories are filed, if the term continues that long, or during the term if it does not, unless the court orders otherwise; and those sections constitute the basis of appellant's argument. The statutes undoubtedly provide means by which a garnishee can enforce speedy action unless good cause for delay exists. The plaintiff may be compelled to exhibit his interrogatories within the first three days of the return term, and the garnishee may, if he chooses, answer at any time within six days. But if the answer is delayed, either by the action of the garnishee, as in this case, or for cause by the court, the effect of the garnishment is to subject to the plaintiff's demand whatever property of the defendant's the garnishee has, or whatever debt the garnishee owes the defendant when the answer comes in. This is true by the words of the statutes, which admit of no different interpretation; for they say explicitly that the notice attaches, not only all debts or property of the defendant the garnishee has or owes when served, but "all which may come into his possession or charge, or under his control, or be owing by him between that time and the time of filing his answer." This shows the policy of our statutes is to extend the efficacy of the garnishment beyond the service to the filing of the answer; and such is the law in states having similar statutes, some even continuing the force of the garnishment to final judgment. *Reinhart v. Empire Soap Co.* (St. L.) 83 Mo. App. 24; *Furnace Co. v. Rogan & Co.*, 95 Ala. 594, 11 South. 188; *Mullin v. McGuire*, 1 Wkly. Notes Cas. 577; *Sweeting v. Wanamaker*, 36 Wkly. Notes Cas. 279; *Bremer Sons v. Mohn*, 169 Pa. 91, 32 Atl. 90; *Thomas v. McDonald*, 102 Iowa, 564, 71 N. W. 572; *Schubert v. Herzberg* (K. O.) 65 Mo. App. 578.

5. The answer does not state a contract for payment of Gottsellig's wages in advance, or that they were paid in advance. On the other hand, it states they were to be paid at the end of each month, and that he was allowed to retain his salary out of remittances sent to him. The answer attempts to state facts which show that Gottsellig kept constantly in the debt of the appellant, so that at no time was anything owing by the latter to be garnished. But after the appellant was notified of the garnishment it was not permissible for it to make remittances to Gottsellig to cover expenses and salary without regard to what his expenditures or salary amounted to, and thus enable him to keep in appellant's debt by misusing part of the money sent to him. If that sort of course could be pursued by a garnished employer month after month for a year and a half, a judgment plaintiff could be cut off from any possibility of collecting his judgment by proceeding against the wages of an employé. Taking the averments of the answer most favorably to appellant, as we must, they

show affirmatively that if Gottselig kept in the debt of the appellant or appropriated his wages month after month subsequent to the garnishment, it was with the garnishee's consent and connivance. It is stated that appellant paid Gottselig his salary each month for many months after it was garnished, and the answer containing such an averment shows no defense on the score of Gottselig's having misappropriated funds or overdrawn, since it clearly implicates the garnishee as a party to whatever he did.

6. Two good replies may be made to the attempt of the garnishee to claim an exemption in favor of Gottselig: The answer avers the latter was a resident of Mississippi; hence he was not entitled to hold his wages exempt under our statutes, which grant an exemption of the last 30 days' wages of an employé when he is the head of a family and a resident of this state. Rev. St. 1899, § 3435; Burlington, etc., Ry. v. Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497. Moreover, this exemption, if it existed, or if one existed by virtue of the execution statutes exempting personal property to the amount of \$300, either could only have been asserted by the judgment debtor himself, as it was a personal privilege of his own. Osborne v. Schutt, 67 Mo. 712; Connelly v. Chilcote, 25 Ohio St. 320.

7. The question which has bothered us most, although only suggested, not argued, by counsel in their briefs, is as to the right of respondent to subject the future unearned wages of Gottselig to the payment of respondent's debt by garnishment process. This is a question on which the authorities are at variance. It must be determined by the language of our own statutes and the construction which has been placed on them. As an original proposition the doctrine is unpalatable to us that the future wages of the head of a family, even though he resides in another state, can be thus appropriated. Considering the fact that the business of many mercantile, manufacturing, and other establishments range over other states than those where the concerns are domiciled, and that they often have numerous foreign employes, we can easily see how a great hardship may be entailed by allowing unearned salaries to be thus seized, especially as our garnishment statutes carry the lien of the garnishment to the date of the garnishee's answer. Such companies may be deprived of the services of useful employes, who will refuse to continue to work for them if repeated garnishments continually absorb their wages so that they cannot support their families. Installments periodically accruing for wages have been ruled by respectable courts to enjoy immunity from sequestration, garnishment, or trustee process, and must necessarily be immune in jurisdictions where no credits are affected by notice of garnishment save such as the garnishee owes or has in his possession when notified. But

some of the decisions which refuse to bind future unearned wages put the rule on a broader ground, namely, that there is no legal process by which such earnings can be reached, and that, out of consideration for a person's primary duty to support his family, equity will refuse to aid the law. Holmes v. Millage, 9 Times Law. Rep. 331; Central Bank v. Ellis, 20 Ont. App. 364; Norton v. Soule, 75 Me. 385; Weyman v. Hichborn, 6 Cush. 204; Potter v. Kane, 117 Mass. 238. Some cases hold that under statutes making the garnishment take effect on all debts due at service, or "thereafter to become due," unearned wages do not constitute a debt, either due or to become due, within the statutory intention. Thomas v. Gibbons, 61 Iowa, 50, 15 N. W. 503; Foster v. Singer, 69 Wis. 392, 34 N. W. 395, 2 Am. St. Rep. 745; Burlington, etc., Ry. v. Thompson, supra; Van Bleet v. Shatton, 91 Tenn. 473, 19 S. W. 428. There is also a line of cases, to be distinguished from the foregoing on principle, holding that, where a round sum in the form of salary or some other remuneration is to be earned by the judgment debtor on an entire contract which has not been completed, such an indebtedness, while still unearned and unaccrued, cannot be garnished. Webber v. Bolte, 51 Mich. 113, 16 N. W. 257; Hamilton v. Rogers, 67 Mich. 135, 34 N. W. 278; Edwards v. Ropke, 74 Wis. 571, 43 N. W. 554. The theory of those decisions is that no debt can be garnished unless it is absolutely due as a money demand; and that is the law in this state. Holker v. Hennessey, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642.

But the reasoning of none of the foregoing cases warrants us to exclude the wages Gottselig earned after the garnishment in this case from the effect of the writ, in view of the fact that under our statutes a garnishment grasps debts which are created or accrue between the time of service and the date of filing the answer, thus affording a complete legal method to reach the wages. When the answer was filed, Gottselig's salary for the intervening months had been earned, was due as an absolute money demand, free from any condition or contingency, and was, therefore, such a credit as is subject to process in this state. Holker v. Hennessey, supra. As to the exemption of wages made by the statutes from public policy, that benefit is extended, as we have seen, only to residents of this state. We cannot enlarge the statutes by construction to embrace a resident of another state. It is true, Gottselig is the head of a family; but the law takes that fact into consideration, and allows this wage exemption in favor of heads of families only when they reside in this state.

The question in all such cases turns on whether the garnishable character of the credit is determined with reference to the time of service of the writ or with reference to the time of answering. As has been said above, in many states it is determined as of

the time of service. Not so, however, in this state. If the claim of a judgment debtor against a garnishee is one for unliquidated damages when notice of garnishment is given, but becomes liquidated by a judgment between that date and the filing of the answer, the claim is subject to garnishment. *Schubert v. Herzberg*, supra. In other words, in this jurisdiction, whether or not the asset or credit proceeded against is of a kind which may be garnished is to be ascertained by its quality and status when the garnishee's answer comes in, and in jurisdictions which have that rule an indebtedness falling due to the judgment debtor subsequent to notice to the garnishee is, of course, impounded. *Ringold v. Sulter*, 35 W. Va. 186, 13 S. E. 46; *Newell v. Ferris*, 16 Vt. 135; *Leeds v. Sayward*, 6 N. H. 83; *Gove v. Varrell*, 58 N. H. 78; *Franklin Fire Ins. Co. v. West*, 8 Watts & S. 350; *Hanover Ins. Co. v. Connor*, 20 Ill. App. 297; *Miller v. Scoville*, 35 Ill. App. 385.

It results that we are forced by the law of this state to hold that the wages of Gottsellg which accrued prior to the date when the garnishee answered, though subsequent to the notification of the garnishee, were subject to be impounded to pay respondent's judgment.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

STATE ex rel. CLEMENT v. RAINEY et al.
(Court of Appeals at St. Louis, Mo. March 3, 1903.)

LANDLORD AND TENANT—ACTION FOR POSSESSION—RENT—JUSTICES OF THE PEACE—JURISDICTION—EXECUTION—CONSTABLES—FAILURE TO SERVE—DEFENSES—ACTION ON BOND.

1. Where relator's attorney, who had prosecuted relator's claim to judgment, directed the constable to return an execution without putting relator in possession of certain premises as commanded by the writ, relator could not maintain an action against the constable and his bondsmen for failure to execute the writ.

2. In an action against a constable for failure to execute a writ, the recital in the constable's return to the writ that he returned the same by direction of plaintiff's attorney, in order that another execution might be issued to another constable, was only prima facie evidence of such fact.

3. Where, in an action against a constable for failure to execute a writ, the constable claimed that it was returned unexecuted, at the direction of plaintiff's attorney, in order that an alias writ might be issued to another constable, while plaintiff claimed that the constable refused on request to execute the writ, whereupon plaintiff's attorney told him that, if he did not intend to serve it, he should return it, in order that another execution might be issued to another constable, whether the execution was returned by order of plaintiff's attorney was a question for the jury.

4. Where alias executions delivered to a constable, directing him to collect a certain judgment for rent, and place plaintiff in possession of the property sued for, were regular and valid, the constable was not justified in refus-

ing to execute the writ for irregularities in the judgment or proceedings anterior thereto.

5. Where an action was brought before a justice of the peace by a landlord to recover possession of the premises, and the amount of rent due as authorized by Rev. St. 1899, § 4131, and the summons was properly served, the justice had jurisdiction of the subject-matter, and having rendered judgment for plaintiff, awarding possession, a constable to whom an alias execution, directing that plaintiff be put in possession of the property, was delivered, was not justified in refusing to serve the same on the ground that the judgment was not within the justice's jurisdiction.

6. Where a landlord brought suit in a justice's court to recover possession, and for rent due, as authorized by Rev. St. 1899, § 4131, the fact that plaintiff obtained in such action a landlord's attachment, under section 4123, on a summons not returnable in less than 10 days, as required in actions by attachment by section 3862, did not deprive the justice of jurisdiction to render judgment for the rent due and for possession.

7. Where a statement filed with a justice in an action for rent and possession stated that defendant had attorned to plaintiff by paying rent to him, it was not objectionable for failure to allege that the relation of landlord and tenant existed between plaintiff and defendant.

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by the state, on relation of Eugene Clement, against Dan Rainey and others. From a judgment in favor of defendants. Relator appeals. Reversed.

Butts & Lydy, for appellant. Allen, Rathbun, Hamlin, Mason & Patterson, for respondents.

Statement of Facts and Opinion.

GOODE, J. The relator, Clement, instituted this action against the defendant Rainey, as constable of Campbell township, Greene county, Mo., to recover damages on account of the failure of said Rainey to serve two executions issued by S. Brooksbank, a justice of the peace of said township, on a judgment obtained by Clement against J. D. Galbraith for the rent of certain premises, and the possession of the same.

The petition is in four counts, the first of which prays damages for the failure to serve the first execution issued on said judgment on November 15, 1901, by placing the relator in possession of the premises. The second count pleads certain special damages alleged to have been caused by the constable's default in refusing to serve the said first execution, said damages being entailed by Galbraith allowing horses and stock to destroy vines and fruit trees on the premises after the refusal of the constable to serve said execution; also damages caused by relator having to remove some lumber from said premises and store it elsewhere. The third count asked for damages for the refusal of the constable to serve an alias execution issued on said judgment on November 30, 1901, by putting relator in possession of the premises described in the execution. The fourth count prays special damages similar to those prayed for in the second count as caused by

the refusal of Rainey to serve the alias execution.

The answer, after admitting the election of Rainey as constable, and the execution of the bond sued on, and also that Brooksbank was a qualified and acting justice of the peace, states that Rainey, by his deputy, W. W. Dillard, collected and paid over to A. F. Butts, the attorney for relator in the case against Galbraith, the full amount of the debt and costs for which judgment was rendered in said case; further, that Rainey was instructed and directed by said Attorney Butts not to make restitution of the real estate to the relator within five days after the issuance of the execution, but was directed by said attorney to return the execution at the end of five days; that said first execution, as originally issued, commanded the constable to make return thereof within five days after its date; that, after it was returned to the justice, it was altered by said attorney so as to be returnable 90 days after its date, instead of 5; that, by reason of the direction of the relator's attorney to the constable to return said execution and not put relator in possession of the property, the latter was estopped to claim damages on account of the failure of defendant Rainey to serve said execution.

The answer further states that Rainey was instructed and directed by said Attorney Butts to make return of the alias execution issued November 30, 1901, in order that Justice Brooksbank might issue another execution in the case against Galbraith, to be directed to J. D. Stokes, constable of North Campbell township, where the real estate was situate, and in which Galbraith was a resident, said Attorney Butts representing to Rainey that Clement would release him (said Rainey) from all liability in the premises; that by reason thereof relator ought not to be permitted to recover damages for not being placed in possession of said real estate.

At the conclusion of the evidence for the appellant the circuit court gave an instruction to the jury that plaintiff was not entitled to recover, and that they should find the issues for the defendants. That ruling is sought to be sustained on two grounds: First. That the justice had no jurisdiction or authority to render a judgment in the action instituted by Clement against Galbraith for possession of the premises. Second. That Butts, as attorney for Clement, had authority to direct the constable to return the executions without making restitution of the property occupied by Galbraith to Clement; that he gave Rainey that direction, in obedience to which Rainey returned the executions without serving them, so far as putting Clement in possession of the disputed premises is concerned.

In determining the force of the first position, it is necessary to notice the proceedings before the justice of the peace (Brooksbank) in the case of Clement against Gal-

braith. That case originated with the filing of the following complaint:

"State of Missouri, County of Greene—ss.: Eugene Clement, being duly sworn, on his oath says that A. D. Galbraith now occupies as tenant the following premises, to wit: The east three-fourths of the southeast quarter of northeast quarter and the west 22 acres of the northeast quarter of northeast quarter of section 17, township 29, range 22 west, containing fifty acres, more or less, in the county of Greene, in said county and state—which said above-described real estate was rented to said A. D. Galbraith on the 11th day of February, A. D. 1901, for the term of one year, at the rate of two hundred and $\frac{99}{100}$ dollars per year, and that the sum of one hundred and three dollars and 32 cents is now due to Eugene Clement for said rent, and that the same has been demanded of said A. D. Galbraith, and payment has not been made; that notes were given for the same, and they are herewith filed as a part of this petition. Wherefore plaintiff asks for judgment for \$103.32 and possession of the premises. Eugene Clement.

"Subscribed and sworn to before me this 29th day of October, 1901. S. Brooksbank, Justice of the Peace.

"Filed the 30th day of Oct., 1901. S. Brooksbank, J. P."

To the complaint were attached four promissory notes, for \$8.33 each, all dated February 11, 1901, and falling due on the 11th days of July, August, September, and October of that year, payable to the order of M. R. Hipes, expressed to be for value received, and bearing 8 per cent. interest when due. These notes were each indorsed by Hipes, the payee.

Along with the complaint, Clement filed an attachment affidavit, stating that the rent was due and unpaid, and that Galbraith was disposing of the crop so as to endanger the collection of the rent, and also an attachment bond, with two sureties, in double the amount of the rent sued for, binding him (Clement) and his sureties to indemnify Galbraith if it appeared the attachment had been wrongfully obtained. Rev. St. 1899, § 4123.

Thereupon the justice issued a writ of attachment to Rainey, the constable, commanding him to attach Galbraith, by, all and singular, his goods, chattels, and effects, or so much thereof as would be sufficient to satisfy the sum of \$103.32, and to summon Galbraith to appear before said justice on November 11, 1901, to answer the complaint of Clement, wherein he demanded \$103.32 for rent and possession of the real estate described in the statement.

The constable's return on this writ recites that he served the same October 30, 1901, by attaching certain grain raised on the premises, and reading the writ to and in the presence of J. D. Galbraith.

Galbraith did not appear, and the follow-

ing judgment was rendered against him by default:

"Now, on this 11th day of November, 1901, this cause comes on to be heard. Plaintiff appears. Defendant comes not, and the justice, after waiting over three hours (to 2 o'clock p. m.) for the defendant to appear, takes up this case, and finds from the evidence that the defendant at the time this suit was brought was indebted to the plaintiff in the sum of \$103.32 for rent to November 1, 1901; that said amount was demanded of the defendant before bringing suit; that said rent was due and unpaid; that the defendant was disposing of the crop grown on the premises so as to endanger, hinder, and delay the plaintiff in the collection of his rent; that seventy dollars have been paid since this suit was brought; that the amount now due is thirty-three dollars and thirty-two cents (\$33.32) for rent of the following described real estate, situated in the county of Greene and state of Missouri, viz.: The east three-fourths of the southeast quarter of northeast quarter and the west 22 acres of the northeast quarter of northeast quarter of section seventeen, township twenty-nine, range twenty-two west, containing fifty acres more or less—to November 1, 1901, and that the rents and profits are worth \$8.33 per month. It is therefore considered by the justice that the attachment of the plaintiff be sustained against the defendant A. D. Galbraith, and that the plaintiff have and recover of the defendant the sum of thirty-three and $\frac{2}{100}$ dollars, to bear interest at 8 per cent. from this date till paid, and that he recover possession of the premises above described, and that execution issue therefor. Given under my hand this 11th day of November, 1901. S. Brooksbank, J. P."

On November 12th an execution was issued, which was returned November 22, 1901; the return reciting the collection of the full amount of the debt and costs for which judgment was rendered, the payment of the amount of the judgment to plaintiff's attorney, A. F. Butts, and that restitution of the premises had not been made for the reason that plaintiff's attorney extended the time beyond 5 days from the date of the execution. Said first execution shows on its face that it was returnable within 90 days from its date; but Butts, the attorney for Clement, swore that he originally wrote it so as to be returnable in 5 days, but, discovering afterwards that an execution could not be made returnable in 5 days, changed it to 90 days, with the knowledge and approval of the justice. The testimony tends to prove the constable refused to evict Galbraith from possession of the premises by warrant of this execution, on the ground that it was extended beyond 5 days after its issue; that Butts did not insist on an eviction within 5 days, but did thereafter insist on an eviction. However, the testimony shows conclusively that service of this writ, so far as putting

Clement in possession of the premises was concerned, was waived by an agreement made between Butts and Rainey that it should be returned and an alias issued. Butts swears he made this agreement in good faith, on Rainey's promise that he would immediately serve the second execution. Be that as it may, this execution was returned by the direction of Butts, and he had authority to order the return, so that no cause of action was shown on the first and second counts of the petition. *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795.

The second execution was issued, as stated, November 30, 1901, and was returned on the 19th of December following; the return reciting that it was made by the direction of plaintiff and his attorney, Butts, in order that an execution might issue to Constable Stokes, of North Campbell township, the property described lying and the defendant residing in said township. Said execution reads as follows:

"State of Missouri, County of Greene—ss.: Eugene Clement, Plaintiff, v. A. D. Galbraith, defendant. The state of Missouri, to the Constable of Campbell Township, Greeting: Whereas, Eugene Clement on the 11th day of November, A. D. 1901, obtained judgment before the undersigned, a justice of the peace within and for the county of Greene, against A. D. Galbraith, that the said Eugene Clement have restitution of the premises as in the judgment described as follows, to wit: The east three-fourths of the southeast quarter of the northeast quarter and the west 22 acres of the northeast quarter of the northeast quarter of section seventeen, township twenty-nine, range twenty-two west, containing fifty acres more or less—and that he recover of the said A. D. Galbraith the sum of — dollars for his damages, and also at the rate of eight and $\frac{2}{100}$ dollars per month for rents and profits from the 1st day of November, A. D. 1901, until restitution be made, together with his costs. You are therefore commanded to take with you the power of the county, if necessary, and to cause the said A. D. Galbraith to be forthwith removed from said premises, and the said Eugene Clement have peaceful possession thereof, and that of the goods and chattels of the said A. D. Galbraith you cause to be levied the damages, rents, and profits aforesaid, with the sum of three dollars and 86 cents for costs, and 75 cents for this writ, and that you return this writ with your doings thereon to the undersigned within 90 days from date thereof. Given under my hand, at Springfield, in said county, this 30th day of November, A. D. 1901. S. Brooksbank, Justice of the Peace.

"Return. I hereby certify that I executed the within writ in the county of Greene on the 19th day of December, 1901, by returning the same to the justice, that another execution may issue in said cause to the constable of North Campbell township (the property described in this execution being in, and the

defendant residing in, said North Campbell township) by direction of the plaintiff and his attorney, A. F. Butts. Dan Rainey, Constable Campbell Township."

The evidence is that various demands were made of Rainey to serve this second writ by evicting Galbraith and putting Clement in possession, but that he refused to do so, apparently on the ground that the judgment of the justice for possession was a nullity. As to its being returned by the direction of Clement and Butts, the evidence tends to show that, after Rainey would not heed the request for service, Butts finally told him, if he did not intend to serve the writ, to return it, and he would have an execution issued to Stokes, the constable of North Campbell township. The evidence will not bear out the inference, or, at best, does not compel it, that Rainey returned this execution by the direction of Butts or Clement, but tends to prove that they insisted on his serving it, and only requested him to return it in case he would not serve it, in order that they might take another step. The recital in the return of the constable that he returned it by the direction of Clement and his attorney, in order that an execution might be issued to Stokes, is only prima facie evidence of the truth of that fact in this action against the constable on his bond. *State ex rel. v. Devitt*, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; *Sanborn v. Baker*, 1 Allen, 526; *Smith v. Emerson*, 43 Pa. 456; *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362; *Splahn v. Gillespie*, 48 Ind. 397. So far, therefore, as the evidence on this point is concerned, it was sufficient to go to the jury as to whether or not the second execution was returned by order of Clement or his attorney, so as to estop the former from recovering damages on account of Rainey's refusal to serve it.

The main point is as to the effect of the magistrate's judgment for possession of the premises. Was that judgment a nullity, and was the execution based on it void? A landlord to whom rent is owing may bring an attachment for his rent by virtue of section 4123 of the Revised Statutes of 1899, or he may bring an action to recover possession of the premises and the amount of rent due by virtue of section 4131. If he sues on the latter section, service of the summons need not be made more than five days before the return thereof. *Rev. St. 1899, § 4132*. But if he proceeds on the attachment section, the summons must be served 10 days before its return; for it is provided that all attachment proceedings based on the landlord and tenant chapter shall be the same as the law provides for in ordinary suits of attachment before a justice of the peace. *Rev. St. 1899, § 4124*. In ordinary attachments the writs are issued and returned as in actions on common process; that is, by writ of summons. *Rev. St. 1899, § 3877*. And in actions on common process in justices' courts the summons, unless otherwise provided, must be served 10 days

before the day of appearance. *Rev. St. 1899, § 3862*. But in this case the summons was issued October 30th, and was returnable on November 11th. It was served on October 30th, which gave Galbraith, the defendant, more than 10 days' notice.

The relator in his action before the justice combined the two remedies in favor of a landlord to whom rent is owing. He sued for rent and possession as provided in section 4131, and aided his suit by an attachment as provided in section 4123; taking care to give the defendant 10 days' notice. Is the constable justifiable for refusing to comply with the execution commanding him to make restitution of the leased premises to Clement, the latter having obtained judgment for possession in said action? If he is, it must be because the justice had no jurisdiction of the subject-matter of the action in which the judgment was entered. Irregularities in the judgment, or the proceedings anterior thereto, will not excuse the constable's delinquency, if the process was not void. *Millburn v. State*, 11 Mo. 188, 47 Am. Dec. 148; *Melcher v. Scruggs*, 72 Mo. 406. Instead of being void on their faces, both the original and the alias executions were regular and valid. Officers having writs must, of course, take notice of the jurisdiction of courts; for if a writ is placed in the hands of an officer, which the court had no authority to issue in any circumstances, such process will not protect the officer in making a levy. An illustrative instance is where the court had no jurisdiction of the subject-matter of the litigation which led up to the execution. *Howard v. Clark*, 43 Mo. 344; *State, to Use of Railroad, v. Schacklett*, 37 Mo. 280; 1 *Freeman on Executions* (3d Ed.) § 100. The question then recurs on the magistrate's jurisdiction; and unquestionably his jurisdiction of the subject-matter of the action for rent and possession instituted against Galbraith was complete, even if we concede two remedies were irregularly and unallowably combined, which we do not decide, because the question is not necessarily involved. And as the judgment was for possession, and a writ commanding Rainey to deliver possession followed, it was the latter's duty to fully execute the writ, which afforded him protection against any action for damages for the eviction Galbraith might have brought. *State ex rel. v. Devitt*, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; *Higdon v. Conway*, 12 Mo. 295; *Brown v. Henderson*, 1 Mo. 134; *Merchant v. Bothwell* (K. C.) 60 Mo. App. 341.

The adequacy of the statement filed before the justice is not a vital question in the present case, as the constable was only concerned with the justice's jurisdiction, not the regularity of the proceedings; but it was a sufficient statement under section 4131. It does not aver in so many words that the relation of landlord and tenant existed between Clement and Galbraith; but it was shown

Galbraith had attorned to Clement by paying him rent, and, moreover, it has been decided that it need not appear, in a statement of a landlord to recover rent, from whom the tenant rented. *Sweeney v. Mines*, 31 Mo. 240. Clement prayed for possession in his complaint, and, as he stated facts sufficient to bring his action within the purview of section 4181, the justice, on the face of the statement, was entitled to render judgment for possession, provided payment of the rent was not made at the hearing of the cause. Rev. St. 1899, § 4183. The fact that an attachment writ was taken out, based on a bond and affidavit, certainly did not deprive the justice of jurisdiction of the subject-matter, nor render the mandate of the execution for restitution of the premises to Clement void.

When the court which issued a process had jurisdiction of the subject-matter of the action, and the process is fair on its face, it, and not the judgment, constitutes the officer's protection, who is not bound to look behind his writ. *Hamner v. Ballantyne*, 13 Utah, 324, 44 Pac. 704, 57 Am. St. Rep. 736; 1 *Freeman on Executions*, § 101, and citations; also cases *supra*. The alias execution purported to be the outcome of an action for rent and possession, and was based on a judgment for both. No refusal to serve said execution, apparently regular and valid as it was, can be accepted, unless the magistrate was without jurisdiction of the litigation; but, as said, the magistrate had jurisdiction.

The judgment is therefore reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

STATE ex rel. CLEMENT v. STOKES.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

CONSTABLES — EXECUTION — REFUSAL TO SERVE — OBJECTIONS — RIGHT TO URGE — MANDAMUS — TERMINATION OF CONTROVERSY — COSTS.

1. In an action against a constable for failure to execute a writ, he was not entitled to defend on the ground that prior to the entry of judgment the parties agreed to dismiss the cause, and that thereafter plaintiff took judgment and caused the execution to issue.

2. An alias execution issued on a justice's judgment was not invalid because prior executions were returned by plaintiff's direction before they had run 90 days.

3. A constable in whose hands an alias execution was placed for service was not entitled to refuse to serve the same on the ground that prior executions issued were invalid.

4. Where a constable refuses to execute an alias execution on a judgment awarding possession of land, he may be compelled to enforce the writ by mandamus.

5. Where, pending mandamus to compel a constable to execute a writ awarding possession of certain property to relator, the defendant in the original action vacated the premises, and it was thereafter determined that relator was entitled to mandamus, the vacation of such premises did not relieve the officer from liability for costs.

Appeal from Circuit Court, Greene County: J. T. Neville, Judge.

Mandamus by the state, on relation of Eugene Clement, against J. D. Stokes. From a judgment in favor of defendant, relator appeals. Reversed.

Butts & Lydy, for appellant. Hamlin & Mason, for respondent.

Opinion.

GOODE, J. The facts of this case are in the main the same as those of State ex rel. Clement v. Rainey, 73 S. W. 250. That case was an action against Rainey and the sureties on his bond as constable, instituted by the relator, Clement, because of the refusal of Rainey to serve an execution issued by a justice of the peace, commanding him to put the relator in possession of certain premises; he having obtained judgment for the possession thereof before the justice who issued the writ. The present action was instituted to compel the defendant, Stokes, to whom an alias execution had issued of the same tenor, to serve that writ by making restitution of the premises to the relator. The alternative writ of mandamus alleges the issuance of the execution, its delivery to Stokes, and the latter's refusal to serve it, with other necessary allegations to entitle the relator, if they be true, to the relief he asks. Stokes' return to the alternative writ alleges that the judgment of the justice for the possession of the premises was void, as having been rendered without due notice to Galbraith, the defendant in the action; further, that, after the parties to the action had agreed on a settlement and dismissal of it, Clement took judgment, and caused execution to issue. The return further alleges the issuance of two executions preceding the one issued to Stokes, and that they were returned before they had run 90 days; that hence the one issued to Stokes was void.

We have considered most of the questions involved in this case in the opinion in the Rainey Case, and need not go into them again. We hold the judgment was sufficient to support process for the restitution of the controverted premises. The statement in the return that prior to the judgment the suit before the justice was settled by Galbraith and Clement constitutes, of course, no defense in favor of Stokes, in refusing to serve the writ. He had no right to raise such a question as an excuse for disobeying a process fair on its face. If the other executions were returned by direction of Clement, as is alleged, before they had run 90 days, that is no reason why the present execution was void; nor had Stokes any right to inquire in regard to previous executions. He was protected by the one placed in his hands, and it was his duty to obey its commands, and obedience in respect to making restitution of the premises may be enforced by mandamus *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *State v. Black*, 34 S. C. 194, 13 S. E.

361; North Pacific Ry. Co. v. Gardner, 79 Cal. 213, 21 Pac. 735.

It is suggested in respondent's brief that Galbraith vacated the premises a few days after this case was tried in the circuit court. If that is true, it will be good reason for refusing to grant a peremptory writ, but no reason why the costs should be taxed against the appellant.

The judgment is reversed and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

LOVE v. LOVE et al.*

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—RIGHTS OF PARENTS—EVIDENCE—ILL WILL OF WITNESS—HEARSAY—FINANCIAL CONDITION OF DEFENDANT—APPEAL—HARMLESS ERROR—FAILURE TO DEMUR—EXCESSIVE VERDICT.

1. In an action by a wife for the alienation of her husband's affections by his father and mother, evidence showing that, though the husband married plaintiff reluctantly, and against the wishes of his parents, after seducing her, he was kind to her after the marriage, and that the father and mother were instrumental in inducing the husband to leave plaintiff, was sufficient to support a verdict for plaintiff.

2. Parents are not justified in disrupting, without cause, marriage ties entered into by their minor son, though entered into without their consent and against their wishes.

3. The intentional enticement of the husband to separate from his wife is in itself a wrongful and unlawful act.

4. An instruction that the jury might assess punitive damages was, if error, harmless, where the jury refused to assess such damages.

5. Under Rev. St. 1899, § 672, providing that no judgment shall be reversed for the want of any allegation or averment on account of which omission a demurrer could have been sustained, defendants cannot, after trial and judgment, first object that a joint judgment against them cannot stand because no joint cause of action was alleged.

6. In an action for alienation of plaintiff's husband's affections, defendants introduced in evidence a letter from plaintiff's brother to one of defendants, the postscript of which was as follows, "You can get out of this by giving me \$500, or I will fill you full of lead." The brother denied the writing of the postscript. *Held*, that the exclusion of the postscript was not error, in the absence of proof by defendants that the brother wrote it.

7. Where the object of evidence was to show ill will of a witness toward a party, its exclusion was harmless when that fact was abundantly proven by other evidence.

8. In an action for alienation of affections of plaintiff's husband, evidence that the husband told defendant, his father, that he was compelled to marry plaintiff by reason of the threats of her brother to kill him if he did not, was properly excluded.

9. In an action for alienation of the affections of plaintiff's husband, evidence by plaintiff of financial condition of defendants was properly admitted.

10. In an action for the alienation of plaintiff's husband's affections, the admission of declarations of defendant, the husband's father, that he refused to consent to the marriage, though error,

was harmless, as all the evidence tended to show that fact, and it was practically admitted.

11. In an action for the alienation of plaintiff's husband's affections, the evidence showed that the husband had seduced plaintiff, and married her reluctantly; that he did not live with her at all through fear of defendants, his parents; and soon afterwards left the state at their instance, and plaintiff afterwards gave birth to a child. *Held*, that a verdict of \$2,250 was not excessive.

Appeal from Circuit Court, Maries County; James E. Hazell, Judge.

Action by Ella Love against John E. Love and Cynthia A. Love. From a judgment for plaintiff, defendants appeal. *Affirmed*.

W. S. Pope and Thos. M. & Cyrus H. Jones, for appellants. Orites & Garrison, for respondent.

BROADDUS, J. This is a suit by the plaintiff against the defendants for alienating the affections and depriving her of the assistance and society of her husband, John Rainey Love. The facts disclosed were that on the 13th day of April, 1900, the plaintiff and said John Rainey Love were married in the county of Maries, Missouri, and that they cohabited as husband and wife for a short time, when he abandoned the plaintiff and left the state. The evidence tended to show that the marriage was compulsory upon the husband. At the time of the marriage the plaintiff was about 17 and the husband about 19 years of age. It was shown that the former lived with her mother, a widow woman, and that the latter lived with his parents, the defendants herein. It is also to be inferred from the evidence that plaintiff's relatives were laboring under the belief that she had been seduced by young Love; and that, evidently acting under such belief, W. E. Heady and another brother of plaintiff went to defendants' home, and made a charge to that effect to John E. Love, in the presence of the son, John Rainey Love, and demanded that the latter marry their sister; that defendant refused to give his consent to such marriage, whereupon said Heady declared that, if something was not done at once, he would have the son arrested immediately. However, it appears that in the afternoon of the same day young Love, in company with the said named Heady, obtained a license for the marriage by means of an order alleged to have been signed by his father, authorizing the issuance of the same, and that later on in the evening said John Rainey Love and the plaintiff herein were married, and cohabited together as man and wife until the following morning, when the former returned to the home of his parents. It is claimed by defendants that said written order purporting to be signed by John E. Love, and by means of which said marriage license was secured, was a fictitious or bogus order. The plaintiff testified that after the night of the marriage her husband visited her about seven times, and

*Rehearing denied April 6, 1903.

that he would come in the evening, and stay with her until about 3 o'clock the next morning, when he would go home to his parents, in order to prevent them from having knowledge that he was staying with her; but that finally the husband, on the 9th day of July, 1900, left the state, and wholly abandoned plaintiff. She also testified that her husband was kind and affectionate to her after their marriage, and that after his disappearance a child was born to her, of which he was the father. Also that after her husband had abandoned her she met defendant John E. Love on the highway, and spoke to him, calling him "Mr. Love," when he said to her, "Well, you and Rainey is married, are you?" to which she answered, "Yes, sir," whereupon he said, "Well, I sent Rainey off. He shan't live with you." And it was further shown by a witness in the case that shortly prior to the husband's departure from the country he had heard the defendant Cynthia A. Love say to her son, John Rainey Love, that she would give him \$1,500 if he would leave.

On the trial the plaintiff, over the objections of the defendants, was permitted to prove that the latter were opposed to the marriage. The defendants offered to prove a conversation had with the said son soon after the marriage, in which he said that he "was compelled to marry plaintiff on account of threats made against him by her brothers; that they threatened to kill him, and that was the reason he married her." The court, upon objection of plaintiff, excluded the evidence. When John E. Love was testifying, the plaintiff, against defendants' objections, was allowed to question him as to his financial condition. This is assigned by appellant as error, as was the refusal of the court to permit defendants to read an entire letter of witness Heady to appellant John E. Love, the part omitted being the postscript, which was as follows: "You can get out of this by giving me five hundred dollars, or I will fill you with lead." Appellants also allege error in the giving and refusing of instructions by the trial court, the admission and rejection of testimony, that the verdict is excessive, and other errors, for which they ask a reversal of the case, including the assignment, urged with much persistence, that under the testimony the plaintiff was not entitled to recover.

We believe that under the law there was ample evidence to support the finding of the jury. We will not undertake to answer defendants' contention as to the credibility of the evidence, nor their assumption that on the facts the verdict is not supported by the testimony. It is sufficient to say that, if plaintiff's evidence is to be believed—and her credibility was not assailed—the defendant John E. Love was instrumental in inducing the husband to abandon his wife. And, if the testimony of another unimpeached witness is true, the defendant wife was also

instrumental in inducing her son to leave plaintiff and the country. And, notwithstanding the husband had seduced plaintiff, and married her reluctantly, yet, if it was true that after the marriage he was kind and affectionate to his wife, the acts of the defendants in alienating his affections and causing him to separate from her was not only a moral, but a legal, wrong. And because they had the right, as parents, to object to the marriage of their son to the plaintiff, did not justify them, after said marriage had been consummated, in seeking, without cause, to disrupt the marriage tie. The plaintiff's deplorable situation, caused by the son's act, should have appealed to their better natures, and impelled them to have offered shelter and protection to the victim.

Where the parents have wrongfully induced and caused their son to abandon his wife, she has a right of action against them for injuries. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947. "A husband may maintain an action for enticing away his wife, or inducing her to live apart from him, and this whether the wrongdoer be the father of the wife or any other person. But merely allowing the wife to come and remain in his house, by a stranger—and much less her father—from good motives, will not give the husband a right of action." *Modisett v. McPike*, 74 Mo. 636; *Bennett v. Smith*, 21 Barb. 439. The law is correctly stated in *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759, as follows: "We concede that in cases of this sort there is a distinction between the liability of parents and that of strangers, but the distinction is only in what will justify their interference. Parents may often be justified in interfering in the domestic affairs of their children, where strangers would not; but even parents cannot go so far as to break up a family without just cause or excuse, and it is not for the plaintiff to prove that no such cause existed, but it is for the defendants to prove that such cause did exist."

Defendants object to instructions Nos. 1, 3, 4, and 5, given for the plaintiff. It seems to us that all said instructions except No. 4 are free from criticism, and that they embody the law, couched in appropriate language expressive of the foregoing views of this court. And because they fail to require the jury to find that the acts of defendants were wrongful can make no difference, if they find such acts were intentional. If one intentionally entices the husband to separate from the wife, the law implies a wrong. The instructions amount to a declaration by the court that the intentionally doing of the act charged is in law a wrongful act. To separate man and wife is in itself a wrongful and unlawful act, the doing of which intentionally is wrongful and unlawful. Instruction No. 4 directs the jury that,

if they find that the defendants' acts were wanton and malicious, they might assess against defendants punitive damages. And whether the evidence showed that defendants acted wantonly or maliciously is immaterial, for the jury, in effect, found that they did not, refusing to assess such punitive damages, which left defendants no cause for complaint on account of said instruction.

It is also claimed that, the judgment being a joint judgment against both defendants, and no joint cause of action alleged, it cannot stand. It is true that the petition is defective in that respect, but it was an apparent misjoinder, and the defendants should have taken advantage of it by demurrer, and, having failed to do so, it was too late after trial and judgment to make objection for that cause. See section 672, Rev. St. 1899, which provides that no judgment shall be reversed "for the want of any allegation or averment on account of which omission a demurrer could have been sustained."

Defendants claim that they were prejudiced by the action of the court in excluding from the jury the postscript of the letter of witness Heady addressed to defendant John E. Love, and hereinbefore quoted. As the witness denied that he wrote the postscript, which could have been written by some one else, the burden was upon the defendants to show that it was the handwriting of the witness, which they failed to do. Therefore the court properly excluded it from the consideration of the jury. In any event, as the object of its introduction was to show the ill will of said witness to said defendant, he could not have been injured by the action of the court in that respect, as that fact had already been abundantly established.

And it was not error in the court refusing defendants' offer to prove that the son stated to the father that he was compelled to marry plaintiff by reason of the threats of her brothers to kill him if he did not do so. It is well-settled law that hearsay evidence, as a rule, is not admissible. *Dunn v. Aultman*, 50 Mo. App. 231; *Fougue v. Burgess*, 71 Mo. 389.

The further contention that the court erred in admitting plaintiff to prove the financial condition of the defendants is also without merit. *Beck v. Dowell*, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650. And it is further insisted that it was error to permit witness Heady to testify to the declarations of defendant John E. Love, wherein he refused to consent to his son marrying plaintiff. There is no denying that he had the right, as the father, to refuse his assent to said marriage, and he incurred no liability in so doing; and the fact that he did so was not a matter for the consideration of the jury. Yet he could not have been prejudiced thereby, as all the circumstances and the evidence in the case went to show such a state of facts. And, if we understand the rec-

ord properly, it was practically admitted that defendants were opposed to the marriage.

Lastly, the defendants contend that the verdict of the jury, which was for \$2,250, was excessive, and the result of prejudice and passion. In *Morgan v. Ross*, 74 Mo. 318, the court used the following language: "The amount of the damages in such cases is considered a question peculiarly within the province of the jury, and as one which cannot, from the very nature of things, be estimated or computed upon any mere compensative or pecuniary basis; and courts certainly would not interfere with a verdict in this or in kindred cases where there is no scale whereby the damages can be graduated with certainty, unless proof be introduced showing flagrant abuse of those powers which the law had confided to the intelligence and good sense of the jury." See *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650. We will not undertake to measure the depths of plaintiff's grief and humiliation, nor the weight of the burden which must rest so heavily upon her in her abandonment and isolation from society. That was the business of the jury. Then, too, this matter was brought to the attention of the learned judge who tried the case below, and who was in a position to much better pass upon the plaintiff's measure of damages than is this court, and he did not think the verdict excessive. To his judgment in that respect, it is our opinion, much weight should be given.

Finding no material error in the case, the cause is affirmed. All concur.

CITY OF DE SOTO ex rel. IRWIN v. SHOWMAN.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ESTIMATES—SUBMISSION—CONTRACTS.

1. Under Rev. St. 1899, § 5858, providing that an estimate of the cost of any municipal improvement shall be made, such an estimate is a prerequisite to the letting of a contract for an improvement.

2. No contract can be entered into for a municipal improvement at a price exceeding the estimate of its probable cost.

3. In an action to recover on a tax bill for a street improvement, it was in issue whether an estimate of the work had been made. It appeared that an engineer had made an estimate at the request of one of the councilmen, and the councilman testified that he filed it with the city clerk. One who was city clerk at the time denied any filing, and the one who became city clerk afterwards stated that he had made search among the records, but could not find any such estimate. *Held*, that the evidence showed that no such estimate was ever submitted to the council.

4. An ordinance for a street improvement undertook to fix the grade by reference to a "da-

¶ 1. See *Municipal Corporations*, vol. 38, Cent. Dig. § 829.

tum plane" as fixed by certain ordinance "No. ____." The ordinance which purported to establish the grade specified numerous elevations above the "datum plane," but the number of the ordinance prescribing the plane was left blank, and in an action to enforce a tax bill for the improvement no such ordinance was introduced, and the engineer who it was claimed fixed the grade testified that the grade he fixed was the first grade ever fixed, and that having no ordinances to go by he established the grade himself. *Held*, that no grade of the street was established.

5. Under Rev. St. 1899, § 5860, requiring that contracts for municipal improvements shall be let on plans filed with the city clerk, a contract for an improvement, the plans for which were not filed with the clerk, is invalid.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action by the city of De Soto, on the relation of H. B. Irwin, against W. A. Showman. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Sam Byrns, for appellant. Green & Bean, for respondent.

Statement of Facts and Opinion.

GOODE, J. Respondent is the owner of a lot in the city of De Soto, Mo., which is a city of the third class. Said lot fronts on Fifth street, between Boyd and Kelley streets, in said city, and this action was instituted to recover on a special tax bill for \$70.35 issued to pay for grading, macadamizing, graveling, curbing, and guttering Fifth street between said other streets, on a contract made by the city of De Soto with the relator, Irwin, on or about June 20, 1900.

The defenses set up in the answer are as follows: (1) The city council did not declare by ordinance it was necessary to pave, macadamize, gravel, and grade Fifth street. (2) The council passed no ordinance declaring that in its judgment the general revenue fund of the city was not in condition to warrant an expenditure from that fund for bringing Fifth street to grade. (3) No ordinance was published for two weeks in regard to the improvement of Fifth street. (4) No ordinance was passed to assess the cost of bringing said street to grade, nor for levying tax bills against said lots to pay for the grading. (5) No estimate of the cost of the work necessary to be done was made by the city engineer or other proper officer and submitted to the council. (6) The contract was not let by competitive bidding. (7) The contract was let to the relator at an adjourned meeting of the council, although the awarding of the contract had been previously postponed to the next regular meeting. (8) Irwin did not sign the contract with the city. (9) No plans and specifications of the work were filed with the city clerk before or after the bid was received. (10) The contract was awarded against the protest of the owners of the abutting property.

The proceedings of the city council preliminary to the awarding of the contract in

question were exceedingly irregular, and proof of what they were rests largely on oral testimony, no record having been kept of many acts. At the conclusion of the evidence the issues were submitted to the circuit judge for decision without declarations of law being requested by either side, and hence, in so far as there is substantial conflict in the testimony, this court is bound to accept the judgment of the court below as a finding of the disputed facts in favor of the respondent.

The first four defenses were overthrown, we think, by the recorded proceedings.

Overlooking several minor objections to the validity of the tax bill, we will take up the more important points made against its validity.

(a) The first is that no estimate was submitted to the council of the cost of the contemplated improvement, and that the contract price exceeded the estimates actually made but not submitted. Such an estimate is a prerequisite to the letting of a contract for a street improvement of the sort which is the basis of this controversy. Rev. St. 1899, § 5858; *City of Independence v. Briggs* (K. C.) 58 Mo. App. 241; *City of Marshall v. Rainey* (K. C.) 78 Mo. App. 416; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897; *Worthington v. Covington*, 82 Ky. 265. It is also the law that no contract can be entered into for such street work at a price exceeding the estimate of its probable cost. Citations *supra*.

In the present case there was evidence tending to prove three estimates were made, but said evidence tends strongly to show that neither of them was submitted to the council, and shows positively that one of them was never submitted to it or even placed on file with the clerk. Two of the estimates were made by an engineer employed by the city council for that purpose by the name of Kinsey, and his testimony is that the two did not vary more than \$300; and that each of them was much below the price at which the work was let to the contractor, Irwin. Mitchin, who was city clerk when the bids were advertised for and received, testified that the contract was awarded on the Kinsey estimates.

Reliance is placed on a subsequent estimate made by an engineer named McGlashon, which was higher than the contract price. All that appears about McGlashon's estimate is that he made it after Kinsey had made two, and that a councilman by the name of Lovett, who was chairman of the street committee, said he had charge of McGlashon's estimate; but it was not shown how McGlashon came to act in the matter or who authorized him to act. Lovett testified as follows: "Q. Did you have charge of this estimate? A. Only charge of it there was. They gave me a copy of the specifications and left the rest with engineer, McGlashon."

Q. What did you do with them? A. I turned them over to the engineer. I said Mr. Kinsey was the engineer. He was employed by the city the first time the estimate was made on Fifth street. His estimate was filed with Mr. Mitchim (the city clerk), and after that I don't know, where they went. And afterwards Mr. Kinsey came down and made some changes in it, and made another estimate; or, I believe, I wrote Mr. Kinsey to come down and make an estimate. I had no estimate from Mr. Kinsey while I was in office."

It was shown by the relator, Irwin, who had become city clerk before the trial, that he had made diligent search among the city records for McGlashon's estimate, and could not find it there, and that nothing of the kind was turned over to him as clerk. It should be stated, further, that there was no record of the submission of any estimate of the cost of any work to the council, the whole matter resting in parol, and Mitchim, who was clerk when the proceedings were had, swore that McGlashon did not make an estimate at all, or, if he did, he (Mitchim) never saw it nor was it before the council.

(b) The grade of the street was not established. An ordinance was enacted which undertook to fix the grade by reference to a "datum plane" (so-called) as fixed by "Ordinance No. —." The ordinance which purported to establish the grade specified numerous elevations above said "datum plane" at different points along the street, but the number of the ordinance prescribing the datum plane was left blank as indicated, and no such ordinance was introduced in evidence, and the testimony tends to show none was ever passed. Now, as to the bearing of this omission on the merits. We have the testimony of Kinsey, the engineer employed to fix the grade, concerning how he proceeded, and it is of the following tenor: "Q. You established a grade the first time you came down to De Soto to survey Fifth street? A. I don't remember; it was some time in 1900. Q. You paid no attention to the ordinance passed then? A. The grade I fixed was the first grade that had ever been fixed. Q. You was directed to go and establish a grade? A. Yes, sir. Q. You know whether this was established with reference to any city ordinance in October, 1899? A. No, sir; I don't know anything about it. Q. I will ask you if you established that grade or provided for the doing of that work under that ordinance? A. I made a statement similar to this; I don't see anything to enable me to identify figures. Q. You had no ordinance to go by? A. I took the trouble to inquire if there was an ordinance. Q. Then you proceeded to establish one yourself? A. Yes, sir."

He further swore that the plans and specifications he made would fit one grade, so far as the surface improvement of the street was concerned, as well as another, but that there would be a difference in the cost of the

contemplated improvement according to the grade established; which is obviously true, as a grade requiring much filling and excavating would cost more than one requiring little. Abutting property owners cannot be taxed with the cost of bringing a street to a grade never established by the city government, and the evidence shows the present tax bill includes expense of that kind. As above stated, Kinsey's estimate, which was the only one on file or before the council, fell far below the price at which the contract was let to Irwin.

(c) Further, Mitchim swore no plans and specifications for the work were ever filed, and that at least one other contractor who wished to bid called at the clerk's office to see the plans and specifications, and, finding none, submitted no bid. The statutes require such contracts to be let on plans and specifications filed with the city clerk. Rev. St. 1899, § 5860.

So far as we can see, the contractor, Irwin, did his work well and complied with his contract; but, with the best will in the world to help him collect the money he earned, we have been unable, after the most careful scrutiny, to find facts in the record which lead us to doubt the propriety of the circuit court's judgment, much less set it aside. That judgment is therefore affirmed.

BLAND, P. J., and REYBURN, J., concur.

MORTON v. SUPREME COUNCIL OF ROYAL LEAGUE.*

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

BENEFIT CERTIFICATE—CONSTRUCTION—SUBSEQUENT BY-LAWS—LIMITATION OF LIABILITY—FOREIGN LAWS—PLEADING—INTERVENTION—TIME OF MOTION.

1. Where a beneficial association had so interpreted its contracts as to render itself liable thereunder though the certificate holder committed suicide while sane, by providing that the company should not be liable if insured committed suicide within two years after the issuance of the certificate, and by thereafter passing by-laws that if insured committed suicide his beneficiary should be entitled to only one-half of the face of the policy, it could not be contended that a certificate was invalidated by suicide on the ground of public policy.

2. Where, in an action on a policy made in Illinois and subject to its laws, such laws relating to the defense urged were not pleaded, defendant's liability must be determined according to the common law.

3. A benefit certificate bound insured to comply with all the laws and usages of the society then in force or which might be thereafter adopted by the order. At the time the certificate was issued one of the by-laws provided that, if any member should commit suicide within two years, defendant should be liable for one-half of the face of the policy, and thereafter such by-law was amended at various times until it finally provided that if any member should die by suicide his beneficiary should only receive one-half of the certificate. *Held*, that the

*Rehearing denied March 17, 1903.

provision of the certificate requiring compliance with future regulations related only to such regulations as effected the member's duties as a member, and that such member was therefore not bound by the by-law as amended.

4. Motions to intervene in an action and to be substituted as curator for the plaintiff, not filed until after judgment, were properly overruled.

Appeal from St. Louis Circuit Court.

Action by Gertrude F. Morton, by William G. Richardson, curator, against the Supreme Council of the Royal League. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Louis R. Steber, for appellant. Wm. B. Gentry, for respondent.

Statement of Facts and Opinion.

GOODE, J. Plaintiff's petition states that William G. Richardson is public administrator and ex officio public curator of the city of St. Louis, in charge of the estate of Gertrude F. Morton, a minor; that on June 26, 1893, the appellant, a corporation organized under the laws of the state of Illinois, insured the life of Charles Morton for the benefit of said Gertrude in the sum of \$4,000, the certificate of insurance being pleaded in full; that said Charles Morton died May 6, 1900, having complied with the regulations governing the appellant association, with his certificate in full force; that appellant refused to pay the amount of the certificate or any part thereof, wherefore judgment was demanded for the same.

The answer was as follows (omitting caption):

"Now again comes defendant, and, by leave of court first had and obtained, files this its second amended answer to plaintiff's petition, and denies each and every allegation thereof as therein stated.

"Defendant, further answering, says that it is a corporation, duly incorporated under the laws of the state of Illinois as a fraternal beneficial association, order, or society; that now, at and prior to the times hereinafter mentioned, it has operated and still operates as such under the laws of the states of Illinois, Missouri, and other states, and that it is duly licensed to operate in said states as a fraternal beneficial association as in the laws of said states defined; that in conformity with the laws of the state of Illinois pertaining to fraternal beneficial associations, and as in said laws of the state of Illinois provided and defined, the defendant association was and is formed, organized, and carried on for the sole benefit of its members and beneficiaries, and not for profit; that it has, and always has had, a lodge system with ritualistic form of work and a representative form of government; that it has made and still makes provision for the payment of benefits, in case of death, out of a fund derived from assessments collected from its members; that its death benefits

are payable only to the families, heirs, blood relatives, affianced husband, or affianced wife of, or to persons dependent upon, the member; that it operates and conducts, and always has operated and conducted, its business as such fraternal beneficial association, order, or society, under the provisions of the laws of the state of Illinois as hereinbefore defined and set forth; that it does not do, and never has done, what is known as the business of life insurance anywhere, or at any time, and is not a life insurance corporation, and that its principal office now and always has been located in the city of Chicago and state of Illinois.

"Defendant, further answering, says that it operates and conducts its business through subordinate bodies known as subordinate councils, and that its subordinate councils, under defendant's constitution and by-laws, are authorized to admit acceptable persons to beneficiary membership; that each member of the order has a voice and vote in the government and management of the order, through duly elected representatives, as provided by its constitution and by-laws, duly enacted by defendant, through such elected representatives, as members of its Supreme Council, or governing body.

"Defendant, further answering, admits that one Charles Morton, while a resident of the city of Chicago, state of Illinois, and in said city and state, duly presented his written application for membership to one of defendant's subordinate councils, known as Bankers' Council, No. 56, located at Chicago, in the state of Illinois, and that in said application, duly signed by him, and as a condition precedent to being made a beneficiary member of the defendant association or order, he agreed in said application to comply with all its laws, rules, and usages then in force or which might be thereafter adopted by the defendant order; that thereupon he was duly initiated in said Bankers' Council, and a benefit certificate of defendant, No. 4,973, was issued and delivered in said city and state aforesaid to said Charles Morton on June 19, A. D. 1889, in which Pauline E. C. Morton, wife of the said Charles Morton, was made the beneficiary.

"Defendant further states that the said benefit certificate No. 4,973, issued as aforesaid, was in form, substance, and language identical with the benefit certificate set forth in plaintiff's petition, saving and excepting the date, number, and the name of the beneficiary, and contained a clause therein reading as follows: 'Upon condition that the said member [meaning Charles Morton] complies in future with the laws, rules, and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund, all of which are also made a part and parcel of this contract;' that said benefit certificate was duly accepted in writing by said Charles Morton, on the face thereof,

in words as follows: 'I accept this certificate on the conditions named therein'—and duly evidenced by his signature thereto attached.

"Defendant further says that it was and is provided in its constitution and by-laws that a member may at any time surrender his benefit certificate and change his beneficiary, and that in pursuance of said provision of defendant's constitution and by-laws, and with the consent of defendant, the said Charles Morton, on June 26, 1893, while still a resident of said city of Chicago, and a member of said Bankers' Council, surrendered the original benefit certificate as aforesaid, and in writing on the back of the said surrendered certificate directed a new benefit certificate to be issued and delivered to him, payable to Gertrude F. Morton, related to him as his daughter; that in said benefit certificate, as issued and delivered by defendant to said Charles Morton in the city of Chicago, state of Illinois, it was and is provided, among other things, as a part and parcel of the contract therein made with the said Charles Morton, as an express 'condition that the said member complies in future with the laws, rules, and regulations now governing the said council and fund, or that may thereafter be enacted by the Supreme Council to govern such council and fund, all of which are also made a part of this contract'; that the fund therein referred to is the widows' and orphans' benefit fund, which is obtained by defendant by levying and collecting assessments therefor from the beneficiary members of defendant's association as are needed, from time to time, to pay its losses by death, etc., and out of which payments to beneficiaries are made, as provided in the constitution and by-laws of defendant; that the said Charles Morton, in writing, on the face of such certificate, by his signature thereto subscribed, accepted the said certificate on the conditions named therein, as in plaintiff's petition set forth and stated.

"Defendant, further answering, says that in the exercise of its powers, through its Supreme Council duly and regularly assembled in the city of Chicago, state of Illinois, on March 13, 1893, and on March 28, 1893, it adopted a by-law which reads as follows: 'If any member shall, within two years subsequent to his admission into this order, die by his own act or hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half of the face value of his certificate.' That said by-law was promulgated to the membership of defendant's association, and went into force and effect April 1, 1893.

"Defendant, further answering, says that at a subsequent session of its Supreme Council, duly and regularly assembled in the city of Chicago, state of Illinois, on April 27, 1895, the said by-law as aforesaid was amended by striking out the word 'two' and inserting in lieu thereof the word 'five,' so that said by-law as amended reads as follows: 'If

any member shall, within five years subsequent to his admission into this order, die by his own act or hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half of the face value of his certificate.' That said by-law was promulgated to the membership of defendant's association, and went into force and effect May 1, 1895.

"Defendant, further answering, says that at a subsequent session of its Supreme Council, duly and regularly assembled in the city of Chicago, state of Illinois, on June 17, 1897, the said by-law as aforesaid (as adopted April 27, 1895) was amended to read as follows: 'If any member shall die by his own act or hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half the face value of his benefit certificate;' that said by-law was promulgated to the membership of defendant's association, and went into force and effect July 1, 1897.

"Defendant, further answering, says that at a subsequent session of its Supreme Council, duly and regularly assembled in the city of Chicago, state of Illinois, on April 11, 1899, the said by-law as aforesaid (as adopted June 17, 1897) was amended by a unanimous vote to read as follows: 'If any member, whether admitted heretofore or hereafter, shall die by his own act or hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half of the face value of his benefit certificate.' That said by-law was promulgated to the membership of defendant's association and went into force and effect July 1, 1899, and was in force and effect at the time of the death of the said Charles Morton. That said by-law is now, and was at its adoption, known as law 2, section 4, 'Laws of the Royal League,' and that said by-law forms part and parcel of its contract with said Charles Morton, and was in force and effect during said Charles Morton's membership in the defendant's society and at the time of his death.

"Defendant, further answering, says that said Charles Morton, up to the date of his death, continued his membership in said Bankers' Council in the city of Chicago, in the state of Illinois, and that all of his monthly assessments and his local council dues were paid by him in the said city of Chicago to the officers of said Bankers' Council in Chicago, and by said officers paid over to defendant herein, in said city.

"Defendant files herewith and attaches hereto a complete copy of its constitution and by-laws, as were in effect at the time of the death of the said Charles Morton, as a part and parcel of its answer herein, to the same extent and with as full and complete effect as if they were fully set out in the body of this answer, and marks the same 'Exhibit A.'

"Defendant, further answering, says that the said Charles Morton, in the city of St. Louis, state of Missouri, on or about the sixth or seventh day of May, 1900, died by his

own hand, and committed suicide by poisoning himself; that in so causing his own death the said Charles Morton understood and was conscious of the physical nature and consequences of his act, and intended to destroy his life; the defendant under its contract is therefore only liable to the beneficiary, the said Gertrude F. Morton, in the sum of two thousand dollars (\$2,000), which it has always been ready and still stands ready to pay, and for which amount (two thousand dollars) it consents that judgment be entered up against it.

"Wherefore, having fully answered and consenting that a judgment of two thousand dollars be entered up against it, defendant prays that upon such payment, and the payment of costs up to date, it may stand discharged from further proceedings, costs, or expenses herein."

A motion for judgment on the pleadings for the face value of the certificate was filed by the respondent, sustained by the court, and an appeal taken. After judgment had been entered, certain motions to intervene and be substituted as curator were filed by strangers to the action, who claimed the right, as against Richardson, to represent Gertrude F. Morton.

The principal controversy in this case is as to whether the suicide by-law of the association, which was in force at the time of Charles Morton's death, constitutes a defense to plaintiff's cause of action; but before discussing that question it is necessary to consider the proposition advanced by the defendant's counsel that an insurance policy payable to the insured or his estate, or one in a fraternal order (in which the designated beneficiary has no vested interest), is forfeited by the suicide of the insured while sane, whether the policy so provides or not. That rule, we admit, is supported by much authority as being one phase of the doctrine that a loss on any contract, caused by some act of a party to it which was a violation of the criminal law or inimical to the public weal, affords no right of action, as where a loss on a policy covering property is due to the incendiarism of the owner, or the holder of a life policy payable to his estate is lawfully killed in preventing him from committing a felony. *Ritter v. Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. There is reason for some applications of the rule, but extending it so as to compass the avoidance of life insurance contracts in the event of suicide is less obviously reasonable than when it is used to defeat a recovery for the loss of property intentionally burned by the owner; and this is true in several aspects of the matter. If companies could be made to pay for incendiary losses on property, the crime of incendiarism would be encouraged to a far greater extent than self-destruction would be by leaving life insurance valid after suicide, both because of the innate love of life and because most life policies are vested

in the beneficiaries, and hence good, notwithstanding the suicide of the insured, in the absence of a special proviso to the contrary. Then it is to be remembered that insurance companies dictate their policies, and usually include all the exceptions to liability they desire to reserve and that the law will permit. Moreover, self-destruction always indicates, if not insanity, at least an irresponsible state of mind, and may well be considered part of the risk assumed, if not specially excluded. For this reason the doctrine in question is not welcomed by all courts, and seemingly not by those of this state, which hold that a company doing a life insurance business takes a risk on an insured person's life subject to all his human passions and frailties. *Adm'r v. Insurance Co.*, 19 Mo. 506; *McDonald v. Triple Alliance (St. L.)* 57 Mo. App. 87.

But whatever merit the rule may possess, we need not concern ourselves about it in the present case, for it is clear the defendant association has interpreted its contracts so as to make it inapplicable to them. The by-laws enacted on the subject of suicide imported that the company understood its policies or certificates had bound it theretofore to pay stipulated benefits in full, notwithstanding the death of a member by his own hand. Either this is true, or we are driven to the position, which no one will contend for, that the society meant to create instead of diminish a liability on its part by those by-laws. Their wording shows, too, that the company understood its previous obligation was to pay in case of suicide; for they read that in the event of the suicide of a member his beneficiary shall receive only one-half of the face value of the certificate, and the logical meaning of such language is that previously the beneficiary was entitled to the full face value. The company itself having construed its contracts so as to leave no doubt about what it intended to insure against, that construction should be adopted, as it contravened no policy of the law. *Patterson v. Camden*, 25 Mo. 13; *Brewing Co. v. Waterworks Co. (K. C.)* 34 Mo. App. 49; *Rose v. Carbonating Co. (St. L.)* 60 Mo. App. 28; *Union Depot Co. v. Railroad*, 131 Mo. 291, 31 S. W. 908; *Williams v. Railroad*, 153 Mo. 487, 54 S. W. 689; *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738. We hold, therefore, that the doctrine above adverted to has no bearing on the determination of this controversy.

This being an Illinois contract, particular reliance is placed on the decisions of the courts of last resort of that state as making by-laws like those pleaded in the answer applicable to contracts for fraternal insurance entered into prior to their enactment, when the certificate of insurance provides that the insuring party shall be bound by future by-laws. Those decisions we have consulted, and find some of them support the position of counsel for the defendant. *Supreme Lodge v. Trebe*, 179 Ill. 348, 53 N. E. 730, 70 Am. St. Rep. 120; *Fullenwider v. Roy-*

al Leauge, 180 Ill. 626, 54 N. E. 485, 72 Am. St. Rep. 239; *Supreme Tent v. Hammers*, 81 Ill. App. 560; *Supreme Legion v. Clarke*, 88 Ill. App. 600. There are later decisions of the Supreme Court of that state which cast some doubt on whether a certificate worded as Morton's was would be subject to the effect of a subsequently adopted by-law reducing the benefit if the member committed suicide; for his certificate differs in its language from the one construed in *Supreme Lodge v. Trebe*, supra, in that it bound Morton to comply with future by-laws, whereas in the *Trebe* Case the words were that the "contract should be controlled" by future laws and regulations. *Peterson v. Gilson*, 191 Ill. 365, 61 N. E. 127; *Covenant Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966.

But attention to the answer will disclose that the defendant has failed to plead the laws of Illinois on this subject. The answer several times avers the defendant is an Illinois corporation, operating under the laws of said state and other states, including Missouri, and duly licensed to operate in said states as a fraternal association. Further, that, in accordance with the laws of Illinois, it is organized for the sole benefit of its members and not for profit, has a lodge system, a ritual, and a representative form of government, makes provision for the payment of benefits in case of death only to the insured's family or persons dependent on him, and operates and conducts its business under the laws of the state of Illinois as a fraternal society, never having done business anywhere or at any time as a life insurance corporation. The answer also shows the contract of insurance in controversy was an Illinois contract, made and performed in that state. But nowhere is reference made to the laws of Illinois or any decisions of its courts concerning the effect of a by-law such as is pleaded in the answer on prior contracts of insurance. The motion for judgment on the pleadings was in the nature of a demurrer to the answer, and we recognize the rule that liberal treatment must be accorded the allegations of the answer and whatever construction most favorable to the defendant they are susceptible of given to them. But it is also true that, if there is an entire absence of averment concerning the laws of Illinois on the point in hand, it must be decided without particular reference to that law.

The senseless rule of practice still obtains that where an action or defense rests on a foreign law, even it be one of a sister state of the Union, such law is a fact which a court cannot take notice of unless it is pleaded and proven. *Garrett v. Conklin* (K. C.) 52 Mo. App. 654; *Banchor v. Gregory* (St. L.) 9 Mo. App. 102; *Thatcher v. Mars*, 11 N. Y. 437; *Phinney v. Phinney*, 17 How. Prac. 197; *Bean v. Briggs*, 4 Iowa, 469. The federal courts have long since rid themselves of this technicality, which forces state courts

to control contracts made in another state by the general doctrines of the common law when they know perfectly well the contracts were entered into with reference to other laws, and know, too, or can easily ascertain, what those laws are. It is well to require proof of foreign laws which are neither familiar nor accessible, like those of European or Asiatic states; but there can be no good reason for forbidding courts to take judicial notice of the laws of the states of this Union. The rule is the other way, and we must be governed by it; and, as the answer contains no averment in regard to the decisions of the courts of Illinois on the crucial question of the case, we cannot determine it solely by the decisions of those courts, but must be governed by the weight of authority.

Certificates in fraternal associations for indemnity in the event of death are contracts for insurance subject to all the rules of law which control the interpretation of contracts generally, create and enforce their obligations, and prohibit their impairment or subsequent alteration without the consent of both the contracting parties. *State v. Benevolent Society*, 72 Mo. 146; *Commonwealth v. Weatherbee*, 105 Mass. 149. And it is a universal principle that one competent party to a legal contract cannot rescind, annul, or impair it, but must perform the full obligation it carries unless excused by his obligee; as it is also a universal principle that, in ascertaining the extent of the obligation assumed, preference will be accorded to an interpretation that yields just and reasonable consequences, and squares with the ordinary actions and motives of men, over one that leads to results unreasonable, unjust, and inconsistent with those actions and motives.

With these premises in mind, let us turn to the suicide by-law of the appellant company in force when Charles Morton died, and consider its meaning and effect according to the usual canons of interpretation, and without regard to any statute of this state, conceding, but not deciding, that the company enjoyed immunity, when it issued the certificate, from the general insurance laws of Missouri, and hence from the statute in regard to the defense of suicide.

It will be observed that the by-law as passed March 28, 1893, and the first amendment thereof, April 2, 1895, do not affect appellant's liability on its certificate, because, as first adopted, the by-law only reduced the amount to be paid on a benefit certificate provided the insured died by his own hand two years after becoming a member, and the first amendment only in case that kind of a death occurred within five years after he became a member. Morton became a member originally in 1889, and lived until May, 1900, the certificate in suit having been issued in 1893.

The next amendment, adopted June 18, 1897, does not in terms apply to certificates theretofore issued, and, under the rule of

strict construction of provisions for forfeitures, will not be construed to apply to prior certificates. The important amendment is the one adopted April 11, 1899, which purported to bind members theretofore as well as thereafter admitted, and provided that if any member should die by his own hand, whether sane or insane, his beneficiary should only receive one-half of the face value of his certificate. This by-law is asserted to have become part of the contract of insurance between the Royal League and Charles Morton, by virtue of a term of the certificate providing that the order was only bound to pay the full amount of the certificate in case, among other things, the insured complied with "the laws, rules, and regulations now governing the said order and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund, all of which are also made a part of this contract."

We are referred to decisions that by-laws like the one in question affect prior insurance when the certificate contains a proviso that it shall be subject to future by-laws. In weighing the authority of the different cases in which that ruling is made, the language of the certificates ought to be attentively noticed in order to ascertain the exact scope of the stipulations, and to see how pertinent the opinion is to the particular case in which it is cited.

But there are numerous well-considered opinions in which it is ruled that subsequent by-laws, undertaking to reduce the amount to be paid in certain contingencies, do not take effect on previous contracts; and that a stipulation to comply with future regulations means the member will comply with such as relate to his duties as a member, but does not mean that the society may interfere with the essential purpose of the contract, namely, the indemnity covenanted to be paid. *Hysinger v. Supreme Lodge* (St. L.) 42 Mo. App. 635; *Knights Templars, etc., v. Jarman* (C. C. A.) 104 Fed. 638; *Supreme Council v. Getz*, 50 C. C. A. 153, 112 Fed. 119; *Pokrefky v. Ass'n*, 121 Mich. 456, 80 N. W. 240; *Becker v. Benefit Society*, 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624; *Insurance Co. v. Connor*, 17 Pa. 136; *Hale v. Ins. Co.* (Pa.) 31 Atl. 1066; *Becker v. Mutual Benefit Ins. Co.*, 48 Mich. 610, 12 N. W. 874; *Weiler v. Equitable Union* (Sup.) 36 N. Y. Supp. 734; *Langan v. Legion of Honor* (Sup.) 70 N. Y. Supp. 663; *Newhall v. Legion of Honor* (Mass.) 63 N. E. 1; *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; *Gaut v. Legion of Honor* (Tenn.) 64 S. W. 1070, 55 L. R. A. 465; *Strauss v. Mutual Reserve Fund*, 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Bragaw v. Knights of Honor* (N. C.) 38 S. E. 905, 54 L. R. A. 602.

Whatever the rule may be in other jurisdictions, in this one it is that by-laws of the kind involved in this controversy do not ma-

terially alter or impair prior contracts of insurance, whatever the provisos of the certificate may be in regard to future by-laws, on the theory, above stated, that the intention of such a provision is to bind the insured simply by administrative or regulative enactments, not such as go to the reduction or withdrawal of the consideration for which assessments are charged. We think this interpretation is not only reasonable and just, but is the only one consistent with the very words of the particular certificate under consideration, which bound Morton to "comply" with all the by-laws in force when he took the insurance or that might thereafter be enacted; and words are to be appraised at no more than their real value when a forfeiture is invoked in their name. Complying with a by-law, or any other law, means obeying it, and obedience, in its nature and essence, calls for intelligent action by a sane being. As was said in the *Wist* Case, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603, an agreement to comply with future by-laws means such as the member can comply with. The by-law invoked against the respondent's right is that, if Morton committed suicide while sane or insane, the amount of the policy should be reduced by one-half. Said by-law does not call for obedience or compliance on the part of a member—is not one which a member is supposed to obey—but is a mere proviso that in case he takes his own life a certain consequence shall result. But, if it did call for obedience, how can Morton be rationally held to have agreed years in advance that he would not commit suicide if insane? Such a contention is extravagant. Compliance with a by-law must be the act of a sound mind, which is able to know the by-law has been adopted and to comprehend and observe its commands. The law compels us to scrutinize this certificate, and refuse to permit its annulment unless the plain meaning of its terms forces that result; and a fortiori must we refrain from seeking an unnatural meaning to bring about such a result. *McCullom v. Ins. Co.* (St. L.) 61 Mo. App. 352. Common sense tells us at once that Morton never intended to bind himself to comply with a law that might be enacted while he was insane or to control his acts while in that state, as it tells us also he did not intend to empower the association to abrogate part of its liability.

The principle of construction to be applied to the enactments of an order intended to operate retrospectively is that they shall have an effect on previous contracts such as may, with probability, be assumed to have been contemplated by the contracting parties instead of one in the nature of confiscation. It is doubtless competent, and may be wise, for insurance companies to refuse to indemnify against suicide; but the usefulness of such a policy is outweighed by the evil of allowing obligations assumed and paid for through years to be impaired or swept away

at the will of the party which has so far received all the consideration. If companies can reduce their liability in case of suicide by half, they can totally wipe it out; and the unjust result will be that part of the indemnity for which the insured long paid premiums will cease to exist without the restoration of any portion of his payments.

This case is identical with *Smith v. Knights of Pythias* (St. L.) 83 Mo. App. 512, in all its facts, and is conceded to be, appellant asserting that that precedent has been disregarded and practically overruled by the later decision of *Morton v. Royal Tribe of Joseph*, 93 Mo. App. 78. All the last-named case decided was that the Royal Tribe of Joseph is a fraternal beneficial association, and as such exempt from the provisions of the general insurance laws of the state, so that suicide was a good defense to an action on one of its certificates. The entire contention was as to whether said company was a fraternal society or a general insurance company, nor was there any point made that the by-law or constitutional clause invalidating certificates if the assured suicided was enacted after the certificate was issued, nor, in fact, any proof to show it was. The opinion in *Smith v. Knights of Pythias*, supra, was not adverted to in the opinion, because the two cases had nothing in common. In *Richmond v. Supreme Lodge* (St. L.) 71 S. W. 736, the certificate was for a sum not to exceed \$2,000, and expressly provided that the right of the beneficiary should be determined by the certificate and by-laws in force when the benefit became payable.

The doctrine of this court that a proviso in a benefit certificate, by which the insured agrees to comply with future rules and regulations, goes no further than to grant a permission to the company to bind the member by amendments of its constitution and rules in matters relating to his membership duties and the society's internal economy and mode of transacting business, is approved and expounded with convincing logic and learning by eminent judges in the cases we have cited. Those cases involved, in principle, the essential point at issue here, namely, the effect of an agreement in a mutual insurance policy that the member will be bound by or comply with future amendments of the order's constitution and rules on the society's power by a subsequent by-law to diminish the amount of its liability in certain contingencies.

In *Knights Templars, etc., v. Jarman*, the certificate bound the company to pay Jarman's wife and children the amount named and all money paid on the policy in assessments, subject to certain limitations contained in the constitution of the order. Jarman had agreed to abide by the constitution, rules, and regulations of the company as they were when he took the insurance or might be made thereafter. A properly en-

acted by-law exempted the company from returning assessments on policies, and it was held to have no effect on the Jarman policy, which antedated the by-law.

In *Supreme Council v. Getz*, an agreement was made by the deceased member when he joined the order (American Legion of Honor) "to conform in all respects and be bound by the existing laws and all future adopted amendments and enactments." Held not an agreement by the insured to accept a by-law reducing the amount of insurance to be paid by the Legion at his death.

In *Pokrefsky v. Fireman's Fund Ass'n*, the charter of the association provided that its affairs should be governed by trustees, who might change its by-laws at pleasure. This charter authority was ruled not to empower the trustees to change a by-law in force when the plaintiff's decedent joined the association, which provided that said decedent's beneficiary was entitled to the entire amount of one assessment on all the members, so as to entitle the beneficiary to only part of an assessment.

In *Becker v. Beneficial Society*, plaintiff had joined the defendant society when a by-law was in force granting weekly benefits to a named amount to a sick member. Years afterwards it reduced the amount of by-laws then adopted in accordance with the constitution of the order. Held that, even after the adoption of said by-laws, plaintiff, when sick, was entitled to the amount of weekly benefits allowed when he joined the society.

In *Becker v. Farmers' Mutual Insurance Company*, 48 Mich. 610, 12 N. W. 874, the contract was for fire insurance in a mutual company, the policy stipulating that it was subject to the charter and by-laws. Becker was notified of the enactment of a by-law vacating the policy if the premises remained vacant 20 days. Held a contract once made with a member cannot be changed in its essence without his consent, and whatever force new by-laws might have they could not be allowed to destroy express contracts.

In *Hale v. Equitable Aid Union*, the certificate recited that "it was subject to such laws, rules and regulations as now exist or may hereafter be adopted." The insured was to receive one-half the amount of the certificate in 12 years if she was then living and in good standing, and was ruled to be entitled to that benefit regardless of a subsequently adopted by-law confining the benefit, in the case of previous as well as present policy holders, to those who should live to the expectation of life, and limiting the payment then to be made to 10 per cent. of the amount of the certificate.

In *Weiler v. Equitable Aid Union*, the applicant for a policy agreed to accept it subject to future regulations, but was nevertheless held entitled to receive the amount of the policy in 11 years according to its terms, although a by-law was enacted later

which restricted payment to such members as lived to the expectation of life—the same decision as in the Hale Case.

In *Langan v. Legion of Honor* (Sup.) 70 N. Y. Supp. 663, the change of rules reduced the amount payable on any benefit certificate. The member had promised full compliance with present and future laws, but the policy was enforced as written.

In *Newhall v. Legion of Honor*, the decision was to the same effect.

In *Wist v. A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603, the insured had promised compliance with future regulations and requirements as the express condition on which he was to participate in the beneficiary fund, taking out a policy for plaintiff, who was not a member of his family nor dependent on him. A subsequent by-law had limited beneficiaries to relatives and dependents, of which change the insured had notice. Held the new rule did not become part of the agreement nor affect the right of plaintiff to recover.

In *Strauss v. Life Ass'n*, 126 N. C. 971, 128 N. C. 465, 39 S. E. 55, 45 L. R. A. 605, 83 Am. St. Rep. 699, it was held an agreement that the constitution and by-laws of the association might be amended did not authorize an amendment taking away a member's substantial rights. To the same effect is the later North Carolina case of *Bragaw v. Knights & Ladies of Honor* (N. C.) 38 S. E. 905, 54 L. R. A. 602.

The foregoing cases were all decided on the theory that subsequent by-laws, despite the member's agreement to comply with them, cannot defeat or abridge the essential rights created by the policy, but affect only the member's duties as such, not his interests as a contracting party. In all of them we find the same argument here advanced and accepted by some courts that the business experience of companies shows them what regulations ought to prevail, and that it is necessary that they be permitted to avail themselves of the teachings of experience by enacting new regulations, as needed, to bind all members and control all agreements. There is some merit in that argument, and it is pertinent to any legislation respecting contracts. It has not been thought, however, sufficiently meritorious to permit state legislatures to impair obligations, and we think is not sufficiently so to permit insurance societies.

What has always been a leading decision to support the appellant's position is *Supreme Lodge v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; but the authority of that case seems to be shaken by the later one of *Gaut v. Supreme Council*, supra, which determined a point not materially different from the one involved in the *La Malta* Case, it seems to us. But the point was decided the other way, and all the foregoing authorities, including *Smith v. K. P.*, which repudiate the doctrine that by-laws can be

passed to impair previous contracts, were approvingly cited.

The motions to intervene were filed after judgment, and were properly overruled.

We find no cause to be dissatisfied with former rulings of this court in similar actions, our review of the authorities having strengthened and reinforced the conviction that they were sound and just; and, as the judgment of the court below was in conformity to them, it is affirmed.

BLAND, P. J., and REYBURN, J., concur.

BUTCHER v. HOFFMAN.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

MALICIOUS ARREST—CONSULTATION OF ATTORNEY—PROBABLE CAUSE—EVIDENCE—SUFFICIENCY—PRESUMPTION OF MALICE.

1. Where the state of facts insisted on by plaintiff rendered larceny by him of certain goods impossible, while that insisted on by defendant tended strongly to show larceny, the mere fact that defendant stated his contention to the prosecuting attorney, and was advised that plaintiff was guilty, did not exonerate him of liability for malicious prosecution.

2. Evidence in an action for malicious arrest for larceny examined, and held to show a want of probable cause.

3. Where want of probable cause is shown, the burden is on defendant to show that he acted without malice.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action for malicious prosecution by Charles Butcher against Emanuel Hoffman. From a judgment for plaintiff, defendant appeals. Affirmed.

Sam Byrns, for appellant. E. J. Bean and Green & Berkley, for respondent.

Statement of Facts and Opinion.

GOODE, J. This is an action for malicious prosecution, begun in the circuit court of Jefferson county, Mo., on June 7, 1901, and tried in said court on January 15, 1902, on an amended petition which avers:

That the plaintiff was a married man on and prior to April 14, 1901, and was living in Jefferson county, Mo. That he was living as a tenant, with his family, on the farm of the defendant. That on or about said 14th of April the defendant, maliciously contriving and intending to injure him in his good name, fame, and reputation, appeared before L. B. True, a justice of the peace, and then and there, maliciously and without probable cause, did make an affidavit and lodge a charge before said justice on April 13, 1901, at the said county of Jefferson, state of Missouri, that this plaintiff did unlawfully steal, take, and carry away from his premises (E. Hoffman's):

¶ 3. See *Malicious Prosecution*, vol. 23, Cent. Dig. §§ 67, 113, 114.

One half barrel of mess pork, of value...	\$ 5 50
One half bushel of navy beans, of value	2 35
One half barrel of sauerkraut, of value	2 35
One case of tomatoes, of value.....	1 80
One half bushel peas, of value.....	80
Two pounds of green tea, of value.....	1 60
Two pounds of Java coffee, of value....	1 00
Two pounds caraway seed, of value.....	24
One bushel of onions, of value.....	1 80
Two pieces of breakfast bacon, of value	1 96
Fifty pounds of granulated sugar, of value	2 75
One large ham, of value.....	2 64

All being of the value of..... \$24 79

—And being the personal property of said Hoffman. That without probable cause he maliciously signed said affidavit, and that the justice issued a warrant on which he was arrested, and was brought before said justice. Was poor, and could not give bond. Was cast into jail to await trial. That he was in jail from the 15th day of April until the 25th day of April, 1901. That he was tried before said justice. That the defendant was a witness against him and testified, and that he was acquitted by the justice. That while in jail he contracted a disease of the eyes. That his sight is impaired. That he suffered in body, and has been humiliated and disgraced, injured in his good name, fame, and reputation. And that his actual damage is \$5,000, and punitive damage \$5,000.

The defendant answered by a general denial.

The evidence showed that in the spring of 1901 the plaintiff, Charles Butcher, obtained information that the defendant, Hoffman, wanted help on his dairy farm in Jefferson county, and applied for work. He met Hoffman at an employment office in the city of St. Louis, and arranged to work for him for one dollar a day, house rent, and fuel, moving to Hoffman's farm the same day. Hoffman boarded him and his family for about a week, until their household goods arrived, and then assigned him quarters in a house some 200 feet from Hoffman's own home, and there he stayed for about three months. A written contract was made between the parties some time after Butcher went on the farm, by which it was agreed Butcher should work for Hoffman, and should receive as consideration a place in which to live and one dollar for every week day he worked.

Shortly after Butcher's engagement, Hoffman engaged another hand on the place, and asked Butcher to board him, which he agreed to do. A dispute arose about the entertainment he furnished the hand, Hoffman contending that Butcher did not provide enough to eat, and rather insisting on his getting more. During the conversation, Hoffman said he was going to order some groceries from St. Louis, and wanted to order some for Butcher at the same time. Butcher consented, and made out a list of articles, and they were sent for by Hoffman in the same order with the goods purchased for his own use. The goods got to Vineland, the railway

station nearest Hoffman's farm, on a Tuesday early in April, and the evidence tends to prove Butcher was notified of that fact by the station agent, and told Hoffman about it the evening of their arrival. Hoffman paid the freight on them the next day at noon, and had them set out on the station platform with the intention of having them hauled to his residence, but forgot about it that day. In the course of the afternoon Butcher took a wagon and team, drove to the station, got the goods which had been ordered for him, hauled them to his home, and put them in the cellar. It is not altogether clear whether he took any articles which were not included in the list he had furnished Hoffman, but, so far as we can gather, he only took those which had been ordered for him. Hoffman was at Butcher's home the same night, and Butcher told him he had the goods. Hoffman asked him how many pieces there were, and Butcher said he did not know; whereupon Hoffman angrily told him he ought to know, and was a fool for not knowing, or words to that effect. Hoffman does not deny this conversation, or that he was informed by Butcher of the latter having hauled the goods from the station, but declares he understood all the time that Butcher had hauled them to his (Hoffman's) residence and put them in the cellar there; that Butcher had no right to any part of the goods except as they were turned over to him by Hoffman, who had bought them and was responsible for them. Butcher had previously bought other provisions from Hoffman, and carried a pass book in which were entered all purchases which he made, such as butter and lard, to be deducted from his wages at the end of the current month.

On the Saturday before the goods in question arrived, the parties had a settlement, and it was found the defendant owed plaintiff \$13 or \$14, which the latter insisted on having in order that he might pay a man named Simon, whom he owed; so defendant paid him his wages to that time. Plaintiff swore that Hoffman agreed to let the debt plaintiff owed him for the groceries run over until the next pay day, which would fall on the 4th day of the ensuing month of May.

The real question of fact in dispute between the parties is whether Butcher got the goods with the full knowledge and authority of Hoffman, to be charged to Butcher, and the price worked out by him during the coming month, or whether they were to be stored in Hoffman's cellar, and belong to him, to be doled out to Butcher as the latter needed them, and was entitled to them on his wages, each article being charged on the pass book as it was obtained. Plaintiff's testimony tends to support the former theory, and the defendant's the latter. The plaintiff's testimony further tends to prove that a sharp quarrel or dispute came up between him and the defendant a day or so after the arrival of the goods, which resulted in plaintiff load-

ing a wagon with his property, including the goods in controversy, hauling them to Vine-land station, and shipping them to Bismarck the following Saturday, to which point he and his family took the train Saturday evening. Hoffman had gone to St. Louis that morning, and was not notified by plaintiff of the latter's intention to leave, nor was any settlement had between the parties. Plaintiff affirms that Hoffman owed him for seven days' work at one dollar a day, and also owed his wife for some work she had done, while he admits owing Hoffman for the groceries. When Hoffman returned home Saturday evening, he was notified by one of the hands of Butcher's departure, and that he had taken the goods with him. The next day he consulted the prosecuting attorney of the county, and afterwards swore out a warrant before L. B. True, a justice of the peace of Bismarck, Mo., charging plaintiff with the larceny of the groceries. Hoffman said he never knew until after Butcher's departure that the goods had been stored in the latter's house, but supposed all the time they were in his (Hoffman's) cellar.

The testimony of the prosecuting attorney, Joseph G. Williams, as to Hoffman's statement of the facts of the occurrence, on which said prosecuting attorney advised the prosecution of the plaintiff, is as follows: In answer to a question as to what Hoffman said, he replied: "I can't tell you exactly. I don't remember it. I never thought anything about it; didn't know I was going to be called upon as a witness. On this Sunday I was in my office in De Soto, and Mr. Byrns came to my office, and told me Mr. Hoffman had a man who had stolen a lot of goods from him, and Mr. Hoffman wanted to see what could be done, and I says, 'Well, has he got a case?' and he says, 'Yes,' and I says, 'All right; you have him come up to see me, and I will see what he has to say. If he has got a case, we will have him arrested.' He went and had Mr. Hoffman come to see me, and I think he stated that he had ordered some groceries from St. Louis. He had gone away, and this fellow had taken them while he was away. He enumerated the items, and I told him that would make him guilty of petit larceny. Q. Where did he tell you he took the groceries from? A. I don't remember. Q. Tell you he sent for the groceries to be used by Mr. Butcher? A. He had ordered the goods to be used, and that Mr. Butcher should use some of them. He said Mr. Butcher had asked him to order some goods for him, and when he was away Mr. Butcher took all the goods and moved away. Q. I would like to know just what that statement was. A. I don't know. I can't recollect it. Q. You heard the testimony of Mr. Hoffman in the justice court in De Soto? A. Yes, sir. Q. That statement made there wasn't sufficient to make a conviction? A. I think so." The prosecuting attorney filed an information before the justice of the peace

based on defendant's affidavit; the latter appearing at the trial and testifying as a witness against the plaintiff.

It should be stated that when the plaintiff was arrested he was unable to give bond, and was incarcerated in jail for about five days. At the hearing of the cause he was discharged by the justice, who thought the evidence was insufficient to warrant a conviction. Thereafter the present action was instituted.

At the close of the testimony herein, the court instructed the jury for the plaintiff substantially as follows: That if they believed the defendant instituted the prosecution before Justice True by filing an affidavit charging the plaintiff with larceny of the property mentioned in the affidavit, and caused a warrant to issue against plaintiff, whereby plaintiff was arrested and incarcerated in jail, and was thereafter tried and acquitted, and if they further found the prosecution was without probable cause on the part of the defendant and was malicious, they would find the issues for the plaintiff. "Probable cause" was defined to mean reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that plaintiff was guilty of the offense of which defendant charged him—a definition very favorable to the defendant. "Malice" was defined to mean the doing of a wrongful act intentionally. The jury were further told that the discharge of the plaintiff by the magistrate was a fact in evidence to be considered in determining whether the prosecution was without probable cause, but was not conclusive proof of it.

Another instruction was of the following tenor: That in order to constitute larceny there must be a taking and carrying away of property, and an intention to fraudulently convert the same against the will of the owner; that if, therefore, the jury found the groceries mentioned in defendant's affidavit were delivered to plaintiff with the full knowledge and consent of the defendant, upon the agreement of plaintiff thereafter to pay defendant for them, they became the property of the plaintiff, and his removal of them from the premises of defendant did not constitute larceny. An instruction given on the measure of damages we will not recite, as there was no point made against it.

At the request of defendant, the jury were instructed that if they found from the evidence that Hoffman, before he began the prosecution, consulted an attorney at law in good faith, and communicated to such attorney all the facts within his knowledge, or which he might have learned by reasonable diligence, bearing on the guilt or innocence of Butcher, and that said consultation with the attorney was had by Hoffman with a view to the advice of counsel learned in the law, and that the attorney, on such submission of facts, advised Hoffman that Butcher

was liable to a criminal prosecution for petit larceny, and further found that said prosecution was begun and carried on by Hoffman in good faith in consequence of said advice, and not pursuant to a previous determination to commence said prosecution, then there was probable cause therefor, and the verdict should be for the defendant.

Another instruction told the jury that if they found from the evidence that Hoffman, before he began the prosecution, placed the facts as they occurred before the prosecuting attorney of Jefferson county, and said attorney, on this statement of facts, advised Hoffman to institute a prosecution, and aided in procuring the necessary papers, then there was probable cause, and the jury should find the issues for the defendant.

There was a judgment in plaintiff's favor for \$500, from which defendant appealed.

But one assignment of error is made, which is that the evidence was insufficient to take the case to the jury, and that the court erred in refusing an instruction at the close of plaintiff's case, and at the close of all the evidence, to return a verdict for the defendant. This contention is based largely on the fact that the defendant consulted an attorney of his own choice, as well as the prosecuting attorney of the county, before he acted; that he laid all the facts before them in good faith; and that on the prosecuting attorney's advice he swore out the warrant against the plaintiff.

One difficulty in dealing with this assignment is that it was not clearly shown in the evidence that the defendant placed the actual facts before the prosecuting attorney; nor, indeed, is it clear beyond dispute or doubt what the facts were. As indicated above, one of two theories of the occurrence might have been adopted, and there was ample evidence to support either. The goods in controversy were undoubtedly ordered to be used by Butcher, and they may have been taken by him from the station, hauled to his own house, and put in his own cellar to be used as he needed them, with the full knowledge and consent of the defendant; the latter agreeing to that course, and intending to collect the pay for the goods on the ensuing pay day in May. On the other hand, it may be true that Hoffman intended to keep the goods stored in his own cellar, and deliver articles to plaintiff as he needed them, charging them on the pass book.

Now, it is obvious that under the first state of facts Butcher became the owner of the goods when they were taken by him with Hoffman's knowledge and consent, and was thereafter a debtor to Hoffman for the price of them. In those circumstances he could not have been guilty of larceny in storing or shipping them, for they were his own property. On the contrary, if Butcher knew and understood that the goods were Hoffman's, although ordered for him (Butcher), and he took them from the station and appropriated

them to his own use without any knowledge on the part of Hoffman, that action constituted larceny—not shipping them to Bismarck.

The testimony of the prosecuting attorney tends to show that Hoffman laid the facts before him according to Hoffman's theory of the case, which, of course, would at once lead the prosecuting attorney to believe a larceny had been committed; whereas, had the facts been stated the other way, it would have been apparent none had been committed.

For a defendant in an action for malicious prosecution to exonerate himself by showing he took counsel, he must show that he disclosed to the counsel all the facts in regard to the alleged crime which he knew, or by the exercise of reasonable diligence could learn, and took advice thereon in good faith. *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650. In the present case the plaintiff and defendant differ utterly as to what the facts were; the former insisting on a state of facts which rendered a larceny by him of the goods impossible, while the latter insists on facts which tend strongly to show Butcher was guilty of larceny. The question is, who was the owner of the goods at the time of the alleged theft? And, as stated, the evidence on that question is contradictory. We do not, therefore, think that defendant must be held to have exonerated himself because he took counsel before he had the plaintiff arrested. That defense was for the jury, and was properly submitted by the instructions given for the defendant.

Another proposition urged is that there was no evidence of malice on the part of the defendant or of want of probable cause for the prosecution. As to the want of probable cause, what we have said above shows there was plenty of evidence going to show no probable cause existed for the plaintiff's arrest. Besides, if his as well as some other testimony was true, not only was no larceny committed when Butcher took the goods from the station to his own house or shipped them to Bismarck, but, as stated above, no larceny could be committed by him, for the ownership and possession of the goods had been turned over to him by the defendant, and he stood simply as the defendant's debtor for their cost.

It has been said that reasonable and probable cause which will relieve a prosecutor from liability is a belief by him of the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man. *Van-sickle v. Brown*, 68 Mo. 627; *Stubbs v. Mulholland*, supra. How could defendant entertain the belief that plaintiff had stolen the goods if, in fact, he had agreed the goods should be paid for on the next pay day out of the plaintiff's wages, knew plaintiff had stored them in his cellar, and offered no objection to his keeping them? It is apparent that if the prosecution was instituted under those circumstances it was wholly ground-

less, known to be so by Hoffman when he instituted it, and gives color to the plaintiff's theory that the object was to force plaintiff to pay for the groceries; and there was substantial evidence to show the actual facts were that way.

Next, in regard to lack of proof of malice on the part of defendant. That contention falls with the preceding one, for, if the defendant acted under the circumstances narrated, he acted without probable cause and with full knowledge of there being no ground for the prosecution, which was sufficient to prove malice. The law is that, if want of probable cause is shown, the jury may infer malice from the facts which show the want of probable cause; and the burden then falls on the defendant to show he acted without malice. *Stubbs v. Mulholland*, supra.

The whole subject of the law of malicious prosecution was so exhaustively treated and settled recently by the Supreme Court in an opinion prepared by Judge Sherwood in the case of *Stubbs v. Mulholland*, supra, that it would be a waste of time to enter on a discussion of the subject. That, under the evidence in this case, the questions of absence of probable cause and of the existence of malice on the part of defendant were for the jury, there can be no doubt in the light of that opinion.

The instructions given by the court were full and fair, and must have thoroughly posted the jury as to the law of the case.

Finding no error in the record, the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

BUCKMAN v. MISSOURI, K. & T. RY. CO.*

(Court of Appeals at St. Louis, Mo. Feb. 3, 1903.)

RAILROAD COMPANIES—KILLING HORSE ON TRACK—NEGLIGENCE—EVIDENCE—HARMLESS ERROR—INSTRUCTIONS—JUDGMENT—EXPERT—QUALIFICATION—IMPEACHING WITNESS.

1. The erroneous admission of evidence as to defective fences is harmless, where the court subsequently instructed that defects therein would not authorize a verdict for plaintiff, and stated what particular facts must be found to authorize a verdict for him.

2. Any vagueness in an instruction as to the negligence authorizing a verdict for plaintiff is cured by other instructions stating explicitly the only basis of a verdict for him.

3. Refusal of an instruction covered by one given is not error.

4. Where the petition for negligent killing of an animal is in three counts, and plaintiff has a verdict on one of them, and is not entitled to recover on the others, judgment is properly entered for plaintiff on the one count, and for defendant on the others.

5. A person who has been a railroad engineer and fireman for 7 years, and one who has been a section hand for 14 years, during which, on numerous occasions, he has observed trains

stopped, are sufficiently qualified to testify as to the time required to stop a train running as it was.

6. That a railroad employé was discharged, and could not afterwards get employment with another railroad, unless it was for incompetency, cannot be shown to affect his qualification to testify as an expert in regard to handling trains.

7. A witness cannot be required to say whether he can point out any testimony of his on a former trial as to a certain matter, but, if it is desired to impeach him, he should be asked whether he did or did not testify as to that particular matter.

8. Evidence in an action for injury to a horse struck by a train held sufficient to warrant a finding that the trainmen, after discovering it on the track, might have checked the train, by the use of ordinary care, in time to avoid striking it.

Appeal from Circuit Court, Monroe county; David H. Eby, Judge.

Action by R. P. Buckman against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

G. P. B. Jackson, for appellant. J. C. Piersol, for respondent.

Statement of Facts and Opinion.

GOODE, J. The amended petition in this case is in three counts; the purpose of each being to recover damages for the death of a mare killed on the track of the appellant railway company in Monroe county, Mo. The case was in this court before, and is reported in 83 Mo. App. 129. The original petition, on which the first trial took place, was also in three counts, and was like the amended petition, except a trifling difference in the second count. The first count of each prayed for double damages because of the failure of the railroad company to erect and maintain proper fences and cattle guards, by reason whereof the mare got on the right of way and was killed; the second count prayed single damages on the same allegations; and the third count charged negligence in handling the train alleged to have struck the animal. Before the first trial, plaintiff dismissed as to the second count of the original petition, and went to trial on the first and third counts, with the result that the jury found a verdict for the railroad company on the first count, and for the plaintiff on the third. There was judgment accordingly, and the case was appealed, as stated, to this court, which reversed and remanded it for retrial. Afterwards the plaintiff filed the amended petition on which the second trial was had, and which, as stated, differs in no material respect from the first petition.

During the second trial the circuit court admitted testimony, against the objection of the defendant, touching the defective condition of the fences and cattle guard where the animal got on the right of way; the purpose of said testimony being to maintain the case as stated in the first and second counts of the petition, and which had been disposed

*Rehearing denied March 17, 1903.

¶ 5. See Evidence, vol. 20, Cent. Dig. § 2361.

of at the first trial in the manner stated. Later the court reconsidered its ruling in regard to that evidence, and gave an instruction that a defective condition of the company's fence or cattle guard would not authorize a verdict for the plaintiff, and that the defendant could not be charged with any negligence because of the bad condition of either; but the appellant insists the admission of said testimony was harmful and entitles it to a new trial.

Civil judgments are not reversed by appellate courts for the admission of incompetent evidence when the testimony is afterwards withdrawn from the consideration of the jury by an instruction, except in extreme instances, where it is manifest that the prejudicial effect of the evidence on the jury remained despite its exclusion, and influenced their verdict. *Stavinow v. Ins. Co.* (K. C.) 43 Mo. App. 513; *Fowles v. Bebee* (K. C.) 59 Mo. App. 401; *Cobb v. Griffith*, 87 Mo. 90; *Sidekum v. Railroad*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; *O'Mellia v. Railroad*, 115 Mo. 205, 21 S. W. 503; *McGinnis v. Loring*, 126 Mo. 404, 28 S. W. 750. In this case, besides withdrawing the irrelevant evidence (granting, for the purpose in hand, that it was irrelevant) from the consideration of the jury, they were pointedly charged concerning the particular facts they must find to warrant a verdict for the plaintiff, and there is no reason to think they ignored those charges and based their verdict on the excluded facts.

Complaint is made of the first instruction given at the instance of the plaintiff: "The court instructs the jury that if they find from the greater weight of the evidence in the cause that on the 3d day of February, 1898, the plaintiff's mare was on defendant's railroad at a point between the first and third public crossings on said railroad, north of the town of Clapper, in Monroe county, Mo., and was then and there struck by a locomotive engine or cars run and operated by defendant's agents or employes, and thereby killed, and if the jury further find that the striking of said animal by said engine or cars was the direct and proximate result of negligence on the part of defendant's agents or employes, if any, in charge of said engine and cars, in running or operating the same, then the verdict of the jury should be for the plaintiff, and, unless the jury so find, their verdict should be for the defendant." The objection to the above charge is that it authorized the jury to return a verdict for the plaintiff for any negligence they might conjecture the defendant's servants had been guilty of in operating the train which killed the mare, whereas the evidence showed that, if the servants of the company were negligent at all, they were only so in not endeavoring to check the train after detecting the mare on the track. We think the instruction was a proper one, and not too general, for it permitted a recovery only

if the mare was struck by the train on account of negligence in operating it; but, if open to any criticism on the ground of vagueness, it was cured by instructions given at the instance of the defendant which told the jury that the only basis of a verdict for the plaintiff was that the men operating the train actually discovered the mare on the track and in a place of danger when the train was at such a distance it might have been stopped by the use of the usual appliances at hand for that purpose, with safety to the train and the persons on it, in time to avoid striking her, and that, after discovering her, such employes failed to make the necessary effort to stop the train. This charge, in substance, as embodied in several different instructions, was according to the former opinion in the case; and the jury must have understood the facts they were to find before they could hold the company responsible, if clear language could enlighten them.

Complaint is made of the refusal of an instruction that whether there was any fence or cattle guard on the railroad company's right of way, or whether, if there, it was sufficient or defective, was immaterial, as those matters were not to be considered by the jury in arriving at a verdict. That charge was sound, as only the case stated in the third count was to be tried; but it was covered by the aforesaid instruction, given at plaintiff's instance, that the defendant could not be charged with any negligence by reason of defects in the fence or cattle guard on its right of way, nor a verdict given for the plaintiff on account of such defects.

After the verdict was returned the court entered judgment thereon for the plaintiff on the third count of the petition, and in favor of the defendant on the first and second counts, which was according to the prayer of the answer and to good practice. *Needles v. Burk*, 98 Mo. 476, 11 S. W. 1008; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *Edwards v. Railroad Co.* (Mo. App. K. C.; not yet officially reported) 71 S. W. 366.

The admission of the testimony of two witnesses offered by the plaintiff as to the time required to stop a train running as the one was that struck the mare is assigned for error on the ground that said witnesses did not qualify as experts. One of them testified to having been a railroad engineer and fireman for 7 years, while the other said he was in the railroad business as a section hand for 14 years, during which period, on numerous occasions, he had observed freight and passenger trains stopped. We think those witnesses were sufficiently qualified to make their testimony competent. *Goins v. Railroad* (K. C.) 47 Mo. App. 173; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737. One of them was shown to have been discharged by the Burlington Company, for whom he

had worked, and after he was discharged he held no other railroad position. A point is made about the court's refusing to allow him to answer whether he had been able to get railroad employment since his discharge. The witness answered that question by saying he had never tried to get it, and an objection being made by the plaintiff's attorney, after the answer was given, the court remarked that the testimony was only admissible as tending to prove he was discharged for incompetency. That ruling was correct, for the only purpose of the question, as of all cross-examination, was to test the qualification of the witness, as an expert, in regard to handling trains. If, however, he was discharged for any other reason than lack of skill, or could not afterwards secure railroad employment for any other reason, the circumstance could have no bearing on the weight of his evidence.

It is also objected that the court refused to permit the plaintiff to answer whether he could point out in the bill of exceptions on which the case was formerly appealed any testimony given by him at the former trial that he had found a piece of the mare's hoof on the track, he having testified on the second trial that he did find a piece of her hoof on the track. The exact question asked of Buckman was this: "Are you able to point out a place in your testimony about finding a piece of the hoof before?" To this question the plaintiff's counsel objected, and the court sustained the objection; saying that the witness might be asked whether he did or did not testify as to that particular matter. That ruling was accurate, and the court's remark indicated the right way to lay a ground for impeaching the plaintiff. We know of no rule of evidence by which a witness can be called on to say where, in a stenographer's notes taken on a former trial, he finds certain statements then made by him, or whether he can find them at all.

Finally it is insisted there was no evidence tending to show the trainmen might have checked the train, by the use of ordinary care, in time to avoid striking the mare after discovering her in a dangerous position, and an ingenious argument is gone into by defendant's counsel to establish this contention. After reading all the evidence, we think there was much testimony on that issue for the jury to weigh. Witness McLeod, who almost saw the accident, testified that he himself, the engineer, and the horses on the track (for there were two, but only one was hurt), seemed to discover the danger at the same time. He testified further that the moon was shining brightly, and there was testimony that the piece of track along which the train approached the mare was straight and level for a long distance. McLeod knew when the engineer saw the horses, by hearing the stock alarm sounded, and swore the engine was then about 70 yards away; that the train was running

at a pretty fair speed, and seemed to run faster after the whistle was sounded than before; and that there was no effort made to stop or check the train. There was other testimony given on the second trial tending to show the train could have been stopped within the distance it was from the horses after they were detected by the engineer. The testimony of the engineer himself was that he used all means at his command to stop, and that in fact the mare was never struck by the engine, but received her injuries by running along the track over the ties. On the other hand, there was testimony to show the wounds and bruises on her were of a sort that must have been caused by a collision. Unquestionably, all this evidence was for the jury to consider, and, as we find the case was properly tried, the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

WATERS-PIERCE OIL CO. v. JACKSON JUNIOR ZINC CO.*

(Court of Appeals at Kansas City, Mo. Feb. 2, 1903.)

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL—PROOF OF AGENCY—INSTRUCTIONS.

1. Where the motion for new trial did not call the attention of the court to its action in refusing an instruction, the error, if any, was waived.

2. Defendant, as principal, is not liable for the value of goods sold to another who was at no time his agent, and who did not assume to act as such with his knowledge.

3. Where a person had been defendant's agent in buying goods from plaintiff, plaintiff was entitled to recover for subsequent sales in case he had no notice of the revocation of the agency, but believed it still continued.

4. One's agency cannot be proved by his own declarations or admissions.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by the Waters-Pierce Oil Company against the Jackson Junior Zinc Company. From a judgment for defendant, plaintiff appeals. Reversed.

Merritt & Miller, for appellant. Galen & A. E. Spencer, for respondent.

BROADDUS, J. The action is on an account for goods alleged to have been sold and delivered to the defendant in the months of October, November, and December, 1900. The defendant denied the purchase and delivery of the goods. The finding and judgment were for the defendant, from which plaintiff appealed.

The defendant owned a mining lease on 23 acres of land, and one F. C. Grable assisted in organizing defendant company, and superintended the construction of its ore-dressing mill on the leased premises, which was completed near the close of the year 1899. It

*Rehearing denied April 6, 1903.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1697.

was admitted that the defendant occupied the premises and operated the business until September 15, 1900. As to all the other facts, the evidence was somewhat conflicting.

Plaintiff's testimony tended to show that during the time last mentioned said Grable was acting as agent of defendant, and as such bought goods of plaintiff at various times, which were paid for by defendant. On the other hand, there was evidence tending to show that one C. E. Hart was defendant's superintendent, and that he bought such goods from the plaintiff, and that said Grable had nothing to do with their purchase. There was evidence tending to show that on said 15th day of September, 1900, defendant ceased to do business, and soon thereafter let the property to the firm of Lindsey & Townsend, who occupied the premises and carried on the mining until December 1st, when defendant leased the same to what was known as the Andrew Jackson Zinc Company. Grable was the manager and agent for those two concerns, and it was during the time they had charge that the goods in controversy were bought by him.

Plaintiff tried its case upon the theory that as the evidence tended to show that the said Grable was the agent of the defendant, and, as such, purchased goods from the plaintiff for defendant up to September 15, 1900, when defendant claimed to have let the property and business to Lindsey & Townsend, and afterwards to the Andrew Jackson Zinc Company, and that during the time of the occupation of the property and the carrying on of the business by the last-named parties the plaintiff sold the goods in controversy, on the order of said Grable, in good faith, believing that he was still the agent for defendant, and without notice from defendant of such change in the business, defendant was liable for the value of the goods. The plaintiff asked several instructions predicated upon its said theory of the case, some of which were given, some refused, and others modified by the court. Complaint is here made of the action of the court in refusing and modifying said instructions, but, as plaintiff did not call the attention of the court to its action in that respect in the motion for a new trial, all errors, if there were such, have been waived. *Hall v. Harris*, 145 Mo. 614, 47 S. W. 506; *Bartlett v. Veach*, 128 Mo. 91, 30 S. W. 347; *Watson v. Race*, 46 Mo. App. 546.

But plaintiff saved its exceptions to the action of the court in giving instructions numbered 1, 2, and 3 in behalf of defendant. There can be no justifiable criticism of instruction No. 2, for it practically amounts to nothing more than telling the jury that if said Grable was at no time defendant's agent, and he had assumed to act as such without its knowledge, the defendant was not liable for the value of the goods, which is

good law. The defendant's third instruction is practically the same as No. 2, except as to an immaterial variation in form.

But plaintiff most earnestly contends that defendant's instruction No. 1 did not embody the law of the case. Said instruction tells the jury that plaintiff must show one of three conditions of fact before it can recover, viz.: First, that said Grable during the time of the sale of the goods was in fact defendant's agent, and as such he bought them; or, second, that defendant's officers knew that he was buying goods in its name, claiming to be its agent without protest on defendant's part, and that plaintiff sold the goods believing him to be defendant's agent; or, third, that defendant's course of business at its mill and property from and after September 15, 1900, was calculated to lead plaintiff to believe that Grable had authority to act for defendant in buying the goods in dispute, and that plaintiff sold the goods in dispute, believing that said Grable was defendant's agent, with authority to make the purchase. The plaintiff contends that agency may be shown in more ways than are included in said instruction, and for that reason alone, if for no other, it should not have been given. But that objection will not hold good unless there was evidence tending to establish the agency in some other manner than that pointed out in said instruction. But plaintiff claims, also, that it is in conflict, by reason of its abbreviation, with plaintiff's instruction No. 2, which is to the following effect, viz.: That if, prior to the sale of the goods in dispute, said Grable had been the agent of the defendant in buying like goods from the plaintiff, and that plaintiff sold to said Grable, as agent of defendant, said goods first named, without notice from defendant of the revocation of his authority as such agent, and believing him to be such agent, the plaintiff would be entitled to recover. It must be admitted that said theory of the case of continuing an agency, once shown, so far as third persons are concerned, who deal with the agent, as such, after, and without notification of, revocation of his authority, is wholly eliminated from said third instruction of defendant, and for that reason should not have been given, for it did not contain, as it purported to, all the theories of the plaintiff's right to recover on the evidence. It is well-settled law that the revocation of the authority of an agency takes effect, as to third persons, only from the time when the revocation is made known to them. *Story on Agency* (9th Ed.) § 470; *Ewell's Evans on Agency*, p. 570, and authorities cited; *Wharton's Agency & Agents*, § 110. As the alleged agency of Grable for the purchase of goods would be revoked, necessarily, when defendant ceased business and leased the same to another party, it was a legitimate inquiry whether plaintiff had notice of such revocation.

Plaintiff further insists that the court

committed error in refusing to allow it to prove what said Grable said as to his agency for defendant while he was buying the goods. One's agency cannot be shown by his own declarations or admissions. *Mitchum v. Dunlap*, 98 Mo. 418, 11 S. W. 989; *The Waverly Timber & Iron Co. v. Cooperage Co.*, 112 Mo. 383, 20 S. W. 566; *Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504.

The objections made to the admission of evidence on the part of defendant we think were without merit. As the case will be reversed for the error noted, it is not necessary to pass upon that part of plaintiff's motion asking for a new trial on account of newly discovered testimony.

Reversed and remanded. All concur.

SPALDING v. CHICAGO, B. & Q. R. CO.
(Court of Appeals at St. Louis, Mo. Feb. 3, 1903.)

CARRIERS—TRANSPORTATION OF LIVE STOCK—DELAY—INJURY—EFFECT OF ABANDONMENT—TENDER OF AMOUNT REALIZED FROM SALE—ISSUE UNDER PLEADINGS.

1. The fact that a shipment of live stock is delayed, and the property injured and depreciated in value, will not give the shipper the right to terminate the relation of bailment by abandoning the property, and charging the carrier as for a conversion.

2. In an action by a shipper of live stock against a carrier, the shipper alleged that the property was never received by him at its destination, and was utterly lost to him. The carrier answered, alleging that the property had been abandoned to it by the shipper while in transit, and that it had forwarded the property to market and sold it on the shipper's account, and tendered him the proceeds. This tender was renewed in the pleading. *Held*, that issues as to whether the amount tendered was the net amount actually realized from the sale, and whether it was the amount that should have been realized, were not determinable under the pleadings.

3. The refusal of a shipper of live stock to comply with the provisions of the contract of shipment requiring that some one accompany the stock to care for them, and that they shall be loaded and unloaded, watered, and fed by the shipper's agent, will not excuse the carrier from transporting the stock to their destination without unreasonable delay, caring for them at the shipper's expense.

Appeal from circuit court, Shelby county; Nat. M. Shelton, Judge.

Action for failure to deliver goods by Albert C. Spalding against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Mosman & Humphrey, for appellant. Drain, Dysart & Mitchell, for respondent.

BLAND, P. J. The petition was in three counts. The appeal is from a judgment rendered on the third count. This count reads as follows: "For another and further cause of action against the defendant, plaintiff states that on the 2d day of February, 1901,

defendant, being a corporation and common carrier as aforesaid, received of and from the plaintiff, at its station at Browning, Missouri, on the Chicago, Burlington & Kansas City Railway, then and now owned by the defendant, eighteen horses, of the value of \$1,800, the property of the plaintiff, and then and there undertook and agreed to transport and carry said horses to East St. Louis, in the state of Illinois, and to deliver them to plaintiff at said destination without delay and in a safe condition; but plaintiff avers that the defendant negligently failed to so transport, convey, and deliver said horses at the said city of East St. Louis, according to its contract and agreement with the plaintiff, by reason whereof the said eighteen head of horses have been totally lost to the plaintiff, and he has been damaged thereby in the sum of \$1,800, for which he prays judgment. And plaintiff avers that the whole amount of damage sustained by him by reason of the premises is the sum of \$2,050, for which he prays judgment, with other general and proper relief." The answer to the third count is as follows: "Defendant, for answer to the third count of the petition, admits that on the 2d day of February, A. D. 1901, the plaintiff delivered to this defendant at its station at Browning one car loaded with horses for transportation to East St. Louis; and defendant charges and avers the fact to be that said horses were delivered to it under and by virtue of a special contract then and there entered into between the plaintiff, Albert C. Spalding, and this defendant, for the transportation of said horses, under and by virtue of which contract it was agreed that in consideration of the free transportation of one person, designated by the plaintiff, by said railroad company, to accompany the stock and care for the same, that the said car and the said animals contained therein should be in the sole charge of said person for the purpose of attention and care for said animals, and that this defendant should not be responsible for such care and attention; and it was further agreed that said animals were to be loaded and unloaded, watered and fed and cared for, by the owner thereof or his agent in charge, and that this defendant should not be liable for loss from theft, heat, or cold, jumping from the cars, or other escapes, injury in loading or unloading, injury which the animals might cause to themselves or do to each other, or any injury which resulted from the nature and propensities of the animals, and that this defendant did not agree by force of said contract to deliver said stock at destination in any specified time or for any particular market, but only to transport and deliver said horses with reasonable diligence, according to the usual manner of running its trains. This defendant says that it was further mutually understood and agreed by and between said plaintiff and this defendant that said animals should be carried and transported from the

station of Browning to the station of Hunnewell, at which station the car containing said animals was to be set out for the purpose of giving plaintiff an opportunity to place in said car other and additional horses. Defendant says that it carried and transported said horses with reasonable dispatch on its regular train to the said station of Hunnewell, and at said station set said car out so that the plaintiff might finish loading the same by placing other horses therein. Defendant says that when said horses arrived at the station of Brookfield the plaintiff telegraphed to the general freight agent of this defendant that the car load of horses was there at Brookfield at his disposal, and then and there abandoned said horses and all care and attention to the same; that defendant tried to get plaintiff to take care of said horses, but he refused to have anything to do with them; that defendant thereupon unloaded said horses, and had them fed and cared for at the said station of Hunnewell, and endeavored to get plaintiff to take charge of said horses, which he refused to do; that thereupon the defendant shipped said horses to St. Louis, and had them sold for the account of the plaintiff on the market in St. Louis, to which they had originally been consigned; that upon said sale the defendant realized the sum of \$873.58 from the sale of said horses, after paying all expenses of freight and attention to said horses, and subsequently defendant tendered to plaintiff the said sum of money so realized from the sale of said horses, which plaintiff refused to accept, and defendant now here brings into court and tenders to the plaintiff herein the said sum of eight hundred and seventy-three dollars and fifty-eight cents (\$873.58), and deposits the same with the clerk of this court for plaintiff; and, having fully answered, the defendant asks to be dismissed, with costs." The reply was a general denial of the new matter set up in the answer.

The summary of Albert C. Spalding's (plaintiff's) evidence, as set out in the abstract, is as follows: "The horses mentioned in the third count I bought in Browning on Saturday to finish the contract, in order to fill the load out as near as I could. I bought a couple of big horses, and the rest, except one nice black mare, were British horses for the British cavalry to ship to the African war. They have contractors in St. Louis to buy that class of horses, and they inspect them there. When the contractor gets his orders filled, why the buyers stop buying on the market, and the market closes, and horses have decreased all the way from \$10 to \$25 per head. These horses were bought Saturday afternoon, and were a good class of British horses; also two big horses that I would call express ones, and one nice road mare. I ordered a car there that morning, and that afternoon they were loaded, and were ready to go at 3 o'clock for East St. Louis to finish loading at Hunnewell, and I

was to pay \$5 extra to stop these horses at Hunnewell. That's what they charged me for putting in horses, or setting out, either. To move, run the car up and put in the load, they charged me \$5 extra from Browning to East St. Louis. Browning is on the Chicago, Burlington & Kansas City Railway, which runs from Burlington to Laclede. When we got to Laclede there was one train going east there, but it pulled out in a few minutes. I told the operator that I wanted this load of horses out on the first train; that I wanted them out on the next train sure; and he said that there would be another train along directly, and they would go out on that. After a bit there was another train came along going east,—an extra going east. That train passed. They were set on a side track at Laclede, and switched around from one track to another, and I kinder watched the horses to see if they cut up any, and a third train went east. I asked the agent: 'Are you going to get these horses out tonight? They ought to be in St. Louis Tuesday morning, and I don't want them bucked around all night.' And he said, 'We will get them out as soon as we can;' and I think about the third train picked these horses up at Laclede, and took them over to Brookfield, about five miles. I went down into the yard to see about them. I had no idea at all but what they would go out on the train. I asked one of the trainmen or one of the conductors where the horses were, and he said they were put in on the train, but would not go out for an hour or so. I think he said third 72. I met the conductor, and he said that this car was set out. I went to the general telegraph office, and asked why they did not get that load of horses out. I went back to the pen down in the yards, and hunted them up, and found that they had been set up on one side of the switch, and not going out on that train. Then there was another train pulled out,—some one said No. 70,—and I went in the office and looked at the train master's board, and found that there were six or seven trains, three 72's and two or three 70's, or something like that, but between three or four trains going out; and I saw the yard master, and said, 'Do you suppose I want to let these horses stand here all night?' He said they would go out on No. 78, but it is behind time, and won't go out for a while yet. I went back to the office, and talked to one of the dispatchers, and begged him to get these horses out to put on the market. He gave me some short reply, and said something about this load having to be filled out at Hunnewell. I told him that this load of horses was to be filled out there, and I did not want this part in bad shape. They were to fill out the load by paying \$5, and I wanted to get my transportation, and I wanted to get the horses in St. Louis, and I said, 'Would you like to have a man standing around here all night?' I asked him for a blank on which I

stated to Mr. Ives, the general freight agent, a dispatch something like this: 'Horses shipped from Browning this date are here subject to your disposal.' That was about 10 at night. Three trains passed us at Laclede. An extra train is one that runs ahead of these regular trains. There are through freights, but I don't just know about them. I think my car arrived at Brookfield on the second 72. Four trains left Brookfield, but I don't know whether they were local or extra. There is a board on the right-hand side in the hallway going into the train dispatcher's office. I saw on this board three No. 72's, and two or three, two and may be three, 70's, and one 78. I saw every train on the board go out. I left Brookfield on No. 78, which was the sixth train to leave after I got there. We were at Laclede about two hours, and the car was switched frequently from place to place, and they were also switched at Brookfield considerably. At Brookfield I saw them throw the car in,—switch around there. I was in Brookfield until some time around 10 o'clock. I got there about 6, I think. There were eighteen horses in the car. It was not a full load. That size of a load would be easier injured switching than a full load. The concussion of the engine knocking around, the horses being loosely loaded, would be thrown down in the car. The tighter the load is loaded, the less mashing there is to them. I asked the agent at Browning if they would catch the train for St. Louis. It would do that if they were on time, and they could get there. I guessed on the main line they would go. He informed me that the schedule time when this train would arrive at St. Louis was 6 the next morning." "By Mr. Mosman: Q. Did he inform you? A. I don't know. I would not say that he did at that time. I stated to the agent at Browning that I wanted these horses shipped to East St. Louis, and finish loading at Hunnewell. I made the remark in his presence that these horses were bought for the British trade. I desired these horses to arrive in St. Louis on Sunday morning, as they were for sale to the British contractors. The sale of horses to the British contractors closed Monday in the afternoon. They finally left Brookfield at 10 o'clock. Q. What else do you know in reference to them until they got to Hunnewell? A. I left Brookfield on the same train. George Davis, the general stock soliciting agent for the defendant, came to me about 2:30 p. m., Sunday, and wanted to know about turning the horses over to him. He wanted to know why it was done. I told him the general tough usage the horses had received in the handling of them from Browning to this point. I told him the reason that I did it, and he got pretty angry at me. He went to the barn, and one horse was rolling and tumbling in great agony, another had its head bruised, and one was so stiff that he could hardly walk. Davis

said, 'You ought to take these horses and put in a claim for them;' and I told him that I would not take them unless he settled the damage that had already occurred, and he ordered the men to get medicine and doctor the horses and get them in shape to ship to-morrow. I saw a Mr. Fitzgerald on the train, who claimed to be general manager. He got off at Hunnewell, and we examined the horses. The horses were in Hunnewell eight or ten days. I saw a boy giving the horses medicine, and a veterinary surgeon, named William Stevens, doctoring them. They were in first-class condition, ready to be shipped on the market, when loaded at Browning. Q. Now, you may state, if you know, what condition these horses were in on the market at St. Louis? A. I considered them in very bad shape to be sold. I saw them unloaded and sold. Their condition was bad. Some of them had fallen away in flesh, and some had bad bruises; some bruised up about the head, and one other horse was stiff,—kind o' stove up; and one black mare in particular was all gaunted, and looked like she had fallen away; well, she had no flesh at all. One pair of express horses, their condition was very bad. Their hair looked like it was all standing up on end, and they looked like they had fallen away in flesh, and one or two were running at the nose. I think one of these big horses looked as though he ought to go to the hospital. Q. Now, state, Mr. Spalding, what would have been the real value of those horses on the market at East St. Louis on schedule time after shipping orders on the day when they were due? Q. What was the worth of those horses, the market value of those horses, at Brookfield, or prior to their arrival at Brookfield, in good condition,—what would have been the market value? A. Well, I valued them all the way from \$90 to \$110 each. I would put them at \$90. I judge that I have been shipping stock ten or twelve years. I shipped some while I was in the livery business, but not extensively like I have in the last four or five years. I think I shipped fifty car loads over the Burlington last year, the year before about forty, and the year before that not so many. By the Court: Well, forty or fifty cars a year? A. Yes, sir. I don't remember when I ordered the car for this shipment. They were loaded about 3 in the afternoon, and left Browning about 3:10. I don't remember the conversation that occurred when the car was ordered. I don't remember that I ordered it through the agent at Browning. I did talk to him when I signed the contract. He said that they were on time and made regular connection for St. Louis trains. This occurred while I was signing my contract and getting ready, about five minutes before the train went out. I live on the Hannibal & St. Joseph Railroad. I knew the time the trains went out of Brookfield, and knew if the trains would make their time, to get over

there. I wanted to know whether this train would make its regular run to Laclede. That was what I was asking the Browning agent about, and his reply was that he thought that it would make its regular time. That was all the conversation that I know of that occurred. I think that we arrived in Laclede at 5:10 p. m., and the car was switched there to get it into the train on the Hannibal road. I knew it had to be switched from the C., B. & K. C. to the Hannibal at Laclede. The Hannibal track runs east and west, and crosses the C., B. & K. C. track at right angles there. Brookfield was a division station on the Hannibal road. I don't know anything about the train provisions at Brookfield. Sometimes the trains go right through to be made up. But I have been on trains that go right through. Brookfield is a division station and headquarters, and I know Mr. Houlahan, the superintendent there, and I have seen the train master there. I could not see Houlahan there. Q. Did you go to his office? Did you go to the general agent's office at that station? A. I think I went in and asked him what time my stock would get out. The agent that runs the shipping department. Q. I am talking about the man that is general agent at Brookfield? A. I do not know the general agent or the local agent, or who anybody is. I went to the agent and asked him what time the train went out. I don't know his name. He was in the right office where I go to order my cars. I don't know that it was the freight agent's office. We got to Brookfield at 6 or 7 o'clock. I don't attempt to give the exact time. I had two conversations with this man,—with a tall gentleman. I don't know his name, but he seemed to be the general manager there in the dispatcher's office. I don't think he was an operator, though. I asked an operator, and he called this man. I said I wanted to get that stock out,—I didn't want them banged around in the yards. I wanted them on the market. Said something like that to him. He said: 'Well, we will get them out on the first train that we can get them out on.' This was along about 8 o'clock, and something after 9 I called his attention to it again. I think the first man I had talked to had gone. I don't know whether I spoke to the same man twice or to two different men. I would not say. He said that he could not get the stock out before No. 78. He said the train was behind time. I asked him where Mr. Ives' office was, and he answered, 'In St. Louis.' I asked him for a blank message, and wrote out a message to General Freight Agent Ives at St. Louis, and paid him 40 cents for the message blank, and the man was a Western Union man. The message was like this: 'The horses shipped from Browning were laid out,—I don't know exactly how many hours,—and they are here at your disposal.' I wanted Mr. Ives, the general freight agent, to handle

this stock with better care. They were at his disposal. * * * A. I meant for him to dispose of the horses. Q. As he understood it, you had not anything further to do with the horses. He could take care of them? A. Yes, sir. Q. And you sent that dispatch so that he might take care of them and you abandon them there? A. I don't know whether the agent called it abandoned or what he called it. I have stated all the conversation I had in the dispatcher's office. The man said that the train would get into St. Louis at 4 o'clock Sunday evening. I gave the message to Ives to one of the boys in the office. Don't know that he gave it to the man I had been talking to. Q. Did you have anything further to do with the horses after that time? A. No, sir. Q. He did not understand you that you had any further claim on them? Your purpose was to turn them over? A. Yes, sir. I think that I talked to two men in the office. I am not sure that I made any complaint to anybody else. I talked to Joe McDonald, one of the conductors of one of the trains. The car had been set in on his train, and was taken off and put on another. I do not know what kind of a train McDonald had. I saw McDonald's train moving out, but don't know whether it went out or went on a sidetrack. I saw other trains leaving, but cannot tell whether they passed beyond the switch. I watched the cabooses, and they went out of sight. Well, I saw as many as two or three trains. I saw the hind end of two or three cabooses leaving the yard of the seven trains I mentioned. I saw three at Laclede and four at Brookfield. Q. Well, what switching did you see done at Laclede with your car? A. I saw my car on the west end of the switch and another time on the southeast switch. Q. Where did you see it,—in switching or in standing still? A. I saw it at Brookfield, after it was picked up on this train, being switched around. Q. Was the engine ahead of your car on the switch? A. With other cars. Q. But you did not watch that movement? A. I noticed that they were giving it some awful jerks. Q. I asked you if you watched that movement? A. I noticed them on the train in there. Q. I asked you if you noticed the manner in which the switching was done. Did you notice that movement while it was being made? A. I did not watch it at the time it was done. Well, I saw it hit and thrown on the track. I saw it struck one time, and switched around on others. At Brookfield they were handling it with a lone engine. After those three movements it was placed in the yards some place. I did not watch it. Those three movements were the only movements I saw there at Brookfield. Some engines handle stock pretty nicely. The switch engine handles it nicely. At Laclede there was a rough movement on the south switch made in taking cars and setting them out for trains. I saw it move two or three times

at Laclede. It was handled roughly on the east switch."

The evidence of other witnesses tends to show that when the car of horses was unloaded at Hunnewell one of them was sick, one stiff and lame, one had a cut over an eye, one a cut on one hind leg, and one a knot or lump on one of its fore legs; that some of them were discharging from the nose, caused either by cold or distemper, and that all of them had the appearance of being gaunted and of having lost flesh; that when they arrived in East St. Louis they were in a bad condition for the market, and one of them was sent to the hospital.

In respect to the running of trains on defendant's road, the testimony tends to show that trains Nos. 70 and 72, mentioned in the plaintiff's evidence as having passed through Brookfield while he was there, were on that occasion run in several sections; that they were loaded at Missouri river points with perishable freight, and were fast through trains for St. Louis and Chicago, and could not be delayed to pick up way freight or take the time to set out or pick up cars at way stations without demoralizing their schedule time; and that No. 78, by which the horses were carried from Brookfield to Hunnewell, was the usual and regular train for doing that character of work.

We note the following paragraphs of the contract of shipment as material to the issues of the cause: "And in consideration of free transportation for one person, designated by the first party, hereby given by said railroad company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railroad company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or to any of his servants, agents, or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard. It is agreed that the said animals are to be loaded, unloaded, watered, and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals cause to themselves or to each other, or which results from the nature or propensities of such animals; and that the railroad company does not agree to deliver the stock at destination at any specified time, nor for any particular market. Shipment is made subject to the usual and ordinary delays in-

cident to railway transportation, and it is agreed that no claim for loss shall be made on account of that nature."

It is in evidence that, after the horses had been unloaded at Hunnewell, the defendant made ineffectual efforts to induce the plaintiff to reship the horses and to settle the matter with him.

The third count, on which the recovery was had, alleges that defendant negligently failed to transport, carry, and deliver the horses at East St. Louis, by reason whereof they were totally lost to plaintiff, alleges their value to have been \$1,800, and demands judgment for \$2,050. Proof that defendant had converted the horses to its own use, or that they had been destroyed in a railroad catastrophe, or that they had been shipped to a wrong destination, and thus lost to plaintiff, would have met the allegations of the petition. No such proof was offered. To sustain the allegations, the plaintiff offered evidence tending to show that the shipment was unreasonably delayed, and that the horses were damaged by the negligent switching of the car in which they were loaded, and that for these reasons he abandoned the shipment and turned the horses over to defendant. The court on this evidence held that the plaintiff had a right to abandon the horses, and leave them in the possession of the defendant, by giving the following instruction for plaintiff: "(3) The jury are further instructed that if you believe from the evidence that there was an unreasonable delay in shipping and carrying the horses of the plaintiff, or that the said horses were so roughly and so negligently handled by the defendant's servants as to materially damage them or lessen their value, then the plaintiff had the right to abandon said horses, and leave them in the possession and control of the defendant; and in passing on the question of whether there was such unreasonable delay, or negligent handling, the jury should take into consideration all the circumstances shown in the evidence." The court further held that plaintiff was entitled to recover of defendant the value of the horses at the time and place they were received for shipment, by giving the following instruction: "(6) If your verdict be for the plaintiff, then it becomes your duty to assess the damage, and you are instructed that the measure of damage is the value of the horses at Browning at the time received by the defendant for shipment, as shown by the evidence; and in arriving at the value of the horses the jury should take into consideration all the facts and circumstances as shown by the evidence."

These instructions are clearly erroneous. The only contractual relation between plaintiff and defendant, in respect to the horses, was that for a consideration the defendant agreed to carry them within a reasonable time and with due care from Browning to East St. Louis. The defendant was a bailee

of the horses for hire, and so long as they remained in specie this relation could not be changed at the election of plaintiff as bailor, no matter how long the delay in forwarding them to their destination, or how much they may have depreciated in value. *Hutchinson on Carriers*, § 775; 3 *Sutherland on Damages*, § 905; *Baumbach v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 23 S. W. 693; *Scovill v. Griffith*, 12 N. Y. 509; *Briggs v. N. Y. Central R. R. Co.*, 28 Barb. 515; N. O., J. & G. N. R. Co. v. *Tyson*, 46 Miss., loc. cit. 738, 739; *Hackett v. B., C. & M. R. R.*, 35 N. H. 390; *Johnson v. Strader & Thompson*, 3 Mo. 359; *Redmon v. C., R. I. & P. Ry. Co.*, 90 Mo. App. 68. There was an utter failure of proof to sustain the allegations of the petition, and the defendant's instruction, in the nature of a demurrer to the plaintiff's evidence, should have been given.

In respect to the tender of the amount realized by defendant on the sale of the horses, it was not made on the theory that plaintiff was entitled to recover anything on his petition, but on the theory, set up in the answer, that all he was entitled to was the net proceeds of the sale made by defendant. Plaintiff declined to accept the tender, or to submit his case on the defendant's answer. The defendant could not force the tender upon him, nor is he bound to accept the amount tendered as the net amount realized from the sale, or that should have been realized from it. As these matters are open to dispute, they will have to be settled under appropriate pleadings. It cannot be done under the pleadings as they were made.

The contract of shipment shows that the horses were to be delivered to the shipper at East St. Louis; that he, or some one for him, should accompany the stock and have the sole charge thereof, for the purpose of attending to and caring for the animals; that the railroad company should not be responsible for said care and attention; and that the animals should be loaded and unloaded, watered, and fed by the plaintiff, or his agent in charge. The refusal of the plaintiff to perform these conditions of the contract did not exonerate the defendant from performing the contract on its part. It was yet bound to carry the horses to the place of destination without unreasonable delay, and it was its duty to care for them and unload them at the expense of the plaintiff, since the covenants to be performed by the plaintiff did not go to the whole or a substantial part of the consideration for the contract, nor were they precedent to the obligation of the defendant to transport the stock. *Springfield Seed Co. v. Walt*, 94 Mo. App. 76. The answer pleaded the contract in full, and alleged the abandonment of the stock by the plaintiff while in transit, the transportation of the horses by defendant to the place of destination, and their sale there on plaintiff's account. It seems to us that, under the ruling in *Chemical Co. v. Lackawanna Line*, 70 Mo.

App. 279, the plaintiff by an appropriate reply may admit that the horses were transported to East St. Louis, and then allege the breaches of the contract by defendant upon which he may be entitled to recover damages. The measure of his damages, it seems to us, is the depreciation in the value, if any, of the horses, or any of them, on account of injuries received through the negligence of the defendant in handling and switching the cars, plus loss or damage, if any, by reason of unreasonable delay in the transportation of the horses to East St. Louis, plus loss or damage, if any, occasioned by a negligent sale of the horses on the market at East St. Louis, from which should be deducted the contract price of the freight to be paid, the extra expense, if any, to which defendant was put in caring for, feeding, watering, and unloading the horses, plus a reasonable commission for selling them on the market.

The judgment is reversed, and the cause remanded, with leave to plaintiff to amend his reply, if so advised.

GOODE and REYBURN, JJ., concur in reversal, but are of opinion that plaintiff was entitled to make proof and recover under the allegations of the third count of his petition.

COTHRON v. CUDAHY PACKING CO.*

(Court of Appeals at Kansas City, Mo. Feb. 2, 1903.)

SERVANT—INJURIES—RES IPSA LOQUITUR—DANGERS KNOWN TO SERVANT—RISKS ASSUMED—EXTENT OF RISKS.

1. A servant was injured by the falling of an iron hanger from a bundle of hangers which he was hoisting to an upper floor of his master's building by means of a rope passing over a pulley, one end of the rope being tied around the bundle. The rope was old, stiff, and frayed at one end, but had been in use for several days, having been substituted for another rope in good condition by order of the master's foreman. It was not shown what caused the rope to become untied. *Held* that as, even though the most perfect rope had been used, the irons might have slipped if insecurely tied, or might have become loosened by coming into forcible contact with some object during their ascent, the character of the rope did not alone account for the slipping of the irons therefrom, and the doctrine of *res ipsa loquitur* did not apply.

2. The servant testified that he knew the place was not safe, and that there was danger of the irons coming out of the rope if not securely tied. *Held*, that the danger to be apprehended from a failure to securely tie the irons, or from their striking against some object in their ascent, and becoming loosened thereby, were risks which the servant assumed.

3. It was immaterial whether the risks were or were not so obviously and immediately dangerous as to deter an ordinarily prudent person from undertaking the work.

4. Where it was shown that injury to a servant, due to the falling of an iron hanger from a bundle of hangers which he was hoisting resulted from the master's failure to provide a suitable rope for the work, or from the fact that

*Rehearing denied April 4, 1903.

the irons were insecurely tied, or became detached by striking some object in their ascent, but it was not shown which, the servant could not recover, as the two latter risks were assumed by him.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by J. W. Cothron against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank P. Seabee and John D. Wendorff, for appellant. Kagy & Horn, for respondent.

BROADDUS, J. This is a suit to recover damages for a personal injury. The defendant is a packing establishment, and at the time of the injury was engaged in constructing a large five-story building, the walls of which had been put up and the joists placed. The plaintiff was struck on the head and injured by one of a lot of cast-iron hangers which fell while he and two of his fellow servants were elevating them by rope and tackle from the first to a floor above. Prior to the time of the occurrence plaintiff and another workman named Dee had been engaged in this work. The hangers in question were of cast iron, about 11 inches long, 2½ inches wide, and a half inch thick, and weighed a little more than 6 pounds. The method by which they were elevated was to tie six or eight of them on one end of a rope passing over a single pulley attached at one of the upper floors, whereupon said Dee and the plaintiff, while standing on the first floor, would take hold of the other end of said rope, and pull the hangers to the desired height, at which point other workmen would disengage the hangers, and drop the rope to the first floor for another bundle of hangers, and so on. Dee did most of the tying, but plaintiff tied some of them; the bundle which fell being tied by the former. And, while it was not shown just how it was tied in the rope, it was supposedly in the ordinary manner. By direction of defendant's foreman, plaintiff and Dee had made a covering over the place where they had to stand while engaged in their work, which was intended as a protection for them from danger of material falling from above. This covering was made upon the joists above of boards, was about 10 by 15 feet in dimensions and with an opening about 2 feet square through which latter the hangers would pass while being hoisted. The rope used at the time of the injury was shown by the evidence to have been old, stiff, and frazzled at the end, but it had been in use during the preceding seven or eight days. Prior to that time they had been using another and different rope, shown to have been in good condition, but which, by order of defendant's foreman, was removed, and the rope in use at the time of the accident substituted therefor. The plaintiff, in detailing what occurred at the time of the injury, testified that while hauling the rope he heard the irons

fall on the covering above, at which time he felt the rope slacken, and one of the irons, in falling, struck him on the head. He also stated that he had suggested to defendant's agent, who was superintending the work, and before they commenced using the old rope, the advisability of using the new rope, whereupon the agent had told him to use the former, saying to him, "If you can't pull that rope, there are men outside that will pull it." The plaintiff further stated that he knew it was not a safe place to work; that there was danger of the irons coming out of the rope if not well tied, and that they would fall; and that he continued the work supposing that said agent knew more about the business than he (plaintiff) did, and that it would be safe. The defense was a general denial, contributory negligence upon the part of plaintiff, and that he assumed the risk. At the close of plaintiff's evidence, defendant interposed a demurrer, which the court overruled.

Plaintiff relied for recovery upon the failure of defendant to provide him with a reasonably safe place to work, and to provide him with reasonably safe tools and appliances. The known facts disclosed by the evidence are that, after the bundle of irons attached to the end of the rope had passed through the aperture in the covering, they for some reason became detached and fell, one of them striking plaintiff on the head and injuring him. It does not appear—because no one saw what occurred—what caused the rope to become untied. It must, however, have been from one of two causes, viz., the rope was not sufficiently secured around them, or they struck some object in their ascent which had the effect of disengaging them from said rope. It is the result of common experience that either cause would ordinarily produce such a result.

There was only one instruction given on the part of the plaintiff, and that was as to the measure of his damages in the event the jury found for him. The theory upon which the case was submitted to the jury is found in instruction No. 3, modified from one asked by the defendant, and which is as follows: "The court instructs the jury that if plaintiff was fully aware of his surroundings in performing the work, and knew of the danger of being struck by hangers in case they should slip out of the rope, and, this being the case, he assumed the risk thereof, unless you further find from the evidence that said risk was not so obviously and immediately dangerous that a man of ordinary prudence would not have refused to use said rope or work in said place." The finding and judgment were for the plaintiff, from which defendant appealed.

The plaintiff relies upon the doctrine of *res ipsa loquitur* to sustain his case. See *Sackewitz v. Am. Biscuit Co.*, 78 Mo. App. 144, and *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149. The theory of *res ipsa loquitur* may be illus-

trated by a statement from the latter, wherein plaintiff was injured by the sudden starting of a machine contrary to its ordinary mode of operation. The court held: "Such action of the machinery tended of itself to show want of care in its construction or condition;" and by way of argument said that: "Some catastrophes are of a nature such as carry in a mere statement of their occurrence an implication of neglect. In such event the theory speaks for itself"—*res ipsa loquitur*. In this case, did the character of the rope in question alone account for the slipping of the irons therefrom? We think not. It might have occurred from other causes, as we have stated. With the most perfect rope, insecurely tied, or, if so tied, by being brought into forcible contact with some object while being elevated, would most probably cause the irons to slip from their fastening. We are not, therefore, to infer that the condition of the rope was the cause of the injury. It probably may have been, but it is as equally, if not more, probable that the result was from one or the other causes named. *Res ipsa loquitur*, or "the thing speaks for itself," does not apply.

If the finding be sustained, it must be under the theory of said instruction that it was the duty of the master to provide a reasonably safe place for his servant, or that, if the place was unsafe, the risk was not so obviously and immediately dangerous as to deter an ordinarily prudent person from undertaking the same. The plaintiff knew that the place was unsafe, and he must have known that there was a risk. In fact, he said he knew there was danger. The defendant had the right to conduct his business in his own way, and whatever risk was ordinarily incident to the business thus conducted was assumed by the plaintiff when he engaged in the work. Any risk not incident to the business, but arising out of defendant's negligence, the plaintiff did not assume. If, therefore, the plaintiff's injury was the result of the ordinary risks of the business, he cannot recover; but, if they were the result of defendant's negligence, he was entitled to recover. Common experience teaches that one of the risks of the business would be the danger to be apprehended from a failure to securely tie the irons with the rope; and another would be the risk to be apprehended by the striking of the irons against some object in their ascent, or while being elevated, thereby causing them to slip from their fastenings. These risks, then, were such as it might be said the plaintiff assumed, because they were incident to the business; and, whether they were great or insignificant, they were assumed by him. If these premises be correct, we cannot see what difference it would have made whether a person of ordinary prudence would or would not have engaged in the work, whether it was or was not obviously and immediately dangerous. It is

not negligence for a person to select his own method of carrying on his business. He is not bound to adopt the safest and best, and he is liable only when he fails to exercise due care and ordinary care in conducting it. And he must provide as reasonably safe a place as is compatible with his manner of doing the thing. The place provided by defendant does not seem to have been unsafe in itself, and plaintiff was not injured for any neglect of duty in that respect. He was injured, evidently, from one of three causes, viz., the insufficiency of the rope, or it being insecurely tied around the irons, or by the irons having been detached from the rope in its ascent by striking against some object, causing the irons to slip from their place and fall. But it does not appear from which, but, we think, most probably from one or the other of the two last-named causes. We do not appreciate the theory that an old rope, however, perhaps, less substantial than a new one, would not be just as effectual, if not more so, in holding the irons in place, as the newer one would have done. And common experience does not teach us that an old rope is more stiff and less pliable than a new one; rather, the contrary is the case.

As we think it has been clearly shown that plaintiff's injury was the result of defendant's failure to provide a suitable rope for the business, if the one in question was not reasonably so, or by one of the two other causes named—the risk of the irons being insecurely tied and their liability of becoming detached by striking some object in their ascent, it not being shown which—the plaintiff was not entitled to recover. It would have been different if the two latter had not been risks which plaintiff had assumed, for in that event it would have been sufficient to have entitled plaintiff to a verdict for an injury which must have been the result of some one of the defendant's acts of negligence.

From what has been said it is held that the court erred in not sustaining defendant's demurrer to the plaintiff's case, and that said instruction, as modified, was not the law of the case. Therefore the cause is reversed. All concur.

MORROW v. PULLMAN PALACE CAR CO.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

SLEEPING CARS—PASSENGERS—LOSS OF GOODS—LIABILITY OF COMPANY—THEFT BY SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTIONS FOR JURY—FINDINGS ON CONFLICTING EVIDENCE—CONCLUSIVENESS—CONFLICTING DECISIONS.

1. The court, in passing on a demurrer to evidence, is required to make every inference in favor of the party offering the evidence which a

*Rehearing denied April 6, 1903.

jury might make, but cannot make inferences in favor of the party demurring to overcome the former inferences; and where the evidence, when so regarded, is insufficient to sustain a verdict, the demurrer will be sustained.

2. Where there is any evidence to establish a complaint from which a jury may reasonably infer the essential fact, the court should not take the case from the jury.

3. Where plaintiff's evidence, when standing alone, tended to prove a prima facie case, but, when considered with the whole evidence, was so clearly nullified that reasonable persons could not differ on it, a demurrer thereto should be sustained.

4. Whether, in an action against a sleeping car company by a passenger for the recovery for the loss of his personal belongings while a passenger, plaintiff's evidence, which tended to prove that the goods were stolen by defendant's porter, was overcome by defendant's evidence, is a question for the jury.

5. A sleeping car company is liable for the thefts of its servants to the extent of the necessary baggage or money of the passenger, regard being had to the character, duration, and purposes of the journey, though the passenger was negligent.

6. Though a sleeping car company was under no obligation to permit a passenger to occupy a bed in the smoking compartment of the car, yet where the servant in charge of the car permitted the passenger to do so the company assumed to the latter the same duties as if he had occupied a regular berth, in the absence of any collusion between the servant and the passenger to defraud the company of its fare.

7. The passenger, because of occupying the smoking compartment under such circumstances, did not assume any risk as to the safety of his personal belongings different from that of the passengers occupying regular berths.

8. The articles of wearing apparel, etc., being placed in such compartment by the passenger on retiring, were during the night, while he slept, in the mixed custody of the passenger and the company.

9. A sleeping car company is not an insurer of the personal belongings of its passengers, but its liability is that of a bailee for hire.

10. It is the duty of a sleeping car company, in order to protect the personal belongings of its passengers, to maintain in its cars a reasonable watch during the night while the passengers are asleep.

11. A passenger who occupies the smoking compartment of a sleeping car, under a special arrangement with the servant in charge of the car, and who retires for the night with knowledge that one of the windows of the compartment is open, is not guilty of contributory negligence which will preclude his recovery for the loss of his personal belongings, unless the window was left open at his request.

12. Even if the window was left open at his request, he will not be precluded from recovering unless his property was stolen by a stranger, through the window, from the outside.

13. Whether a passenger, in an action against a sleeping car company by him for the recovery for the loss of his personal belongings while a passenger, was guilty of contributory negligence, *held*, under the evidence, a question for the jury.

14. Whether a sleeping car company, in an action against it by a passenger for the recovery for the loss of his personal belongings, was negligent, *held*, under the evidence, a question for the jury.

15. Where no instructions were asked or refused, and no exceptions preserved to the admission or rejection of evidence, and the judgment rendered can be upheld on any theory of law applicable to the facts, the court on appeal must affirm it.

16. Where the evidence is conflicting, the general finding of the court, sitting as a jury, is conclusive on appeal.

On Motion to Transfer to Supreme Court.

17. A decision that a sleeping car passenger has the exclusive custody of his personal belongings during the daytime, or while he is awake, is not in conflict with a decision that such personal belongings, during the nighttime, while the passenger is asleep, are in the mixed custody of the passenger and the company, so as to authorize the transfer of the case from the Court of Appeals to the Supreme Court.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by W. F. Morrow against the Pullman Palace Car Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, for appellant. James A. Reed and Fyke Bros., Snider & Richardson, for respondent.

SMITH, P. J. On the evening of July 28, 1901, the plaintiff, with his wife, daughter, and son, and a Miss Chandler, who accompanied them, took passage in one of defendant's sleeping cars from Kansas City, in this state, to Oelwein, in the state of Iowa. The plaintiff engaged and paid for a section containing an upper and lower berth, his wife and daughter occupying the lower and his son the upper. He and the members of his family accompanying him had a number of dress suit cases and valises. After his wife and the other two ladies had retired for the night, he withdrew from his inside pocket a purse containing his money, and from this he took a small amount of change, after which he opened his suit case—a new one—and dropped the purse therein, closing and locking it (the case) in full view of the negro porter, who was acting in the double capacity of conductor and porter, and who had sole charge of the car. The plaintiff, after thus putting his money in his dress suit case, set the latter down by the side of the berth occupied by his wife and daughter. Later on he and his son went to the smoking compartment at the rear end of the car, where it was cooler than in the main body of it. While they were sitting in this compartment, the plaintiff, in the hearing of the porter, remarked to his son, "Why would not this be a good place to sleep?" and thereupon the porter remarked: "Why, you can, if you like. It is very often they do sleep here, and you can if you want to." The plaintiff then asked what would be the expense, and the porter replied that "they gave him whatever they please." The porter thereupon made up the plaintiff's bed in the smoking room, just as he did those for the other passengers in the main part of the car. The couch on which the plaintiff's bed was made extended across the room. There was an outside window in the compartment, about four feet from the head of plaintiff's bed, which was left open from 12 to 15 inches. The plaintiff was not furnished a key to lock the compartment, but before retiring he clos-

ed the door leading into it. He hung his trousers up on a hook above the head of his bed, and then hung his coat and hat over them. His shoes he placed by the side of his bed. In his trousers pockets were his watch, chain, spectacles, Knight Templar charm, pocketknife, and something like a dollar in change. The next morning, when he awoke, he discovered that his trousers and the contents of his pockets, with his shoes, were gone. He called the porter, and inquired of him what had become of his missing things, and he replied that he did not know. The car was then near Oelwein, and by the time it reached there the plaintiff had secured another pair of trousers, but when about to leave the car he was unable to find his dress suit case. He told his son to see the porter, and get it, if he could. Whereupon the plaintiff, his wife, daughter, son, and Miss Chandler searched the car for the missing suit case, but none of them could find it. At this time the berths had been put up, so that the seats could be used. The plaintiff's son searched under the seats and on the sides of them for the missing case, but the search was vain. After this the porter was asked if he remembered it, and he said, "Let me see; I don't know." Then he stated that he had seen a lady going towards the station with a grip or suit case that looked like the one in question. The plaintiff's son and the porter then went to the station, but the porter was unable to find the lady with the case there. The former then remarked to the latter: "If you don't get that valise, there is going to be trouble. All of our money is in there." The plaintiff's son then made further search for the suit case in the car, and, failing to find it, took up his own valises, and went into the car of a connecting train, where his sister, who had preceded him there, stated to him that the porter had brought to them the suit case. It was afterwards ascertained to be intact. The plaintiff's keys were subsequently sent to him by one who had found them by the side of the railway track at the city of Des Moines, Iowa, where the train pulling the car in which plaintiff had taken passage at Kansas City had stopped on its way during the night preceding the morning of its arrival at Oelwein. The other articles, however, the value of which was considerable, were never recovered. A jury was dispensed with, and the case was submitted to the court. At the close of plaintiff's evidence, and at the conclusion of all the evidence, the defendant demurred, on which the ruling was adverse to defendant, followed with judgment for plaintiff. Defendant thereupon appealed.

The propriety of the action of the court in denying defendant's demurrers is the only question raised in the case. The rule has been long and well settled in this state to the effect that in passing upon a demurrer to the evidence the court is required to make every inference of fact in favor of the party offer-

ing the evidence which a jury might, with any degree of propriety, have inferred in his favor, and when, received in this light, it is insufficient to support the verdict in his favor, the demurrer should be sustained. *Willson v. Board*, 63 Mo. 137. But the court is not at liberty in such case to make inferences of fact in favor of defendant to counteract or overthrow either the presumption of law or inferences of fact in favor of plaintiff. *Buesching v. Gas Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Donohue v. Railway*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848. And, where there is any evidence to establish a complaint from which the jury may reasonably infer the essential fact, the court should not take the case from the jury. *Thomas v. Express Co.*, 30 Mo. App. 86; *Twohey v. Fruin*, 96 Mo. 104, 8 S. W. 784. And where the evidence for plaintiff contains that which, if alone, would tend to prove facts sufficient to establish his *prima facie* case, yet, when considered with the whole evidence, it is so completely neutralized, destroyed, or rendered inoperative that reasonable persons could come to but one conclusion as to its effect, a demurrer in such case would be properly interposed. But where that part of the evidence which is relied on as destroying or nullifying that of plaintiff is not conclusive in its character, but is such as reasonable persons might entertain different opinions, then the whole evidence should go to the jury for determination. *Torpey v. Railway*, 64 Mo., loc. cit. 387.

The evidence of the plaintiff tended to establish a state of facts from which it may be reasonably inferred that the defendant's negro porter, who was also acting in the capacity of conductor, purloined the plaintiff's property. If such testimony is given credence, it is inconceivable how any other inference could be fairly drawn from it. The evidence of defendant tending to prove that plaintiff's keys were found shortly after their loss near the railway track at Des Moines in no way neutralizes or destroys the evidence adduced by plaintiff. It would have been no difficult matter for any one having plaintiff's keys on the inside of the car to have thrown them out of an open window to the side of the track where they were found. It seems to us that it was quite as probable that they were thrown out from the inside of the car as that they were dropped by one having them in his possession on the outside of it. Nor can it be claimed that the testimony of defendant's conductor and porter, with that of the train conductor, in respect to the footprints on the top of the oil box of the car, which was situated directly under the open window of the smoking compartment, and just above the car wheel, has the effect of neutralizing and destroying the evidence adduced by plaintiff.

It is a part of the history of the country, of which we may take notice, that the summer of 1901 was perhaps the hottest and driest season that has occurred since its

first settlement. It may be well inferred from the evidence that the train which pulled the sleeper on which plaintiff took passage on its way from Kansas City to Oelwein was enveloped in a constant cloud of stifling dust, and that it encountered no mud. That the dust settled on every exposed part of the sleeper there is little room to doubt. But that plastic clay was found on any part of it during that trip may be well doubted. If it rained on that or the preceding day the fact could have been easily shown by the reports made by the United States weather observer at Des Moines.

If it be true, as defendant insists, the smoking compartment of its car was entered from the outside through the open window at Des Moines, and the person entering did so by placing his feet on the top of the oil box, and from there climbing through the window, and in that way left his footprints in the dust that had settled on the top of such oil box, still it is wholly improbable that, after the train had run from Des Moines to Oelwein, a distance of more than 200 miles, and occupying about six hours in doing so, such footprints on the top of the oil box or the abrasion of the surface of the coat of dust on the side of the car under the open window should still have been visible when the car reached the latter place. The evidence so offered by the defendant as to the footprints and marks in the dust on the side of the car, to say the least of it, is by no means of conclusive character. Neither the evidence of defendant in respect to the finding of plaintiff's keys nor that in respect to the footprints raises an inference sufficiently strong to conclusively rebut and overcome the incriminatory inference deduced from plaintiff's evidence.

Applying to the evidence the rules which we have hereinbefore stated, and we have no doubt that the case was properly submitted to the jury, or, which is the same thing, to the court sitting as a jury. And as there was evidence justifying the submission on the theory that the defendant's porter purloined the property lost by plaintiff, in considering the case on that theory the defense of contributory negligence is to be excluded. The rule is that a sleeping car company is liable for the thefts of its servants to the extent of the necessary baggage or money of the traveler, regard being had to the character, duration, and purposes of the journey, whether the traveler has been negligent or not in exposing such baggage or money so as to tempt the cupidity of servants. In such a case contributory negligence of the passenger would not be regarded as the proximate or juridical cause of the injury. *Root v. Sleeping Car Co.*, 28 Mo. App., loc. cit. 207, 208, and authorities there cited.

There was evidence adduced by the plaintiff justifying the consideration of the case on the ground of negligence. The negro who was in charge of defendant's car was, as has

been stated, acting in the capacity of both conductor and porter thereof. He was the sole representative of the defendant, and must be regarded, as to the conduct and management of that car, as its vice principal. He collected fares, assigned passengers to their berths, changed them from one berth to another when desired by them, and was defendant's factotum on that car. The case is not different to that where it has been held that when a railway conductor, who was exercising control over a train, and was the only one present in absolute control of its movement, with the apparent right to say who, if any one, should travel on it, permitted a person to take passage on it without notice of any want of authority to grant such permission, in the absence of collusion between him and the conductor to defraud the company of its fare, whether he paid the fare or not, such person became a passenger, and as such was entitled to have the train managed with the care that was due from a common carrier to its passengers. *Wagner v. Railway*, 97 Mo., and authorities there cited on page 522, 10 S. W. 488, 3 L. R. A. 156; *McGee v. Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706.

The defendant was under no obligation to permit the plaintiff to occupy a bed in the smoking compartment of the car, but if it did so it is quite difficult on principle to see why the former did not assume to the latter the same duties as if he had occupied a berth inside of the main part of the car, or how the plaintiff assumed any risk by his occupancy of the smoking compartment different from that of the other passengers occupying regular berths in the main car. When plaintiff hung up his wearing apparel, in which were his watch, spectacles, and the other articles, it was just the same as if he had hung them up in an inside berth, so far as the duties of the defendant to him went. These articles were in the mixed custody of the plaintiff and defendant. A sleeping car company is not an insurer of the personal belongings of the passenger. Its liability is that of a bailee for hire, and in cases of loss, if liable at all, it is on the ground of negligence. In order to be so liable, it must have neglected some duty which it assumed to perform for the passenger. One of its duties, according to the adjudged cases, is to maintain in the car a reasonable watch during the night while the passenger is asleep. *Root v. Sleeping Car Co.*, ante; *Florida v. Sleeping Car Co.*, 37 Mo. App. 598. The defendant's combined conductor and porter seems not to have given the plaintiff or his personal belongings the slightest attention during the night. He knew that one of the windows of the compartment was open and unscreened, but he did not offer to place a screen in it. The plaintiff's clothes were hung on a hook over his bed, four feet from the window, and, if there was any danger to be incurred by leaving the window open,

the defendant should either have screened it, or offered to do so; but in this, according to plaintiff's evidence, it failed. As the window was left open by defendant, a greater degree of care and vigilance was required of it. The plaintiff cannot be held to have been guilty of contributory negligence unless the window was left open and unscreened at his request; nor can he be barred of his right to recover, even if he did request the window to be left open and unscreened—a fact which his evidence does not tend to prove—unless his property was stolen by a stranger, through the window, from the outside. The court could not, under the evidence of plaintiff, declare, as a matter of law, that he was guilty of contributory negligence, and therefore not entitled to recover. The evidence, we think, in the concrete case, was of such a character as to require a submission on the issue of the negligence of the defendant and the contributory negligence of the plaintiff.

The court might have found for plaintiff on either the theory that the property was purloined by the defendant's porter, or on the ground of defendant's negligence. The practice is in cases like this, where no instructions were asked or refused, and no exceptions reserved to the admission or rejection of evidence, that, if the judgment can be upheld by us on any theory of law applicable to the facts which the evidence tends to prove, it must be affirmed. *Wagner v. Furniture Co.*, 63 Mo. App., loc. cit. 208. While the evidence adduced by defendant in many material respects is in direct conflict with that of plaintiff, yet such conflict was a matter for the consideration and determination of the court sitting in the capacity of a jury, and its general finding on the whole case for the plaintiff must conclude us.

We discover nothing in the defendant's contention that the court, after it was developed at the trial that the plaintiff's keys had been found and returned to him, should have opened the case, and allowed it to take further testimony. There was nothing shown to justify the conclusion that, if the case had been reopened, any testimony would have been obtained materially different from that already given.

The judgment will be affirmed. All concur.

Opinion on Motion to Transfer to the Supreme Court.

By reference to *Root v. Sleeping Car Co.*, 28 Mo. App. 199, and *Chamberlain v. Pullman Palace Car Co.*, 55 Mo. App. 474, decided by the St. Louis Court of Appeals, it will be seen that the defendant's contention that the decision rendered by us is contrary to that in those cases cannot be upheld. In the first of these cases (28 Mo. App. 199) it was declared that:

"(1) The settled law is that a sleeping car company is not an insurer of the baggage

of the passenger, but that its liability at most is that of a bailee for hire. In the case of the loss of the passenger's baggage or belongings it is, therefore, liable, if at all, only on the ground of negligence; and, in order to be so liable, it must have been negligent in the performance of some duty. That duty, so far as adjudged cases seem to have gone, is that it will maintain in the car a reasonable watch during the night while the passenger is asleep. We now go further, and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him, nor watch himself, while he is absent from his berth in the washing room, preparing his toilet after arising in the morning. This duty of watchfulness extends so far as to make the sleeping car company liable for the negligent failure to perform it to the extent of any baggage or personal belongings which the passenger may thereby lose, which are reasonably necessary to be taken by him on his journey, regard being had to his station in life, and to the length, purposes, and probable duration of the journey. * * *

"(2) We hold that a sleeping car company is not liable, while the passenger is awake, for a theft of the baggage or money of the passenger not committed by defendant's own servants, but committed by some one else while it was failing to keep a reasonably diligent watch, where the passenger himself had been negligent in exposing such baggage or money to the theft. The custody of the passenger's hand baggage and money is, saying the most that can be said in his favor, a mixed custody—partly his custody and partly that of the sleeping car company. But it is not even a mixed custody in respect of money or other small valuables which he can conveniently keep upon his person, or under his eye, while he is awake. Such a custody is the exclusive custody of the passenger, and not, in any sense, the custody of the carrier. Now, if a passenger puts such articles in a situation where anybody can steal them, and goes away, and leaves them there, and especially if he does this without notifying any servant of the sleeping car company that he has so left them, it must be said, as a matter of law, that he has been guilty of contributory negligence."

In the second of those cases (55 Mo. App. 474) the language contained in the second of the two above paragraphs was quoted with approval.

It is thus seen that in the two cases cited the St. Louis Court of Appeals has decided no more than that the custody of such belongings of the passenger as consist of his personal valuables, and which he can con-

veniently keep upon his person, or under his eye, during the daytime, or while he is awake, is his exclusive custody, and not a mixed custody; i. e., partly his and partly that of the sleeping car company.

In this case, as shown by the opinion, it is ruled that the custody of such belongings during the nighttime, while the passenger sleeps, is a mixed custody, so that it is obvious that there is no conflict between the said ruling of the St. Louis Court of Appeals and that made by us in the present case. That court has declared that the custody of the personal belongings of the passenger during the daytime, or when he is awake, is his exclusive custody; while we have declared that when the passenger has retired for the night to his berth or bed for sleep that the custody of his personal valuables, carried in the pockets of his wearing apparel, and hung up above the head of his bed, is, during the time he sleeps, a mixed custody. It may be that the custody of personal valuables of a passenger during the night, while he sleeps, is exclusively his, and not a mixed custody, as is ruled by us; but certainly there is nothing in the two cases aforesaid decided by the St. Louis Court of Appeals holding anything to the contrary. It will be seen that the facts in those two cases were where the loss took place in the daytime, and not where, as here, it took place in the nighttime, while the passenger slept.

It results that the ruling made by us, whether right or wrong, is not in conflict with that of our sister court, and for that reason the motion of defendant must be denied.

BATES COUNTY BANK v. MISSOURI PAC. RY. CO.*

(Court of Appeals at Kansas City, Mo. Feb. 2, 1903.)

FIRE CAUSED BY ENGINE—SUFFICIENCY OF EVIDENCE—INFERENCES.

1. Evidence examined, and held to fail to show that a fire in hayricks was caused by an engine passing over a near-by railroad track.

2. Where the inference that a fire in hayricks was not communicated from a passing locomotive is as strong as the inference that it was so caused, the owner of the hayricks is not entitled to recover from the railroad company.

Appeal from Circuit Court, Bates County; W. W. Graves, Judge.

Action by the Bates County Bank against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

R. T. Railey, for appellant. Smith & Denton, for respondent.

BROADDUS, J. The plaintiff sues for the value of a quantity of hay alleged to have been destroyed on the 12th day of July,

1900, by fire set out by one of defendant's engines while being operated on its line of railroad. The finding was for the plaintiff. The only question raised by the defendant is that the plaintiff failed to make a case. It was shown that defendant's track passed east and west through a station named Nyhart on to the town of Butler, and within 150 feet of plaintiff's ricks of hay; that south of defendant's right of way there was a green hedge fence, about 15 feet high; that about 25 or 30 yards east of where the hay was stacked was a private roadway, passing north and south over defendant's track, and which was used by the farmers of the neighborhood in hauling hay from the bottom lands to their respective farms; that within a short time previous to the fire some hay had been scattered along this roadway to the defendant's tracks; that on the day of the fire a mixed train of defendant, consisting of an engine, caboose, combination passenger coach, and some other cars, passed east through Nyhart, going to Butler, at about 11 o'clock a. m.; that the track from Nyhart to said roadway is on a slight grade; that at the time of the fire there was but a light wind; that when the smoke was first seen it was south of the hedge, and extended upward for some distance, and then gradually moved toward the south; and that the hay between the hayricks and where the roadway crossed the railroad track, and extending along said roadway a strip, had been burned between said points. The witnesses agree that the fire was first discovered about one hour after the passage of defendant's train. Witness J. I. Ehardt testified that he was about one-half mile northwest of the rick of hay at the time he first saw the smoke, at which time it was on the south side of the hedge, and that he did not see any smoke or fire between the railroad track and the hedge before this time. A. A. Malone, a witness who saw the smoke while he was about a mile away, went to the place of the fire in two or three days afterwards. He testified that the fire had burned along the private crossing up to the end of the ties on the railroad. Harrison Chipps testified that he lived about three-fourths of a mile from the place where the hay was destroyed; that in the forenoon of the day in question, in company with one Abe Scoles, he was west of Nyhart, and saw defendant's train pass at 11:28 o'clock a. m.; that he was then on his way home; that in going home he passed through Nyhart, and stopped there three or four minutes to hitch a hayrake to the rear end of his wagon; that he had some straw in his wagon, and that he sat in front, driving his team; that he met a Mr. Hensley near the hayricks in question, and talked to him a minute or two, the time then being 10 minutes to 12 o'clock m.; that he passed over the railroad on said private roadway, and within 30 yards of said hay ricks; that when he arrived at home he unhitched his

*Rehearing denied April 6, 1903.

team, fed them, ate his dinner, and immediately thereafter, while watering and feeding his hogs, he discovered the fire. He also stated that he did not notice the track that was burned between the ricks and the railroad until after everything was afire, at which time said track of fire had been burned out. G. A. Scoles corroborated Chipps in every particular, except as to the length of time they stopped and talked with Hensley. He testified that he was sitting on the rear end of the wagon, with his face to the north, watching the hayrack; that he was looking down; and that there was nothing to obstruct his view, except said hayrack. He saw no smoke nor fire. He stated that the stackyard between the road and the ricks had not been burned off before he saw the fire on the ricks, but that in 15 or 20 minutes afterwards he saw it was burned off. For the purpose of showing that the progress of the fire from its inception was necessarily slow, plaintiff proved that the scattered hay in the road had been ground into the earth by passing teams and wagons. This was all the material evidence in the case.

The defendant contends that all the facts and circumstances did not raise the legitimate inference that the fire was caused by sparks thrown out by defendant's engine. From the evidence it may be safe to conclude that the fire was not set out previous to the passage of defendant's train, but about one hour afterwards, which circumstances, together with the fact that the hay that was scattered on said roadway from defendant's track to the hedge, and a strip from there on to the hayricks, was burned, is all the testimony tending to show that the fire was set out by the defendant's engine. In *Peck v. Ry. Co.*, 31 Mo. App. 123, the plaintiff made out a stronger case than this; but the court held that he was not entitled to recover, as there was no tangible evidence that defendant's engine had set out the fire, and no fact proved from which a reasonable deduction could be made to that effect, and that it could only be a matter of conjecture. In *Moore v. Ry. Co.*, 28 Mo. App. 622, it was held that "a verdict founded upon mere conjecture of possibilities or probabilities, however reasonable, will not be permitted to stand." And in *Glick v. Ry. Co.*, 57 Mo. App. 97, it was held "that appellate courts will draw with a firm hand the line between evidence and reasonable deductions, on the one hand, and mere conjecture and speculation, on the other." There were other facts and circumstances that must be taken, in connection with that which we have noted, as constituting the total of plaintiff's testimony upon which it claimed a verdict, viz., the slight upward grade of defendant's tracks approaching the place in question; the entire absence of evidence that the train in question was a heavy one, necessitating the exertion of more than ordinary power by the

engine, usually resulting in sparks from the smokestack, or that it did emit such sparks. And further, the undisputed testimony of the witnesses Chipp and Scoles, who passed along the private roadway over the scattered hay 10 minutes or more after the passage of defendant's train, and stopping in the meantime to talk with Hensley in the proximity of the hayricks, without seeing any smoke or fire, seems to rebut any inference, if any existed, that the engine set out the fire that destroyed plaintiff's hay. The evidence of these two witnesses was not in conflict with the other evidence in the case, but is consistent with it in every respect. The plaintiff seeks to overcome the effect of their testimony on the ground that the fire may have escaped their attention, as it must have been at that time in an incipient state, and thereby overlooked. This may have been true, and it was possible, even probable, that such was the case; but the most reasonable conclusion is that, if there had been a fire started in the hay 10 minutes previous to the time mentioned, there would have been some visible evidence of its existence, especially in the way of smoke, which, from the position of the witnesses, they would have more than probably seen. And if it be a matter of legitimate inference, the inference that the two witnesses would have seen the fire, if any had existed, is as strong as that of the plaintiff that it might have existed but not been noticed; and, if the inferences are equal, the plaintiff was not entitled to recover. The preponderance must be in his favor.

For the reasons given, we are of the opinion that defendant's instruction to find a verdict for the defendant should have been given, as the plaintiff did not make out a case sufficient to recover. The cause is therefore reversed. All concur.

LYTLE et al. v. JAMES et al.*

(Court of Appeals at Kansas City, Mo. Feb. 2, 1903.)

MINING CLAIMS—LICENSEE—INJUNCTION AGAINST TRESPASSER.

1. One having a right as licensee by contract to remove ore from land for a certain time, revocable only for failure to comply with certain rules and regulations, having no remedy at law against a trespasser, may have injunction, under Rev. St. 1899, § 8649, providing for the writ where adequate remedy cannot be afforded by action for damages.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by William F. Lytle and others against Ed. James and others. Decree for plaintiffs. Defendants appeal. Affirmed.

Redding & Owen, for appellants. Thomas & Hackney, for respondents.

*Rehearing denied April 6, 1903.

§ 1. See *Mines and Minerals*, vol. 34, Cent. Dig. § 142.

BROADDUS, J. This is a suit by plaintiffs to restrain the defendants from entering and mining on lot 24 of the Center Creek Mining Company's land in Jasper county. The plaintiffs, except McDonald and Moody, are licensees of the Center Creek Mining Company on this and other lots, and prior to this suit had erected a concentrating mill, with appurtenances, and had conducted mining operations on said lots. Previous to the suit, plaintiffs McDonald and Moody leased from the other plaintiffs, at a stipulated royalty, lot 24 and other lots, and were conducting mining on the same when the injunction herein was granted. In June, 1901, the defendants made a drift from their mine adjoining over onto lot 24, and were cutting and removing ores thereupon at the time of the granting of the injunction. The defense was that the defendants had leased said lot from the plaintiffs McDonald and Moody prior to the injunction, and that they were then operating on said lot under said lease. There was no writing evidencing such lease, and plaintiffs denied that any such lease had been made. This seemed to be about the only disputed fact in the case. The attempt was made to prove that plaintiffs McDonald and Moody had made a verbal lease to defendants, but, as the court found for the plaintiffs, it was equivalent to a finding that no such lease existed. We have examined the evidence, and are forced to the conclusion that the claim of the defendants in that respect was only a pretense, and that no such lease existed at or prior to the commencement of the suit.

The Center Creek Mining Company, under its rules and regulations, retained possession of the lot. The plaintiffs, except McDonald and Moody, who claim under their coplaintiffs, registered under said rules and regulations as to the lot in controversy with other lots. The rules and regulations of said mining company are required under the mining law as provided by chapter 133, Rev. St. 1899. Section 1 of the rules of said mining company provided that: "Said company will keep at its office a register of all mining lots on said lands (its lands) and containing a copy of these rules and regulations, and no person will be permitted to prospect or mine on said land until he shall, with the consent of the superintendent, select a mining lot or lots, and sign such register designating the same, thereby subscribing to the rules and regulations therein contained." Section 2 is as follows: "Work shall be commenced within five days after registering and shall thereafter be carried on continuously in good faith, and in good miner-like manner. Work shall not be suspended at any time except on written permission of the superintendent." The court, after having heard all the evidence, made the temporary injunction perpetual. The defendants appealed.

It is contended that, as the plaintiffs are merely licensees, they cannot maintain this

action. In *Rochester v. Gate City Mining Co.*, 86 Mo. App. 447, it was held that: "A miner who enters a mining lot under mining rules is entitled to only a certain per cent. of the mineral removed by him, is a mere licensee without possessory right, and his possession is not such possession as will sustain forcible entry and detainer." See, also, *Lowe v. American Zinc Co.*, 89 Mo. App. 680. The plaintiffs admit that such is the law, but insist that, having no legal remedy, they are entitled to resort to a court of equity to protect their rights. Section 3649, Rev. St. 1899, provides for the writ of injunction "wherever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." In *Arnold v. Bennett*, 92 Mo. App. 156, it was held that, as the plaintiff had no interest in the ore upon the lot, he could not maintain an action for trespass against one for digging and taking away ore from such lot; that the ore was a part of the realty before it was mined, and belonged to the owner of the fee. Under the rulings in the cases named the plaintiffs have no legal remedy whatever, much less an adequate one. In *Smith v. Jameson*, 91 Mo. 13, 3 S. W. 212, it was held that: "An injunction will not lie as an original and independent proposition to determine the title to land and mines thereunder where the same are held by defendants under claim of right and color of title." But in *Echelkamp v. Schrader*, 45 Mo. 505, it was held that: "While chancery will not use its extraordinary powers to restrain by injunction a trespasser merely because he is a trespasser, it will nevertheless interfere by injunction where the acts done or threatened are ruinous to the property trespassed upon, or of a character to permanently impair its just enjoyment in the future—as where the trespasser digs into and works a mine to the injury of the proprietor, or where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land." And the court enforces its position by a quotation from Judge Story that "an injunction is now allowed in all cases of timber, coals, or quarries when the party is a mere trespasser." The plaintiffs' action is not predicated upon any ownership of the ore, but upon their right to acquire an interest therein as licensees.

The question presented for our consideration is, what rights, if any, did they have under the circumstances shown by the record of the case? It must be conceded that they were entitled, by virtue of registration under the mining laws of the state, to mine the ores in lot 24, and this was a contractual right, which even the said mining company was bound to respect. By the rules and regulations of said mining company, the plaintiffs' right to mine said lot will not terminate until January 1, 1905, and is only subject to revocation for failure to comply with such rules and regulations. Notwithstanding

plaintiffs had no interest in the ore until mined, and no interest in the realty itself, and no such legal possession as would support an action for trespass or forcible entry and unlawful detainer, yet they were in the actual possession of the lot, under contract with the right to mine the ores. There is no distinction in law between the ownership of tangible property and a contractual property right. The plaintiffs' right to mine the ore on the lot in question was property just as much as the ore which belonged to the mining company. And we can readily conjecture that a miner under circumstances similar to this case, by reason of work done in the mine, the erection of buildings on the land, and cost of machinery, may acquire property and property rights in a mine of much greater value than the land itself. It would be useless to argue that in such cases the miner would not have the protection of the courts, even as against the owner of the fee, if he attempted to interfere with such property and property rights. In this case the defendants were strangers, who were found intermeddling with plaintiffs' right to mine the ores in question, and they asked the court for protection. Unless there is some way to prevent one miner from intruding upon another miner, a state of anarchy would prevail in mining regions of the state, and confusion and violence would follow. But we are satisfied that there is a remedy for such a condition, and that the writ of injunction is that remedy, and the only remedy. The question is too plain for argument or the citation of authorities.

The cause is affirmed. All concur.

STATE v. ITTNER.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

CRIMINAL LAW—INFORMATION—OFFICERS—TITLE OF OFFICE.

1. An information filed in the name of and signed by "F., Acting Assistant Prosecuting Attorney of St. Louis Court of Criminal Correction," and verified by the affidavit of the prosecuting witness, is not objectionable on the ground that no such prosecuting officer is known to, or provided for by, the statutes.

Appeal from St. Louis Court of Criminal Correction; W. H. Clark, Judge.

Anthony S. Ittner was convicted of assault, and he appeals. Affirmed.

Stephen C. Rogers, for appellant. Chas. P. Williams, for the State.

REYBURN, J. The defendant has appealed from a judgment of the St. Louis court of criminal correction convicting him of assault and battery upon Frank Ungar. A trial was had before the court, the defendant adjudged guilty, and a fine of \$5 and costs imposed. It is strenuously urged in behalf of defendant that he should have been discharged by reason of the insufficiency of the evi-

dence to warrant any conviction. The record discloses abundant support in the testimony for the judgment of the trial court, and we cannot pass upon the credibility of the witnesses or the preponderance of the proof. The information filed in the name of and signed by "G. N. Fickeissen, Acting Assistant Prosecuting Attorney of the St. Louis Court of Criminal Correction," and verified by the affidavit of the prosecuting witness, is assailed as not filed by the proper officer, and that no such prosecuting officer as acting assistant prosecuting attorney of the St. Louis court of criminal correction is known to, or provided for by, the statutes. In *State of Missouri v. Fitzporter*, 17 Mo. App. 271, an information of the same court, in the name of and filed by a prosecuting officer designated by the same official title, was held valid. The same identical objections were arrayed in the *Fitzporter* Case against the information as herein presented, and the same authorities and course of reasoning in both cases invoked; and we are now asked to reverse this earlier ruling of this court, without any sound reason assigned therefor. The decision rendered by this court through the eminent jurist delivering the opinion in the *Fitzporter* Case is to our minds eminently satisfactory and convincing, and the judgment of the lower court herein is accordingly affirmed.

BLAND, P. J., and GOODE, J., concur.

PANNELL v. PANNELL.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

JUDGMENT—SATISFACTION—SETTING ASIDE FOR FRAUD.

1. Evidence that satisfaction of a judgment was obtained by fraud held sufficient to sustain the setting of it aside on that ground.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Ada Pannell against Charles F. Pannell. Plaintiff's motion to set aside entry of satisfaction of judgment for her was granted, and defendant appeals. Affirmed.

Jones, Jones & Hocker, for appellant. Johnson, Houts, Marlatt & Hawes, for respondent.

REYBURN, J. In an action then pending in the circuit court of the city of St. Louis on April 23, 1894, the respondent, Ada Pannell, was awarded a decree of divorce from appellant, Charles F. Pannell, with alimony at the rate of \$35 per month. On March 18, 1899, appellant filed in the federal court a voluntary petition in bankruptcy, and included in the schedule of his liabilities accompanying it as an indebtedness to respondent arrears of alimony aggregating \$2,094. On April 3, 1899, appellant obtained from respondent her signature to the fol-

lowing paper: "Now at this day comes Ada L. Pannell and acknowledges satisfaction of judgment in the above-entitled cause. [Signed] Ada L. Pannell. Witness: W. O. Jones." This acknowledgment of satisfaction was presented to the circuit court by the attorney of appellant, and an entry of record made in the following language: "Now comes plaintiff by attorney, and here in open court acknowledges to have received full and complete satisfaction of the judgment heretofore entered herein." On March 6, 1901, respondent filed a motion to set aside such entry of satisfaction, reciting as follows: "Now comes the plaintiff in the above-entitled cause, and moves the court to set aside and for naught hold the entry of satisfaction of judgment heretofore, to wit, on April 8, 1899, entered upon the records in said cause for the following reasons: (1) Said judgment was not in fact satisfied. (2) The acknowledgment of satisfaction procured by the defendant from the plaintiff was without any consideration whatever. (3) Said acknowledgment of satisfaction obtained from the plaintiff as aforesaid was not sufficient in law to authorize the entry of satisfaction made herein. (4) Said entry of satisfaction was not made in any of the manners prescribed by the statute in such cases made and provided, and for that reason was illegal and void. (5) The writing filed herein, acknowledging satisfaction of the judgment, was obtained from plaintiff by defendant through the defendant's false and fraudulent representations that said writing was for the purpose and only to be used for the purpose of enabling the defendant to secure a discharge in bankruptcy in the voluntary bankruptcy proceedings which he had instituted in the United States District Court for the Eastern District of the state of Missouri, and for no other purpose, and that said writing would not diminish the plaintiff's rights and claims upon the defendant herein, but that in fact the defendant would do more for the plaintiff than the order allowing alimony required of him. The plaintiff shows that she was ignorant and unadvised as to the legal effects of her said writing signed by her as aforesaid; that she had no counsel to advise her, and that she was persuaded by the said defendant to go with him to his attorney and adviser; that it was unnecessary for her to consult a lawyer in the premises; that his attorney would protect her rights, and that his attorney had advised him that her rights would not be impaired by signing the acknowledgment of satisfaction aforesaid; that said acknowledgment was prepared by the attorney for the defendant, and presented to her for her signature in the office of defendant's counsel, and there signed by her upon the false and fraudulent representations aforesaid. Wherefore, the premises considered, plaintiff prays that the entry of satisfaction heretofore made as aforesaid be vacated, and for naught held,

and that execution issue against defendant herein to enforce the decree of the court heretofore rendered in this cause allowing plaintiff the sum of \$35.00 per month as alimony." On November 4, 1901, after hearing testimony, the court sustained plaintiff's motion, and ordered that the entry of satisfaction be set aside and vacated, and, after proper steps, defendant has appealed to this court.

The argument in print on behalf of appellant presents numerous points and authorities in support, but in the oral argument his counsel confined the discussion to the question whether fraud had been perpetrated by appellant upon respondent in obtaining her signature to the release or satisfaction, which he stated was the only material question in the case. The testimony at the hearing below on the part of respondent tended to show that but an insignificant part of the alimony had been paid; that appellant had importuned her frequently to sign a paper in regard to his bankruptcy proceeding; that he had represented to her that it would be necessary for her to sign an acknowledgment of satisfaction in order that he might be adjudged a bankrupt; that he had assured her that he would be in a better position to provide for her, and that her signing the satisfaction of judgment would in no wise affect her right to alimony. After several conversations he finally induced her to accompany him to the office of his attorney, dissuading her from first consulting her own attorney, assigning as a reason that the paper she signed was only a matter of form, and that there was no occasion for her to incur the expense of professional advice in regard to it. Yielding to his solicitation, and upon these representations, she went to the office of his attorney, who then prepared the acknowledgment of satisfaction, which she signed and delivered to appellant's attorney, who thereafter presented it to the circuit court, and obtained the entry of satisfaction above. Appellant, in his testimony upon the motion, denied the version of respondent regarding her signature to the paper, and disclaimed any representations or statements to induce her action, except a promise to buy some household furniture, and he sought to establish by the purchase of household furniture shortly before the satisfaction was obtained an independent and new consideration for its execution. But in addition to the fact that the furniture did not exceed \$400 in cost, and therefore would have been inadequate, the testimony further established that appellant caused the purchase to be made in the name of their son, Fred Pannell, and not in the name of his former wife, and that the latter paid the first installment of \$50 on the purchase price. The appellant was contradicted on substantial questions at the hearing by every witness who was examined on material matters, including as well the furniture dealer from whom

the furniture was purchased, and who was examined on appellant's behalf. The ruling of the circuit court in granting the order to vacate the record entry of satisfaction finds abundant support in the testimony, and is sustained by the preponderance of testimony upon the issue of fraud in obtaining respondent's signature, conceded by counsel for appellant to be the dominant feature presented, and it is, therefore, needless to discuss other reasons assigned by respondent for the correctness of the lower court's action, and the judgment herein is accordingly affirmed.

BLAND, P. J., and GOODE, J., concur.

STEPHENS v. DEATHERAGE LUMBER CO.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

INJURIES TO SERVANT—SETTING ASIDE VERDICT—DISCRETION OF TRIAL COURT.

1. Although there was some evidence in an action for personal injuries from which it might be inferred that the one under whose order plaintiff was working when injured, and through whose negligence the injury was caused, was acting as foreman by authority of defendant's superintendent, yet, since the trial court saw the witnesses and heard them testify, its action in setting aside a verdict for plaintiff because the great preponderance of the evidence was against him will not be disturbed on appeal.

2. The granting of new trials being largely in the discretion of the trial court, its action thereon will not be interfered with unless such discretion has been abused.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by John A. Stephens against the Deatherage Lumber Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Porterfield, Sawyer & Conrad, for appellant. Botsford, Deatherage & Young, for respondent.

BROADDUS, J. This is a suit by plaintiff for damages for an injury to his person alleged to have been received in April, 1901, while in the employ of defendant, through the negligence of Charles V. Floyd, defendant's agent.

It appears that plaintiff was assisting in unloading heavy lumber from a freight car onto a wagon; that the manner of doing the work was to place two skids, with one end of each resting on the wagon, and the other ends on the freight car; and that said Floyd and one other workman got upon the car and rolled down the lumber over the skids onto the wagon, when plaintiff and the driver of the wagon would place them in proper position, and then get out of the way of the next piece of lumber, which would be sent down in the same manner. There was evidence that, af-

ter the work had progressed for a while, it became necessary to remove the skids from their position, after which Floyd ordered plaintiff to replace one of them, which he did; but that, before he had time to get out of the way of danger, said Floyd and his assistant rolled down a piece of lumber, which struck and injured plaintiff. There was also evidence that Floyd that day hired plaintiff and another to assist in the work, and agreed with them as to the wages they should receive for their labor, and that he directed the unloading of the lumber from the car onto the wagon.

It was shown by defendant that Floyd, who was the traveling salesman of defendant, but not then so engaged, was asked by Mr. Funk, the secretary and general manager of defendant, to assist in the work of unloading said cars; that for two days previous to the date of plaintiff's injury he had assisted in the work, but that on the morning of the last day it was found that there was not enough men on hand for the purpose, which fact Floyd communicated to Funk, who directed him to hire two others; that in pursuance of this direction he hired plaintiff and one Mahoney, and put them to work; and that Floyd acted only as an assistant in unloading the lumber, and gave no directions, but only made suggestions as to the best manner of doing the work. It was shown that, previous to the time in question, Floyd had not acted in the capacity of foreman in the business of unloading lumber from the cars.

There was much evidence as to the manner in which plaintiff was injured and the extent of his injuries, but for present purposes it will not be necessary to state it.

The defendant's answer was a general denial, and the further defenses that the plaintiff's injury was the result of his own negligence, and that he assumed the risk. The finding was for the plaintiff, which the court set aside on the ground that error was committed in its refusing to peremptorily instruct the jury to find for defendant. From the action of the court in granting defendant a new trial, plaintiff appealed.

It is presumed from the argument of counsel and a review of all the evidence, although the whole case is gone over by both sides, that the court based its action upon the failure of plaintiff to show that said Floyd was at the time mentioned acting as defendant's foreman, with authority to direct the work. There is no positive evidence that Floyd was clothed with any authority to act as foreman, and, if such authority existed, it must be inferred from the circumstances that the superintendent directed him to hire plaintiff and Mahoney, and that Floyd supervised the unloading of the lumber onto the wagon.

In *Glover v. Nut Co.*, 153 Mo. 327, 55 S. W. 88, it was held that "the power to employ and discharge is not always a conclusive test of the relation of master and servant," and that "the opportunity to observe and influ-

*Rehearing denied April 6, 1903.

ence, and report delinquencies, is one of the tests employed." Applying these rules to the facts of this case, it would hardly do to infer that it was the intention of the superintendent, Funk, when he telephoned Floyd to hire two laborers to assist him in the work, that Floyd should also direct it; but, taken in connection with the other evidence that he in fact supervised the other workmen, we are not prepared to say that there was no testimony from which it might not have been reasonably inferred that he was acting as foreman by authority of said superintendent. Nor do we understand that the court, in granting a new trial because of the error supposed to have been committed by reason of failure to instruct for the defendant, meant to hold that there was no such testimony, but only to hold that the great preponderance of the evidence was against the plaintiff. In *Powell v. Railway*, 78 Mo. 80, the question of the power of trial courts to set aside verdicts of juries was considered, and it was there held that notwithstanding there may be some evidence to support a plaintiff's case, yet, unless it be of such a character as would warrant the jury in finding a verdict in his favor, the court may set it aside. See also *Commissioners v. Clark*, 94 U. S. 284, 24 L. Ed. 59; *Merchants' Bank v. State Bank*, 10 Wall. 639, 19 L. Ed. 1008.

It must be admitted that the testimony in this case as to the agency of Floyd to superintend the workmen was not very conclusive, and, as the trial court saw the witnesses and heard them testify, it was best qualified to judge of their credibility and to weigh the force of the evidence. The granting of new trials is largely a matter of discretion, wisely lodged in the trial courts, and with which appellate courts never interfere unless such discretion has been abused. *Baker v. Independence*, 85 Mo. App. 180; *Haven v. Railway*, 155 Mo. 216, 55 S. W. 1085.

For the reason given, the cause is affirmed. All concur.

S. ALBERT GROCERY CO. v. GROSSMAN et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

APPEAL—ERRORS NOT AFFECTING MERITS.

1. Where the judgment is manifestly for the right party, it should be affirmed, regardless of errors occurring at the trial.

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Action by the S. Albert Grocery Company against C. Grossman and another. Judgment for plaintiff on a trial de novo after an appeal from a justice, and defendants appeal. Affirmed.

The suit is on an account, and was commenced before a justice of the peace. In aid of the suit, plaintiff sued out a writ of at-

tachment. The affidavit for the attachment contains the following statutory grounds: "(1) That the defendants are about fraudulently to conceal, remove, or dispose of their property so as to hinder and delay their creditors. (2) That the defendants have failed to pay the price or value of the articles and things delivered to them by the plaintiff, which by contract they were bound to pay upon the delivery. (3) That the debt herein sued for was fraudulently contracted on the part of defendants." A plea in abatement of the attachment was filed by defendants. On the trial of this plea the attachment was sustained. Plaintiff also had judgment on the merits. Defendants appealed to the circuit court, where, on a trial de novo, the attachment was again sustained, and judgment was again rendered for plaintiff on the merits. Defendants appealed to this court.

Marsh Arnold, for appellants. John A. Hope, for respondent.

BLAND, P. J. (after stating the facts). Error is assigned for the admission of some unimportant evidence, and for the giving and refusing of certain instructions. We do not think it worth while to notice these alleged errors, for the reason that the judgment is so manifestly for the right party that it should be affirmed, regardless of any errors that may have intervened at the trial. The evidence is clear, convincing, and overwhelming that the defendants are mercantile adventurers; that they established a store and procured goods from the plaintiff by false and fraudulent representations as to both their ability and intention to pay for them, and with the intent of never paying for all they bought. The evidence shows that defendants had, time after time, gotten—in small amounts—the goods sued for from plaintiff by fraud and deceit; that after they were informed that their fraudulent methods would no longer be successful, and plaintiffs were about to take steps to enforce the collection of their debt for the goods, they secreted a part of them, and, as soon as the attachment was levied, divided what goods were left between them, one of them going to the state of Arkansas and setting up for himself, and the other going to a new location in Missouri and setting up business in the name of his wife. The evidence shows that every step taken by the defendants to procure goods from the plaintiff is tainted with fraud and deceit, and shows conclusively that their purpose was to get all the goods they could from plaintiff through false and fraudulent representations, and to pay just as little as possible.

The judgment is for the right party, and is affirmed. All concur; GOODE, J., because, while he thinks the issues were for the jury, he thinks, also, that no error occurred in the rulings on evidence or in the instructions.

**FIRST NAT. BANK OF MILAN v. WELLS
et al.***

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

**NEGOTIABLE INSTRUMENT—SURETY—WAIVER
OF NOTICE—VERBAL AGREEMENT—ACCEPT-
ANCE OF RENEWAL—HARMLESS ERROR.**

1. Where, on an appeal from a judgment on a note, the record does not disclose that it was offered in evidence, or that a ruling that, under the pleadings, such offer was unnecessary, was made to settle a contention as to who was to have the opening and closing arguments, but it shows that defendants, in their answer, admitted the execution of the note, and pleaded matters in bar and avoidance, the defendants are not in a position to complain of the above-mentioned ruling of the court.

2. In the absence of a showing, it will not be presumed that the holder of a note surrendered it for a renewal note before it was signed by the only solvent surety on the old note.

3. A verbal agreement by a payee of a note with a surety, made prior to its execution, that the note is to be collected at maturity, is merged in a stipulation in the note waiving notice of protest and extension of time, so that the surety cannot complain of an extension given without notice to him.

4. Where a note contained a stipulation waiving notice to the sureties of an extension of time, a subsequent verbal agreement, without consideration, that no extension is to be given, will not be upheld.

5. A stipulation in a note waiving notice of extension of time is binding on the sureties.

6. Where the custom of country banks is to permit the maker of a note, in negotiating an extension, to sign a renewal note, pay the interest thereon, and leave it with the bank, to be accepted when the sureties on the old note have signed it as of the day it is dated, the law will not imply an acceptance of the renewal note before it is signed by the sureties.

Appeal from Circuit Court, Sullivan County; Samuel Davis, Special Judge.

Action by the First National Bank of Milan against Elijah Wells and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Childers Bros., for appellants. J. M. Winters and Wattenbarger & Bingham, for respondent.

SMITH, P. J. This is an action on a promissory note for \$3,000. The answer admitted the execution and delivery of the said note, and then pleaded several special defenses to the action thereon.

It appears from the bill of exceptions that at the inception of the trial, which was to a jury, the court held "that, under the pleadings, it was not necessary for plaintiff to offer in evidence the note." Why or what was the occasion for this holding, is not disclosed. The plaintiff seems not to have offered the note in evidence, and, so far as we can discover, there was nothing then before the court requiring any ruling of that kind. Most generally in the trial of such cases the plaintiff will offer to give in evidence the note, the execution of which stands admitted by

the answer, to the end that he may open and conclude the argument to the jury. Where, however, the answer, as here, admits the execution of the note, and pleads one or more defenses in bar or avoidance, the burden of proof rests on the defendant, who by reason of that fact becomes entitled to the right to open and close the argument. But it does not appear from the bill of exceptions that the ruling of the court was made to settle any contention of that sort in this case. If the court, on its own motion, and in advance of any necessity or occasion therefor, made the announcement already referred to, and the plaintiff, in conforming to the ruling of the court so made, did not introduce the note in evidence, we are unable to see that the defendants were prejudiced thereby. The answer had admitted every fact constitutive of the plaintiff's cause of action, so that there was no fact which plaintiff was required to prove to make out his *prima facie* case. The introduction of the note in evidence was not required for that purpose. We are expressly forbidden by the statute to reverse a judgment because of any error committed by a court during the progress of the trial before it, unless such error be prejudicial on the merits. Section 865, Rev. St. 1899. The effect of the alleged ruling resulted more to the advantage of the defendants than to their disadvantage, and so there is no just ground for complaint on that account.

One of the defenses pleaded by the separate answer of defendant John D. Crumpacker was that, without the consent or knowledge of the other makers of the note, at the request of the plaintiff, without any consideration whatever, and without a redelivery of said note, he signed it as surety. The note was dated April 12, 1899, and was payable 120 days after date. It appears from the evidence that the defendants had several months previously borrowed of plaintiff \$3,000, and for which they had executed their joint note. It does not clearly appear for whose benefit the money was borrowed, but it may be inferred that it was for the benefit of defendant Wells. The note sued on was taken in lieu and in renewal of that first given. The defendant John D. Crumpacker testified that it was some days after the other defendants had signed the note that he signed it. But it does not appear that, at the time he signed, the original note had been surrendered, or that the renewal note was accepted in its stead until after he had signed it. In the absence of any showing to the contrary, we may presume that the plaintiff in the transaction exercised the care that a person of ordinary prudence would exercise in transactions of that kind, and therefore did not deliver up the original, and accept in its stead the renewal note, until the latter had been signed by the defendant; and especially so in view of the fact that it seems that he was then the only party to the original whose solvency was unquestioned. We do

*Rehearing denied April 6, 1903.

not, therefore, think there was any evidence adduced entitling the defendant to a submission of this defense to the jury.

The said defendant, as a further defense, pleaded that, at the time he signed the note sued on, the plaintiff, by its cashier, agreed that when the same matured he would collect it, but when it did mature, instead of complying with its said agreement with him, it, without his knowledge, and for a valuable consideration, entered into a contract with the other defendants whereby, after the maturity of said renewal note, the plaintiff thrice extended the time of payment of the same, whereby he (defendant answering) was discharged. The petition alleged and the answer admitted that the note sued on contained a stipulation to the effect that the makers thereof agreed to waive notice of protest and extension of time. The verbal agreement alleged in the answer, having been entered into prior to the execution of the note, was merged in it. The rule is settled that parol evidence is not admissible to vary or contradict a written contract. The written contract is conclusively presumed to merge all prior negotiations, and to express the final agreement of the parties. To permit a party, when sued upon a written contract, to admit he signed it, but to deny it expressed the agreement he made, would absolutely destroy the value of all negotiable instruments. *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521; *Catterlin v. Lusk* (decided at present term) 71 S. W. 1109. And therefore evidence in support of such an agreement was properly rejected. And, too, the offer of evidence tending to prove that after the defendant had signed the note the plaintiff had agreed to collect it at maturity, and not to extend the time of payment, was rightly rejected, because no consideration was shown for such an agreement as to the plaintiff. The agreement incorporated in the note, and already referred to, for the extension of time of the payment thereof, was valid and effectual between all the parties. There is no rule of law prohibiting any party to a promissory note from waiving any right which the law may give him as such. So one who is in fact a surety may contract as a principal. He may waive the rights which the law throws around him as a surety, and he does so when he in terms agrees to be bound as principal. As was said in *McMillan v. Parkell*, 64 Mo. 286: "It is clearly competent for a surety to renounce the privileges which the law confers upon him as such. He may, by assenting to an extension of time granted to his principal, waive his right to a discharge on account of such extension. So he may at the time of entering the contract waive in advance the legal protection to which he would be entitled as surety, and agree that he may, throughout the transaction to which he becomes a party, be held to the legal liability of a principal." See, also, *Picot v. Signiago*,

22 Mo. 587; *Wood v. Motley*, 83 Mo. App. 97. The defendant, by the terms of the note, bound himself as principal; and he could not, in the face of that stipulation, be permitted to introduce evidence contradicting or varying it. *Bank v. Terry*, 67 Mo. App. 12. So that it is plain that the offer of evidence respecting the agreement between the plaintiff and defendant, as pleaded in the answer of the latter, was properly rejected.

There was some evidence adduced, relating to the extensions of the time of payment of the note, which went in without objection, but this was insufficient to entitle defendant to a submission of that defense.

The defendant testified that plaintiff's cashier presented him a note that had been signed by his codefendants, and requested him to sign it; at the same time telling him that defendant Wells had paid the interest on such renewed note. It appears further, however, that the plaintiff still retained the old note—that sued on. It appears, too, that the plaintiff had never accepted the new note, and would not do so without the defendant answering would sign it. The defendants introduced it at the trial. The defendant John Crumpacker testified that he was not certain where he obtained the renewal note, but thought he got it either from plaintiff or defendant Wells. It is clear from the facts to which the Crumpackers testified, and the inferences to be drawn therefrom, that there was no unconditional agreement entered into between plaintiff and the defendants, or any two of them, for the extension of the time of the payment of the note, or the renewal thereof. The agreement was conditional, and that plaintiff would accept the renewal note if all the defendants would sign it. The payment of interest is a sufficient consideration for the extension of the time of the payment of a note, but it does not of itself afford evidence of a contract to extend. *Bank v. Love*, 62 Mo. App. 378; *Aultman v. Smith*, 52 Mo. App. 351. It does not appear that there was any unconditional agreement to extend the time of payment of the note sued on, for any definite period or at all. There is evidence of an agreement to accept a new note of the defendants, but not that only of the two who were insolvent, or, at most, of doubtful solvency. There is no evidence that the plaintiff agreed to accept the renewal note in place of the old one, without the name of the defendant answering being signed thereto, or that the interest was paid or received with that understanding. The facts and circumstances disclosed by the evidence, and the inference to be fairly deduced therefrom, make it clear that the plaintiff, on the application of the defendants not answering, promised them to accept a renewal note and the interest thereon if all the makers of the old note signed it.

The defendants lived at different places in the vicinity of the town in which the bank was located. It had not been and was not

at all times convenient for all of them to be present at the same time when renewing said note; hence it was that, when an arrangement was made for a renewal note, it was understood to be upon the condition that they all signed it, and that they might do so as was convenient to them. The very first note—the one given for the original loan—is conceded to have been signed in that way. This was the habit of the parties in their transactions with the plaintiff in respect to the signing of these notes. Whatever inference may arise when the payee is found in possession of a note is repelled and rebutted by the facts and circumstances explanatory of that provision in this case.

The manner in which the plaintiff is shown to have carried on the several transactions with defendants accords with the usual and customary practice prevailing among the country banks in this state; this practice having been adopted for convenience. The customers of such banks are most generally farmers and stockmen residing apart and remote from the towns where such banks are located, and, when one of them desires a loan, it is the usual custom for him to go to his bank, and arrange for it by giving his note, and agreeing to have one or more of his neighbors, named and satisfactory to the bank, to call later on and sign the same as sureties or indorsers; and when it is so signed it is accepted; the proceeds, less the interest, being passed to the credit of the principal, and becoming subject to his check. If, when the note matures, the principal finds it inconvenient, or if he is then unable, to discharge it, he goes to the bank and negotiates for an extension of the time of payment. This is done by making a new note for the amount, signing it, paying the interest, and leaving it with the bank, with the understanding that the sureties or indorsers on the old note, or others equally satisfactory, will later on call and sign such note as of the day it is dated. If the latter come in and sign, then it is accepted, and the old note canceled and delivered up. If the proposed sureties or indorsers are those on the old note, and they do not call and sign the renewal note, it surely cannot be that they can claim that the bank, by holding the renewal note for their convenience, and until completed by them, has thereby accepted such renewal note in lieu of the old one, and that they are thereby discharged from their obligation to pay the latter. Under such circumstances, the law does not imply an acceptance of the renewal note.

There is nothing in the evidence in the case tending to prove that the plaintiff accepted the renewal note in lieu of that sued on, or that the defendant answering was, by operation of law, discharged from the latter. It results that the peremptory instruction given for the plaintiff was proper, and that the judgment accordingly should be affirmed. All concur.

WALTER COMMISSION CO. v. GILLELAND et al.*

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

LANDLORD AND TENANT—DISPOSSESS ACTION—TENDER OF RENT—JURISDICTION OF JUSTICE—APPELLATE JURISDICTION—JUDGMENT FOR POSSESSION—ABATEMENT BY SUBSEQUENT SUIT.

1. An action brought under the landlord and tenant act to recover rent and the possession of the demised premises will not be abated by the institution of a subsequent action of forcible detainer for the recovery of the same premises.

2. Under Rev. St. 1899, § 4133, providing that in actions by landlords to recover possession of demised premises for nonpayment of rent, if rent and costs shall not be tendered before the justice on the hearing of the cause, the justice shall render judgment of possession for the landlord, a tender of rent and costs for the first time on appeal to the circuit court will not prevent a forfeiture.

3. Under Rev. St. 1899, §§ 4130, 4133, providing that a justice of the peace cannot enter a judgment for rent in a dispossession action for a sum in excess of his jurisdiction, but that plaintiff may sue for possession alone, where the amount of rent due at the time of a trial *de novo* in the circuit court on appeal from the justice's judgment exceeds the justice's jurisdiction the circuit court cannot enter judgment for the rent, but plaintiff may elect to take judgment for possession alone.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by the Walter Commission Company against Howard and Edward Gilleland. From a judgment for plaintiff on trial *de novo* in the circuit court after an appeal from a justice, defendants appeal. Reversed.

This is an action which was brought before a justice of the peace, under the landlord and tenant statute, to recover possession of the space or stall No. 25 on the outside of the Kansas City Market House, and also the rent due thereon. The evidence presented by the record before us tends to show that Kansas City leased the said space to L. S. Walters for the term of one year, beginning on the 1st day of April, 1893; that at the commencement of said term there was no building on said space, and that during his tenancy the said city permitted him to construct and erect a building thereon for his own use; that after the expiration of said term he, with the consent of said city, held over and continued in possession of said space, and the building thereon, as tenant thereof; that while so in possession he transferred said space and building to the plaintiff, and placed it in possession thereof; that plaintiff, while so in possession of said space and building, paying rent to the said city, leased the same to defendants, and placed them in possession under said lease, and that defendants, after being so put in possession, never surrendered the same to plaintiff; that at the time of the commencement of this suit defendants owed the plaintiff \$68.30 rent; and that plaintiff de-

*Rehearing denied April 6, 1903.

manded the same after it became due. The cause was removed by appeal to the circuit court, where plaintiff had judgment for \$421.-49, and the defendants appealed.

F. W. Gifford and Hamner & Hamner, for appellants. Chas. H. Winston, for respondent.

SMITH, P. J. (after stating the facts). It may be here stated that 24 days after the commencement of this action the plaintiff began an action of forcible detainer against the defendants for the restitution of the said space and building and the rent then due, with damages, etc. The latter action was pending in the circuit court at the time of the trial of the former. The complaint and other papers filed in the unlawful detainer case were put in evidence by the defendants at the trial of this cause. The defendants requested the court by an instruction to declare that, as there were two suits between the same parties for the same thing, it should not allow the plaintiff to proceed. This request was, we think, properly refused. The grounds upon which courts abate subsequent suits is that they are unnecessary, and therefore vexatious and oppressive. *State v. Dougherty*, 45 Mo. 296; *Jacobs v. Lewis*, 47 Mo. 344; *Thompson v. Holden*, 117 Mo. 118, 22 S. W. 905; *Warder v. Henry*, 117 Mo., loc. cit. 541, 23 S. W. 776; *State v. Moss*, 35 Mo. App., loc. cit. 447. Where two suits are brought at different times between the same parties, and for the same thing, that first brought occupies the ground, and that subsequently brought will be abated. The rule of *lis pendens* can have no application in a case like this, where it is sought to abate the first suit because of the bringing of a subsequent one, even though such subsequent suit be between the same parties and for the same thing.

The defendants in the circuit court for the first time made a tender of the amount of rent they thought was then due plaintiff under the terms of their lease. This was not accepted by plaintiff. The defendants further requested the court to declare that after the tender of all rent and interest thereon, and refusal by plaintiff, and the deposit thereof with the sheriff, and payment of all costs, the plaintiff could not further maintain its action. This instruction was properly refused, because the statute (section 4133, Rev. St. 1899) expressly provides that upon the return of the summons, executed, the justice shall proceed to hear the cause, and if it shall appear that the rent which is due has been demanded, and payment has not been made, and if the payment of such rent, with all costs, shall not be tendered before the justice on the hearing of said cause, such justice shall render judgment that the landlord recover possession. It is thus seen that, if the payment of the rent and costs is tendered at the trial before the justice, that shall have the effect

to abate the suit, and thus avoid the forfeiture, or, which is the same thing, continue the lease. *Nagel v. League*, 70 Mo. App., loc. cit. 490. But suppose, as here, payment of the rent and costs is not tendered at the trial before the justice, and judgment is rendered for possession and the rent; can the tenant take an appeal from such judgment, and at any time thereafter—no difference how long—make tender of the rent and costs due at the time of such tender, and in that way prevent a forfeiture, and so prolong the life of the lease? We neither find, nor have we been cited to, any precedent by which we may be guided in determining this question. The manifest purpose which the Legislature had in view in the enactment of this statute was to provide a speedy and effective remedy by which the landlord may recover possession where default has been made by the tenant in the payment of the rent. If a suit is brought by the landlord under this statute, the tenant may avoid a forfeiture if he will make the tender, and at the time required by it; but he cannot be allowed afterwards to make such tender, and thereby avoid the forfeiture, for to allow him to do so would be to encourage delay, and thus thwart the legislative purpose in enacting the statute. A construction of the statute under which a subsequent tender would avoid a forfeiture would have the effect to encourage appeals to be taken for the sole purpose of securing delay, and is therefore not to be tolerated.

Complaint is made that the judgment is for an amount which exceeds the jurisdiction of the court. The jurisdiction of the appellate court in such cases is derivative, and is not more comprehensive than that of the justice. Within the territorial limits of Kansas City the jurisdiction of justices of the peace of actions for the recovery of money, etc., is \$300. In all cases contemplated by section 4130, Rev. St. 1899, the landlord may recover possession of rented premises, and also have judgment for the amount of the rent then due, in those cases where the amount of the rent shall not exceed the jurisdiction of a justice of the peace by the general law establishing the amounts of recoveries in money to which that jurisdiction extends. Rev. St. 1899, § 4133; *Smith v. Crews*, 2 Mo. App., loc. cit. 269; *Leahy v. Lubman*, 67 Mo. App. 191. Where, as here, the amount of the rent due at the time of the trial *de novo* exceeds the jurisdiction of the appellate court, the plaintiff may elect to take judgment for the possession alone. In that case he will be protected, as respects the rent, by the bond provided by section 4139, Rev. St. 1899. It is apparent upon the face of the judgment that it is in excess of the jurisdiction of the court in such cases, and therefore it cannot be sustained.

There are several other questions discussed in the briefs of counsel, but as they are not raised by the appeal, we cannot notice them here. It results that the judgment will be re-

versed, and the cause remanded, with directions to the circuit court to give plaintiff judgment for possession alone, without the rent due; leaving it to remain as unadjudicated matter. All concur.

STATE v. RUSSELL.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

INTOXICATING LIQUORS—ILLEGAL SALE—LOCAL OPTION LAW—DRUGGIST—CLERKS—PHYSICIAN'S PRESCRIPTION—EVIDENCE.

1. A druggist is entitled to sell intoxicating liquors on written prescriptions issued by practicing physicians in counties where the local option law has been adopted.

2. Where a clerk of a registered pharmacist was directed by his employer, who was present at the time, to deliver intoxicating liquors to a customer, on a physician's prescription, a sale so made was a sale by the pharmacist, and the clerk was not liable to prosecution therefor.

3. In the prosecution of a clerk of a registered pharmacist for the illegal sale of intoxicating liquors, a physician's prescription, on which the sale was made, was admissible.

Appeal from Criminal Court, Greene County: Jas. J. Gideon, Judge.

William Russell was convicted of illegally selling intoxicating liquors, and he appeals. Reversed.

Wear & McGregor, for appellant. A. B. Lovan, for the State.

Statement of Facts and Opinion.

GOODE, J. Appellant was indicted in the criminal court of Greene county for violating the local option law, which is in force in Greene county outside the city of Springfield. The indictment charges that on March 21, 1901, at the town of Republic, in said county, he unlawfully sold intoxicating liquor, to wit, one gill of whisky, to William Holding, the appellant having no license at the time, and the sale being made without a license. The evidence tended to show that W. E. Kimmons owned and conducted a drug store in the town of Republic, and that the appellant, William Russell, clerked for him; that on the day mentioned in the indictment William Holding told the proprietor he wanted some whisky, and produced a prescription prepared and signed by Dr. G. B. Dorrell, a registered physician and surgeon, holding a certificate from the State Board of Health. Kimmons, when Holding asked him for the whisky, said he was sick, and he would have the appellant draw it; and thereupon told the appellant to draw the whisky, which the latter did under the immediate eye and supervision of Kimmons. Holding handed Russell the money to pay for it. The prescription was introduced in evidence, but excluded by the court. The appellant introduced the record of the county court to show Kimmons was a registered pharma-

cist; also the certificate of the State Board of Health authorizing Dr. Dorrell to practice medicine in the state of Missouri. It was further shown that Kimmons had a merchant's license. At the conclusion of the evidence the court instructed the jury that if they found, from the evidence, the appellant on or about March 21, 1900, sold to Holding intoxicating liquor, to wit, one-half pint of whisky, in the town of Republic, the same being outside the corporate limits of the city of Springfield, in said Greene county, they would find him guilty. Further, that, although the jury believed from the evidence that the appellant was in the employ of Kimmons, and Kimmons was at the time of the sale of the whisky the proprietor of a drug store, where the sale was made, and was a registered pharmacist, and was present at the time of the sale, and instructed the appellant to get the whisky, such facts constituted no defense.

Several instructions were asked by the defendant and refused, of which the purport was that, if Kimmons was a registered pharmacist, and the owner of a drug store, and the appellant was in his employ, and delivered the whisky to Holding under the direction and in the presence of Kimmons, or as an aid to or under the supervision of the latter, and in his presence, in his drug store, then the sale was a sale by Kimmons, and the jury should find the appellant not guilty. Under the instructions given the jury returned a verdict of guilty, and assessed the punishment of appellant at \$300.

The local option law and the drug store law may coexist in the same territory, and a druggist may sell liquors on written prescriptions issued by a practicing physician, even in counties where the local option law has been adopted. *State v. Bevans* (St. L.) 52 Mo. App. 130; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State v. Moore*, 107 Mo. 78, 16 S. W. 937. This case is exactly like the case of *State v. Hammack*, 93 Mo. App. 521, in which this court decided that the assistant or clerk of a registered pharmacist running a drug store may fill the prescription of a physician under the supervision of his employer, and, if he makes a sale of intoxicating liquor in doing so, he is not amenable to the criminal law, as the registered pharmacist is the responsible party. The evidence in the present case strongly goes to prove this liquor was sold under the very eye and immediate command of Kimmons, who, if he had a valid prescription, was entitled to sell it. The prescription was excluded, and that ruling was erroneous, as was also the theory on which the case was submitted to the jury in the instructions.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

DOVER v. MISSISSIPPI RIVER & B. T. RY.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

INJURY TO RAILWAY BAGGAGE AGENT—NEGLECT—OPEN SWITCH—LIABILITY OF EMPLOYER—ACCIDENT INSURANCE—DAMAGES.

1. Whether there was negligence in leaving open a switch to a side track, into which the train on which plaintiff was a baggage agent ran, injuring him, is a question for the jury, there being evidence that a switchman of another train opened it, and left it open after his train had picked up cars from the side track.

2. The insurance by a railroad employé in an accident company against injury in his employment, the premium being paid partly by him and partly by his employer, and acceptance by him of benefits thereunder, does not discharge his employer from liability to him, there being no contract by which he accepted or agreed to accept the insurance money in settlement of his claim against his employer.

3. The evidence held sufficient to sustain a verdict of \$2,000 in an action by a baggage agent, 45 years old, against his employer for personal injuries which might prove continuous.

Appeal from Circuit Court, Jefferson County; Frank R. Dearing, Judge.

Action by Harrison L. Dover against the Mississippi River & Bonne Terre Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. F. Green, for appellant. Sam Byrns, for respondent.

REYBURN, J. This is an appeal by defendant from a judgment of the Jefferson county circuit court in favor of plaintiff for the sum of \$2,000 in an action for personal injuries. The plaintiff, an employé of the defendant as a baggage agent, while in the performance of his duties, being transported in the baggage car of one of defendant's trains on the 3d of August, 1900, was injured in consequence of the train on which he was riding colliding with a car standing on the switch track of defendant, which switch, it was averred, had been negligently left open by the servants of defendant; and that the engineer in charge of the engine pulling the train on which plaintiff was employed knew the switch was open, or by the exercise of ordinary care might have known it. He was thrown against the front end of the car by the force of the collision, and the injuries sustained were charged to be the following: The second or great finger of plaintiff's right hand was cut off, the end of the third finger of the same hand was cut off, the index finger and the little finger of the same hand were each mashed, a cut was received over the left eye, and in being thrown the plaintiff received a severe wound of the muscles and nerves of the back about and below his kidneys; that his right hand was permanently injured, and since receiving the injury to his back he had been unable to control his urine; that the injury was permanent; he had spent about two months in the hospital, had suffered great bodily pain, and would

continue to suffer on account of the injuries. The answer was a general denial, a plea of risk assumed incident to the service, a plea of contributory negligence, and as a special defense and in mitigation of any damages it charged that, in pursuance of an arrangement made between plaintiff and defendant, the plaintiff, after entering the employment of defendant, had obtained a contract of insurance in the Aetna Life Insurance Company of Hartford, Conn., of date March 29, 1900, by which, upon payment of \$2.72 per month, the insurance company would insure the plaintiff for any damage sustained by him on account of injuries which he might receive while in the employ of defendant; that under such policy, in case of any injury, the plaintiff was entitled to receive from the insurance company the sum of \$1 per day for each day he was disabled from active service for a period of 52 weeks, in case his injury continued for that space of time; that such contract was procured in pursuance of an agreement between plaintiff and defendant, by which it was agreed that each should pay one-half of the premium required for such insurance per month to maintain such policy of insurance; that, pursuant to such agreement with plaintiff, the defendant fully complied with such contract, and from the date of the policy paid monthly to the insurance company the premium required to be paid by it, but upon the agreement with plaintiff that, in case of loss or injury by him, he should look to such insurance company for his indemnity for such loss under its policy, and the amount of such indemnity should be in full satisfaction for any loss for injuries sustained by the plaintiff, and that this was the consideration which induced defendant to pay for such insurance; that, after the injury sustained by plaintiff, the plaintiff had the option or election to demand indemnity from defendant for such injury, or demand or receive such indemnity from such insurance company, and that, if he elected to receive such indemnity from the insurance company under the policy, he had the right to receive the sum of \$1 per day during the whole time he was injured or disabled, not to exceed a period of 52 weeks; that after the injury, notwithstanding that plaintiff had the right to receive, if he had received a permanent injury, indemnity to the amount of \$1 per day for such period of 52 weeks, he accepted and received from the insurance company, in full satisfaction of any claims under such accident policy and on account of the injuries received by plaintiff set forth in his amended petition, the sum of \$223, and in writing released such insurance company from all liability on account of such injuries; that the plaintiff was precluded from recovering any sum on account of the injury set forth, and that he had accepted and received full satisfaction for such injuries from the insurance company, and had elected to accept such satisfaction in lieu of any claim for damages

against defendant. At the close of the testimony introduced by plaintiff, and at the termination of all the testimony in the case, the defendant requested the court to instruct the jury that under the pleadings and evidence the finding and verdict should be for the defendant, which request the court refused, and gave a series of instructions on the part of plaintiff and defendant, which need not be analytically considered.

1. The first contention of defendant is that the averment of plaintiff's complaint that "the switch had been carelessly, negligently, and wantonly left open by the agents of the defendant," was not sustained by the evidence, and that the first instruction submitting such issue to the jury ought not to have been given. There is abundant evidence—in fact it is conceded—that the switch in question was open and set for the side track at the time the train on which plaintiff was ran into it; and the testimony further tends to show that a north-bound freight train of defendant had passed shortly before, and had picked up two cars from the side track using the switch; that the switchman, one of the crew of the north-bound train, got off and threw the switch, and that it was probably he who left the switch open; and it was properly left to the jury to determine whether defendant's servants had been guilty of negligence by leaving the switch open connecting the side track with the defendant's main track. Appellant made no effort to rebut the presumption of negligence arising from the occurrence of the collision, so that, even if the evidence did not sustain the charge that the switch was negligently left open, the verdict would be warranted by the unexplained collision, and no reversible error was committed by the instruction complained of.

2. It is strenuously contended by defendant that the acceptance by plaintiff of the indemnity from the insurance company was a discharge and release of any right of action against his employer, the railway company, especially in the light of the form of the plaintiff's claim, verified by his affidavit dated February 27, 1901, made against the insurance company under the policy, which first detailed the foundation and amount of his demand, and then recited, "Which, when paid, shall be in full discharge of all claims which I have, or may have, on account of the personal injuries aforesaid." In support of its position we have been cited to and appellant attempts to apply those authorities from other states holding that a contract of membership in a railroad relief association between a railroad employé and such association, which accorded the employé in case of injury the right of election either to sue the company for damages or accept the benefits of the relief fund, upon the condition that such acceptance should be a release and satisfaction of his damages against the railroad, was valid, and not against public policy, and that

the voluntary acceptance of the benefits provided for in his contract of membership in such relief association by a railroad employé after receiving an injury, where such contract provided that such acceptance would operate as a satisfaction of further claim against the railroad on account of such injury, was a bar to a subsequent suit for damages against his employer. But the facts in the case at bar do not bring it within the range of those decisions, in all of which the election of remedy and the discharge of the employer in event of acceptance of the benefits paid by the relief association were presented as constituent elements of an express contract. The testimony herein fails to establish any express contract by which he agreed to accept or did accept the indemnity paid by the insurance company in settlement of his claim for damages against the defendant. The claim made by him for indemnity under the policy against the insurance company, and the receipt indorsed upon the draft for the amount paid him under the policy, do not mention the defendant, but, on the contrary, the terms of the release expressly are confined to a discharge of the insurance company, and no implied agreement for release of the claim for damages by plaintiff against defendant can be logically inferred from the mere claim and acceptance of the benefits of the accident insurance policy. We have seen no authority sustaining any such implication, and the general rule is well established that there can be no abatement of damages by reason of partial compensation from a collateral source. *Dillon v. Hunt*, 105 Mo. 154, 16 S. W. 516, 24 Am. St. Rep. 374.

The appellant asked the following instruction: "The court instructs the jury that if you find and believe from the evidence that a policy of insurance to indemnify plaintiff against loss or damage by injury received by him while in defendant's employ was procured from the Aetna Life Insurance Company by an arrangement between the plaintiff and defendant, each paying one-half of the premium for such insurance, and that defendant complied with its part of the contract, and paid all of the premiums due from it up to the time plaintiff received his injuries, and that defendant received from said insurance company the sum of \$223 in settlement of the injuries received by him, and executed a release and receipt to such insurance company, then, in that event, plaintiff cannot recover any further sum as against the defendant." But the court modified it by adding: "And further find that such insurance was intended by plaintiff and defendant to be in lieu of any claim of plaintiff against the defendant for any injury received by him while in defendant's employ." The court also gave the following instruction at appellant's request: "The court instructs the jury that if you believe and find from the evidence that a contract for indemnity insurance was procured for plaintiff, and he

was entitled to receive from the insurance company for his injury indemnity for a period of fifty-two weeks at the rate of \$1 per day, and further find that he accepted the sum of \$223 in full settlement of his claim in said insurance policy, then you may take such facts into consideration in determining the extent and character of his injuries and in mitigation of damages, if any, to which you may believe he is entitled on account of injuries." These instructions, as given by the court, fairly presented for the consideration of the jury the issue that the benefits received under the policy were in satisfaction and discharge of any claim for damages against his employer, and also emphasized appellant's claim of partial payment by it of the accruing premiums, and directed the jury that the acceptance of the sum paid by the insurance company might be taken into consideration in mitigation of damages, and were as favorable to defendant as the proof sanctioned.

3. This court is urged to set aside this verdict as excessive. The testimony shows that the defendant was in his forty-fifth year at the time of the occurrence; that he was in the hospital several months, and required medical attention much longer; was unable to resume his employment for eight months; his right hand permanently impaired, and the other injuries detailed by him remained at the time of the trial, and might also prove continuous. His wage-earning capacity did not seem diminished, and the physician who attended him did not regard his injuries as serious, but the question of damages was one peculiarly for the jury, and there was substantial testimony by which the jury was warranted in its action, and we can perceive no just reason for determining that the jury, in its finding, was actuated by passion, prejudice, or other improper influences, and, in the absence of such conviction, we are not authorized to interfere with it.

Affirmed.

BLAND, P. J., and GOODE, J., concur.

BOYCE et al. v. ROYAL CIRCLE

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MUTUAL BENEFIT INSURANCE — DUES — PER CAPITA TAX — FAILURE TO PAY — FORFEITURES — ENFORCEMENT — WAIVER — AUTHORITY OF LOCAL OFFICERS.

1. The constitution and by-laws of a benefit society required members to pay the local secretary monthly assessments on the 1st day of each month, and a semiannual per capita tax on the 1st days of December and June of each year, and declared that any member who failed to pay such assessments within 30 days, or his per capita tax during the months of December and June, thereby elected to terminate his membership, was suspended, and surrendered his

rights. *Held*, in the absence of evidence of a custom to receive such assessments and per capita tax after the time for their payment had expired, that the local secretary had no power to waive a forfeiture of a certificate by receiving delinquent assessments.

2. Where, in an action on a benefit certificate, the evidence tended to prove that monthly assessments were required to be paid by the holder, and a semiannual per capita tax, and the by-laws of the association provided a forfeiture for a failure to pay the tax at maturity, as well as for failure to pay the monthly assessments, the association was entitled to enforce a forfeiture for a member's failure to pay the per capita tax at maturity, as well as for a failure to pay the assessments.

Appeal from Circuit Court, Texas County; Leigh B. Woodside, Judge.

Action by Katie Boyce and another against the Royal Circle. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

J. L. Lamphier, Vocert & Covert, and Edwin Puller, for appellant. W. L. Hiett and Lamar & Lamar, for respondents.

Statement of Facts and Opinion.

GOODE, J. Plaintiffs state in their petition that they are the beneficiaries of a certificate of insurance in the defendant corporation, a fraternal order, organized under the laws of the state of Illinois, but authorized to do business in Missouri; that the contract of insurance was entered into between the deceased, Thomas J. Henderson, and the defendant, on October 11, 1899, said Henderson being then a member of a local circle of the defendant company at Cabool, Mo.; that the consideration for the insurance was that said Henderson, in addition to certain advance fees paid by him, should thereafter comply with the rules and regulations of the defendant either then in force or subsequently enacted. The benefit certificate was for \$1,000, and bound the Royal Circle, on the death of Henderson, to pay to Katie Boyce, his mother, and Minnie Henderson, his sister, said sum, upon satisfactory proof of the death of the assured. Plaintiffs further state that said Henderson complied with all the terms and conditions of the contract, as well as all the rules and regulations of the circle; that in August, 1901, while still a member of the Cabool Circle, in good standing, he died, with his certificate in full force and effect; that after his death the local circle, in violation of the laws of the order, refused to furnish blank forms whereon to make proof of the death of said insured, and also refused to pay the amount of the certificate, or any part of it. The answer admits the membership of Henderson, and the contract of insurance in which the plaintiffs were beneficiaries, and that Henderson died on the date alleged in the petition, but denies that he complied with his contract and the constitution, by-laws and rules of the society, or that he died a member of the association in good standing. The answer then sets forth certain provisions of the constitution and by-laws which

¶ 1. See Insurance, vol. 22, Cent. Dig. § 1911.

obliged the members to pay the local secretary of their circle an assessment of varying amounts, according to the ages of the paying member, on the 1st day of each month, which money the local secretary was to forward to the supreme secretary; further, to create an expense fund, a semiannual per capita tax of 75 cents was required to be paid by each beneficial member on the 1st days of December and June of each year. Another article provided that a member who failed to pay this assessment for the benefit fund within 30 days from the date the same fell due, or to pay his per capita tax during the months of December and June of each year, elected, by such failure to pay, to at once terminate his membership in the order, and thereby stand suspended, and elected not to hold the order for any liability whatever, but surrendered all his rights as a beneficial member. The answer then alleges that Henderson, instead of complying with the rules and regulations, failed to pay any assessments after the month of April, 1900, and failed to pay his per capita tax during the month of June, 1900, and that in fact the last payment he made was for April of that year; that, by reason of his failure to pay his monthly assessments or dues and the per capita tax, he had ceased to be a member, and had forfeited his rights to the beneficiary certificate before his death occurred. A replication was filed which alleged the defendant waived any default on the part of the deceased in the payment of assessments or dues by afterwards retaining the dues or assessments when paid; also that all dues and assessments owing by the insured were duly tendered to the defendant.

At the trial plaintiffs rested after introducing a section of the constitution of the defendant order requiring the local secretary of a circle to furnish blank proofs of death to the beneficiary of a certificate issued on a deceased member's life. The defendant then took the burden, but was not permitted to prove much; nearly all the evidence it offered being excluded by the court for one reason or another. It did, however, succeed in proving by the local secretary of the Cabool Circle that Henderson did not pay in time his per capita tax or his monthly assessments for the months of May, June, July, or August, 1900, but that about the 10th day of June the May assessment was paid by Minnie Henderson, who also, we gather from the record, paid the assessments for said other months on the 9th day of August; further, that two of those assessments were returned to her, to wit, for June and July, while that for May was sent to the supreme secretary, nothing being shown about the disposition of the August assessment. Certain sections of the constitution and by-laws were introduced in evidence, substantially of the tenor above recited from the answer; one providing for a per capita tax of 75 cents to be paid on the 1st days of December and June of each year, and the other for an assessment to pay death

or disability claims which should be due and payable on the 1st day of each month.

This appeal seems to be here on an incomplete record, for it is alleged in the petition and admitted in the answer that Henderson died in August, 1901, but no showing whatever is made of any payment of dues to the defendant company after August, 1900.

At the close of defendant's evidence the court instructed the jury to return a verdict for plaintiffs for the full amount of the certificate, apparently on the assumption that the local secretary of the Cabool Circle, by accepting payments of Henderson's monthly dues for May, June, July, and August, waived his default, restored him to membership, and reinstated his certificate of insurance in full force and effect. That is a view of the law which we cannot accept. Members of fraternal societies holding policies of insurance therein are presumed to know their by-laws and regulations in regard to payment of dues, and to conform to them. In fact, it is an express part of their certificates, ordinarily, that they shall comply with the by-laws in those respects, and be bound by their provisions; and so it was of this one. The petition states. Nor have local secretaries power to waive payment or set aside any other essential feature of the contract. The life of these societies depends on the punctual payment of dues, and they can neither survive nor meet their obligations if punctuality in that respect is not observed and exacted. The power of any local secretary of this company is distinctly defined and limited in one of the clauses of the constitution. It was his duty to collect assessments from the members of his local circle on the 1st of each month, as well as the per capita tax when it fell due, and to remit the same to the supreme secretary. He had also power to accept payment of monthly assessments and the per capita tax within 30 days after the last day of the month in which the same fell due, on a certificate signed by the delinquent member, of his good health; and he could accept payment within 30 days later (that is, within 60 days after suspension) on a certificate of good health from the local medical examiner. So far as appears from any clause of the constitution, he had no right to accept payment after default save on those terms. It was expressly provided that, if members remained in default in their monthly dues or per capita tax 30 days after the same were due, they thereby elected to terminate their membership in the order and to stand suspended, also not to hold the order for any liability, and surrendered all their rights as beneficial members. Those articles were in force when the certificate was issued to Henderson, and he accepted them as part of a contract which the Cabool secretary was powerless to impair. *Harvey v. Grand Lodge (K. C.)* 50 Mo. App. 477; *Chadwick v. Triple Alliance (St. L.)* 56 Mo. App. 463; *Scheele v. State Home Lodge (K.*

C.) 63 Mo. App. 277; McMahon v. Supreme Tent Maccabees, 151 Mo. 522, 52 S. W. 384.

The spontaneous action of local secretaries of this and kindred societies in accepting dues from suspended members contrary to the constitution or by-laws, whether the acceptance be due to ignorance or complaisance, does not, *ipso facto*, reinstate the insurance, and cannot have that result unless the settled rules of law governing contractual obligations are set aside as to contracts of fraternal insurance. It is true, a course of business may be tolerated by the chief officers of an order by which a local officer may become vested with authority to waive prompt payment of dues, or other regulations. If a local secretary goes on for a considerable period accepting dues after default, and remitting them to the supreme officers, who accept them with knowledge that they were paid out of time, these would be facts from which a waiver might be inferred; the waiver being founded on the notion that the member was led by the course of dealing into believing it was all right to pay his dues after the regular date. McMahon v. Maccabees, *supra*. No such line of conduct was proven or attempted to be in this case. It was not shown that Henderson was ever in default prior to May, 1900, or that the local secretary was accustomed to receive his or any one's else dues after the month in which they should have been paid. In fact, nothing was proven to mitigate the *prima facie* forfeiture of his membership and certificate. These contracts for fraternal insurance must be treated like other contracts—a reasonable interpretation given to them, and the ordinary rules of law applied to their enforcement, instead of a coddling interference in behalf of delinquent members. Provisions for forfeitures should be strictly construed, but not abrogated. There was no proof made of any payment by Henderson, or any one in his behalf, of his per capita tax which fell due in June, or that the forfeiture for nonpayment was waived. Then, too, the assessments for June and July were returned, while the one for May had been earned, because the suspension of Henderson's membership did not take effect until the end of that month.

Plaintiffs' counsel insists there was no evidence of any monthly assessment having been levied by the company. There was no formal proof of that kind; but certainly the evidence tended to prove the monthly assessment of Henderson was 50 cents, and that he so understood the matter, had paid at that rate, and recognized his obligation to do so as each month came around. Be that as it may, the constitution itself provided for 75 cents semiannual per capita tax, which was not paid in June; and according to the by-laws a forfeiture was worked by the failure to pay said tax as effectually as by failing to pay the monthly dues.

On the evidence in the record, the peremp-

tory instruction to return a verdict for the plaintiffs was unwarranted, and therefore the judgment is reversed and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

KANSAS CITY v. FERD HEIM BREWING CO.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

"MERCHANT" — MANUFACTURER — DEALER — APPEAL—SUFFICIENCY OF DECLARATION OF LAW—WAIVER OF VARIANCE.

1. Under Kansas City Charter, art. 5, § 78, declaring that the word "merchant" in the charter shall include every one who shall sell goods, wares, and merchandise at any store, stand, or place occupied for that purpose in the city, and Rev. St. 1889, § 8540, defining a merchant as any one "who shall deal in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose," a manufacturer is a merchant if he keeps in stock at a store, stand, or other place articles manufactured by him for sale in the ordinary course of trade.

2. A manufacturer is not a merchant if he only manufactures goods to fill orders from his customers.

3. A dealer is not necessarily a merchant, since he need not have a store, stand, or place in which to keep and sell his goods.

On Rehearing.

4. Where a declaration that under the proceedings and proof the plaintiff was not entitled to recover was offered and given at the trial of a case, the plaintiff is entitled to have the question of his right to recover under the pleadings and proof reviewed on appeal.

5. Rev. St. 1899, § 655, provides that when it shall be alleged that a party has actually been misled to his prejudice by a variance between the pleading and the proof of the adverse party, that fact shall be proved to the satisfaction of the court by affidavit showing in what respect he has been misled, and thereupon the court may order the pleading to be amended on such terms as shall be just. *Held*, that one who fails to avail himself of the section waives any variance.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Kansas City against the Ferd Heim Brewing Company. Judgment for defendant, and plaintiff appeals. Reversed.

A. W. Burnet, for appellant. Hardin & Taylor, for respondent.

BROADDUS, J. This is a suit of the plaintiff against defendant, a corporation doing business in Kansas City, for merchants' and ad valorem and personal property taxes for the years 1898, 1899, and 1900. The defendant denied its liability for such tax, on the ground that it was not engaged in the business of a merchant, but that of a manufacturer. The trial court found for defendant, and plaintiff appealed.

The case turns upon a proper definition of the term "merchant." By section 78 of article 5 of the charter of Kansas City the

¶ 2. See Licenses, vol. 32, Cent. Dig. § 32.

word "merchant," when used in such charter, "shall be held to mean and include every person or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose in Kansas City." Section 8540, Rev. St. 1899 (the same as section 6894, Rev. St. 1889) defines a merchant as follows: "Every person, corporation or co-partnership of persons who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant." Substantially, the two definitions are the same. These definitions are somewhat different from that of the common law, and as such, of course, must govern. The question has been adjudicated in this state, the latest of which under the Constitution we are bound to follow. The last case that we have been able to find is that of *State v. Richeson*, 45 Mo. 575, in which it was held that: "One who manufactures and supplies goods to the previous orders of his customers alone, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute." But that: "In an action by the state against one engaged in the manufacture of white lead for exercising the trade and business of a 'merchant without license' the state would make out a prima facie case by showing that defendant, after receiving orders from his customers, filled them the same and succeeding days. The natural inference would be that he kept the articles on hand, and to rebut this inference it was not sufficient to show that he might have manufactured the lead after the orders were received, but he should have shown that he did so manufacture it." In *State v. West*, 34 Mo. 424, it was held that: "To be a merchant, in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same. One who manufactures and supplies goods alone to the previous order of his customers, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute." In *State v. Whittaker*, 33 Mo. 457, the court held that: "A merchant, under the statute, is a person who deals in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose. It is immaterial if the defendant, by his labor, changed the form of the goods sold. If he deal in the selling of the goods at a store, he is a merchant for the purposes of the act." And it was further held that it was "immaterial that the store, stand, or place may have been also occupied for some other purpose."

It will be seen by these decisions that a manufacturer may or may not be a merchant within the meaning of the charter and the

statute of the state. If he keeps at a store, stand, or other place, in stock, articles manufactured by him for sale in the ordinary course of trade, he is a merchant. If he only manufactures upon order, he is not a merchant. It is, therefore, a mixed question of law and fact whether a manufacturer is or is not a merchant. There is nothing in the case of *Kansas City v. Lorber*, 64 Mo. App. 608, in conflict with the ruling here. In *Kansas City v. Butt*, 88 Mo. App. 237, the question before the court was different from that involved in this case. It was there held that the defendant was a manufacturer. There the city was attempting under its charter and ordinances then in force to impose an occupation tax on the defendant. The facts showed that defendant was not a dealer in ice, but a manufacturer, and that its products were sold before manufacture to one person; the court holding that the charter imposed no such tax upon manufacturers. There the court was not called upon to distinguish between the common law and the statutory definition of the word "merchant." The question was whether the defendant was a dealer, not whether he was a merchant. It does not follow that because a merchant is a dealer, a dealer is also a merchant. A merchant must have a store, stand, or other place where he sells his goods. A dealer need not have such store, stand, or place to keep and sell his goods. He may buy and sell without such aids to his business. A merchant, under the definition, is not required to be a purchaser; but the dealer, at common law, is both a buyer and seller. The plaintiff city recognized the distinction by imposing an occupation tax on ice dealers, and not upon merchants.

We think the court was in error in holding that because the defendant was a manufacturer, as such he was not a merchant. For the reason that the question involves the city's revenue, the cause is reversed and remanded to be tried in accordance with this opinion. All concur.

On Motion for Rehearing.

(April 6, 1903.)

The first ground for rehearing is that, as plaintiff asked no instructions in the trial court, it therefore cannot be heard on a question of law; citing *Wischmeyer v. Richardson*, 153 Mo. 556, 55 S. W. 74, and other like cases. These authorities have no application to the case at bar for the reason that the respondent offered a declaration, which was given by the court, that under the pleadings and proof the plaintiff was not entitled to recover. The giving of this declaration of law sufficiently indicated the theory upon which the cause was tried, and the ruling here is in harmony with the ruling in the cases cited.

The second point relied on is that the city charter requires that the tax be imposed on goods kept on hand "during the three months

next before the 1st day of January of such year," whereas the petition sues for taxes on goods alleged to have been held on the 1st day of January. This statement is true, but the evidence shows that the assessment was duly made. This objection was raised on the trial at the offer of the plaintiff to introduce evidence that the assessment had been made, but it was overruled, and no exception was taken to the ruling of the court, and the assessment and the action of the board of appeals was received in evidence. The assessment and the action of the board of appeals in raising the assessment were judicial acts, and as such were conclusive. *State ex rel. v. Hoyt*, 123 Mo. 348, 27 S. W. 382. At most, there was only a variance, by which defendant, if misled, had its remedy under the statute. Failing to avail itself of the provisions of section 655, Rev. St. 1899, the variance was waived.

Lastly, defendant asks us to review our decision on the question as to whether the defendant was a merchant within the meaning of the charter, and calls our attention to several authorities on the question, claiming that we have misconstrued the law. We have examined the additional authorities mentioned, and are satisfied with the opinion already rendered.

Motion for rehearing overruled. All concur.

DODD et al. v. GUISEFFI.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

APPEAL—VERDICT—CONCLUSIVENESS—SECOND NEW TRIAL—REVIEW OF EVIDENCE—BILL OF EXCEPTIONS—EXTENSION OF TIME—JUDICIAL DISCRETION—PRESUMPTION OF PROPER EXERCISE.

1. Where a verdict is based partly on oral evidence, in which there is a conflict, it cannot be disturbed on appeal, even though the evidence in its support may be incredible.

2. Under Rev. St. 1899, § 801, forbidding a second new trial except where the jury erred in matter of law or were guilty of misbehavior, a verdict on a second trial cannot be disturbed because against the weight of the evidence.

3. Facts put in issue by the pleadings cannot be assumed in the instructions, thus justifying a withdrawal of a case from the jury, or a disturbance of their verdict, even though the facts assumed are evidenced by uncontradicted oral testimony.

4. Under the statute authorizing the trial court, in its discretion, to extend the time for filing the bill of exceptions, it will be presumed that its discretion was properly exercised.

Appeal from St. Louis Circuit Court; John A. Talty, Judge.

Action by D. McTarish Dodd and others against Giorollano Guiseffi. From a judgment for defendant, plaintiffs appeal. Affirmed.

Holmes, Ten Broeck & Spooner, for appellants. Rowe & Moore, for respondent.

REYBURN, J. An attachment suit was brought in the circuit court of the city of

St. Louis by appellants against respondent, assigning among other statutory grounds for attachment that the defendant had fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors. A trial was had on defendant's plea in abatement, and the jury returned a verdict in his favor, which, upon plaintiffs' motion for new trial, was set aside by the court, and the case again proceeded to trial on the plea in abatement with the same result; nine jurors concurring in the last verdict. At the second trial a great volume of testimony was introduced, tending to support the various grounds for attachment, and contained in the lengthy record filed in this court, which, however, has not been abstracted; and appellants are content to narrow and confine their reliance for reversal in this court to the presentation and consideration of the single proposition that the evidence offered by plaintiffs was not only uncontradicted upon the particular ground of attachment (that the defendant had fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors), but that it also was fully established by the testimony of the defendant himself, and that therefore, as a matter of law, plaintiffs were entitled upon this ground to a verdict, and that the verdict of the jury, ignoring the undisputed evidence upon this ground, had nothing to support it, and plaintiffs were entitled to a new trial, regardless of the number of trials preceding. There was evidence proving that defendant had given a chattel mortgage upon his property to Aimee D. Emory to secure notes for the total sum of \$1,000, which defendant testified he repaid in installments, making the final payment at a late hour on January 9, 1896. The mortgage remained after such payment not released, and defendant explains that this was due to the fact that the mortgage had been stolen from his desk in his absence by the mortgagee after its payment, and by her placed on record. But however this may be, by letter of defendant to plaintiffs, dated the day on which he asserted he made the final payment of the mortgage, and by his succeeding letters, defendant represented to plaintiffs that this chattel mortgage was an existing obligation.

1. The question presented to the jury by the issue joined on this ground of attachment was whether the defendant had fraudulently concealed, removed, or disposed of his property so as to hinder or delay his creditors; and while proof that a chattel mortgage, in truth extinguished by payment prior to its record, was permitted to remain on the records without release, thus appearing as an unpaid, secured indebtedness, and was so represented by defendant to his creditors, the plaintiffs, was most convincing evidence of plaintiffs' ground of attachment, and the attempted explanations by defendant and the mortgagee of the conditions attending its

record, and the excuses offered why it was not released, may be specious and appear unworthy of belief, yet it still remained for the triers of fact alone to determine whether all the evidence tendered was sufficient to satisfy their minds and convince them of the fraudulent conduct ascribed to defendant. We are not unmindful of the well-known rule empowering the court to assume facts established by documentary evidence alone, but upon this issue of fact the evidence was not exclusively in documentary form, but was in large part oral, and the case was submitted to the jury, as well, upon the testimony of the numerous witnesses of the respective parties. The court is not permitted to assume the existence of facts unless they are either admitted by the pleadings or conceded upon the trial. Section 801 of the present statutes permits a second new trial only where the jury erred in a matter of law or were guilty of misbehavior, and, unless such error in matter of law or misconduct on part of the jury appears, neither party is entitled to more than one new trial. Appellant has not indicated any error by the jury in any matter of law, and makes no charge of misconduct; and, if this court was at liberty to weigh the testimony, the plain letter of the statute would forbid disturbing the verdict as against the preponderance of the evidence. The contention of plaintiffs, in substance and effect, is an appeal to this court to weigh the evidence; and, if their position was tenable and pursued to its logical length, the reasoning now resorted to would have warranted the trial court to peremptorily instruct the jury to find a verdict for plaintiffs. That an imperative instruction, even where the testimony offered is uncontradicted, excepting always the legal construction of written instruments, would not be proper, is the rule irresistibly deduced from the elaborate decision of the Supreme Court in *banc* in the Gannon Case, 145 Mo. 576, 46 S. W. 968, 47 S. W. 409, 43 L. R. A. 503, in which earlier cases in this state are fully reviewed and affirmed. This court also long since approved the doctrine that issues of fact were solely for the jury, and an instruction assuming facts put in issue by the pleadings, even where testimony was uncontradicted, was erroneous. *Dulaney v. St. Louis Sugar Refining Co.*, 42 Mo. App. 639.

2. The conclusion reached diminishes the materiality of respondent's objection that the bill of exceptions was not in conformity to law, because the record failed to disclose any good cause for which the extensions of time for filing the bill of exceptions granted by the court, subsequent to the first extension of time, were made. It is therefore sufficient to say that the statute authorizing the extension of the period for filing the bill of exceptions commits to the sound discretion of the trial judge, both in term time and in vacation, the power to extend such time;

78 S.W.—20

and, in the absence of a showing otherwise, the usual presumption respecting the correctness of official conduct will be indulged in—that such power was neither abused nor arbitrarily exercised, but that the court possessed of the statutory right to make such extensions of time acted properly and with discretion, and the grounds of its action will not be inquired into. *State v. Lord*, 118 Mo. 1, 23 S. W. 764; *City of St. Joseph*, to use, etc., *v. Farrell*, 106 Mo. 437, 17 S. W. 497; *State ex rel.*, etc., *v. Wayne County Court*, 98 Mo. 362, 11 S. W. 758; *Smith v. H. D. Williams, etc., Co.* (No. 8,587, St. Louis Court of Appeals, not yet officially reported) 73 S. W. 315.

The judgment is affirmed.

BLAND, P. J., concurs in the result.
GOODE, J., not sitting.

CORNWELL v. ST. LOUIS TRANSIT CO.
(Court of Appeals at St. Louis, Mo. March 17, 1903.)

REWARDS FOR ARREST AND CONVICTION—
RIGHT OF OFFICER.

1. Defendant offered a reward for the arrest and conviction of any person doing a certain act. Plaintiff was a member of the sheriff's posse when he made an arrest, so that he could not claim a reward for this, but he was discharged from the posse, and defendant then renewed the promise, and he then secured the conviction. *Held*, that he was entitled to the reward.

Appeal from St. Louis Circuit Court;
Franklin Ferris, Judge.

Action by Charles J. Cornwell against the St. Louis Transit Company. Plaintiff was granted a new trial, and defendant appeals. Affirmed.

Morton Jourdan, for appellant. Richard A. Jones, for respondent.

REYBURN, J. The facts disclosed by the testimony in this case are that appellant caused to be inserted on May 24, 1900, in the *Globe Democrat* and in the *St. Louis Republic*, respectively, the following advertisements:

"\$250 reward will be paid for the arrest and conviction of any person who may threaten with violence or intimidate or attempt to intimidate any person now employed by the St. Louis Transit Company for the purpose of deterring any such person from continuing in such employment.

"St. Louis Transit Company,

"Edwards Whitaker, President."

"\$250 reward will be paid for the arrest and conviction of any person who may throw any missiles at any car or any person engaged in the service of the St. Louis Transit Company.

"St. Louis Transit Company,

"Edwards Whitaker, President."

In June, 1900, respondent, then a member of the sheriff's posse comitatus, together with S. G. Burr, arrested one Thomas Daly, in the city of St. Louis, for shooting at a car of the transit company, and had him locked up in the Four Courts. Respondent then swore out a warrant against him in the court of criminal correction. Afterwards respondent proceeded to the office of the president of the appellant, and was referred to the office of Boyle, Priest & Lehmann, and by Lehmann again referred to Morton Jourdan, and accordingly, accompanied by Burr, Cornwell called at the office of Jourdan, whom they informed of the arrest of Daly, and that a warrant had been issued against him for shooting at a car, and inquired, if they convicted him, if they would be entitled to a reward, and Jourdan replied they would, and that they would be only too glad to pay the reward, but what they wanted above all things was the conviction. A day or two later respondent was discharged from the posse, and appeared at the court of criminal correction at the trial of Daly, which resulted in his conviction. He then reported to Jourdan that, with the testimony of Burr and himself, he had secured a conviction of Daly, but Jourdan said he could do nothing until they exhibited to him a certified copy of the conviction, which they obtained at their expense and submitted, and, after inspecting it, Jourdan said: "Well now, gentlemen, you understand this is a partial conviction; that the man has one of two courses to pursue: First, to ask for a new trial; and, second, to go into the Court of Appeals. I have not time to-day, but, if you will meet me to-morrow at some hour in the morning, I will look that up for you when I am up there, and, if he does not do either one, we will pay the reward the next morning." Respondent, Burr, and Jourdan met the day following at the court of criminal correction, and Jourdan stated to them that Daly had asked for a new trial, and had changed attorneys, and said further: "Well, my advice to you is to employ an attorney now to look after your case, from the fact that he has one of the best criminal lawyers in St. Louis." Respondent then tendered employment to Jourdan, which he declined, stating that, if they employed an attorney and finally convicted the man, they would pay the reward. Respondent and Burr, acting upon this advice, employed counsel to look after the case, and paid \$10 filing fee in the proceeding against Daly, which had been appealed to the St. Louis Court of Appeals, and afterwards a motion to dismiss the appeal, prepared by counsel employed by respondent, was sustained, and the conviction was made final.

It appeared from the testimony of the president of appellant that Boyle, Priest & Lehmann were general counsel for the transit company, and Jourdan was employed as counsel in special cases, particularly those relating to the strike at the time, and that

the advertisements offering reward were inserted in the newspapers by authority of appellant's officers and board of directors. Plaintiff, first taking an assignment from Burr of all his interest, began this action before a justice of the peace, filing a written complaint, upon which trial was had in the circuit court on appeal, and at the close of the case the court, at the instance of appellant, instructed the jury that under the law and the evidence plaintiff was not entitled to recover, and directed a verdict for defendant. Plaintiff's motion for new trial was sustained on the ground that the court erred in giving the imperative instruction, and appellant has appealed from this ruling.

Plaintiff, as a member of the posse, at the time he made the arrest, was a conservator of the peace (Rev. St. 1899, § 6219), and therein was merely discharging his duty as such deputy and temporary officer, and would have been debarred from recovering any reward for the performance of such official obligation; for a public officer is not allowed to receive, for performing an official duty, any other compensation than that provided by law. Public policy forbids an officer from claiming a reward for performance of any act which is by law made part of his duty, but if an officer performs an act or renders extraordinary services, alike beyond and outside the limit of his ordinary official duty, and for which a reward has been offered, he becomes entitled to such additional remuneration, and may lawfully make claim thereto without violation of the policy of the law. Wood on Master & Servant (2d Ed.) § 170; Gregg v. Pierce, 53 Barb. 387; Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; Morris v. Kasling (Tex. Sup.) 15 S. W. 226, 11 L. R. A. 399; Bronnenberg v. Coburn, 110 Ind. 174, 11 N. E. 29; Thornton v. Ry., 42 Mo. App. 58; Hogan v. Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Smitha v. Gentry (Ky.) 45 S. W. 515, 42 L. R. A. 302; Lees v. Colgan (Cal.) 52 Pac. 502, 40 L. R. A. 355; St. Louis, etc., Ry. Co. v. Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 66.

Respondent was discharged as a member of the posse shortly after the arrest, and for discharging this duty, regardless of how faithfully it may have been performed, he was not entitled to claim the reward. After his term as deputy was brought to an end, any duties or disabilities as an officer likewise ended, and he resumed his status as a private citizen. The offer of the reward was repeated and renewed to him after the fulfillment of his official obligations, and after he had ceased to be an officer, and when such reward could be no inducement to the performance of any act required of him by law. Relying upon the assurance and promise of the special agent of defendant intrusted with the management of the difficulties growing out of the strike, and acting upon the recommendation of this agent, without

any legal duty on his part, respondent in his private character rendered the service for which the general reward had been offered, and, by the expenditure of his own fund in employing counsel and for payment of court costs, completed and made final the conviction of the offender. The offer of the reward, when acted upon, became a contract, which was executed upon rendition of the service by respondent and the substantial performance of the conditions, and entitled him to the recompense proffered, the inducement and consideration moving him. *Reif v. Paige*, supra; *Wood, Master & Servant*, § 165, p. 323.

The action of the trial court in sustaining plaintiff's motion for a new trial will be sustained. The judgment is affirmed. All concur.

HILL BROS. v. BANK OF SENECA.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—DECLARATIONS OF AGENTS—TERMINATION OF AGENCY—EVIDENCE—ACCOUNTS KEPT BY AGENTS—APPEAL—INSTRUCTIONS—HARMLESS ERROR—EXCLUSION OF EVIDENCE—DISTURBANCE OF VERDICT.

1. Where there is evidence to support a verdict, it will not be disturbed on appeal.

2. An agreement by defendant to pay plaintiffs for threshing wheat mortgaged to them was not brought within the statute of frauds as a special promise to answer for the debt of another because it included an agreement to pay for wheat previously threshed by plaintiffs under agreement with the mortgagor.

3. It was not error to refuse an instruction repeating instructions already given.

4. In an action to recover a balance due for threshing wheat, an instruction that the jury were to find for the plaintiffs if defendant contracted to pay for the threshing "on taking possession of the wheat," was not prejudicial to defendant in assuming that the contract was made when possession was taken, when in fact it was made on the next day.

5. Where a mortgagee contracted to pay plaintiffs for threshing the entire crop of wheat mortgaged, plaintiffs were entitled to recover for threshing the whole crop, and the fact that the agreement with the mortgagor by which the mortgagee took possession of the wheat authorized it to incur expense only so far as was necessary to market enough wheat to satisfy the mortgage, of which agreement plaintiffs had knowledge, was immaterial.

6. Where plaintiffs were informed by defendant that defendant's agents would be in full charge of the details connected with threshing wheat mortgaged to defendant, which plaintiffs were engaged to do, and an indorsement to that effect appeared on the back of one of the mortgages, defendant was bound by the admissions and promises made by such agents, irrespective of the actual authority vested in them.

7. In an action to recover the balance due under a contract engaging plaintiffs to thresh wheat mortgaged to defendant, where evidence had been introduced by defendant showing that plaintiffs had kept their account in the name of the mortgagor, it was competent for plaintiffs to show that they had done so at the request of defendant's agents.

8. In an action to recover the balance due for threshing wheat mortgaged to defendant, declarations of defendant's agents, while still acting within the scope of their agency, that defendant was going to pay for the threshing, were competent.

9. In an action to recover a balance due for threshing wheat mortgaged to defendant, an instruction limiting defendant's credits to \$1,062, when his mortgagor had paid plaintiffs \$250 additional to "apply on the threshing amount," was not error where the plaintiffs' uncontradicted evidence was that the \$250 was applied to the payment of an account for threshing oats.

10. In an action to recover a balance due for threshing wheat mortgaged to defendant, it was shown that plaintiffs had drawn a draft for such balance on another party, who had an interest in the wheat. Defendant relied on this fact to excuse it from liability. Plaintiffs testified that it was done at the instance of defendant's agents, and to corroborate that fact introduced a statement of account rendered by the agents, after the termination of the agency, in which defendant was credited with the draft when drawn, and charged with it when returned dishonored. *Held*, that the statement was properly admitted in evidence.

11. In an action to recover a balance due for threshing wheat mortgaged to defendant, a separate mortgage, executed by the mortgagor to defendant's agents, was properly excluded.

12. Where facts relating to a mortgage were made to appear by oral testimony, the exclusion of the mortgage was, if error, harmless.

13. Where the jury returned a verdict for plaintiffs, without an assessment of damages, the court properly refused to receive it, and directed the jury that they must assess the damages without further instructions.

14. Plaintiffs were engaged by defendant to thresh a crop of wheat mortgaged to it, defendant's agent having charge of the work. After threshing a sufficient quantity to satisfy defendant's claims, a contract was entered into between plaintiffs and a subsequent mortgagee of the wheat, whereby the latter was to pay for all wheat threshed thereafter, plaintiffs retaining sufficient grain to secure their claim. Pursuant to this agreement, plaintiffs held two car loads of wheat, which they finally let go, on a promise by defendant's agents, whose agency had in the meantime terminated, which fact plaintiffs knew, that defendant would pay for the same. *Held*, that plaintiffs could not, in reliance on the promises of the agents, recover for the wheat threshed subsequent to the new agreement.

Appeal from Circuit Court, Newton County; H. C. Pepper, Judge.

Action by Hill Bros. against the Bank of Seneca. From a judgment for plaintiffs, defendant appeals. Affirmed, with condition.

Geo. Hubbert, for appellant. J. T. Sturges, for respondents.

Statement of Facts and Opinion.

GOODE, J. Many of the facts of this case are stated in the report of the decision on a former appeal (87 Mo. App. 590); but as the case came to this court then from a judgment rendered by the court below in favor of the bank on a demurrer to the plaintiffs' evidence, the facts to support the defense on the merits were not before us, and were not embraced in the statement of facts then made. The question for our determination on that appeal was whether the plaintiffs' evidence made a case for submission to the jury, and we held that it did, reversing the

*Rehearing denied March 31, 1903.

judgment, and remanding the cause to be retried; which imposed on the defendant, of course, the necessity of introducing evidence to maintain its defenses pleaded in the answer.

To recapitulate to some extent the principal facts will assist a reader to understand the controversy. The action was brought to recover from the defendant bank an unpaid balance of the cost of threshing about 34,000 bushels of wheat. This wheat was raised by W. A. Richardson on 3,900 acres of land in the Indian Territory, near Catoosa. Richardson had given two mortgages on the growing crop to the Bank of Seneca—one dated February 12, 1808, to secure a promissory note for \$1,500, maturing May 16th; the other dated April 19, 1898, to secure a promissory note for \$3,000, due 90 days after date; that is to say, July 19th. J. M. Berry, cashier of the bank, went to Catoosa on July 2d to look after the bank's security on receipt of information that some of the wheat had been shipped by Richardson. Before that date Richardson had employed the plaintiffs, a firm composed of O. W., L. W., and F. W. Hill, doing a threshing business under the style of Hill Bros., to thresh the crop. They had begun the work on June 22d, and had threshed about 5,000 bushels, as the fuller evidence discloses, when Berry appeared on the scene. At that time Hill Bros. had their machines in the field. Threshing was in full progress. Richardson had shipped several car loads of the cleaned wheat to St. Louis, and had some on hand. He agreed to pay the plaintiffs seven cents a bushel for threshing. Berry found Richardson in the wheat field near the machine, and had an interview with him, the result of which was that Richardson surrendered possession of the wheat to Berry as the bank's representative. This was done by the following indorsements, the first of which was made on the back of the mortgage dated February 12th, and the second on the back of the one dated April 19th:

"Possession of the within described property is hereby delivered to the Bank of Seneca, Mo., they, through their representative T. M. Reynolds & Co., to attend to the within threshing of the wheat and selling same and paying all further bills and expenses, receiving full possession of all sales until the indebtedness to the Bank of Seneca, Mo., is paid in full.

"Delivery possession of the cattle is also made; agreement upon my part to cut them out from other cattle is also made when requested to do so by the bank or its agent, Mr. Reynolds & Company.

"W. A. Richardson.

"Dated July 2, 1898, 4:45 p. m.

"Witness: [Signed] O. W. Hill."

"Possession of the within described property is hereby given in full to the Bank of Seneca, Mo., through its cashier J. M. Berry, who through himself or representative

is to attend to the further threshing of the wheat, loading and billing the same, and is to receive full proceeds of sale of wheat until all the indebtedness due said bank is paid in full and all the expenses of threshing, hauling, loading, freight, commission, labor and other things are paid."

When Berry took possession of the wheat, he first put the plaintiffs in charge as his agents, but the next day he again went to the field in company with T. M. Reynolds and Thomas Dougherty, a firm doing business at Catoosa under the style of T. M. Reynolds & Co., and on that date—July 3d—he took the wheat out of the hands of Hill Bros., and put it in charge of Reynolds & Co., as the bank's agents. At the same time Berry made the contract with the plaintiffs in regard to the threshing on which this action is founded.

The testimony for the plaintiffs is, in substance, that Berry said to O. W. Hill: "That wheat I put in your hands yesterday I will take out and put in Mr. Dougherty's hands. Go ahead with the threshing, and look to the Bank of Seneca for the pay, for we will pay you for the entire crop." Berry had previously notified O. W. Hill of the bank's mortgages, and that he was the cashier of the bank. Thereafter the plaintiffs continued the threshing, the wheat was shipped and sold by Reynolds & Co., and the proceeds applied to the payment of the indebtedness to the Bank of Seneca until July 15th, when that bank had realized enough money to discharge its notes. Meanwhile Reynolds & Co., as the bank's agents, had paid the plaintiffs on account of the threshing \$1,062. After the execution of the mortgages to the Bank of Seneca, Richardson had made a mortgage to Reynolds & Co., and still later, on July 15th, he gave another mortgage to the Bank of Coffeyville, Kan., of which J. T. Wettack was cashier. Richardson owed the Bank of Coffeyville, and Wettack went to the Indian Territory to look after the indebtedness held by that bank as Berry had gone to look after that owing to the Bank of Seneca. On July 15th an arrangement was made between the Bank of Seneca, Reynolds, and Wettack, as the representative of the Coffeyville Bank, by which the possession of the wheat was delivered to the latter concern, which was to be paid out of the proceeds of sales after all prior liens had been discharged. It is contended by the defendant that an agreement was made with Wettack that he should pay whatever expense was incurred thereafter for threshing the remainder of the wheat, and that this arrangement was communicated to and acquiesced in by the plaintiffs, who agreed thenceforth to look to the Bank of Coffeyville for payment, and not to look to the Bank of Seneca. Plaintiffs dispute this, and say they had no knowledge of any such agreement, and the evidence on the subject of whether they knew of it prior to August 9th is very conflicting. Some time afterwards the plaintiffs made a draft on the Bank of Coffeyville.

feyville for something over \$2,000, which circumstance is insisted on by the defendant as showing they looked to the Coffeyville Bank for their pay; but the testimony for the plaintiffs is that they were demanding payment from Reynolds & Co., as agents of the defendant, and were induced by them to make this draft on the Bank of Coffeyville, Reynolds & Co. representing that said bank would be sure to pay it, and thereby they (Reynolds & Co.) would recoup the \$1,062 which had been previously paid to plaintiffs, thus forcing the Bank of Coffeyville to bear the entire expense of the threshing.

On August 9th plaintiffs and Wettack had an understanding by which the latter agreed to pay for work done after that date, and the following memorandum was executed:

"August 9th, 1898.

"As cashier of the First National Bank of Coffeyville, Kansas, I agree that Hill Brothers may retain 7 cents per bushel for all wheat that they may thresh from this date of wheat belonging to W. A. Richardson and mortgaged to said bank, and may hold enough of said wheat to make them secure in the wheat threshed for said Richardson from this date.

"J. T. Wettack, Cashier.

"In Duplicate.

"I agree to the above contract.

"W. A. Richardson."

In addition to the above credit of \$1,062, defendant insists it should be credited with the sum of \$250, which Richardson had paid Hill Bros. before Berry took possession, but which Hill Bros. say was applied on a debt due for threshing oats for Richardson, instead of wheat. Defendant also says it is entitled to a credit of \$134, paid on some machinery for the plaintiffs; but this credit seems not to be insisted on seriously.

The answer, besides a general denial, sets up the taking possession of the wheat by Berry; that part of it had been already threshed under a contract with Richardson, but that none of the wheat theretofore threshed was ever applied to the payment of the defendant's notes; that Berry took possession for the bank, in order to sell such of the wheat as was necessary to pay its notes, and for no other purpose; that in pursuance of that purpose Reynolds & Co. were put in charge, with an instruction to hold the wheat only until the bank's notes were paid, and that thereafter the bank would have no further connection with it; that while the wheat was in the possession of Reynolds & Co. as defendant's agents, they not only paid out of the proceeds the indebtedness due the defendant, but paid the plaintiffs the full amount due for threshing all the wheat which went to pay the defendant's notes—that is to say, during the time the control of the crop was with the defendant, amounting to \$1,064, or the cost of threshing 15,200 bushels of wheat; that afterwards Reynolds & Co. notified the plaintiffs of the discharge

of the bank's indebtedness, that it had relinquished the control of the crop, and had nothing further to do with the threshing. The answer further denies that the plaintiffs made any contract whatever with the bank for threshing the wheat, and pleads that the alleged contract on which the plaintiffs founded their action is within the statute of frauds, because it includes a promise to answer for the debt Richardson had incurred for threshing prior to the time Berry took possession. The replication was a general denial.

The instructions will be noticed as far as seems necessary in reviewing the assignments of error.

The jury first returned a verdict in this form: "We the undersigned jurors, find for the plaintiff the whole amount, less what has been paid." The court refused to receive that informal verdict and so informed the jury. The deputy sheriff in charge of the jury swore he reported to the judge, after the later refused to receive the first verdict, that the jury said they could not accurately remember the figures given in the evidence, and asked for further instructions, whereupon the court directed him to tell the jury he did not have any further instructions to give, and they would have to do the best they could with what they had. Finally, they returned a verdict in favor of the plaintiffs for \$1,135.96. Judgment was entered accordingly, and defendant appealed.

Much of the argument addressed to us in support of the contention that this case should be reversed goes rather to the weight of the evidence—with which we have nothing to do—than to errors assigned because of rulings made at the trial. On the former appeal we held there was evidence that Berry acted within the scope of his authority in contracting with the plaintiffs, and that the bank approved and adopted his acts. The full evidence adduced during the second trial vindicated that conclusion, and showed beyond question that, in the main, Berry's course was both authorized and ratified. Having already ruled that plaintiffs made a *prima facie* case, we accept the jury's finding, as implied in their verdict, that the contract for threshing which plaintiffs testified Berry entered into with them was, in fact, made. But said contract undertook to bind defendant to pay, not only for threshing done pursuant and subsequent to it, but for threshing previously done under the contract with Richardson, and defendant challenged the validity of the agreement as including an oral promise by the defendant to pay Richardson's debt. The learned circuit judge declined to accept that construction, holding the agreement lay outside the statute of frauds, and, we think, rightly.

In the first place, the evidence shows that the \$1,062.04, which both sides admit were paid on plaintiffs' account, exactly compensated for all the work done from the begin-

ning to July 9th, including what was done prior to the 3d, when Richardson turned over the crop. The total wheat cleaned to July 9th was 15,172½ bushels, which, at seven cents a bushel, amounted to \$1,062.04. Thus the evidence certainly tends to prove, if it does not conclusively prove, that both parties fully performed the agreement to pay for the work done while Richardson was in possession; and it would be going a long way to hold that, after the part of the contract claimed to be a promise to answer for another's debt was executed, it still had power to invalidate the part in which the defendant is conceded to have promised to pay only its own debt. Further, the Hills swore that Berry proposed, if they would go on with the threshing, to pay them for cleaning the entire crop. They accepted his proposition, and continued the work. That was no special promise to answer for the debt of another, but a direct agreement on the part of the bank, through its agent, to pay plaintiffs a stipulated compensation for a service to be rendered. It was supported by an ample consideration, and was none the less valid because incidentally it would result in discharging Richardson's indebtedness for prior threshing. *Yeoman v. Mueller*, 33 Mo. App. 343; *Winn v. Hillyer*, 43 Mo. App. 139; *Walther v. Merrell*, 6 Mo. App. 370; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Clifford v. Luhring*, 69 Ill. 401. The contract in this case, so far as appears, was made for the exclusive benefit of the bank, and it received the benefit in the continued work of the plaintiffs. In such a case it is wholly immaterial that, in consequence of the performance of the contract, the debt of some one else will be paid, and immaterial, too, whether or not the original debtor remains liable. *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317; *Dyer v. Gibson*, 16 Wis. 560; *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459; *Calkins v. Chandler*, supra; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Cleveland v. Farley*, 9 Cow. 639; *Mallory v. Gillett*, 21 N. Y. 412; *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Stewart v. Campbell*, 58 Me. 439, 4 Am. Rep. 296; 1 *Reed on Stat. Frauds*, § 570; *Brown, Stat. Frauds* (5th Ed.) § 165. Several of the cases we have cited, notably *Yeoman v. Mueller*, *Winn v. Hillyer*, and *Walther v. Merrell*, which were decided by this court, are in no respect different from the case at bar, so far as the point in hand is concerned. If the defendant agreed to pay plaintiffs for threshing the entire crop of wheat in consideration of their continuing to thresh after defendant got possession and plaintiffs performed the contract, the defendant is as much liable for the work done before it got possession as for that done afterwards.

There was, as stated, an acute conflict in the testimony as to whether plaintiffs were

apprised that the defendant had realized enough cash by July 15th to satisfy its demands, and had then surrendered possession of the remaining wheat to Wettack for the Coffeyville Bank, with the understanding that he would pay for subsequent threshing; also as to whether plaintiffs assented to said arrangement, and agreed to thereafter look to Wettack for payment. An issue was bound to be submitted to the jury as to those matters; and in three instructions requested by the defendant, and presenting the issue in as many aspects, the trial court carefully advised the jury that, although they found the contract was made between plaintiffs and defendant as asserted by the former, yet, if they found that subsequently said arrangement was made with Wettack, and plaintiffs knew of and assented to it, they could not recover from defendant for wheat thereafter threshed. The same theory was embodied in the fourth instruction given at the plaintiffs' instance, and, indeed, was kept in view throughout the trial, with an exception which will be noticed presently. The evidence to support defendant's contention that plaintiffs agreed to look to Wettack for their pay after July 15th may be very strong, and we are not willing to deny that it is; but there was much countervailing testimony, and the verdict of the jury is the end of the matter. Even Berry did not testify positively on the subject, but swore he left Catoosa on July 15th with the impression that Wettack was to pay plaintiffs for subsequent work. Defendant's third refused instruction was but a repetition of those given, so it was not error to refuse it.

Certain instructions given for the plaintiffs are questioned as telling the jury that, if they believed the defendant contracted to pay for the threshing, as contended by the plaintiffs, "on taking possession of the wheat," etc., thus assuming that the contract was made when possession was taken, whereas it was made the next day, if at all. That objection is hypercritical. The instructions did not make plaintiffs' right to recover turn on a legal connection between the acquirement of possession by the defendant and its alleged agreement with the plaintiffs, but on proof of said agreement; and no harm could have resulted from the slight confusion of dates in the instructions.

The first refused instruction, in effect, construed the contract between the parties to entitle plaintiffs to pay for threshing only so much wheat as was needed to satisfy its mortgages. Perhaps that charge had better be quoted: "The court instructs the jury that in this case the plaintiffs were entitled, under the terms of the arrangement by which Berry took control of the wheat as he found it in the Indian Territory, to have Reynolds & Co. account to them for the threshing of a sufficient amount of the wheat to satisfy the Seneca Bank's mortgage debts and the expenses of threshing and marketing the

wheat; and if the jury believe from the evidence that the plaintiffs did receive accounting and settlement from Reynolds & Co. for threshing of such sufficient amount of the wheat to satisfy the bank's debts and expenses, then that contract must be taken as having been fulfilled, and plaintiffs cannot recover any more from defendant on account thereof." By what warrant the trial court could have charged that an agreement by the defendant to pay for threshing the entire crop only entitled plaintiffs to pay for threshing part of it, we know not. The argument advanced by the defendant on this point is that the agreement between Berry and Richardson, as shown by the memoranda signed by the latter when he turned over the wheat, authorized Berry to incur expense only so far as was necessary in order to market enough wheat to satisfy the bank's mortgages, as the plaintiffs knew. That argument calls in question Berry's authority to represent the bank, or at least the extent of it; although his authority was conceded on the second trial, and the case defended along other lines. It is an irrelevant argument, however, for plaintiffs' case does not depend on the arrangement by which Berry took possession of the wheat, but on the arrangement he made with them. Their contract could only be fulfilled by payment in full for the threshing covered by that arrangement, whether in fact defendant had to have that much wheat cleaned to discharge its notes or not. The instruction was correctly refused.

The second refused instruction requested the court to charge that neither Reynolds nor Dougherty had any authority to make contracts or agreements for the Bank of Seneca, or make admissions or promises for it, but only to perform such part of the agreement made by Berry as he intrusted to them. But how would plaintiffs know what part he intrusted to them? Berry testified he told the plaintiffs, in answer to a question as to how they would get their pay if they continued to thresh pursuant to his request, that T. M. Reynolds & Co. would be in full charge, and would look after all the details. Besides, the memorandum written on one of the mortgages when the bank took charge of the wheat provided that the bank, through its representatives, T. M. Reynolds & Co., would attend to the threshing of the wheat, selling the same, and paying expenses; and thereafter those agents conducted all the business connected with cleaning, shipping, and marketing the wheat, and paying the expense entailed. Said second instruction bore on certain testimony which tended to prove Reynolds and Dougherty had at different times made statements the tenor of which was that the bank had agreed to pay for the threshing, and would have to pay for it. Part of this testimony came out in showing why Hill Bros. kept their threshing account against Richardson instead of the Bank of Seneca—a fact which the defendant sought to utilize as

evidence of its contention that plaintiffs had no contract with it. The bookkeeper of the plaintiffs testified he kept the account that way by direction of Dougherty, who said that Reynolds & Co. would see the plaintiffs were paid, and that the bank was going to pay for the threshing. The evidence that plaintiffs' account was kept in Richardson's name by request of defendant's agents was certainly competent when defendant was trying to make use of that circumstance in support of its defense. Said declarations of Reynolds and Dougherty were made while they were still acting within the apparent scope of their agency, if the testimony of the plaintiffs that they had had no notice of the bank's relinquishing possession of the wheat on July 15th is true, which was for the jury to decide. Berry himself swore he told the plaintiffs Reynolds & Co. would look after the threshing, and pay for it; so the admitted declarations and promises pertained directly to their agency, and fell within their authority as Berry had explained it to the plaintiffs. The evidence was, therefore, manifestly competent. *Meagher v. Railroad*, 14 Mo. App. 499; *Peck v. Ritchey*, 66 Mo. 114; *Eagle Construction Co. v. Railroad*, 71 Mo. App. 626.

The fifth refused instruction predicates a defense against plaintiffs' demand for work done before the bank got possession, on the ground that, if Berry promised to pay for said work, the understanding was not put in writing. We have already discussed that phase of the case.

For the plaintiffs the court instructed the jury that, if they believed the bank, on taking possession of the crop through its cashier, Berry, arranged with the plaintiffs to continue the threshing, and promised to pay for threshing the wheat, they would find the issues for the plaintiffs, less the amount already paid them, to wit, \$1,062.04; that, if they found from the evidence the price agreed on between the plaintiffs and defendant was seven cents a bushel, that fixed the liability of the defendant at that price, but, if no specified price was agreed on, then the plaintiffs, if entitled to recover, should receive whatever the threshing was reasonably worth, not to exceed seven cents a bushel. That charge is challenged because of the limitation of the amount of payments the jury might allow the defendant. Defendant asserts that Richardson made a payment of \$250 on the threshing of the wheat before Berry took possession, which was not included in the \$1,062 plaintiffs admitted receiving. Richardson testified that about two weeks before the plaintiffs began to thresh he paid them "\$250 to apply on the threshing account." This money was advanced to enable plaintiffs to pay freight and other expenses of shipping their machinery. But the plaintiffs had another account against Richardson at that time for threshing oats, and their testimony is that this money was applied as a

credit on that account, and not on the one he owed for wheat threshing, and that, therefore, Richardson received the benefit of it. We find no testimony in the record to contradict what the plaintiffs swore about this payment, for Richardson did not testify that he made any application of the payment, and so, of course, plaintiffs had the right to apply it to either account. *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96. If there had been testimony to prove the \$250 was paid for threshing wheat, and directed to be applied on that indebtedness, an error would have been committed in the instruction.

Reynolds & Co. rendered statements of account to plaintiffs occasionally, and the trial court admitted in evidence two items from those accounts. Defendant assigns this for error, because the entries were made subsequent to the wheat passing out of its possession. Now, as heretofore stated, plaintiffs, on July 29th, made a draft of \$2,200 on the Bank of Coffeyville, to pay for the threshing, which defendant contends shows plaintiffs were, therefore, looking to that bank for their pay. Reynolds and Dougherty testified they had nothing to do with that draft, whereas the plaintiffs testified Reynolds and Dougherty induced them to make it. The admitted items corroborated the plaintiffs, as they showed the draft was credited to defendant on Reynolds & Co.'s books when drawn, and charged to them when it was returned dishonored, thus tending to disprove the inference that plaintiffs recognized the Bank of Coffeyville as their debtor by making the draft on it.

Error was not committed in excluding the mortgage given by Richardson to Reynolds, as that was a transaction with which the plaintiffs had nothing to do; and, besides, the facts in regard to the mortgage got before the jury by verbal testimony.

As to the alleged error in giving an oral instruction to the jury after they had retired, suffice to say the court did not give any oral instruction. When a verdict was brought in without an assessment of damages, the court rightly refused to receive it, and told the jury they must calculate the amount plaintiffs were entitled to recover, but expressly refused to instruct them further.

Defendant insists plaintiffs were wrongly permitted to recover for work done after August 9th, when they knew Wettack had possession of the wheat, made an agreement with him that he should pay for subsequent threshing, and took the written permission to retain enough wheat to make them secure; and this point seems to be well taken.

Plaintiffs withheld two car loads of wheat, pursuant to that agreement, which they testified they finally let go on the promise of Reynolds & Co. that it should be shipped to the Bank of Seneca, and the threshing paid for. This matter was obscure when the case was here before, as the contract of August 9th was not then in the record. The wheat

in those cars belonged to S. P. Race, not to Richardson, and Race had given the Bank of Seneca a mortgage on it, but it was mingled with Richardson's, and plaintiffs threshed it along with his. Plaintiffs' counsel argues from those facts that his clients are entitled to hold defendant for threshing the Race wheat, and also for all threshing done after August 9th. To recover for this extra threshing, plaintiffs were allowed to prove, over defendant's objection, another and different contract from the one pleaded in their petition, made with Reynolds and Dougherty, as follows: "Q. I will ask you, after August 9th, if you made this contract for wheat threshing you done after the 9th day of August? A. Yes, sir. Q. Tell the jury about that. A. We went down there, and found Mr. Race loading that wheat on there, and we wanted that wheat, and he said 'All right,' and we went on and told Reynolds and Dougherty, and they said, 'That wheat goes to the Seneca Bank,' and they said, 'You let that wheat go, and we will see that you get your money.' Q. You asked for it, and Race agreed to give it up to you? A. Yes, sir." That the wheat belonged to Race is immaterial: but it is material that plaintiffs recovered for threshing it and other wheat after August 9th, on which date, as their own testimony proves, they contracted with Wettack to pay for subsequent work, knowing that his bank had possession, and that the Bank of Seneca had nothing more to do with the wheat.

One of the Hills witnessed the memoranda creating Reynolds & Co.'s agency and confining it to the period that might elapse before the Bank of Seneca was fully paid. Plaintiffs' argument on this point is inconsistent with the fourth instruction they asked, which is as follows: "(4) If you find from the evidence that the defendant bank, on taking possession of the Richardson wheat under its mortgages, promised and agreed to pay for the threshing of the same—whether for all the wheat or only so long as the same was in their possession—then said bank is liable for all threshing until the plaintiffs were notified that the bank's mortgage was satisfied and defendant's possession terminated, and you should find for plaintiffs for such amount, less the amount paid on same, being \$1,062.04." That instruction propounds the theory that the plaintiffs' right to hold defendant for threshing ended whenever plaintiffs were notified the defendant's mortgages were satisfied and its possession of the crop terminated, and this was the theory of the trial. It is plain to us that error was committed in unguardedly admitting this evidence, the tendency of which was to bind defendant for threshing done after August 9th. But the quantity of wheat threshed after that date was definitely proven, to wit, 3,929 bushels; the cleaning of which, at seven cents a bushel, amounted to \$275, and this sum we will order remitted as the condition of affirmance.

This may be slightly unjust to the plaintiffs, for possibly the defendant ought to pay for threshing the Race wheat which it got; but the facts are not before us to enable us to decide that point, as it turns on whether there was authority given to Reynolds & Co. to act in reference to the Race wheat, or whether their action was ratified. Their original authority had expired, and therefore did not per se enable them to bind the bank.

If the plaintiffs will enter a remittitur within 10 days, the judgment will stand affirmed; otherwise it will be reversed, and the cause remanded to be retried. The costs of the appeal must be taxed against the plaintiffs.

BLAND, P. J., and REYBURN, J., concur.

P. M. BRUNER GRANITOID CO. v. KLEIN et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MECHANIC'S LIEN—NOTICE OF CLAIM—SERVICE ON EXECUTORS OF OWNER.

1. In a proceeding to enforce a mechanic's lien, notice of demand served on the two executors of the owner of the property as executors was sufficient to notify the four trustees vested with title to the property under the will, even if the trustees were the proper persons to be notified, where the executors were also trustees, and the will provided that a majority of the trustees could perform any act that the trustees were empowered to perform.

2. Rev. St. 1899, § 4212, provides that where a property owner, who has contracted for an improvement, dies while there is a lienable demand outstanding against the property, his executors or administrators must be made parties to an action to enforce the lien, and that it is unnecessary to make his heirs or devisees parties, unless there is no executor or administrator. *Held*, that the executor, and not the trustees, to whom the property has been devised, are the proper parties on whom to serve notice of demand in a proceeding to enforce the lien.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by the P. M. Bruner Granitoid Company against F. B. Klein and Charles H. Peck's executors. From a judgment for plaintiff, defendant executors appeal. Affirmed.

S. T. G. Smith and T. S. Meng, for appellants. Alex. Young and Max Ruler, for respondent.

Statement of Facts and Opinion.

GOODE, J. The defendant Klein did the granitoid and concrete work in the basement of a building erected by Charles H. Peck on a lot in the city of St. Louis. The Bruner Granitoid Construction Company furnished Klein about 88 tons of crushed granite, of the value of \$228.50, which Klein used in doing the work, but did not pay for. The job was finished the latter part of June, 1899, and on the 3d day of the ensuing July Charles H. Peck, the owner of the property, died,

leaving a will, of which the defendants Stephen and John A. Peck qualified as executors July 14th. In October following, plaintiff filed a lien account in the office of the clerk of the circuit court of the city of St. Louis, having previously, and in due time, served notice in writing on Stephen and John A. Peck of its claim. This action was instituted to enforce that lien. Klein defaulted. The defense by the executors is that the will of Charles H. Peck vested the title to the property in four trustees, to wit, Stephen, John A., and Belle Peck and Rebecca Dusenberry, and that said trustees were not notified of plaintiff's demand.

The notice, as stated, was given to the executors of Charles H. Peck's will as such, but those executors were likewise two of the trustees appointed by the will. One clause of the will in regard to the duties of the trustees provides that a majority of them may perform any act which the trustees are empowered to perform except certain enumerated acts. Undoubtedly, the notice to Stephen and John A. Peck, although it was served on them as executors, sufficed to notify them as trustees, too (*Shaw v. Bryan*, 30 Mo. App. 523); and, as they constituted one-half of the whole number of trustees, we cannot see how any action could have been taken by the trustees in respect to the plaintiff's claim to the prejudice of the estate because notice was not served on the other two, granting, for the sake of argument, the trustees were the persons to notify. But we are of the opinion that the proper persons to notify were the executors of the will. The main object of the preliminary notice of a lienable demand which the statute requires a subcontractor to give to a property owner is to warn the latter against paying the original contractor while outstanding claims exist in favor of laborers and materialmen. *Henry v. Plitt*, 84 Mo. 237; *Fruin-Bambrick Const. Co. v. Jones*, 60 Mo. App. 1; *Miller v. Hoffman*, 26 Mo. App. 199. The debt to the original contractor is owed by the owner of the property, and becomes a demand against his estate if he dies while it is unpaid, which his executors must meet. They represent the deceased owner, and would seem to be the parties who ought to be notified. The general rule is that the notice must be given to the one who owned the property at the time the contract for the improvement was made. *Kuhleman v. Schuler*, 35 Mo. 142; *Brown v. Wright*, 25 Mo. App. 54; *Koenig v. Boehme*, 14 Mo. App. 593. And it has been held that, if the property is conveyed while the improvement is in progress, a notice to the grantee is not necessary. *Kuhleman v. Schuler*, supra; *Gale v. Blaikie*, 126 Mass. 274. The logical deduction from that rule is that the personal representatives of the owner after his death, who represent his estate, and are liable for what he owed for the improvement, should be notified of the claims of subcontractors, laborers, and ma-

terialmen, in order that said executors may be warned against paying the original contractor in full. But as the statute law now stands in this state, if a property owner who has contracted for an improvement dies while there is a lienable demand against his property outstanding, his executors or administrators must be made parties to an action to enforce the lien; and it is unnecessary to make his heirs or devisees parties unless there is no executor or administrator. Rev. St. 1899, § 4212. Hence, as Charles H. Peck's executors were not only liable to the original contractor for the cost of the improvement, but were subject to an action by the plaintiff, they unquestionably were entitled to notice of the plaintiff's claim.

It follows that there was no defense shown to the action, and the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

HEMAN v. FRANKLIN et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MUNICIPAL CORPORATIONS — ORDINANCES — SIDEWALKS — CONSTRUCTION — DEFENSES — SUBMISSION TO JURY — VERDICT — JUDGMENT — REVIEW.

1. Under St. Louis City Ordinance No. 16,630, providing that in certain districts new sidewalks constructed shall be of artificial stone, and that whenever a sidewalk in such district is out of repair, and is not repaired or rebuilt by the abutting owners after notice, the work shall be done under an annual contract for stone flagging, the determination of the question whether a sidewalk in such a district is out of repair is within the discretion of the municipal authorities; and the exercise of such discretion is not, in general, reviewable in an action on a special tax bill for relaying a walk, on the ground that the one replaced was in good condition.

2. Where, in an action on a special tax bill for relaying a sidewalk, defendant contended that the walk replaced was in good condition, and that the walk constructed was not laid in a workmanlike manner and was worthless, and the court erroneously submitted the first defense to the jury, a judgment on a verdict in favor of defendant, without showing on which issue it was based, could not be sustained.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by John C. Heman against Sara E. Franklin and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Stone & Slevin, for appellant. H. A. Loevy, for respondents.

Statement of Facts and Opinion.

GOODE, J. This is an action on a special tax bill for laying a granitoid sidewalk in front of a lot owned by Mrs. Franklin, one of the defendants, on Compton avenue, in the city of St. Louis. The work was done pursuant to Ordinance No. 16,630 of the city of St. Louis, which prescribed that in certain districts in the city all new sidewalks were

to be constructed of artificial stone, known as "granitoid." The ordinance also provided that, whenever a sidewalk in said district was out of repair, the street commissioner should notify the owners of the abutting property to have the same repaired or rebuilt, and, if they failed to do so, should cause the work to be done under the annual contract for stone flagging. Mrs. Franklin was notified to repair the brick sidewalk in front of the property in question, but neglected to do so. Plaintiff, in obedience to the order of the street commissioner, took up the brick walk, and in place of it laid a granitoid one, for which work this action was brought.

Two defenses were interposed: that the brick sidewalk which was torn up to make room for the granitoid was in good condition, and that the new granitoid, when laid, was so poor and fell so far below the specifications as to be worthless. Evidence was admitted which bore on both issues, and the court likewise submitted both to the jury by instructions. The jury were told, among other things, that if they believed that, at the time plaintiff was ordered to reconstruct the sidewalk in front of Mrs. Franklin's premises, there was a brick sidewalk there, in sound and perfect condition, and not in need of any repairs, the verdict must be for the defendant.

This case was tried in the circuit court before the publication of the decision of the Supreme Court in *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026, or that of this court in *Heman v. Ring*, 85 Mo. App. 231. Those two decisions maintain the proposition that it is for the municipal authorities of the city of St. Louis to say when a sidewalk therein is in such bad condition that it needs to be repaired or replaced, and when those authorities, in the exercise of their judgment and discretion, order an old sidewalk to be replaced by a new one, the property owner, generally speaking, cannot defend against the tax bill issued to pay for the new one on the ground that the replaced walk was in good condition. The very ordinance in question was considered in those two cases, and, as neither fraud nor legislative caprice appeared to be the cause of its enactment, was upheld as valid. It follows, as defendants' counsel concedes, that the court erred in instructing the jury the plaintiff could not recover if the jury found the brick sidewalk in front of Mrs. Franklin's lot was in good condition when the granitoid walk was ordered.

It is, of course, a defense if the granitoid work was worthless; and under the city charter the defendant has the right to show the new walk was not laid in a workmanlike manner, and thereby obtain an abatement, pro tanto, from the face of the tax bill. Charter St. Louis, art. 6, § 25 (Rev. St. 1899, p. 2513). But the jury must pass on that defense in this case, and it is impossible for us to know whether they found the issues for the defendants because the brick sidewalk

was good when removed, or because the grantold was worthless when laid. In *Heman v. Gerardi* (St. L.) 69 S. W. 1069, no exceptions were saved, and there was nothing for this court to review; but in the opinion there was an irrelevant remark in regard to the right of the plaintiff to recover on a quantum meruit, which should not be construed to deny the right of a defendant sued on a St. Louis tax bill to take advantage of the provision of the St. Louis charter above cited, as there was no need to decide the point in that case.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

RHINEHART v. NEW MADRID BANKING CO. et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

ATTORNEY AND CLIENT—AUTHORITY—RECEIPT OF MONEY—BANKS—DEPOSIT OF COLLECTIONS—EFFECT—NOTICE OF INDEBTEDNESS OF ATTORNEY.

1. An attorney of record who prosecutes a suit to judgment for his client has authority to receive the money due on the judgment.

2. Where an attorney collected money belonging to plaintiff as her attorney, and deposited the same to his credit in defendant bank, the relation of trust between plaintiff and the attorney did not pass to or charge the bank as trustee of the plaintiff in respect to the money so deposited.

3. Where plaintiff's attorney collected money for her which he deposited to his credit in defendant bank, and thereafter gave plaintiff a check on the account for the amount due her, less his fees, the fact that plaintiff was unsatisfied with the settlement obtained, and notified the cashier of the bank that there was yet due her \$117 of the money so deposited, did not entitle her to sue the bank to recover the amount so claimed.

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by M. B. Rhinehart against the New Madrid Banking Company and others. From a judgment in favor of plaintiff, defendant bank appeals. Reversed.

The facts in this case, briefly stated, are that Robert Rutledge, an attorney at law, prosecuted a suit for the plaintiff, and recovered a judgment in her favor for \$2,142.35, which amount he collected and deposited in the defendant bank to his individual credit. Afterwards he gave a check to plaintiff against the deposit for \$1,792.35, which plaintiff presented to the bank, and had cashed. At the time she cashed the check she notified the cashier that there were yet \$117 of the money deposited by Rutledge due to her, and that Rutledge had overcharged her that amount as attorney's fee. The \$350, the balance of the judgment collected by Rutledge and remaining to his credit in the bank, he claimed

for fee for his services, and to reimburse him for money he had paid out as expenses in the prosecution of plaintiff's lawsuit. This suit was brought against both the bank and Rutledge. A demurrer was interposed to the petition by defendants on the ground that the petition failed to state any cause of action and that there was a misjoinder of parties defendant. Plaintiff thereupon dismissed her suit as to Rutledge, and the demurrer was overruled as to the bank. The bank filed an answer denying generally the allegations of the petition. The issues were submitted to the court, who gave plaintiff judgment, whereupon defendant appealed.

Rutledge & Miller, for appellant. J. V. Conran, for respondent.

BLAND, P. J. (after stating the facts). An attorney of record who prosecutes a suit to judgment for his client has authority to receive the money due on the judgment. *Acock's Adm'r v. McBroom*, 38 Mo. 342; *Carroll County v. Cheatham et al.*, 48 Mo. 385. The depositing of the money by Rutledge in the bank created the relation of debtor and creditor between him and the bank (*Paul v. Draper*, 73 Mo. App. 566), and it was no concern of the bank's that Rutledge had collected the money as attorney to plaintiff. His trust relation to the plaintiff did not pass over to nor charge the bank as trustee of the plaintiff in respect to the money deposited by Rutledge. Plaintiff, by a proper suit in equity, might have stopped the money in the hands of the bank, and subjected it to her claim, and recovered the fund itself. But there was no contractual relation, in respect to the money, between her and the bank, and she was not entitled to a money judgment in her suit at law against the bank.

The judgment is reversed. All concur.

SMITH v. H. D. WILLIAMS COOPERAGE CO.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

BILL OF EXCEPTION—EXTENDING TIME FOR FILING—PRESUMPTION—TAX SALE—RECOVERY OF LAND—LIMITATIONS—REIMBURSEMENT FOR TAXES.

1. Though an order in vacation extending the time for filing a bill of exceptions does not show for what cause the extension was granted, it will be presumed to be "for good cause shown," as authorized by Rev. St. 1899, § 728.

2. A tax deed, which on its face shows that two tracts of land were sold at one time and for a gross sum, is void, under Act March 30, 1872, § 189 (2 Wag. St. p. 1193), requiring each tract to be offered separately.

3. A tax deed void on its face will not set in motion the statute of limitations of three years (Act March 30, 1872, § 221; 2 Wag. St. p. 1207) for recovering land of a tax purchaser.

4. The provision of Act March 30, 1872, § 219 (2 Wag. St. p. 1206), for the purchaser of land for taxes holding the land till remunerated for taxes, etc., applies only when, in a suit in

¶ 1. See Attorney and Client, vol. 5, Cent. Dig. § 204.

ejection, the owner succeeds in recovering possession from the person in possession under a tax deed.

Appeal from Circuit Court, Butler County; Jas. L. Fort, Judge.

Action by John N. Smith against the H. D. Williams Cooperage Company. Judgment for plaintiff. Defendant appeals. Reversed.

The suit was begun before a justice of the peace to recover one car load of stave bolts, alleged to be of the value of \$75, and alleged to have been shipped to defendant from Hendrickson by one Robert Byrnett on or about the 1st day of December, 1900. After the service of summons on defendant, but before the day set for trial, defendant filed the following affidavit with the justice: "Now comes John Runnette, in the above-entitled cause, in behalf of defendant herein, and says that the timber in question was cut on the land belonging to him, and that he had sold said timber to Robert Byrnett, the grantor of defendant herein, and that the said J. N. Smith does not own the land from which said timber was cut, and the question to be decided in this cause is one affecting the title to the land on which said timber was cut. John Runnette, per M. R. Lare, Agt."—and moved that the cause be certified to the circuit court, which was done. In the circuit court the issues were submitted to the court, sitting as a jury.

Plaintiff, to sustain the issues on his part, offered the following evidence:

First. The evidence of plaintiff, who testified as follows: "I am in possession of the north half of the northeast quarter of section twenty-eight, and the north half of the northwest quarter of section twenty-seven, township twenty-six north, range five east. The stave bolts replevied in this action were made by W. R. Byrnett from white oak trees that were growing upon that tract of land, and the staves, when made, were sold by Byrnett to the defendant. The bolts sued for were worth more than seventy-five dollars. The timber was cut without my knowledge, permission, or consent. I have claimed to own the land since I purchased at tax sale in September, 1878. I paid the taxes one or two years, and would have paid all of the taxes, but found, on application to the collector, other parties had paid them. The land from which these stave bolts were cut adjoins my home place, upon which I have lived for forty years. My home place is the northeast quarter of section twenty-seven, township twenty-six north, of range five east. Since I purchased at tax sale, in 1878, I have used the land that I then bought for the purpose of cutting wood for fuel and fence rails, in connection with my home place—for all such purposes as land not inclosed or improved is usually used in connection with other land. When the parties who cut this timber, which was afterwards replevied, were cutting, I went to them and told them not to cut; that the land was

mine, and not to move the timber." On cross-examination the plaintiff testified: "I neither own nor claim any land in section twenty-eight, other than the north half of the northeast quarter. That on the north half of the northwest quarter of section twenty-seven, and the north half of the northeast quarter of section twenty-eight, township twenty-six north, range five east, there was never any improvement, inclosure, or structure, but the land was and always has been quite wild. I claim title to the land from which this timber was cut by virtue of a tax deed dated September 17, 1878, made by the state of Missouri, through Charles W. Addy, collector of Butler county, and recorded September 20, 1878, in Book M, at page 213. I have no other claim on the land or timber."

Second. The following tax deed:

"Know all men by these presents, that, whereas at the July adjourned term, 1875, of the county court of Butler county, Missouri, a judgment was obtained in said court in favor of the state of Missouri, against the following described tract of land, situated in said county of Butler and state of Missouri, viz:

No. of Tract	Quantity		Parts of Sections, number of Surveys, Towns, Cities and Additions.	Section.	Township.	Range.	Years for which taxes are due	Amt. of taxes, interest, costs and penalties.
	Acres	100ths.						
1	80		N $\frac{1}{2}$ NW $\frac{1}{4}$	27	26	5	1874	\$3.97
2	80		N $\frac{1}{2}$ NE $\frac{1}{4}$	28	26	5	1874	2.86
								\$7.83

"For the sum of money set opposite each tract of land respectively, in the above tabular statement, being the amount of taxes, interest and costs assessed upon said tracts, respectively, for the years set forth opposite each tract in the above tabular statement, and amounting in the aggregate to seven dollars and eighty-three cents. And, whereas, on the fifth day of October, A. D. 1875, Charles W. Addy, collector of the county aforesaid, by virtue of a special execution, issued out of the county court of the county aforesaid, dated the thirty-first day of August, A. D. 1875, and to the collector of said county directed, did expose to public sale, at the courthouse door in the county aforesaid, in conformity with all the requisitions of the statute, in such case made and provided, the tracts of land above described, for the satisfaction of the judgment so rendered as aforesaid. And whereas, at the time and place aforesaid, John N. Smith, of the county of Butler and state of Missouri, having offered to pay the aforesaid sum of seven dollars and eighty-three cents for all of the first tract, above tracts or parcels of land, to wit:

"The north half of the northwest quarter of section twenty-seven (27) and the north.

half of the northeast quarter of section twenty-eight (28) all in township twenty-six (26) range five (5) east, which was the last quantity bid for. The fractional portion of each above-described tract was stricken off and sold to John N. Smith.

"Now therefore, I, Charles W. Addy, collector for Butler county, for and in consideration of the premises and the sum of seven dollars and eighty-three cents, to the collector of said county as aforesaid, in hand, paid by the said John N. Smith at the time of the aforesaid sale, and by virtue of the statute in such cases made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said John N. Smith, his heirs and assigns, the above-described tract of land, viz.:

No. of Tract.	Acre.	1000ths.	Parts of Section, number of Surveys, Towns, Cities and Additions.	Section.	Twp.	Range.
80 80			N $\frac{1}{4}$ NW $\frac{1}{4}$ N $\frac{1}{4}$ NE $\frac{1}{4}$	27 28	26 26	5 5

"To have and to hold unto John N. Smith and his heirs and his assigns forever; subject, however, to all rights of redemption by law.

"In witness whereof, I, Charles W. Addy, collector as aforesaid, by virtue of this authority aforesaid, have hereunto subscribed my name and affixed my seal this 7th day of September, A. D. 1878.

"[Seal.] Charles W. Addy,
"Collector of Butler County."

The deed was duly acknowledged, and was on September 30, 1878, filed for record.

Defendant objected to the reading of the deed in evidence for the following reasons: "Because the said deed is void on its face and confers no title to the plaintiff. Because the said deed shows on its face a single sale in bulk of two separate tracts of land, situated in different sections, or, if only tract were sold for the price named, then such sale is without authority of law and is void. Because the deed is void for want of sufficient description"—which objections were by the court overruled.

At the close of plaintiff's evidence the defendant offered the following declaration of law, which the court refused: "The court declares the law to be that, under the pleadings and the testimony, the plaintiff cannot recover, and the finding must be for the defendant."

Defendant offered and read in evidence a patent from the United States to Peter Meyer, dated September 10, 1859, conveying the north half of the northwest quarter of section 27, and the north half of the northeast quarter of section 28, township 26, range 5 east, and mesme conveyance down to John

Runnette, showing that he acquired title to all of said lands on October 16, 1888.

W. R. Byrnett, a witness for defendant, testified as follows: "I purchased the white oak timber standing on the north half of the northwest quarter of section twenty-seven, and the north half of the northeast quarter of section twenty-eight, township twenty-six north, range five east, from John Runnette, through his agents, M. R. Lare and George Seebick, and some of the property replevied herein was manufactured from timber cut by me on said land, and the staves made therefrom were sold and delivered by me to the H. D. Williams Cooperage Company, the defendant, and the said staves so made and sold were worth less than forty dollars."

Defendant at the close of all the evidence asked the court to declare the law as follows, all of which the court refused:

"Now, at the close of all the testimony in the case, the court declares the law to be that, under the pleadings and testimony, the plaintiff is not entitled to recover, and the finding must be for the defendant.

"(1) The court declares the law to be that the legal effect of the deeds read in evidence is to vest in John Runnette the legal title to the north half of the northwest quarter of section twenty-seven, and the north half of the northeast quarter of section twenty-eight, township twenty-six, range five east.

"(2) The court declares the law to be that if the court, sitting as a jury, should find for the plaintiff, then in assessing the value of the property the court should find the value of the timber in controversy as it stood in the tree, and not after it was manufactured into stave bolts, either at Hendrickson or at the place of delivery to the defendant, namely, Poplar Bluff."

No other instructions were asked or given. The court rendered judgment for plaintiff for \$40. After taking the necessary steps to preserve its exceptions, defendant appealed.

Wm. N. Barron, for appellant. John G. Wear, for respondent.

BLAND, P. J. (after stating the facts). 1. The time for filing bill of exceptions was extended by an order of the court from June 15, 1901, to August 17, 1901; and afterwards, by successive orders of the judge made in vacation, the time was extended to April 14, 1902. The bill of exceptions was filed March 31, 1902. The orders made in vacation by the judge, extending the time in which to file the bill of exceptions, are in the following form: "Now at this day it is by the judge of the Butler county circuit court, in vacation, ordered that the time heretofore allowed the defendant for filing its bill of exceptions be extended for a further period of sixty days from and after the expiration of the time heretofore allowed for filing bill of exceptions herein." No written application was made by defendant for these orders. For the rea-

son that the orders themselves, nor any papers accompanying them, show for what cause, or that for good cause, the time in which to file the bill of exceptions was extended, respondent contends they are void. Section 728, Rev. St. 1899, provides that the bill of exceptions may be written and filed during the term of court at which the cause was tried, or within such time thereafter as the court may, by order entered of record, allow, and that the time may be extended by the court or judge in vacation "for good cause shown." The power of the judge to extend the time in which to file a bill of exceptions, whether the order therefor be made in vacation or in term time, is statutory. When made in vacation, it should show, either upon its face or by its file marks, that it was made at a time when the judge possessed the authority to make it. *Mitchell v. Williams* (St. L.) 79 Mo. App. 389. So long as the authority to make the order continues in the judge, his jurisdiction to make it is as full and complete in vacation as in term time. The power is not one to be exercised arbitrarily, but, in the language of the statute, "for good cause shown." The statute leaves the propriety of making the order to the sound discretion of the judge, and when he exercises that discretion the presumption, in the absence of any contrary showing, is that he did not abuse it. *State v. Lord*, 118 Mo. 1, 23 S. W. 764; *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; *City of St. Joseph, to Use of Gibson, v. Farrell*, 106 Mo. 437, 17 S. W. 497; *State ex rel. Board of Ed. v. Wayne County Court*, 98 Mo. 362, 11 S. W. 758. The several orders extending the time for filing bill of exceptions were made at times when the court or judge had jurisdiction to make them, and the presumption will be indulged that they were made "for good cause shown."

2. The fact that the defendant demurred to the evidence at the close of plaintiff's evidence, and again at the close of all the evidence, raises the question as to the validity of plaintiff's tax deed. The deed was made under the revenue laws of March 30, 1872. Section 217 of the act of 1872 (2 Wag. St. p. 1205) prescribes the form of the deed to be executed by the collector. The deed read in evidence attempted to follow the statutory form, and, in the main, did so. But it is fatally defective in that it shows affirmatively upon its face that in making the sale the collector did not comply with section 189 of the act, which requires that the "collector shall offer for sale publicly, separately, and in consecutive order, each tract of land, or town lot, or city lot." The deed, on its face, shows that both 80-acre tracts were sold at one time, and for the gross sum of \$7.83. In *Allen v. Buckley*, 94 Mo., lot. cit. 160, 7 S. W. 10, the Supreme Court, commenting on a deed conveying more than one tract of land, made under the revenue laws of 1872, said: "When more than one tract is included in the deed,

it should show, either expressly or by necessary implication, the sale of each tract separately for its own tax. For this reason, if for no other—that the deed does not show this—the court was justified in holding it to be invalid." *Black on Tax Titles* (2d Ed.), at section 260, says: "When the taxes are assessed to different persons, or upon different and distinct interests, or separate lots or parcels, the officer cannot legally advertise and sell the whole of a tract, including the several interests or lots distinctly and separately taxed, or such portion of the same as shall be necessary to pay the taxes, but each interest or lot must be separately advertised and sold for the payment of that tax only for which it was liable; otherwise the whole sale will be void." In support of the text the author cites in a footnote numerous cases from many states.

3. Section 221 of the act of 1872 provides that any suits against the tax purchaser to recover land shall be commenced within three years from the time of recording the tax deed. It is contended by respondent that he was entitled to hold the land under this special statute of limitations. It has been repeatedly held that a tax deed void on its face will not set this statute in motion. *Mason v. Crowder*, 85 Mo. 529; *Pearce v. Tittsworth*, 87 Mo. 635; *Pitkin v. Reibel*, 104 Mo. 505, 16 S. W. 244.

4. Plaintiff further insists that he is entitled to hold the lands until he is remunerated for the taxes, etc., he has paid on them, and invokes the equitable provision of section 219 of the act. The equity of this statute can only be applied when in a suit in ejectment the owner succeeds in recovering the possession of the lands from the person in possession under a tax deed. This is not such a suit, and, besides, the evidence discloses that plaintiff was never in the actual possession of the land, nor was he constructively possessed of it by virtue of a valid tax deed.

It follows that defendant's demurrer to plaintiff's evidence should have been sustained. The judgment is reversed. All concur.

HILL-O'MEARA CONST. CO. v. HUTCHINSON et al.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MUNICIPAL CORPORATIONS—PAVING—SPECIFICATIONS—ALTERATION—OBJECTIONS—ESTOPPEL—SPECIAL TAXES—CONTRACT—COMPLETION OF WORK—TIME—DEFECTIVE CONSTRUCTION—DEFENSES—GENERAL ISSUE.

1. Under St. Louis City Charter, art. 6, § 25 (Rev. St. 1899, p. 2513), providing that the party charged with payment of a tax bill may plead in reduction of the amount that the work was not done in a workmanlike manner, an abutting owner, assessed for street paving, is entitled to allege as a defense the contractor's failure to lay the paving according to the contract.

*Rehearing denied March 31, 1903.

2. Where a contract for street paving required the contractor to warrant the pavement for one year after its completion, and in an action on a special tax bill for the improvement defendant alleged defective construction of the work, evidence concerning the condition of the pavement during the first year after it was laid was admissible.

3. Where the petition in an action on a special tax bill alleged that the work was completed "in the manner" prescribed by the contract, a general denial was not sufficient to raise an issue that the work was not completed within the time required.

4. Where a city ordinance directing an improvement, fixed no time for its completion, but the contract fixed a time limit, and contained a proviso that the contractor should suffer a per diem penalty for failure to complete within the time, a tax bill against an abutting owner was not void for the contractor's failure to complete the improvement in time if it was finished within a reasonable time.

5. Prior to the paving of a street, the abutting owners petitioned the city for permission to lay stone sidewalks 15 feet in width, with a roadway of 30 feet, which was in contravention of the general city ordinance, requiring 60-foot streets to have 20-foot sidewalks and a roadway 36 feet wide. Such petition was granted and the sidewalk constructed. The roadway was thereafter ordered to be paved to a width of 36 feet, when the owners, including defendants, protested. After the making of the contract, a special ordinance was passed, reducing the roadway to 30 feet. In an action on a special tax bill for the paving it was shown that defendants joined in the protest against the widening of the roadway, and did not object to the width of the pavement after the change, but did object to the kind of material used. *Held*, that whether defendants were estopped to defend on the ground that the pavement was 30 instead of 36 feet wide was for the jury.

Appeal from St. Louis Circuit Court; J. A. Talty, Judge.

Action by the Hill-O'Meara Construction Company against Sarah L. Hutchinson and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

S. T. G. Smith and T. S. Meng, for appellants. Collins & Chappell, for respondent.

Statement of Facts and Opinion.

GOODE, J. In this case, which is on a special tax bill issued for paving and otherwise improving a portion of Taylor avenue, in the city of St. Louis, only three defenses require our attention, although others were made in the court below. Those three defenses, as stated by the appellants, are that the work and materials were defective and insufficient, of no benefit to appellants' property, and did not comply with the contract between the city and the respondent; that the improvement was not finished within the time limit prescribed by the ordinance ordering it; and that, after said ordinance had been enacted, and the contract for the paving let to the respondent, another ordinance was passed, by which the width of the roadway to be paved was reduced from 36 to 30 feet.

The defense based on the alleged failure of respondent as contractor to lay the paving according to the contract was preferred

by the answer, and is allowable, as the charter of the city of St. Louis provides that a party charged with payment of a tax bill may plead in reduction of its amount that the work mentioned in it was not done in a good and workmanlike manner. St. Louis Charter, art. 6, § 25 (Rev. St. 1899, p. 2513). The petition alleged the paving was done in a good and workmanlike manner. The answer denied this, and also specially pleaded, as stated above, that the work was defective and insufficient. The contract for the improvement contained a clause by which the Hill-O'Meara Construction Company warranted the pavement for one year after its completion, and bound itself for the expense of repairs which might become necessary on account of imperfections in the work or materials in that time. Said contract, in conformity to the city ordinance, also required the construction company to pay \$200 into the city treasury to be used for making such repairs, and this condition was complied with by respondent.

To support the defense of defective construction, certain questions were asked of witnesses concerning the condition of the pavement at the time of the trial and during the first year after it was laid. These questions were objected to on the score that its condition at the time of the trial, several years after it was put down, was immaterial, while its condition during the first year, in view of the above stipulation of the contract, was a matter between the city and the contractor. The objections were sustained, but the circuit judge said appellants might show the contractor did not live up to the contract. Those rulings were inconsistent. Evidence of the condition of the pavement when the trial occurred was remote, but its condition during the first year it was down was relevant; because one can readily see that its condition then might have been such as tended to prove, or, indeed, conclusively proved, it was not laid in a good and workmanlike manner. The fact that the construction company was bound to repair during the first year did not justify the exclusion of the testimony in question. That stipulation for the benefit of the city which pays for repairs out of public funds in no way subtracts from a property owner's charter right to plead bad construction in reduction of the amount of a tax bill. Error was committed in refusing appellants' offer to prove the condition of the pavement during the first year it was in use.

So far as appears, the ordinance ordering the improvement fixed no time for its completion, but the contract between the city and the construction company required the respondent to begin work in one week after written notice to do so was given by the street commissioner, and carry it on regularly and uninterruptedly, unless otherwise ordered, with such force as to insure its completion in six weeks thereafter. The street commissioner notified the construction com-

pany on April 17, 1897, to begin work in one week, and complete the improvement by June 8th. The answer set up no defense based on the failure of the construction company to finish in time, unless that defense is made by the general denial of the allegations of the petition, one of which was that the work was done in a good and workmanlike manner, with the material and in the manner prescribed by the contract. But the general denial did not contain this defense, for it would be a perversion of language to say the allegation of the petition that the work was completed in the manner prescribed by the contract means it was completed within the time limited. Appellants asked permission during the progress of the trial to amend their answer in this regard, which request was denied, and that ruling is now said to have been an abuse of judicial discretion. We would not reverse the judgment on that ground, but, as the case will probably be retried, we refer to the case of *Heman v. Gilliam* (Mo. Sup.) 71 S. W. 163, in which it was decided that where a city ordinance directing an improvement fixes no time limit for its completion, but the contract does, with a proviso that the contractor shall suffer a per diem penalty if the work extends over time, the tax bill is not void if the improvement is finished within a reasonable time. That ruling is now the law, and is sound law, we think. The contract in question imposed a penalty of \$5 a day on the construction company for every day consumed in laying the pavement after June 8th, while the ordinance prescribed no time of completion, and hence the case is in all respects like the one above cited.

The defense on which the chief stress is laid by the appellants is that, after the contract was let to the respondent, an ordinance was passed by the city reducing the width of the roadway to be paved, and the consideration of this point requires the statement of certain facts which transpired anterior to the paving of the street. In 1890 William H. Claggett and George W. Cale owned nearly all the property on both sides of Taylor avenue between St. Louis and Ashland avenues, which was the part of Taylor avenue improved by the respondent. Some time in that year those men asked permission of the board of public improvements of the city of St. Louis to lay a granitoid sidewalk on each side of Taylor avenue between said other avenues, and permission to do so was granted them, the width of the sidewalks fixed at 15 feet, and of the roadway at 30 feet. Thereupon the owners laid the sidewalks 15 feet wide, and graded the roadway. In 1891 Claggett and Cale sold to Mrs. Hutchinson, one of the appellants, the lot against which the tax bill in suit was issued, and by mesne conveyances the title thereafter vested in her and her husband, Albert J. Hutchinson. When they purchased, the street was improved to that extent and in that way. This was in contra-

vention of a general ordinance of the city of St. Louis, which provides that a street 60 feet wide shall have sidewalks 12 feet and a roadway 36 feet wide. Rev. Ord. 1901, c. 15, § 599. When the ordinance ordering the paving of the street was enacted, it seems said provision of the general ordinance was observed and a roadway provided for 36 feet in width; and so the contract was let to the respondent, which began to pave over 36 feet of the street. This excited a remonstrance by the property owners who had laid their sidewalks with reference to a 30-foot roadway, and at their request and on their protest the municipal assembly passed a special ordinance making the roadway of Taylor avenue between St. Louis and Ashland avenues 30 feet wide and its sidewalks 15 feet.

It should be remarked in this connection that by the contract between the city and the Hill-O'Meara Construction Company the paving was let to the construction company by the quantity of work done, and not in bulk, or by the linear foot; and so, it seems, bids were taken. Therefore it does not appear that the cost to the property owners was increased by this reduction of the width of the paving. But the appellants themselves protested against widening the roadway. The title to the lot in question was vested at that time solely in Sarah L. Hutchinson, but both she and her husband testified that he acted for her in what was done in regard to the paving, and he swore that, if the other property owners protested against the roadway being widened, he did. Mrs. Hutchinson testified on this point that, when the construction company commenced making the roadway wider, she objected, but only stated her objection to her husband, giving him no authority in the matter. She immediately swore, however, that she left the matter to him, and did not attend to it herself; that it did not make any difference to her what the width of the roadway was, only she did not want it to come within 6 feet of her sidewalk; that she knew they were making the roadway only 30 feet wide, and she was satisfied with that width, but not with the material of which they were making it; also that her husband built an apron to run from the sidewalk to the curb. The testimony of the appellants shows conclusively they did not object to the width of the pavement, but did object to its being Telford pavement, instead of brick. The testimony of Mrs. Hutchinson likewise tends to prove they joined in a protest against the widening of the roadway. On such evidence the court submitted to the jury the question of whether appellants were estopped to defend against the tax bill because the pavement was 30 instead of 36 feet wide, by telling them, in effect, that, if the appellants acquiesced in that change, it constituted no defense. We consider that ruling correct. It is plain from appellants' own admissions that they did not

want the roadway to be 36 feet wide, for one of that width would have been extremely detrimental to their property, and have involved the alteration of the sidewalks along the avenue. It is likewise plain that the only objection made to the work before and while it was in progress was because some of the lot owners wanted a brick pavement. There was ample evidence to go to the jury as to whether appellants did not participate in having the ordinance passed after the contract had been let by which the width of the roadway was established at 30 feet, with full knowledge that the pavement respondent was going to put down would correspond to said ordinance. While a property owner may not be precluded from setting up in defense of a tax bill that the improvement was not made according to the ordinance ordering it by merely seeing the work improperly done without protesting, he cannot induce a departure from the ordinance and contract by his own acts, and then avail himself of the change to escape payment. This is but an extension of the general principle of the law of estoppel, which prevents a person from inducing another to take a certain course, and then claiming the course was illegal, in order to defeat a demand based on it. *Brick & Terra Cotta Co. v. Hull*, 49 Mo. App. 433; *Cross v. Kansas City*, 90 Mo. 13, 1 S. W. 749, 59 Am. Rep. 1; *Valle v. Independence*, 116 Mo. 333, 22 S. W. 695.

Appellants seem to rely on *City of Trenton v. Collier*, 68 Mo. App. 483; but we find nothing in that case to show that Collier, who defeated the action on the ground that the ordinance on which the tax bill was based had not been followed in doing the work, was an active agent in causing the work to be done differently.

For the error noted, the judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

ADOLFF v. COLUMBIA PRETZEL & BAKING CO.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MASTER AND SERVANT—INJURIES TO INEXPERIENCED SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—PETITION—ALLEGATIONS OF NEGLIGENCE—INSTRUCTIONS.

1. Plaintiff, a minor under 18 years of age, had been employed in a bakery to do manual labor and operate a small pretzel-cutting machine. She was directed by her forewoman to work at a large dough-kneading machine, which was generally operated by a skilled employé, in the latter's absence. The operation of the machine was somewhat dangerous for an inexperienced person, and required the attention of a man. Plaintiff had been previously warned not to use the machine, and knew that it was dangerous, but, on her objecting, she was told by her forewoman that, if she did not obey, she would be discharged, or her wages reduced, whereupon she attempted to operate the machine, and in doing so her hand was caught

in the rollers and mashed. *Held*, that whether plaintiff assumed the risk of the extra danger to which she was exposed was for the jury.

2. Where plaintiff, an inexperienced employé in a bakery, was directed to operate a dough-kneading machine, and placed her hand over the rollers to push the dough, which had lodged in the trough before reaching the rollers, through the machine, with the result that her hand was caught between the rollers, plaintiff's mode of operating the machine, or the danger incident thereto, was not such as to render her guilty of contributory negligence as a matter of law.

3. Where the complaint charged specific acts of negligence with relation to the machine, and also charged that plaintiff had been ordered by her forewoman to operate the machine, which she did only after objecting, and being told that, if she did not obey, she would be discharged, the petition was sufficient to support a judgment for plaintiff on the ground that defendant was negligent in ordering plaintiff to use the machine, though such negligence was not one of the specific acts specified.

4. An instruction that it was the duty of the master using complex machinery to have it properly equipped with appliances to protect employes, and, if defendant was derelict in so doing, such dereliction constituted negligence, and if the machine by which plaintiff was injured was not properly equipped, and in attempting to operate the same plaintiff's hand was caught, and by reason of such defects her injuries were caused or increased, plaintiff was entitled to recover, was erroneous, as not limited to any specification of negligence in the equipment of the machine alleged in the petition.

5. Where it was alleged that the machine by which plaintiff was injured was defective, in that no shift was provided to throw the belt which ran the machine from the tight to the loose pulley, and on the trial the court permitted evidence as to the difficulty the engineer experienced in stopping the machine after plaintiff's arm was caught therein, on the theory that the evidence was competent as to the extent of the injury, instructions that defendant's failure to have a shift to throw the belt was not such an act of negligence as entitled plaintiff to recover, and that the evidence admitted was to be considered only on some other ground of negligence, and that defendant's failure to have such shift was not the proximate cause of plaintiff's injury, and that the jury should disregard such evidence, were inconsistent and misleading.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Lena Adolff against the Columbia Pretzel & Baking Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. C. & J. C. Jones, for appellant. Young & Ruler, for respondent.

Statement of Facts and Opinion.

GOODE, J. Plaintiff, Lena Adolff, was employed in the year 1900 in the bakery of the defendant, the Columbia Pretzel & Baking Company, and had been employed there for 10 months prior to the time she met with the accident complained of in this action. Said accident occurred May 7th in that year, when the plaintiff was a minor, not quite 18 years of age.

A dough rolling or kneading machine was used in the bakery, and was operated by a skilled employé, called the "baker"; it be-

ing a machine, as the testimony tends to show, requiring the attention of a man, and somewhat dangerous for an unskillful, inexperienced person to use. The machine consisted of two iron rollers about 3 feet long and 10 inches in diameter, one set above the other at a distance which could be changed according to the thickness of dough desired; but they were usually set about an inch or an inch and one-half apart. Back of these rollers was a wooden trough as wide as they were long, set at a steep incline towards the rollers, in which the dough was placed, and down which it slid to the rollers, passed between them, and came out rolled or kneaded into a trough immediately in front, whence it was taken and either rerolled or carried to another machine to be cut into pretzels, loaves, or other forms of bread. The rollers were turned by two cogwheels running into each other, and turned by a pulley, on which ran a belt that was connected at its other end with a shaft rotated by steam power, as was all the machinery in the bakery. There were both a loose and a tight pulley, but no shift to throw the tight pulley onto the loose one; and in fact there seems to have been a nail driven in the tight pulley to prevent the belt from working onto the loose one. The result was that, to stop the rollers, the steam had to be shut off.

Plaintiff, although she had been employed in the bakery for ten months before she was hurt, had never worked at this machine, but had worked two months on a smaller pretzel-cutting machine, different in its construction and operation from the one that hurt her; and before that time had done manual labor. There was testimony that on two occasions before the accident, she had gone to the rolling machine to get the rolled dough, but had been interfered with by the baker before she rolled it. There was testimony also that she knew the machine was dangerous, and had been warned to stay away from it. Her testimony—and it is corroborated by that of other witnesses—is that early in the morning of the accident she was told by the forewoman in charge of the girls in the room to get some dough from the rolling machine, or to roll some dough. This command was given to her for the reason that the baker who had charge of that machine had left the bakery some moments before, and the hands were out of dough. The plaintiff remonstrated against the order, saying she was afraid to try to run dough through the machine, but was told by the forewoman, Annie Melsenbach, that, if she did not obey, she would be discharged, or her wages cut down, as the plaintiff testified, though the forewoman denied giving any such order, and swore that plaintiff went voluntarily to the machine, in disregard of instructions theretofore given to stay away from it. On this point the evidence is quite conflicting. At all events, plaintiff attempted to roll a lump of dough through the machine, but it stuck or lodged

on the floor of the wooden trough before reaching the rollers, and, to force it through, plaintiff put her left hand over the top of the rollers, and pushed the dough towards them, with the result that her hand was caught between the rollers, and so badly mashed to four inches above her wrist that the flesh was loosened from the bones, and her thumb had to be amputated.

The acts of negligence charged in the petition are that no rules were posted in the establishment prescribing the duties and regulating the conduct of the employes; that an incompetent person and one of intemperate habits was put in charge of the steam dough roller; that the machinery was not properly made and covered; that there was no appliance whereby the belt might be thrown off the tight pulley, so as to stop the rollers in case of accident; that the forewoman, knowing the machine was dangerous to operate by one unfamiliar with it, gave the command aforesaid to plaintiff to get dough from it, in obeying which order plaintiff, on account of her inexperience, received the injuries recited. The answer contains a general denial, a plea that plaintiff's injuries were due to her own negligence, and that she knew of the danger incident to operating the roller when she undertook to use it.

At the instance of the plaintiff the court gave 8 instructions, at the instance of the defendant 19, and of its own motion 4—31 in all. Five others requested by defendant were refused, besides an instruction in the nature of a demurrer to plaintiff's case at the close of her evidence. The verdict was in plaintiff's favor. Her damages were assessed at \$3,000. Judgment was entered for that sum, and an appeal taken to this court.

Three reasons are assigned by the defendant why the demurrer to plaintiff's case should have been sustained, and they are as follows: First. Whatever danger there was in using the machine was necessarily incident to its operation, and was, namely, that the operator might permit his hand to be drawn between the rollers. But this risk lay open to observation, and was as well known to the plaintiff as to any one else. Therefore, when she undertook to use it, she assumed the risk of injury incident to its use. Second. The injury to the plaintiff was conclusively shown by all the evidence to be the result of her own negligence in permitting her hand to be drawn between the rollers. Third. None of the acts of negligence alleged was proven. The evidence shows without conflict the rolling machine was in perfect condition, except that it had no shift to change the belt from the tight pulley to the loose one, which deficiency had nothing to do with causing plaintiff's injury, as the court below charged; that the machine was of the kind commonly used for kneading dough, and, being in good repair, no negligence of the defendant can be predicated on the score of furnishing an improper or defect-

ive appliance. Of those arguments in their order.

The first one invokes the doctrine of assumption of risk by a servant, as to which the cases are more unsatisfactory and conflicting than they are in reference to any other rule bearing on liability for personal injuries. One writer, after arraying the opinions of most Anglo-Saxon courts of last resort on the subject, declares their net result is "a veritable chaos of conflicting precedents." 31 Am. Law Review, 687. This conflict exists among the English as well as the American precedents. O'Maley v. Gaslight Co., 47 L. R. A., 161, note, page 162. And the Missouri decisions touching the rule have been criticised as exceptionally fluctuating and inconsistent. Limberg v. Glenwood Lumber Co., 49 L. R. A. 1, notes on pages 44 and 61. These observations are made without a thought of attempting the elucidation of this vexed topic, but to draw attention to the difficulties which beset a court in dealing with a controversy involving it, wherein both parties can cite plenty of precedents to support their respective positions. We shall take notice of general principles only so far as a reference to them promises to help in the endeavor to collect from the discordant decisions rules to guide us in the disposition of the case in hand.

The important facts to be seized in considering the defense of assumption of risk, as raised by the demurrer to the plaintiff's evidence in this case, are that operating the dough machine was outside the scope of plaintiff's original contract of employment, and the extra hazard of that task was not compensated by her ordinary wages. No compensation was paid or agreed to be paid her for the extra risk which she was coerced to undertake by fear of losing the wages she was receiving for less dangerous work; and, instead of taking the risk voluntarily, and of her own motion, she quailed before the danger, and yielded to the forewoman's command, under the influence of a threat to discharge her. On those facts we decline to hold that, as a necessary legal conclusion, she assumed the risk, either by an agreement express or implied, or on the theory of the maxim, "*Volenti non fit injuria*"—that to which a person assents is not esteemed in law an injury. The defense of assumption of risk, whether in actions between master and servants or other parties, must be founded on a contract and tested by the principles of contract law; or, if there was no contract relationship between the parties which included the fatal hazard, on said maxim, which embraces assent induced by other causes as well as by contracts. That a particular risk was assumed by an employé may logically result from the contract of employment, by which, in accepting service, he accepted at the same time the ordinary hazards of the service for a compensation made proportionate to them. A contract of that

sort is expressed by parties now and then, but is more frequently raised by implication of law; and in many instances such an implication is warranted, in some measure, by the facts of the hiring. *Devitt v. Railroad*, 50 Mo. 302; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 453, 8 L. R. A. 450, 17 Am. St. Rep. 476; *Railway Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739; *Hough v. Railroad*, 100 U. S. 213, 25 L. Ed. 612; *Gardner v. Railroad*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Railway v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 953; *Railroad v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Snow v. Railroad*, 8 Allen, 441; *Railroad Co. v. Young*, 1 C. C. A. 428, 49 Fed. 723; *Indermaur v. Dames*, L. R. 1 C. P. 274. Certainly, the evidence before us does not make good beyond dispute the defense of assumed risk on the hypothesis of an agreement by which the plaintiff assented to the extra hazard, but rather tends to show the risk was not within the purview of the original hiring, nor taken into account in fixing plaintiff's wages. Neither is there proof of a special agreement in reference to the work in the course of which the accident happened.

But to make the doctrine of assumption of risk relevant, some evidence that plaintiff assented to the risk by contract, express or implied, is required, unless the plaintiff acted spontaneously, or at least with the concurrence of her own will, in attempting to use the dough roller. That is to say, in default of evidence of an agreement about the matter, the defendant must rely on the maxim above stated as a foundation for the defense of assumed risk. *Miner v. Railroad*, 153 Mass. 398, 26 N. E. 994; *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647; *Mellor v. Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; *Railroad v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Louisville, etc., Ry. Co. v. Conroy*, 63 Miss. 562, 56 Am. Rep. 835; *Mundle v. Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *James v. Rapides (La.)* 23 South. 469, 44 L. R. A. 33; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685. Cases may be found which hold a servant assents to the greater risk when he obeys an order to do work involving it on the theory that yielding to the command, though reluctantly, waives any claim of compensation for a resultant injury. But those decisions strike us as unsound, for the waiver of a substantial, as distinguished from a formal, right, must, like other agreements, be supported by a consideration, or it is nonenforceable. *Fulkerson v. Lynn*, 64 Mo. App. 649; *Haseltine v. Ausherman*, 87 Mo. 410; *Fairbanks-Morse Co. v. Baskett (St. L.)* 71 S. W. 1113. Moreover, the rule regarding presumed assent to a risk is modified in the case of an inexperienced employé lacking full comprehension of the danger, who received assurances from an experienced superior that the work might be safely done, as such an employé has the right to rely somewhat

on the knowledge and judgment of his employer or superintendent. And the facts may warrant an inexperienced employé in taking a positive order to perform a task as an implied assurance that it can be safely performed, although the employé is apprehensive of injury. If a servant attempt a perilous task under protest, and for fear of losing his employment, full voluntary assent to incurring the danger is displaced to some extent by compulsion; and in this state, as well as according to many modern decisions in other jurisdictions, the question of whether the risk was assumed is then for the jury. *Keegan v. Kavanaugh*, 62 Mo. 230; *Rowland v. Railroad*, 20 Mo. App. 463; *Larson v. Mining Co.*, 71 Mo. App. 512; *Cox v. Granite Co.*, 39 Mo. App. 424; *Steel Co. v. Schymanowski*, 162 Ill. 459, 44 N. E. 876. As the command in this case was accompanied, according to the testimony for the plaintiff, with a threat of discharge, it was properly left to the jury to say whether plaintiff, in obeying that command, assumed the risk of the extra danger to which she was exposed. *Shortel v. St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; *Fogus v. Railroad*, 50 Mo. App. 250; *Patterson v. Railroad*, 76 Pa. 389, 18 Am. Rep. 412; *Penn. Co. v. Lynch*, 90 Ill. 333; *Chicago, etc., Ry. Co. v. Clark*, 11 Ill. App. 104; *Sanders v. Barker*, 6 Times L. Rep. 324; *Yarmouth v. France*, L. R. 19 Q. B. Div. 647; *Goldthwait v. Railroad*, 160 Mass. 554, 36 N. E. 486; *Richmond, etc., Ry. Co. v. Norment*, 84 Va. 172, 4 S. E. 211, 10 Am. St. Rep. 827; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Brazil Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Tagg v. McGeorge*, 155 Pa. 368, 26 Atl. 671, 35 Am. St. Rep. 889.

Some of those cases regard the defense, when it is raised on facts like we have here, as one of contributory negligence, and as depending on the imminency of the peril. We venture the comment that this is theoretically erroneous, even if practically harmless; for, if the risk was assumed, the defense is complete, whether the danger was imminent or remote, and whether the servant was cautious or careless. But if the risk was not assumed in a blinding manner, the question of contributory negligence arises, to be determined by the test of whether the plaintiff exercised ordinary care.

The assumption of a risk appears to involve the fact (shown by testimony or inferred from circumstances) of comprehension that a peril is to be encountered, and willingness to encounter it; that is to say, a positive exercise of volition in the form of assent to the risk. Negligence, on the contrary, arises from negative mental states like ignorance, unskillfulness, or lack of caution. But eminent courts and jurists have regarded the two doctrines of assumption of risk and contributory negligence as different names for the same thing, and have treated the defense according to the law of torts,

rather than that of contracts. *Thorpe v. Railway*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188; *McMullen v. Railway Co.*, 60 Mo. App. 231; *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Rittenhouse v. Railway Co.*, 120 N. C. 544, 26 S. E. 922; *O'Rourke v. Railroad Co.* (C. C.) 22 Fed. 189. In the present case it is immaterial which theory is right, as both defenses were interposed and submitted to the jury.

It is urged that the case of *Nugent v. Milling Co.*, 131 Mo. 241, 33 S. W. 428, is like this one, and should control it. The cases are alike in the circumstance that both plaintiffs got their hands mashed between rollers, but are unlike in every other respect. On reading the opinion, it will be noticed that the case shown by Nugent's evidence was entirely different from the one stated in his petition. His petition stated that the particular work in the performance of which he was hurt was not the work for which he was employed, but was extrahazardous, as the manager of the milling company knew when he ordered it done. That was a case similar to this. But the evidence showed Nugent was injured in the course of his regular employment, and in doing work which he had been doing for six months; not an outside task, under a special order. The opinion says: "The work plaintiff was required to do was not extrahazardous, as alleged in his petition, but, according to his own language, was the work he was employed to perform. * * * Thus the question of inexperience on the part of the plaintiff and extrahazardous work performed are out of the case as charged against the defendant on plaintiff's own showing." In the *Harff Case*, 168 Mo. 308, 67 S. W. 576, which is cited also as a controlling authority, the gist of the decision was that the plaintiff risked a danger not only obvious, but imminent and threatening, and therefore could not recover. There are remarks in the opinion which look like the judgment was based on the doctrine of assumption of risk, but the controlling and decisive fact was that Harff exposed himself to imminent and glaring peril, which shows the decision was rested on his contributory negligence. Some witnesses swore the plaintiff in this case voluntarily attempted to use the roller, not only without any command being given to her, but against express warning; and the testimony as a whole required that the question of whether she assumed the risk be referred to the jury. *Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340; *Barry v. Railroad*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610.

We will next consider the second reason assigned by the defendant why the demurrer to plaintiff's case should have been granted, namely, that plaintiff's own testimony shows she was guilty of negligence in operating the roller, which contributed to or caused the injury. Two arguments are made in sup-

port of this contention—that she was negligent in encountering peril which was apparent and obvious, the danger of operating the machine being as plain to her as to any one else, and that she was negligent likewise in the unskillful mode in which she operated it. In answer to the first argument we state again that the issue of an employé's negligence in taking an unusual risk which arises in the course of his work (if the defense is regarded as sounding in tort) depends on whether the danger incurred was so threatening and apparent that a man of common prudence would have been deterred by it. If it was, the employé was guilty of contributory negligence, and cannot recover for an injury suffered; otherwise his action is not barred. *Doyle v. Railroad*, 140 Mo. 1, 41 S. W. 255; *O'Mella v. Railroad*, 115 Mo. 205, 21 S. W. 503; *Hamilton v. Coal Co.*, 108 Mo. 364, 18 S. W. 977; *Alcorn v. Railroad*, 108 Mo. 81, 18 S. W. 188; *Soeder v. Railroad*, 100 Mo. 681, 13 S. W. 714, 18 Am. St. Rep. 724; *Huhn v. Railroad*, 92 Mo. 447, 4 S. W. 937; *Blanton v. Dold*, 109 Mo. 75, 18 S. W. 1149; *Settle v. Railroad*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Herbert v. Shoe Co.*, 90 Mo. App. 305; *Smith v. Coal Co.*, 75 Mo. App. 77. That rule obtains because a servant is only bound to use ordinary care, and, if he does what men of common prudence do in like circumstances, he stands acquitted of negligence. *Francis v. Railroad*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Railway Co. v. Yeargin*, *supra*; *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296. In this case, while there was danger to a novice in operating the roller, we cannot declare that, as a necessary legal inference, the danger was so great that no person of common prudence would have incurred it; but must hold, on the contrary, it was a question for the jury to answer whether the plaintiff was guilty of contributory negligence. Neither do the facts show so positively as to exclude every other rational inference that the plaintiff's negligence in her mode of using the machine caused her hand to be caught. Plaintiff was, as stated, inexperienced, and there is testimony that the machine required experience, skill, and strength. The issue of her negligence in this regard, as well as the other, was properly referred to the jury.

The third reason assigned why the plaintiff should have been nonsuited is that no act of negligence charged in the petition was made good by the proof, but that the plaintiff recovered on a ground not pleaded, to wit, the command given by the forewoman. It may be conceded that, so far as the evidence shows, the kneading machine was of the kind commonly used in bakeries, was in good order, and free from defects—at least from any which caused the plaintiff's hand to be caught, or had anything to do with her injury, except that it might have been less severe if there had been a shift to throw the belt off the tight pulley. But this defect,

if it was one, is not to be regarded in discussing the demurrer, because the circuit court took it out of the case by an instruction that it had nothing to do with the accident, as it also excluded proof of the alleged employment of an intemperate baker. If defendant is responsible for the injury, it is because of the command given by the forewoman to the plaintiff to get dough, or roll some dough; and it is immaterial which words were used, because the meaning was the same, as plaintiff had to roll the dough through the machine to comply with the order. Defendant insists that said command is not one of the acts of negligence specified in the petition, and it is true there is an enumeration of negligent acts which does not embrace it. But further on the petition states with particularity all the circumstances connected with the order, and plaintiff's reluctant obedience when she was threatened with the loss of her position. Those allegations are sufficient to charge the defendant with negligently ordering, and, in a sense, forcing, the plaintiff to use the roller, and sufficient to let in evidence as to whether said negligence was the proximate cause of her injury.

What we have said above disposes of the contention that the plaintiff did not make out a *prima facie* case, but we have now to deal with certain minor assignments of error committed in ruling on the instructions. The given instructions are so numerous and lengthy that we cannot recite them all and consider each one separately. Besides being too numerous, they were to some extent inconsistent and misleading. Two of the instructions for the plaintiff were as follows: "The court instructs the jury that it is the duty of an employer using dangerous and complex machinery to have it properly equipped with proper appliances to protect its employes, and, if the jury believe and find from the evidence that the defendant in this case was derelict in so doing, then such dereliction constitutes negligence on its part." "The court instructs the jury that if they believe and find from the evidence in this case that the dough roller mentioned in the evidence was not properly and safely equipped, and that in attempting to run and operate the same, under the conditions mentioned in the other instructions given herein, the plaintiff's hand was caught in said machine, and that by reason of such defect her injuries were caused or increased, and that, if said dough roller machine had been properly equipped, the plaintiff could have saved herself from said injuries, or decreased the extent thereof, the jury will find for the plaintiff in such sum as will compensate plaintiff for the said injuries caused or increased by such defect in the said steam dough roller, if you find that there was a defect." The first of those instructions was too general. It contained no reference to any specification of negligence stated in the petition, but left it to the jury to find the defendant guilty of

negligence because of anything in the equipment of the dough machine which they happened to think was defective, though it may have had nothing to do with plaintiff's injury, nor, indeed, have been named as a cause of the accident. The same criticism applies to the second instruction. Both were faulty in not hypothecating the particular acts of negligence alleged, but instead leaving it to the jury to find a verdict for the plaintiff on account of some equipment or appliance they might conclude the dough roller lacked, whether that particular deficiency was proven to be the cause of the injury or not. In truth there was slight, if any, evidence to show the accident resulted from the machine being improper or defective.

Several instructions given on behalf of the defendant were, we think, too favorable to it in regard to plaintiff's assumption of risk, and ought to be modified if the case is tried again. In one instruction the jury were told that the failure of the defendant to have a shift to throw the belt which ran the dough roller from the tight pulley to the loose one was not such an act of negligence as to enable the plaintiff to recover, and that the evidence on that subject was only submitted for the consideration of the jury in the event they found the defendant was guilty of other negligence which caused her injury. In connection with that instruction, it is appropriate to notice a ruling of the court on some evidence offered in regard to the difficulty the engineer experienced in stopping the machinery while plaintiff's arm was between the rollers. That testimony was objected to by the defendant, and the plaintiff's counsel insisted it was competent because the petition charged the machinery was not properly equipped, and because the engineer could not stop the roller, except by shutting off the steam, on account of there being no shift. The court overruled the objection for the reason that the evidence might go to the extent of the injury, as showing that, if her hand could have been extricated at once, the injury might have been less. But the court gave another instruction at the request of the defendant, in which the jury were told the negligence of the defendant in failing to have an appliance whereby the belt could be thrown off the tight pulley was not the proximate cause of plaintiff's injury, afforded no basis for recovery, and that the jury should disregard any evidence tending to prove such an appliance was not maintained. Those rulings were inconsistent, and may have been misleading. In fact, the case was overinstructed, and the mass of charges given to the jury, we think, tended rather to obscure, than to clarify, the issues.

For the errors mentioned, the judgment will be reversed, and the cause remanded to be retried. It is so ordered.

BLAND, P. J., and REYBURN, J., concur.

SHOTLIFF v. MODERN WOODMEN OF AMERICA.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

BENEFICIARY ASSOCIATIONS—FOREIGN COMPANIES—ANSWERS IN APPLICATION—WAIVER—SUICIDE—EVIDENCE.

1. Foreign as well as domestic fraternal beneficiary associations are exempt from the general insurance laws; Rev. St. 1899, § 1408, defining such associations, and declaring they shall be exempt from such laws, and section 1410 providing that any foreign association coming within the description may do business in the state by complying with the provisions of the act and obtaining a license.

2. A finding in an action on a certificate of insurance in a beneficiary association that insured did not commit suicide *held* supported by the evidence, it not excluding every reasonable hypothesis of accident.

3. There is a waiver of objection to the answer of an applicant for insurance in a beneficiary association to the question as to insanity in his family, where, on his stating the facts, the examining physician, who wrote the answers, and who was an agent and officer of the association, advised him to answer "No," which answer was written in application.

4. The by-law of a beneficiary association that no officer may waive any of its laws which relate to the substance of the contract for the payment of benefits refers to a completed contract of insurance, and not to the preparing and acceptance of applications.

Appeal from Circuit Court, Newton County; Henry C. Pepper, Judge.

Action by Fannie B. Shotliff against the Modern Woodmen of America. Judgment for plaintiff. Defendant appeals. Affirmed.

McDavid, Johnson & Cravens, for appellant. White & Clay, for respondent.

BLAND, P. J. The defendant is admitted to be a fraternal beneficiary association organized under the laws of Illinois. It is licensed to transact insurance business in this state. On December 26, 1900, defendant issued its certificate of insurance for the sum of \$1,000 to David H. Shotliff; loss payable to his wife, the plaintiff. Shotliff died on April 12, 1901. The suit is to recover the amount secured by the benefit certificate. Plaintiff recovered judgment in the circuit court, from which defendant duly appealed.

Defendant admitted plaintiff was the wife of David Shotliff, that it issued the benefit certificate sued on, and that David Shotliff was in good standing with the order when he died, and admitted proofs of loss had been duly and timely made. Its defense was, first, that Shotliff died of his own hand, which avoided the insurance; second, that in his application for the policy, which was made a part of the contract, he made misrepresentations, which also avoided the policy, for the reason that he warranted the truth of these representations. The misstatement complained of was that he represented, stated, and warranted that there had been no

*Rehearing denied March 31, 1903.

† 2. See Insurance, vol. 22, Cent. Dig. § 1962.

insanity in his family, when, in truth and in fact, his sister Nellie had prior thereto been insane, and had been admitted to an insane asylum at Nevada, Mo., as an insane patient, and had been confined there for a period of six months.

It is conceded that, under the by-laws and contract of insurance, suicide avoids the contract; but it is contended by plaintiff that the defendant, being a foreign corporation, with a mere license to do business in this state, is not exempt from the provisions of section 7896, Rev. St. 1899, which declares that suicide of the insured, sane or insane, shall be no defense to suits on policies issued by corporations doing business in this state to citizens of this state, unless it be shown to the satisfaction of the trier or triers of the facts that the insured contemplated suicide at the time of making his application for the policy, and any stipulation in the policy to the contrary shall be void.

1. All the laws of this state in respect to fraternal beneficiary associations were incorporated in one act, passed in 1897 (Laws 1897, p. 132). These laws will be found in chapter 12, art. 11, Rev. St. 1899, beginning with section 1408 of the chapter. This section (1408) defines what is a fraternal beneficiary association, and declares that they shall be exempt from the provisions of the insurance laws of the state. The section does not mention domestic or foreign corporations, but includes all associations, whether foreign or domestic, which come within the definition of fraternal beneficiary associations. Section 1410 of the article provides that any foreign association coming within the description given in section 1408 may be permitted to do business in this state, by complying with the provisions of the act, on obtaining a license or certificate from the insurance commissioner authorizing it to do business in this state. There is nothing to be found in the act of 1897 to indicate that the Legislature intended that the law should apply to fraternal domestic societies, but not to foreign fraternal societies admitted to do business in this state. On the contrary, we think that the whole act shows the purpose of the Legislature was to put foreign associations authorized to do business in this state on the same footing as domestic ones. They are required to perform the same duties, in respect to making reports, etc.; and we have no doubt that both are governed and protected by the act, and that both are exempt from the general insurance laws of the state. *McDermott v. Modern Woodmen* (No. 8,653, decided at this term, not yet officially reported) 71 S. W. 833.

2. The issue as to whether or not Shotliff committed suicide was submitted to the jury by appropriate instructions. Their finding that he did not die by his own hand is challenged by the defendant on the ground that it was against all of the evidence. The evidence shows that Shotliff was in good health

and of a cheerful disposition; that he was on good terms with all his neighbors, had no enemies, and that his domestic relations were happy; that he was not indebted to any one, and was reasonably prosperous in his business; that on the morning he was killed he arose from his bed at about 6 a. m., and, after lighting a fire, chatted pleasantly with his wife for a few moments, and then went out—as his wife supposed, to feed the horse. When breakfast was ready, his eldest daughter went out to call him in to breakfast. She found him lying in a path about 100 yards from the house, dead, with a gunshot wound in his right temple, and a 38-caliber revolving pistol lying at his side. The bullet entered a little above and in front of the right ear, penetrated the skull, and fractured the same at a point from two to three inches above and back of the left ear. One load had been discharged from the pistol found at his side. All the other cartridges in the pistol had been snapped, but did not explode. He had had the pistol but a few days. When he got it he said he wanted it to shoot a dog that had been bothering him and his family. The pistol was defective. On examination it was found that the hammer would not stand cocked, and had to be held back in place by the thumb in order to fire the pistol. The coroner and one or two other witnesses testified that Shotliff's face was slightly powder-burned. The physician who made the post mortem examination and other witnesses testified to the contrary. The presumption is that Shotliff did not commit suicide. To overcome this presumption, it was incumbent on the defense to show that every reasonable hypothesis of accidental death was excluded by the evidence. *Boynton v. Ins. Co. (La.)* 29 South. 490, 52 L. R. A. 687. The inference is very strong that the shot that killed Shotliff was discharged from the pistol found at his side, and discharged while in his hands; but that it was purposely discharged by him with suicidal intent, the evidence does not conclusively show, and we doubt if it preponderates in that direction. There is absolutely no evidence that Shotliff had any cause to commit suicide, or that any trouble was preying upon his mind that would drive him to so desperate an act. On the contrary, the evidence shows that his environment, his family, his happy disposition, his good health, his freedom from debt, and the friendship and respect of his neighbors, would inspire him with the hope of continued life. The pistol was out of order, tricky, and uncertain. Shotliff had had it but a few days, and had probably never attempted to use it before, and was unacquainted with the condition that it was in. He had evidently tried to fire several of its chambers, but failed, and the probabilities are that when it went off and killed him he was making an examination of it to see why it would not fire, and, in making this examination, carelessly handled it, and at an unpropitious moment it

fired, as many an old, out of order firearm has done before. We do not think it can be said that the evidence excludes every reasonable hypothesis of accident.

3. The application for insurance is in two parts. The first was made out by Shotliff; the second, by the camp physician, and consists of questions that were propounded by the camp physician, the answers to which were written by him and under his supervision, as required by the by-laws of the association. To one of these questions, to wit, "Has your father, mother, or any brother or sister, etc., been afflicted with insanity?" The answer was, "No."

Following this part of the application, the insured stated:

"Applicant Will Please Note This Clause.

"I have verified each of the foregoing answers and statements from 1 to 35, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declarations, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any Benefit Certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said Benefit Certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all of the laws of said Modern Woodmen of America, whether now in force or hereafter adopted, that my Benefit Certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the Head Physicians and I shall be regularly adopted in accordance with the ritual of this society, and shall make the payments as required by its laws at adoption; and any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the by-laws of the Society. And I hereby expressly waive for myself and beneficiaries the privileges or benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any state, now

in force or that hereafter may be enacted, that would, in the absence of this agreement, modify or conflict with any contract with this society, or cause it to be construed in any way contrary to its express language.

"David H. Shotliff, Applicant.

"(Name in full; initials not allowed.)

"Dated Dec. 11th, 1900.

"Answers written by H. H. Johnson, M. D."

Dr. Johnson was the physician of the camp of which the insured became a member. He had been elected by the camp, but his appointment and commission were from the head medical examiner of the district in which the camp was situated. This head physician had not only power to appoint and commission, but to revoke the commission of any camp physician.

To the application for insurance was appended the report of the examining physician, which is as follows:

"36. (a) Are you a regularly appointed and commissioned Camp Physician? Yes. (b) Are you and the applicant alone while making this examination? Yes. (c) Do you know him to be the same man described in the accompanying application? Yes. (d) How long have you known him? 3 years."

"48. Do you know of any facts bearing upon the risk which are not set forth in the foregoing questions? No."

"50. Do you from your examination of this applicant, and from all other facts within your knowledge, believe said applicant will outlive the full period of his expectancy, according to the American Table of Experience (copy of which table is indorsed hereon) and do you recommend that said applicant be admitted to beneficiary membership? Yes.

"Dated at Neosho, Missouri, this 11th day of Dec., 1900. Hour of examination 3 p. m.

"H. H. Johnson, M. D.,

"Camp Physician, Camp No. 4,290."

In respect to Shotliff's answer to the question about insanity in his family, Dr. Johnson testified: That he asked the applicant the question whether any relative of his (meaning them) had been afflicted with insanity, and he (Shotliff) said: "Yes, sir; I have a sister who was confined in the asylum at Nevada. There was a question as to her insanity, and the family physician told them it was not a case of insanity; that it was a case of nerve exhaustion;" that Dr. McCollister had told the family, and him particularly, that his sister was not insane, but her condition was due to her domestic relations, and she was not able to go to a private sanitarium, and the family concluded the proper thing to do, in order to get her where she could be properly treated, would be to send her to the insane asylum, and that she came back entirely cured; that he told them that he was satisfied that the domestic relations existing between his sister and stepmother

were the absolute cause of her temporary aberration of mind, and it was not insanity. That he (Johnson) talked the matter over with him, and told him that, under the conditions, probably the proper thing for him to answer would be none, if he felt that way; that he would not advise him one way or the other. "He [Shotliff] said, 'I will answer that none, for I firmly believe that she was not insane.' So I answered none in his application. I did not advise him. I wrote the answer in the application, based on what Mr. Shotliff told me."

The evidence tends to prove that Shotliff's sister Nellie, prior to his making his application for insurance, was insane, and was confined in an insane asylum at Nevada, Mo., in the year 1896, for a period of six or eight months, as an insane patient. That she had been so confined was not denied by the plaintiff, but plaintiff denied that she in fact was insane.

On the insanity issue the court instructed the jury as follows: "You are instructed that if you find that the affiant, David H. Shotliff, made known to the examining physician all the facts relative to his sister's alleged insanity and confinement and treatment in the insane asylum, then his knowledge is the knowledge of the defendant company, and if said company, with said knowledge, issued the policy sued on, it thereby waived the defense of said answer being not true." The court refused to instruct the jury, as requested by the defendant, to the effect that Dr. Johnson could not bind the association by the waiver of a truthful answer to any question in the application, and that, if Nellie Shotliff was in fact insane, plaintiff could not recover. If the above instruction properly declares the law, then it is immaterial whether Nellie Shotliff was sane or insane, and the error of the court, if it was error, in excluding certain evidence offered by the defendant tending to prove her insanity, was nonprejudicial. Under the by-laws of the association, it is made the duty of the camp physician to examine each applicant, and to accept or reject him; but, whether he does the one or the other, he is required to forward his examination and report to the head physician, who finally accepts or rejects the application, regardless of the action or recommendation of the camp physician. The camp physician is therefore an aid to the head physician, and, in making his examination and report to the head physician, acts as the agent of the association, and not of the applicant. Shotliff, in respect to the insanity of his sister, told Dr. Johnson what he knew and believed to be the truth; and the doctor, after hearing his statement of the facts, advised Shotliff to answer "No" to the question as to the existence of insanity in his family, and wrote that word in the application. True, he says he did not advise him how he should answer the question; but his evidence shows that he did advise him, and

wrote the answer as he advised. Here, then, was an agent of the association, whose duty it was not only to ask these questions, but likewise to write answers in the application, who, after being put in possession of all the facts known to the applicant about the alleged insanity of his sister, in effect advised him that she was not insane, and to so state in his application, and then, in pursuance of his own advice, and doubtless honest belief, in effect, wrote in the application that she was not insane. It seems to us that it was within the scope of Dr. Johnson's employment as an agent and officer of the association to waive Shotliff's true, complete, and full answer to the question, and to advise and answer according to his own opinion, but that there is a waiver in this case. By-law No. 34 reads as follows: "No Waiver of any Prerequisite. No officer of this society, nor any local camp or officer thereof, is authorized or permitted to waive any of the provisions of these laws, or of any other laws of this society which relate to the substance of the contract for the payment of benefits between the member and the society, whether the same be now in force or hereafter enacted." We think this by-law had reference to a completed contract of insurance, and is not a limitation upon the powers of the agent of the association in preparing and accepting applications for insurance. The officers to whom the association had intrusted the medical examination of applicants, and their acceptance or rejection as members of the association, upon such examination must, in the very nature of their duties, act upon their own judgment and in the exercise of a sound discretion. The by-laws can furnish them no guide for their action, beyond the general description in regard to age, condition of health, etc., required of the applicant to become a member of the association.

In *Crouse v. Hartford Fire Ins. Co.* (Mich.) 44 N. W. 496, it was held: "Restrictions in the policy, and not in the application, upon the agent's power to waive conditions of the policy, cannot be construed to refer to any act or knowledge of the agent that occurred before the policy issued." In *Home Ins. Co. v. Hancock* (Tenn.) 62 S. W. 145, 52 L. R. A. 665, it was held: "A statement in an application for insurance, written by the agent, that the fee-simple title is in the applicant, when he had only a life estate, will not avoid the policy if the agent knew the true state of the title before the application was signed." In *Michigan Shingle Co. v. Ins. Co.*, 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 319, substantially the same ruling was made. In *Mutual Benefit Life Ins. Co. v. Robison*, 7 C. C. A. 444, 58 Fed. 723, 22 L. R. A. 325, it was held that an insurance company is estopped to question the truth of answers in an application, notwithstanding the applicant warrants the answers to be true, where they are made under a requirement of the company by its own medical examiner, who

deduces the answer from facts correctly stated to him by the applicant. In *Mut. Ben. L. Ins. Co. v. Davless' Ex'r*, 87 Ky. 541, 9 S. W. 812, it was held that the insurer is estopped to deny the correctness of representations in the application which his agent, with full knowledge of the facts, has induced the insured to make. In *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468, 43 N. W. 697, it is said to be too well settled to be now questioned that if, at the time of issuing the policy, the company or its agents know the falsity of a representation by the applicant, the company is estopped from asserting such falsity in order to escape liability. In *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122, it was held that the knowledge by the insurer's agent of the falsity of a material statement by the applicant estops the insurer to set up such falsity to avoid payment of the policy. In *Parker v. Amazon Ins. Co.*, 34 Wis. 363, and *Mechler v. Phoenix Ins. Co.*, 38 Wis. 635, it was ruled that if the agent of the insurer relies upon his own knowledge in filling up the application, without consulting the applicant, a mistake of the agent will not avoid the policy. In *Temmink v. Met. L. Ins. Co.*, 72 Mich. 388, 40 N. W. 469, it was held that where the insurer's agent assumed the entire preparation of the application which the applicant signed without knowing its contents, the company cannot set up the breach of warranty arising from the incorrectness of answers for which the agent was responsible.

That if the agent of the insurer, with knowledge of the facts, incorrectly states them in the application, the insurer is estopped to deny their correctness, has been held in many of the Western states. *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *Sullivan v. Phoenix Ins. Co. of Brooklyn*, 84 Kan. 170, 8 Pac. 112; *Williamson v. New Orleans Ins. Ass'n*, 84 Ala. 106, 4 South. 36; *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 40 N. W. 386; *Menk v. The Home Ins. Co.*, 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Pickel v. Ins. Co.*, 119 Ind. 291, 21 N. E. 898. In *Cotten v. Fidelity & C. Co. (C. C.)* 41 Fed. 506, it was held that a general warranty against bodily infirmity in an application did not extend to nearsightedness, when the applicant wore spectacles, which the agent of the insurer saw. In *Follette v. U. S. Mut. Acc. Ass'n*, 107 N. C. 240, 12 S. E. 370, 12 L. R. A. 315, 22 Am. St. Rep. 878, it was held that where insurance has been had upon an application representing the insured as free from bodily infirmity, which was contested because of deafness, the insured may show that the insurer's agent knew of such deafness before and while soliciting such insurance, from conversations with him. In *Pudritzky v. Su-*

preme Lodge K. of H., 76 Mich. 428, 43 N. W. 373, it was held that where a physician, acting as agent for the company, in examining an applicant for life insurance, assumes to write out the answers to the questions upon his own knowledge of the facts, rather than from the answers given by the applicant, the answers as given by him are conclusive on the company. In some of the Eastern states a different doctrine seems to prevail. In some of these states the application is considered as a part of the contract, and if, in fact, the representations in it are in a material respect untrue, an action at law cannot be maintained; and oral testimony cannot be received to show either that the company, when it issued the policy, knew that the representations were untrue, or that the untrue representations were inserted in the application by the agent employed by the company to solicit the insurance, without the knowledge of the applicant, who had orally stated the truth to the agent. *McCoy v. Met. Ins. Co.*, 133 Mass. 82; *Plympton v. Dunn*, 148 Mass. 523, 20 N. E. 180; *Franklin F. Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Wilson v. Ins. Co.*, 4 R. I. 141; *National L. Ins. Co. v. Minch*, 63 N. Y. 144; *Bartean v. Ins. Co.*, 67 N. Y. 595; *Kenyon v. K. T. & M. M. A. Ass'n*, 122 N. Y. 247, 25 N. E. 299; *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. 315. The Missouri cases are in accord with the cases in the Western states, and hold that where an agent of an insurance company has authority to take applications for insurance, and to fill up the application, and to do all things which may be needful in perfecting it, his acts are the acts of the company; and from which it follows necessarily that the doctrine of estoppel in the case applies, and that the company will not be allowed, after a loss, to disprove statements made by it through its agents, notwithstanding the statements may be warranted to be correct. *Thomas v. Hartford Fire Ins. Co.*, 20 Mo. App. 150; *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 148, 97 Am. Dec. 383; *Rissler v. Ins. Co.*, 150 Mo. 366, 51 S. W. 755; *Parsons v. Fire Ins. Co.*, 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; *Montgomery v. Ins. Co.*, 80 Mo. App. 500; *Cagle v. Ins. Co.*, 78 Mo. App. 431; *Williams v. Bankers' & Merchants' T. M. F. Ins. Co.*, 73 Mo. App. 607. In *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, it was held: "Agents of an insurance company, authorized to procure applications for insurance and forward them to the company for acceptance, must be deemed the agents of the insurer in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained. Hence, where such agent, either by his direct or indirect act, makes out the application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the

insurer, and not to the insured. This is the rule in the case of 'mutual' as well as of 'stock' or 'proprietary' companies." The authorities in this state and in the other Western states support this doctrine. We therefore hold that Dr. Johnson was the agent of the association in filling out the application of Shotliff for insurance. The evidence shows that he was put in possession of all the facts in reference to the sanity of Nellie Shotliff, and that the answer to the question as to whether or not any of the Shotliff family had been afflicted with insanity was made by him, or on his advice, and that the company is bound by the answer, and estopped to assert that Nellie Shotliff had been insane.

It follows that the judgment must be affirmed. It is so ordered.

REYBURN and GOODE, JJ., concur.

AMERICAN HARDWOOD LUMBER CO. v. NICKEY.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

PARTNERSHIP — SURVIVORSHIP — CHOSE IN ACTION — ASSIGNMENT — ATTACHMENT — REASONABLE GROUNDS — WAIVER — ADMISSION TO PREVENT CONTINUANCE.

1. The surviving member of a partnership has the right to assign a chose in action which belonged to the partnership.

2. An attachment defendant by settling with the attachment plaintiff waives the question whether there were reasonable grounds for the suing out of the writ, and cannot set up that it was wrongfully sued out, and his performance of a contract with the attachment plaintiff thereby excused.

3. On an issue whether certain property had been delivered to defendant in as good condition as when received, plaintiff offered evidence of an absent witness, set forth in an application for a continuance, which defendant had admitted would be sworn to were the witness present. The application did not state that the witness had seen the property when delivered, and was an expression of witness' opinion as to its condition. *Held*, that the admission of defendant operated as a waiver of his right to cross-examine the witness as to his knowledge of the facts on which he based his opinion, and hence the evidence was improperly excluded.

Appeal from circuit court, St. Louis county; J. W. McElhinney, Judge.

Action by the American Hardwood Lumber Company against Leander F. Nickey. There was a judgment for defendant, and a new trial was ordered. From an order denying a motion to set aside the order granting a new trial, defendant appeals. Affirmed.

The case is here on a second appeal. In the statement of facts on the first appeal (see 89 Mo. App. 270 et seq.) the pleadings, the portions of the contract upon which the pleadings are predicated, and the history of the doings and transactions of all the parties in interest in respect to the sawmill and logs, are fully set forth. All the legal questions involved in the controversy were adjudicat-

ed on the first appeal, and the judgment was reversed, and the cause remanded to try a single issue of fact, to wit, whether or not Short & Kilgore had kept and performed the contract prior and up to June 15, 1896, at which time a substitutional contract was made between plaintiff and defendant herein, superseding the one upon which the suit was brought. After the cause was remanded the venue was changed from Butler to St. Louis county.

At the October, 1901, term of the St. Louis circuit court the issues were, by agreement of parties, submitted to the judge of the court sitting as a jury. It developed on the trial that Short, of the firm of Short & Kilgore, was dead at the time the assignment of the right to receive and to sue for and recover the \$1,500 sued for in this suit was made to plaintiff by Kilgore, for the firm of Short & Kilgore. Plaintiff offered and read in evidence receipts and drafts showing that defendant, Nickey, had received payment in full for all logs he had furnished the mill from the date of the contract, September 10, 1895, up to and including June 15, 1896. About June 4th, Nickey attached the mill in a suit he commenced against Short & Kilgore. Plaintiff, under the contract of June 15, 1896, took possession of the mill, and continued to operate it until January 21, 1897, when he surrendered it to the defendant under a contract in which the following stipulations are found: "That the said party of the first part hereby surrenders and delivers to party of the second part possession of the sawmill of said party of the second part, located at Harveill, Missouri, of which party of the first part has had possession under contract with said party of second part; and said party of the second part hereby accepts possession of said sawmill, and agrees that the same at the date of receipt by him is in as good condition, natural wear and tear excepted, as when delivered by him to party of the first part. * * * But it is stipulated and agreed that the execution of this agreement shall not be taken or construed as a waiver of any right or claim for damages by reason of the breach, if any, by either party hereto, of any previous contract between the parties hereto, except as herein specially waived and released."

Before the trial was commenced plaintiff filed an application for a continuance on account of the absence of John H. Douglas and A. H. Woerheide. Douglas resided in the state of Arkansas. His mileage and witness fees had been tendered him and he promised to attend the trial. On the day before the cause was set for trial plaintiff's attorney received a telegram from Douglas' physician stating that Douglas was seriously ill, and unable to be present at the trial. Among other things the application stated that Douglas would swear to, if present, was that the mill was in as good condition when he stopped running it for plaintiff as when he first

took charge of it. The application stated that in addition to what was stated in Woerheide's deposition he would testify, if present, that Short & Kilgore performed the contract of September 10, 1895, upon their part in all respects until the latter part of May, 1896, when the attachment was levied, and that further performance was prevented by defendant, and that the mill, "together with the machinery and appliances thereof, was in as good condition, natural wear and tear only excepted, as when Short & Kilgore took possession thereof under the contract of September 10, 1895." The court ruled that the non-attendance of Douglas did not afford plaintiff any ground for a continuance. Thereupon defendant agreed and consented that if Woerheide was present he would testify as set forth in the application. The court thereupon overruled the application.

After Woerheide's deposition (taken before the first trial, and which was directed to the payment for logs, etc., by Short & Kilgore, but not to the condition of the mill or machinery when plaintiff took possession of it under the contract of June 16, 1896) was read in evidence, plaintiff offered to read from the application for a continuance what it was alleged and admitted Woerheide would swear to if present, to wit: "That at the time the American Hardwood Lumber Company began operating said mill under the contract of June 15, 1896, the same, together with the machinery and appliances thereof, was in as good condition, natural wear and decay only excepted, as when Short & Kilgore took possession thereof under the contract of Sept. 10, 1895"—which is objected to because it is not stated that the witness saw the mill and machinery when delivered to Short & Kilgore or when delivered to plaintiff. The objection was sustained, to which ruling plaintiff then and there excepted.

Defendant testified that within four or five days after May 15, 1896, plaintiff sent Douglas to take charge of the mill, and that Short & Kilgore had nothing to do with the mill after that time; that when Douglas took charge the mill was racked and damaged; that one or two saws were broken, and a large piece cut out of the saw cab, which was of cast iron, rendering it worthless and damaging it a thousand dollars; that the engine was broken and damaged \$500 or \$600. Robert Rice, a witness for defendant, testified that he tempered a chisel for Kilgore, who with the help of another man cut a piece out of the saw cab, and that the cab never did any good afterwards; that he was a sawyer, and such a cab costs from \$2,000 to \$2,500. Plaintiff, in rebuttal, offered and read in evidence the pleadings and judgment rendered in the Oregon circuit court in the suit of Nickey v. Short & Kilgore and American Hardwood Lumber Company, which are set forth in the statement and opinion on the first appeal of this cause (see 89 Mo. App. 270).

At the request of plaintiff the court gave the following declarations of law: "(1) The court declares the law to be that if the firm of Short & Kilgore paid to defendant the sum of \$1,500 as security for the performance upon their part of the contract of September 10, 1895, read in evidence; that said Short & Kilgore substantially performed said contract upon their part, from its date until on or about the 15th day of June, 1896; that on or about said 15th day of June, 1896, defendant refused to further perform said contract upon his part, or to permit said Short & Kilgore to further perform the same upon their part; and that said Short & Kilgore transferred all their interest in said \$1,500 to plaintiff—then plaintiff is entitled to recover of defendant the sum of \$1,500, together with interest from the institution of this suit. (2) The court declares the law to be that the contract of June 15, 1896, entered into between defendant and plaintiff, amounted to an abandonment by defendant of the contract of September 10, 1895, between himself and Short & Kilgore. And the court further declares that if prior to the making of said contract of June 15, 1896, said Short & Kilgore had substantially performed the contract of September 10, 1895, upon their part, and that thereafter said Short & Kilgore assigned to plaintiff all their interest in the \$1,500 deposited as security for the contract of September 10, 1895, then the plaintiff is entitled to recover"—and refused the following: "(3) The court declares the law to be that if on or about the 4th day of June, 1896, defendant, without reasonable grounds therefor, instituted an attachment suit against Short & Kilgore, and caused the writ issued in such suit to be levied upon the timber and other property of said Short & Kilgore, situated at the sawmill mentioned in the contract of September 10, 1895, between defendant and said Short & Kilgore, and that such writ was levied upon said property, then the act of defendant in instituting such suit and causing such levy to be made amounted to a prevention by him of the further performance by Short & Kilgore of the contract of September 10, 1895. (4) The court declares that the fifteen hundred dollars deposited with defendant by Short & Kilgore to secure the performance of the contract of September 10, 1895, was intended by said parties as a penalty, and not as liquidated damages."

Of its own motion the court gave the following: "(5) The court declares the law to be that if on or about the 4th day of June, 1896, defendant, without reasonable grounds therefor, instituted an attachment suit against Short & Kilgore, and caused the writ issued in such suit to be levied upon the timber and other property of said Short & Kilgore, situated at the sawmill mentioned in the contract of September 10, 1895, between defendant and said Short & Kilgore, and that such writ was levied upon said property, then the act of defendant in instituting such

suit and causing such levy to be made amounted to a prevention by him of the further performance by Short & Kilgore of the contract of September 10, 1895, until such attachment was released. (6) The court declares the law to be that if the court, sitting as a jury, should find that the copartnership firm of Short & Kilgore, composed of Sampson Short and Hugh L. Kilgore, was dissolved, and said partners ceased to transact business as such, some time prior to the death of said Sampson Short; that said Sampson Short died some time in the year 1898, and that thereafter, in the year 1899, the said Hugh L. Kilgore signed and undertook to execute, in the name of said firm of Short & Kilgore, the assignment to the American Hardwood Lumber Company, dated September 12, 1896, offered in evidence—then the court should find that such assignment is void and of no effect to transfer to plaintiff the alleged cause of action sued upon, and the court should find for the defendant."

Judgment was rendered for defendant. In four days thereafter plaintiff filed the following motion for new trial: "Comes now the plaintiff in the above-entitled cause, and moves the court to set aside the judgment therein and grant it a new trial, and as grounds for said motion states: (1) That the court erred in admitting incompetent, illegal, and improper evidence offered by the defendant, against plaintiff's objections thereto; (2) that the court erred in excluding competent, proper, and legal evidence offered by plaintiff; (3) that the court erred in its findings of facts; (4) that the court erred in refusing proper and legal declarations of law requested by the plaintiff; (5) that the court erred in granting improper and erroneous declarations of law requested by defendant; (6) that the court erred in making improper and erroneous declarations of law of its own motion; (7) that the judgment is against the law, the evidence, and the weight of the evidence; (8) that the findings of fact of the court are not supported by the evidence, and are contrary to the weight of the evidence; (9) because the judgment should have been for the plaintiff; (10) because the court erred in overruling plaintiff's motion and application for a continuance."

After hearing the motion the court made the following order: "The motion of the plaintiff for a new trial heretofore filed herein having been fully considered, it is ordered and adjudged by the court that said motion be, and the same is hereby, sustained on the sixth ground stated therein; that is to say, that the court erred in improper and erroneous declarations of law of its own motion. And it is accordingly ordered and adjudged by the court that the judgment heretofore entered herein, on the 25th day of November, 1901, be, and the same is hereby, set aside and vacated, and that a new trial be, and hereby is, granted herein. Cause ordered continued."

Defendant in due time filed a motion to set aside the order granting a new trial, which motion the court overruled, and defendant appealed.

Lentz & Biggs, for appellant. Lambert E. Walther, for respondent.

BLAND, P. J. (after stating the facts). Declaration of law No. 6, given by the court, is erroneous. The common-law rule of survivorship in one member of a firm on the death of the other has not been abrogated in this state (*Avery v. The Kansas City & Southern Ry. Co.*, 113 Mo. 561, 21 S. W. 90; *Judy & Co.'s Surviving Partner v. Mfg. Co.* [St. L.] 60 Mo. App. 114), and Kilgore, as the surviving partner of the firm of Short & Kilgore, had the legal right to assign the chose in action in suit to plaintiff.

The only issue of fact for trial was whether or not Short & Kilgore had performed their part of the contract of September 10, 1895. On June 15, 1896, this contract, by the consent of the defendant and Short & Kilgore, was put an end to, and a new contract was made by and between plaintiff and defendant in respect to the running of the mill and the furnishing of logs. The inquiry, therefore, as to the performance of the contract by Short & Kilgore, was confined to the period of time running from September 10, 1895, to June 16, 1896.

The evidence is that on June 4, 1896, the defendant attached the mill and stopped its operation, and that Short & Kilgore did not thereafter run the mill or have charge of it. In respect to the attachment the court declared the law as stated in declaration No. 5, given of its own motion. The attachment suit was never tried, but was settled by the payment of \$2,692.91 to defendant by Short & Kilgore through the plaintiff. Whether or not Nickey had reasonable grounds for the attachment it seems to us was not material in this suit. By the settlement of the attachment suit and the payment of the amount demanded by Nickey, both parties waived their right to have the grounds for the attachment inquired into. Therefore we think the fifth declaration of law is inapplicable to the facts in the case, and should not have been given.

The breach of the contract by Short & Kilgore, relied on by the defendant, was that Short & Kilgore had damaged the mill, machinery, and engine in an amount exceeding the sum of \$1,500. The contract of September 10, 1895, contains the following stipulations: "It is further understood and agreed that if the said party of the second part shall fall, neglect or refuse to keep and perform his part of this agreement they shall forfeit to the said party of the first part all the payments made to the said party of the first part under and by virtue of this agreement. * * * The said party of the second part further agrees to make all necessary repairs on the said machinery and buildings, to keep

the said sawmill plant in good running order, and at the end of the term herein provided for to deliver the said land, sawmill plant and machinery to the said party of the first part, in as good order as the same now is or may hereafter be put, less necessary wear and tear," etc.

In respect to the advance payment of the \$1,500, the contract provides that "said sum shall be taken and considered part payment for the timber so to be delivered by said party of the first part (Nickey) to the said party of the second part, and also to be held by the said party of the first part as security for the due and proper performance of said contract by the said party of the second part."

In respect to these provisions of the contract and to the answer of plaintiff filed in the Oregon county circuit court we said, when this cause was here on the first appeal, that, "by its answer in the Oregon county case, the plaintiff herein alleged that the fifteen hundred dollars were deposited as a forfeit and as and for stipulated damages should Short & Kilgore fail to carry out the contract. We think this a correct construction of the contract; at any rate, the plaintiff is estopped to assert the contrary by its answer in the Oregon county case (*Lilly v. Menke*, 143 Mo., loc. cit. 146 [44 S. W. 730]); and, if it can be shown that prior to the execution of the contract of June 15th they did fail to keep and perform their contract of September 10th, the defendant is entitled to retain the money." *Lumber Co. v. Nickey* (St. L.) 89 Mo. App., loc. cit. 288.

Plaintiff proved that Short & Kilgore complied with the contract in every respect while they operated the mill, except that part which required them to deliver the mill and machinery to Nickey in as good order as when received by them, less necessary wear and tear. Plaintiff offered to prove that Short & Kilgore kept this part of the contract by the evidence of Woerheide as set out in the application for a continuance, but this evidence was excluded for the reason that the application did not state that Woerheide saw the mill when delivered to Short & Kilgore or when delivered to the plaintiff.

The statement of Woerheide in the application for a continuance was the expression of the witness' opinion as to the condition of the mill when received by Short & Kilgore and when delivered by them. Whether or not he was qualified to give the opinion is not disclosed by his own evidence or by any other evidence in the record. Defendant had admitted that if Woerheide was present he would swear to the facts stated in the application for a continuance, and, while defendant did not waive his right to object to the competency or relevancy of the evidence, he did thereby waive his right to cross-examine Woerheide as to his knowledge of the facts upon which he based his opinion, and we think, in the circumstances, it was error to

exclude the evidence. When the application for a continuance was overruled plaintiff was without other evidence to show that the mill and machinery was not materially damaged while in the possession of Short & Kilgore. From the connection that Douglas and Woerheide had with the mill it seems to us that they would be able to testify in respect to its condition when it passed from the possession of Short & Kilgore to the plaintiff. They were both absent, and the plaintiff was deprived of their evidence, and, while we think the court did not err in overruling the application for a continuance, we think the absence of these witnesses and the exclusion of Woerheide's evidence put the plaintiff in a position where it was powerless to produce any evidence on the most vital issue of fact in the case.

On all the evidence heard the judgment was for the right party, independent of instruction No. 6, given by the court of its own motion. We are of the opinion, however, that the exclusion of Woerheide's evidence was error, and from an examination of the whole record are convinced that in the interest of substantial justice a new trial should have been awarded.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

KEUTHAN v. ST. LOUIS TRUST CO.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

ABSTRACTS OF TITLE—DUTY OF ABTRACTER—COURT RECORDS—EXAMINATION—NEGLIGENCE—MATTERS DEHORS RECORD—MEASURE OF DAMAGES—INTEREST.

1. Where an abstracter of title in examining a transfer by tax deed saw that the record showed jurisdiction in the court to render the judgment on which the deed was founded, and that the parties to the judgment and the title claimed under it were identical in name and description, it was not actionable negligence for him to fail to make inquiries dehors the record to ascertain any possible defect in the proceedings or error in the name or description of the parties.

2. Where property was sold under a tax judgment, neither a motion to vacate the judgment nor depositions of the owner filed in support thereof form any part of the record proper which an abstracter of the title to the property was required to examine in making an abstract of the property.

3. In an action against an abstracter of title for negligence in failing to discover a defect in a sale of the property for taxes, in the absence of evidence that he read a deposition on file in support of a motion to vacate the judgment, which was denied, which deposition would have disclosed that the proceedings conveyed only one-sixteenth of the title and fifteen-sixteenths of a life estate instead of the fee, an instruction that the abstracter was guilty of negligence as a matter of law was erroneous.

4. Where, in an action against an abstracter of title for negligence in failing to discover a defect, plaintiff proved that he paid \$2,500 for the property, and by reason of the defect he only acquired one-sixteenth of the title and

fifteen-sixteenths of a life estate therein, the measure of damages was the difference between what he paid and the present worth of what he actually received, estimating the true value of the property at \$2,500.

5. In an action against an abstractor of title for damages sustained by his failure to disclose a defect, where plaintiff had not been ejected, but had received the rents and profits of the property, he was not entitled to recover interest in addition to damages.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Frederick A. Keuthan against the St. Louis Trust Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Lubke & Wilcox, for appellant. Stewart, Cunningham & Elliot, for respondent.

BLAND, P. J. In December, 1895, plaintiff was negotiating with Annie Edwards and her husband for the purchase of lot 15, block 14, of the Laclede Race Course subdivision, in city block No. 3985, of the city of St. Louis, and received from them the following certificate of title:

"St. Louis Trust Company. Capital and Surplus, \$3,000,000. Land Title Department. No. 615 Chestnut St. No. 2255. St. Louis, Mo., May 4th, 1895. 11 A. M.

"M. J. Edwards, Esq. Sir:—The St. Louis Trust Company hereby certifies that, according to the records contained in the several offices wherein conveyance of, or incumbrances on, or liens against real estate, situated in the city of St. Louis, Missouri, may be filed or recorded, the title to lot No. 15, in block 14, of the subdivision of Laclede Race Course, and in city block No. 3985, in said city of St. Louis, fronting 25 feet on the south line of Hunt avenue, by a depth southwardly of 125 feet to an alley 15 feet wide, as shown on the foregoing plat, is fully vested in fee simple in Annie Edwards, and is unincumbered except as follows:

"General taxes of 1893 and 1894—delinquent—\$23.75 and interest.

"General taxes of 1895—a lien not now payable.

"Paid May 31, 1895.

"H. Y. Sherwood, Manager.

"Special taxes: None found of record in the city comptroller's office except the following:

"Street sprinkling 1894—delinquent \$0.71 and int.

"Street sprinkling 1895—a lien not now payable.

"Paid May 31, 1895.

"H. Y. Sherwood, Manager.

"Assessments for street and alley openings: None found of record in the city comptroller's office.

"Deed of trust to trustee of John B. Kreiger, dated July, 1892, recorded in book 1105, page 121, to secure one principal note for

\$1,200, due 2 years after date, and 4 semi-annual interest notes for \$36 each.

"Judgment: Dr. B. Chamblin v. M. J. Edwards, May 11, 1893, \$23.

"Attachments: None.

"Mechanics' Liens: None.

"In witness whereof, the St. Louis Trust Company has caused this certificate to be signed by its president, attested by its secretary, and its corporate seal to be hereunto affixed the day and year first above written.

"Void unless attached to our examination No. 2255, lot 15, city block 3985.

"[Seal.] St. Louis Trust Company,

"By Thomas H. West, President.

"Attest: John D. Filley, Secretary.

"H. Y. Sherwood, Manager
Title Department."

He took this certificate to the St. Louis Trust Company, and delivered it to Mr. H. Y. Sherwood, manager of defendant's title department, and asked him to have the title examined, or rather to have it extended down to December 28, 1895, and afterwards, to wit, on December 28, 1895, received from plaintiff the following certificate, and paid defendant a fee of five dollars therefor:

"St. Louis Trust Company. Capital and Surplus, \$3,000,000. Land Title Department. No. 615 Chestnut Street. No. 2255. St. Louis, Mo., Dec. 28th, 1895. 9 A. M.

"Frederick H. Keuthan, Esq. Sir:—The St. Louis Trust Company has examined from the 4th day of May, 1895, the date of its annexed certificate, to the present time, the title to the property therein described, to wit:

"Lot No. 15, in block 14, of the subdivision of Laclede Race Course, and in city block No. 3985 of the city of St. Louis, and reports that all the title which Annie Edwards is shown by the said certificate to have then had on and to the same, is still fully vested, according to the St. Louis City Records, in said Annie Edwards, subject to the following intermediate incumbrances only.

"General taxes of 1895—Due, \$21.53.

" " " 1896—A lien.

"Special taxes and assessments for street and alley openings—None found of record in the city comptroller's office, except the following:

"Street sprinkling, 1895—Due, \$0.54.

"Deed of trust to trustee for S. C. Buckingham, dated May 4th, 1895, recorded in book 1287, page 50, to secure one note for \$200, due one year after date, and 2 semi-annual interest notes for \$7 each. Subject to deed of trust for \$1200.

"Judgments—None. Attachments—None. Mechanics' Liens—None.

"Deed of trust for \$1200 recorded in book 1105, page 121, and judgment v. M. J. Edwards, remain unsatisfied of record.

"Taxes of 1894 have been paid.

"In witness whereof, the St. Louis Trust Company has caused this certificate to be

signed by its president, attested by its secretary, and its corporate seal to be hereunto affixed the day and year first above written.

"Void unless attached to our examination No. 2255, lot 15, city block 3985.

"[Seal.] St. Louis Trust Company,

"By Henry C. Haarstick, 1st V. President.

"Attest: John D. Filley, Secretary.

"H. Y. Sherwood, Manager
Title Department."

Plaintiff testified that on the faith of these certificates he completed the purchase of the lot and received a warranty deed for the same from Annie Edwards and her husband, for which he paid \$2,500, including the incumbrances named in the certificate of title, which he assumed and afterwards paid.

On the trial it was stipulated by and between the parties that on and prior to January, 1869, the title to the lot was vested in the Laclede Association. On June 17, 1869, the Laclede Association conveyed the lot by warranty deed to Jane Sauriol, which deed was recorded in Book 386, page 466. Jane Sauriol et al., by sheriff, conveyed the lot by two sheriff's deeds dated May 11, 1892, to Michael Morrissey. Michael Morrissey and wife conveyed the lot by warranty deed dated August 19, 1890, to Marcellus J. Edwards. Marcellus J. Edwards and wife conveyed the lot by warranty deed dated April 3, 1894, to Frederick H. Keuthan. Frederick H. Keuthan and wife conveyed the lot by special warranty deed dated April 3, 1894, to Annie Edwards. The last two deeds, as appear in evidence, were made for the purpose only of transferring the title from Marcellus J. Edwards to his wife, Annie Edwards, and that Mr. Keuthan knew nothing about the title at the time when the deeds were made. Annie Edwards and husband conveyed the lot by warranty deed dated December 26, 1895, to Frederick H. Keuthan. Besides the above was the following: "Fabian Sauriol and wife to Fabian M. Sauriol et al. Quitclaim deed, dated June 13, 1886. Recorded in Book 805, page 490." The last-mentioned deed was made by Fabian Sauriol and his second wife to the sons of Fabian Sauriol by his first wife.

After his purchase the plaintiff went into possession of the premises, and is still in the possession thereof. For the first 10 months he received \$20 per month as rent therefor; after that and down to the trial he had received \$15 per month rent.

A short time before the beginning of this suit plaintiff was about to sell the premises. The prospective purchaser wanted a certificate of title from the Lincoln Trust Company. This company caused an examination of the title to be made, and discovered what was thought to be a defect in the title, and the sale fell through. Plaintiff then demanded damages of the defendant, which it refused to pay, whereupon this suit was commenced.

After alleging the employment of defendant

to examine the records and give a certificate of the true condition of the title, the petition alleges: "Plaintiff further states that defendant did not carefully and faithfully examine the title to said lot, and did not deliver to him a correct and true certificate of the title thereto, but, on the contrary, negligently and carelessly examined said title to said lot and the records affecting the same, and that said certificate was untrue and erroneous, in this: that at the time it was delivered to plaintiff the said Annie Edwards was not the owner of the entire fee-simple title of said lot, as said certificate set forth, but was the owner of only an undivided $\frac{1}{16}$ th of said fee, and the owner during the natural life of Fabian Sauriol of a life estate in the other $\frac{15}{16}$ ths of said fee, and that said other $\frac{15}{16}$ ths thereof was then vested, subject to said life estate, in Fabian M. Sauriol, William Henry Sauriol, and Charles Joseph Anthony Sauriol, and that defendant, by the exercise of ordinary and reasonable care in making its said examination, could have discovered said defects in the title of said Annie Edwards to said lot. Plaintiff further states that by reason of said certificate being erroneous and untrue, and by reason of defendant carelessly and negligently examining the title to said lot as aforesaid, he has been damaged in the sum of \$2,500. Plaintiff further states that, as soon as he had any knowledge or belief as to said certificates being untrue and erroneous, he called on the defendant, and demanded that it make good to him his said damages, and that defendant then, and ever since then has, and now does, refuse so to do. Wherefore plaintiff prays judgment for \$2,500 and costs." The answer was a general denial.

The issues were submitted to the court, who, after hearing the evidence, found for the plaintiff, and assessed his damages at \$1,294.25.

Defendant filed a motion for new trial, assigning as error the giving and refusing of instructions, and that the verdict of the court was against the evidence. The court sustained the motion, and granted a new trial, "on the grounds of error in instructions, and because the finding was against the law and the evidence." From the order granting a new trial plaintiff duly appealed.

The chain of title from the Laclede Association to plaintiff is complete, but a latent defect in the sheriff's deed to Morrissey was discovered when plaintiff was about to sell the premises. This sheriff's deed is founded on a judgment rendered in a suit for back taxes against Jane and Fabian Sauriol, commenced February 2, 1881, in the St. Louis circuit court. To the summons issued in the cause the sheriff returned that defendants were not found. On this return an order of publication to defendants was made November 15, 1881. Proof of the publication of this order was made at the March term, 1882, and at the same term judgment by default

was rendered. Execution was issued on the judgment, and the lot was sold thereunder at the May term, 1882, Morrissey becoming the purchaser. In January, 1884, Fabian Sauriol filed his motion in the circuit court to vacate the judgment, quash the execution, and set aside the sheriff's deed. Morrissey and others were notified of the filing and pendency of this motion. In support of the motion, the deposition of Fabian Sauriol was taken at Tacoma, Wash. This deposition was filed and published in the St. Louis circuit court, and was thereafter kept with the papers in the tax suit.

The following is an abstract of the evidence from the deposition of Fabian Sauriol opened and filed in said back-tax case, which was taken April 10, 1884: "Said Sauriol testified that at that time he resided at Tacoma, Washington territory; that he was the defendant in said tax suit; that he was married to his first wife, Jane Judge, in the city of St. Louis, Missouri, on the 16th day of May, 1860; that his first wife died in St. Louis on the 16th day of March, 1870, and was buried in Calvary Cemetery; that he married his second wife, Jane Cartwright, in 1875; that he had five children by his first wife, named Fabian M., William Henry, Charles Joseph Anthony, Mary Olive, and Mary Jane; that Mary Olive and Mary Jane were dead at that time, and that the rest were all living; that Fabian M. Sauriol was at that time aged 23 years, Wm. H. 21 years, Charles Joseph Anthony 19 years; that Mary Olive died before her mother's death, and that Mary Jane died three months and fourteen days after her mother's death."

On November 5, 1884, the motion to vacate, etc., was overruled, and no further steps were taken in the matter.

Fabian Sauriol's deposition was taken by plaintiff, on May 2, 1901, at Tacoma, Wash., and read in evidence on the trial of this cause. He testified as follows: "That he would be 64 years old on the 9th day of May, 1901; that he lived at Tacoma, Washington; that he was first married to Jane Judge, a single woman, on May 16, 1860; that his first wife died March 6, 1870; that there were five children born by this marriage, named Fabian M., William Henry, Charles Joseph Anthony, Mary Olive, and Mary Jane; that the two girls are dead; that Mary Olive died at the age of nine months, and before her mother died, and that Mary Jane died some time over three months after her mother's death; that the three sons are still living; that he married his second wife, Angela Josephine Virginia Cartwright, in St. Louis, March 28, 1875, and that she is now living, and that they are living together as husband and wife; that we have always called my second wife Jane, and she is called Jane by her own parents, but her full name, as heretofore stated by me, was the name she was christened with a few days before her marriage to me, but she has never used

that name, except in the certificate of marriage. Witness testified that he bought the property in controversy in June, 1869, at auction, and placed the title in the name of his first wife, Jane; that the property in question remained in witness' first wife's possession until she died, and that he never did anything with the premises after her death; that his first wife did not leave any will, and there never was any probate proceedings upon her estate; that his first wife was buried in Calvary Cemetery in St. Louis; that neither witness nor his said children or second wife ever made any conveyance of said property, but that he and his second wife, in May, 1875, gave a deed of trust or mortgage, which witness afterwards paid; that witness and his second wife, and all of his children then living, left St. Louis in August, 1875."

The deed of trust mentioned in Sauriol's deposition as having been executed in 1875, was signed and acknowledged by Fabian Sauriol and Jane Sauriol, his wife.

It is conceded by plaintiff that Fabian Sauriol, at the time of the rendition of the judgment in the back-tax suit and the sale on the execution issued thereon, was the owner in fee of one-sixteenth and had a life estate in fifteen-sixteenths of the lot, and that the sheriff's deed conveyed this interest to Morrissey.

The court at the instance of plaintiff declared the law as follows:

"(1) The court declares the law to be that if the court, sitting as a jury, finds and believes from the evidence that the defendant, prior to the execution of either of the certificates offered and read in evidence by the plaintiff, knew, or by the exercise of ordinary or reasonable care on its part might have known, that Jane Sauriol, grantee in the deed of the Laclede Race Course Association, died prior to the beginning of the tax suit offered in evidence, leaving children surviving her, and that she never conveyed said lot during her lifetime, and that said children were not made parties to said tax suit, then the defendant is liable.

"(2) It was the duty of the defendant to have examined all records and conveyances, suits and files, recorded and kept in the different public offices in the city of St. Louis, and the courts of record thereof, which appertained to or affected the title of the lot in question in this case, and if, by the exercise of ordinary or reasonable care in so doing, defendant could have seen the files in the tax suit, No. 2093, including the deposition and motion to vacate judgment and quash execution filed in said suit, and have ascertained therefrom that said Jane Sauriol died before the filing of the tax suit, leaving children surviving her, and made no conveyance of the lot prior to her death, and that her said children were not made parties to said tax suit, then the defendant is liable.

"(3) The title made by the sheriff's deed

was one in invitum,—that is, against the will of the defendants named in the writ of execution—and therefore the defendant should have exercised greater care to ascertain that the proceedings in said tax suit were regular and conferred upon the court full jurisdiction; and if the defendant failed to exercise this care, and in consequence thereof made an untrue certificate, and the plaintiff suffered loss thereby, then the defendant is liable.

"(4) For the purpose of the examination of the title to the lot in controversy, the deposition of Fabian Sauriol, filed on the 22d day of April, 1884, in the tax case No. 2,093, and which filing was noted and recorded in Book 4, page 310, of the record book of the circuit court of the city of St. Louis, must be considered as forming a part of the records of that case, although not such for the purpose of an appeal or writ of error.

"(5) The court also declares the law to be that for the purpose of making an examination of the title to the premises in question here the motion to set aside the judgment in the back tax suit in evidence, numbered 2,093, and the filing of which motion was noted in Book 4, at page 229, of the record book of the circuit court, must be considered as part of the record of said cause, although not such for the purpose of an appeal or writ of error in said cause.

"(6) If the court, sitting as a jury, finds for the plaintiff, the measure of damages is what the court may believe from the evidence to have been the value of the premises at the time when the plaintiff completed his purchase, less $\frac{1}{10}$ thereof, and less also the value of the curtesy of the remaining $\frac{18}{10}$ at the date of the deed to plaintiff, namely, December 28, 1895, computed upon the life of said Fabian Sauriol's age at that time."

Whether or not the officer of the defendant who made the certificate of title in making his examination of the title examined the proceedings in the tax suit, and if he did whether or not he discovered the motion and deposition of Fabian Sauriol, filed with the papers in that cause, is not in evidence, for the reason the officer who made the examination was dead at the time of the trial.

The instructions given for plaintiff declared, as a matter of law, that it was the duty of defendant to both examine the proceedings in the suit for back taxes and to discover and read the deposition of Sauriol, and on the information contained in said deposition to ascertain for himself whether or not Jane Sauriol died before the commencement of the tax suit, leaving children surviving her who were not made parties to that suit. An investigator of title for hire is required, in the performance of his undertaking, to exercise skill and care, and if he fails to do either, and damage results to his employer by reason of his negligence, he will be liable, but he is not a guarantor of the title. *Schade v. Gehner*, 133 Mo., loc. cit. 257, 34 S. W. 576.

Warvelle on Abstracts, p. 522, § 6, says:

"It is a fundamental rule in equity that purchasers are directly affected by every matter or circumstance concerning the title to the property they take which affirmatively appears from the pleadings or decrees of courts of competent jurisdiction, in actions relating to such property, whether such purchasers have actual notice or not. It is the application of this rule which renders necessary a searching investigation of the court rolls whenever real property is sold, for every man is presumed to be cognizant of what transpires in the courts of justice, and the law will charge him with actual notice of whatever there occurs which affects the merits of the title he would take. This rule, which has always been considered a hard one, is not a favorite with the courts, who are ever inclined to limit its application, and it will not be extended to embrace collateral matters, or matters not specifically mentioned in the bill or decree," etc. See, also, *Dugan v. Follett*, 100 Ill. 581.

Where a conveyance of real property results from legal proceedings, and the official deed is only prima facie evidence of the recitals therein, as is a tax deed in this state, an examiner of title should do one of two things. He should either by marginal notes on his abstract call attention to the fact that the deed is but prima facie evidence of title, or he should examine the court proceedings, and ascertain for himself whether or not the court rendering the judgment had jurisdiction of the subject-matter and had also acquired jurisdiction of the person of the defendant, and that the parties to the suit and to the title are identical. *Warvelle on Abstracts*, p. 619. Such an examination would ordinarily be sufficient, if the record showed jurisdiction in the court to render the particular judgment, and the parties to the judgment and the title claimed under it to be identical in name and description, and it would not be negligent in the examiner to fail to make inquiry dehors the record to ascertain if there might not be some possible defect in the proceedings or error in the name or description of the parties. Neither the motion nor deposition filed by Fabian Sauriol to vacate the judgment, etc., formed any part of the record proper. *United States v. Gamble & Bates*, 10 Mo. 457; *Christy's Adm'r v. Myers*, 21 Mo. 112; *City of St. Louis v. Pahl*, 114 Mo. 32, 21 S. W. 448; *State v. Brennan*, 164 Mo., loc. cit. 506, 65 S. W. 325, and cases cited. An examiner, seeing that the motion had been denied, would not be expected to examine the papers and review the action of the court. But, if he read the deposition, it was of sufficient importance to put an ordinarily prudent man on inquiry, and if he neglected to make inquiry he would unquestionably be guilty of negligence. The evidence does not show that the examiner read the deposition. In the absence of such evidence, we think the court erred in declaring, as a matter of law, that he was guilty of negligence.

2. If instruction No. 4, asked by defendant, but refused, should be modified to conform to the views herein expressed and then given, it, with those that were given for defendant, would fully present the defense made at the trial.

We do not think the sixth declaration of law given for plaintiff states the correct rule of plaintiff's measure of damages. He paid \$2,500 for a full fee-simple title. He actually got one-sixteenth of that title and fifteen-sixteenths of a life estate for and during the life of Fabian Sauriol. His loss was the difference between what he had paid (\$2,500) and the present worth of what he actually received, estimating the true value of the lot at \$2,500. Nor do we think he is entitled to interest on the loss, for the reason he has had the uninterrupted possession of the lot, and has enjoyed the rents and profits thereof. He is not entitled to both rents and interest. *Hutchins v. Roundtree*, 77 Mo. 500; *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048.

The judgment is affirmed and remanded. All concur.

WILLIAMS v. BAKER et al.

(Court of Appeals at St. Louis, Mo. March 17, 1908.)

VENDOR AND PURCHASER—VENDOR'S LIEN—ASSIGNMENT OF DEBT—RIGHTS OF ASSIGNEE—NOTES—TRANSFER AFTER MATURITY—DEFENSES AVAILABLE—ESTOPPEL—BREACH OF WARRANTY.

1. A purchaser of a note given for a part of the price of land acquires the right to enforce the vendor's lien against the land for the balance of the price thereby secured, by suit in his own name.

2. A purchaser of a note given for part of the price of land, after its maturity took the same subject to every defense to which it was subject in the hands of the payee.

3. Where, in an action by an assignee of a note given for a part of the price of land, there was no evidence that defendant, who was a subsequent purchaser of the land, had any knowledge that the maker of the note and an intermediate purchaser of the land had written letters to the payee acknowledging that the note was justly due, and promising to pay the same as soon as they would raise the money, defendant was not estopped by such letters from setting up a breach of warranty of title as a defense to the note.

4. In a suit to enforce a vendor's lien for a balance of the price of land sold, against a subsequent purchaser of the land, defendant was entitled to plead as a defense a breach of the vendor's warranty of title, and was not bound to sue at law to recover damages therefor.

Goode, J., dissenting.

Appeal from Circuit Court, Pemiscot County; Henry O. Riley, Judge.

Action by Richard Williams against J. K. Baker and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

On March 2, 1897, E. Still and N. Gibson were the joint owners of the east half of the southwest quarter of section 21, township

17 north, of range 11 east, situated in Pemiscot county, Mo. On said date E. Still, representing himself as the sole owner of said land, sold the same to J. K. Baker, a resident of the state of Tennessee, for \$240, and executed and delivered to him a warranty deed therefor. Baker paid \$140 of the purchase price, and gave Still his promissory note for the balance, \$100, due 12 months after date, which fact was recited in the deed. On February 7, 1897, J. K. Baker conveyed the land by warranty deed to his son, D. E. Baker. On February 14, 1899, D. E. Baker conveyed the land by warranty deed to his mother, P. E. Baker. All of these deeds were duly recorded. After the note for the balance of the purchase price became due, J. K. Baker and D. E. Baker wrote letters to Still promising to pay the note. Still exhibited the note and these letters to the plaintiff, and induced him to purchase it. After acquiring the note, plaintiff commenced this suit in the Pemiscot circuit court against the three Bakers to enforce his vendor's lien against the land for the balance of the purchase money evidenced by the note. J. K. Baker died before notice of the suit could be served upon him, and the suit as to him was dismissed, and was also dismissed as to D. E. Baker on his motion. The answer of the remaining defendant, P. E. Baker, alleged a breach of the covenant of warranty contained in the Still deed, and by reason thereof alleged a failure of the consideration of the note.

The court refused the following instructions asked by plaintiff:

"(1) The court declares the law to be that in this cause, if the court sitting as a jury shall find that J. K. Baker bought the land in controversy from E. Still, and that the deed of conveyance recited upon its face that a note of \$100 had been given for the balance of the purchase price of said land, and that said deed of conveyance had been recorded in the recorder's office in Pemiscot county, Mo., prior to the time that the defendant P. E. Baker purchased said land, the law will presume that said P. E. Baker had notice of the lien of said E. Still upon said land for the unpaid balance of the purchase price thereof.

"(2) If the court, sitting as a jury, shall find that said E. Still transferred the note given as aforesaid for the balance of purchase price in said land, for value, to plaintiff, Richard Williams, and that said note has not been paid, then the finding of the court will be for the plaintiff to the extent of the amount due now on said note.

"(3) The court declares the law to be that, even though he may find that the consideration of the note given by J. K. Baker to E. Still has partly failed, yet such fact is no defense to the defendant P. E. Baker."

No other instructions were asked or given, and the court, to whom the issues were by agreement of parties submitted, found

for defendant, and rendered judgment in her favor, from which plaintiff appealed.

J. P. Tribble, for appellant. Brewer & Collins, for respondents.

BLAND, P. J. (after stating the facts). 1. By his purchase of the note and the assignment thereof to him, the plaintiff acquired the right to enforce the vendor's lien against the land for the balance of the purchase money by a suit in his own name. But he, having purchased the note after its maturity, took it subject to every legal or equitable defense that it was subject to in the hands of the payee. *Kellogg v. Schnaake*, 56 Mo. 136; *Kelly v. Staed*, 136 Mo. 436, 37 S. W. 1110, 58 Am. St. Rep. 648; *Booher v. Allen*, 153 Mo., loc. cit. 622, 623, 55 S. W. 238; *Gemmell v. Hueben*, 71 Mo. App. 291.

The plaintiff contends, however, that he was induced to purchase the note on account of the representations and statements made by J. K. and D. E. Baker in their letters written to Still, to the effect that the note was justly due, and that they would pay it as soon as they could raise the money. Had these representations been made to plaintiff with the knowledge that he was about to purchase the note, and had he relied upon them in making the purchase, then J. K. and J. E. Baker would have been estopped to set up a defense of failure of consideration. But these letters were not written to plaintiff, and there is nothing in the record to show that either of the Bakers had any knowledge or notice that plaintiff was negotiating for the note; besides, neither of them are parties to the suit, and it is not perceived how the defendant can be estopped by conduct to which she was not a party, and of which she had no knowledge, or even notice.

2. It is further contended by appellant that the suit is not on the note, but to enforce the vendor's lien. This is true, but it is also true that the object of the suit is to collect the balance of the purchase price of the land which is evidenced by the note. The suit is to collect a debt alleged to be due, and charge the land directly with the payment of that debt. The defendant purchased the land with notice that it was subject to the payment of this debt, and that the legal holder of the note, whoever he might be, would be entitled to sue to enforce the payment of the debt against the land.

The lien is an equitable one. The question arises whether or not this equity can be enforced, in the face of the evidence that conclusively shows that it is without consideration, or, rather, that the consideration has failed, and in the face of the further fact that this equitable lien had its origin in and is founded on the fraud perpetrated on J. K. Baker by Still. It is insisted by appellant that defendant is bound to let this fraud be consummated, bound to discharge the lien, though fraudulent, and rely upon Still's war-

ranty for redress. In other words, that, for the reason the defense rests on a breach of warranty, the collection of the fraudulent debt may be enforced in equity, and the defendant forced to resort to a suit at law on the warranty to recoup her damages. To accede to this contention would be, in effect, to hold that where one is sued in equity he cannot interpose a special legal defense or show that the equity which the plaintiff seeks to enforce is void for want of consideration on the ground that defendant has a complete remedy at law. It seems to us this would be a roundabout and circuitous way to get at the right of the thing, and that it is opposed to both law and reason. We cannot see why a failure, or partial failure, of consideration for the purchase price of land may not be interposed to defeat a suit to enforce a vendor's lien for the balance of such purchase price; that it may be done we think is the law in this country. *Durment v. Tuttle*, 50 Minn. 428, 52 N. W. 909; 6 Am. & Eng. Ency. of Law (2d Ed.) p. 792.

That the plea of failure of consideration of the purchase price for personal property sold on a warranty is available as a defense in a suit to recover such price is the well-settled law in this state. *Brown v. Weldon*, 99 Mo. 564, 13 S. W. 342; *Miles v. Withers*, 76 Mo. App. 87; *Stewart v. Miles*, 80 Mo. App. 24; *Schoenberg v. Loker*, 88 Mo. App. 387. We can see no reason for a distinction in this respect between suits for recovery of the purchase price of chattels sold on a warranty and suits to recover the purchase price of land sold on a warranty.

The answer pleaded a breach of the warranty of title as failure for the consideration of the debt which the plaintiff sought to enforce. The evidence showed conclusively that the breach had been made, and that it was made the moment Still delivered his deed to J. K. Baker. The covenant of title ran with the land, and the right to sue for a breach of it passed to defendant by means of the deed from J. K. Baker, and from the latter to the defendant, and we think to set up this breach as a defense to the suit to enforce the payment of the balance of the purchase money was available to the defendant, and affirm the judgment.

REYBURN, J., concurs. GOODE, J., dissents, because there is no proof defendant's title to the land has been questioned nor her power to enjoy it disturbed.

CALDWELL v. RENFRO et al.
(Court of Appeals at St. Louis, Mo. March 17, 1908.)

EXEMPTION—CLAIM AGAINST EXECUTION—REMOVAL FROM STATE.

1. The right to an exemption, claimed against execution by one as the head of a family, un-

¶ 1. See Exemptions, vol. 23, Cent. Dig. § 23.

der Rev. St. 1899, § 3162, is not lost as against such execution, he then being a resident of the state, by his subsequent removal therefrom.

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Action by George M. Caldwell against Thomas J. Renfro. From a judgment relative to a claim of exemption, defendant and H. M. Hopke, sheriff, appeal. Reversed.

Hostetter, Dempsey & McGinnins, for appellants. J. H. Blair & Son, for respondent.

REYBURN, J. In an action by attachment brought February 21, 1899, by George M. Caldwell against Thomas J. Renfro, the attachment was sustained October 8, 1900, and final judgment rendered April 1, 1902, in favor of plaintiff against defendant, for the aggregate amount of \$2,092.08. The causes of attachment assigned charged Renfro with concealing and disposing of his property so as to hinder and delay his creditors, and being about to so transfer and remove his property, but did not embrace any charge that he was about to leave the state, or that he was a nonresident of the state. Before the sale by Sheriff H. M. Hopke of the property attached, March 15, 1899, Renfro served written notice on the sheriff, as the head of a family and resident of Missouri, demanding statutory exemptions under section 4903 of the Statutes of 1889, and also claiming, under section 4906, \$300 exemptions, now sections 3159 and 3162, respectively, of the present statutes. After final judgment was rendered in the attachment suit, all of the proceeds of the sale of the property attached, except the sum of \$102.71, had been ordered by the court to be disbursed by the sheriff, and at the June term, 1902, plaintiff filed a motion for an order on the former sheriff to pay over this sum remaining to him on account of his judgment, and at the same term Renfro filed a motion for an order requiring the sheriff to pay the same amount to him in recognition of his exemption rights, and the sheriff likewise filed a motion for an order authorizing him to pay such balance to Renfro on his exemption claim.

The plaintiff's motion recites that on April 1, 1902, the court adjudged that Henry M. Hopke, as late sheriff of Pike county, had in his hands the proceeds of sale of personalty attached and sold under order of court; that in such final judgment the court ordered Hopke, as such sheriff, to pay the plaintiff from said funds certain amounts towards payment of the judgment rendered in said cause, but no part of the judgment indebtedness had been paid; that there remained in the hands of said Hopke, as such sheriff, of said proceeds, the sum of \$102.71, which the court omitted or failed to order said Hopke, as such sheriff, to pay over to plaintiff in such final judgment on account of his indebtedness; that the attachment in said cause had been sustained, and under the final judgment the plaintiff was entitled to said sum, and

that said Hopke, as such sheriff, had said sum then on hand; and prayed for an order on said Hopke, as such sheriff, requiring him to pay such sum to plaintiff towards payment of said indebtedness.

Renfro's motion set out that at the time of the issuance and levy of the writ of attachment and the sale of the attached property he was a resident of the state of Missouri, and had a family, and as such was entitled to all the exemption rights fixed by statute, and that prior to the sale of such attached property he had served written notice on Henry M. Hopke, then sheriff of Pike county, and the officer who was executing the attachment writ, claiming his exemption rights in the attached property and its proceeds, and that nothing had ever been set out to him by the sheriff, either out of said property or its proceeds, on account of his exemption claims; that on final judgment rendered by the Pike circuit court the sum of \$102.71 was found by the court to be in the hands of the sheriff, being the balance of the proceeds of the sale of Renfro's interest in the attached property not covered by a landlord or vendor's lien in favor of plaintiff; that he (Renfro) was entitled to such sum on account of his exemption rights; and prayed for an order on the former sheriff to pay over such amount, which was still in his custody, to Renfro on account of his exemption claim and rights.

The motion of Henry M. Hopke, former sheriff of Pike county, recited the facts contained in the motion of defendant Renfro, and that said sum was a portion of the interest of Renfro in the proceeds of sale of such attached property not covered by a vendor's or a landlord's lien, exempt from attachment, and belonged to Renfro, and asked authority of the court to make payment of the amount to the latter on account of his exemption rights.

These three motions were taken up and heard at one time, and from the evidence it developed that Renfro, about six months prior to the hearing of the motions, had removed to Illinois, where he was then residing with his family, although at the time of the issuance of the attachment writ, the levy on the property, and its sale, and for nearly three years thereafter, pending the litigation between Caldwell and Renfro, the latter continued to be a resident of Missouri. The trial court sustained the motion of the plaintiff, and overruled the motion of Renfro and Hopke, who thereupon both perfected their appeal.

Appellants asserted the right of Renfro to the fund in question as exempt from seizure by attachment under the provisions of section 3162 of the Revised Statutes of 1899. Exemption rights are purely of statutory origin, and exist only so far as thereby created. The statutes of exemption, being benevolent and humane in their character, have been given a liberal construction so as to give full

effect to the intention of the legislature, but no such construction should be given as to evade the purpose of the statute, and the intention of the lawmakers in extending charity to the impecunious must also be just to the creditors. *Wagner v. Furniture Co.*, 63 Mo. App. 206; *Thompson, Homesteads & Exemptions*, §§ 4, 731; *Waples, Homesteads & Exemptions*, pp. 36, 37, 764. Appellant Renfro's right to assert his exemption privileges arose when the levy was effected, and even before the levy the statute required the officer in whose hands the process had come to apprise him, as the head of a family, of the property exempt from attachment and execution. Section 3163, Rev. St. 1899. He had asserted his exemption rights in the proper manner by claim in writing served on the officer holding the attachment writ on March 15, 1899, while he continued as a resident of this state within the protection of its laws, and the rights of the parties hereto must be determined by their status at the time of the issuance of the writ of attachment. The notice of his exemption claim gave the property to which this appellant was entitled the status of property exempt from attachment, and the respondent had no lawful right, and the officer no legal power, to subject such property to the process. Renfro's rights, thus firmly established, remained fixed, and his subsequent change of residence and removal to another state could not have the effect of forfeiting or destroying such vested rights, or, by expanding the scope of the attachment writ, add to its effect or enlarge the rights of respondent beyond those existing thereunder at the time of its issuance. *Stotesbury v. Kirbland*, 35 Mo. App. 148; *Thompson, Homesteads & Exemptions*, § 839.

The judgment will therefore be reversed and remanded, with instructions to the lower court to sustain the motion of appellants.

BLAND, P. J., and GOODE, J., concur.

CAMPBELL v. AMERICAN BEN. CLUB FRATERNITY.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

BENEFICIAL ASSOCIATIONS—SUBSEQUENT BY-LAWS IMPAIRING INSURANCE—FOLLOWING DECISION OF ANOTHER STATE.

1. Provision in the application and certificate of a member of a beneficial association that he accepts the certificate subject to all future laws of the association, renders binding on him only after-adopted laws for the conduct of the association, duties of members, and the like, and not such as impair his contract of insurance.

2. Though the Supreme Court of the state in which one became a member of a beneficial association has decided that the provision in a certificate of membership that the member accepts it subject to all future laws of the association makes binding on him subsequent by-laws impairing his contract of insurance, this will not be followed in an action for his insurance.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by A. B. Campbell against the American Benefit Club Fraternity. Judgment for plaintiff. Defendant appeals. Reversed conditionally.

Nathan Frank and R. A. Jones, for appellant. R. P. & O. P. Williams, for respondent.

REYBURN, J. * At Aberdeen, Miss., in January, 1886, Hugh Campbell, the deceased husband of respondent, became a member of a fraternal beneficial organization, a corporation organized under the laws of the state of Kentucky, with its principal office in the city of Cincinnati, Ohio. This association had a local lodge at Aberdeen, of which the assured became a member, termed, in the language of the order, "Castle Gregg," and received a beneficial certificate from this, the Knights of the Golden Rule, on which this suit is brought, having made it payable to his wife, the plaintiff. The application for membership contained a stipulation to accept the certificate subject to the laws of the order then in force or which might thereafter be enacted by the supreme commandery. The certificate itself contained the following provisions: "This certificate issued by the authority of the Supreme Commandery Knights of the Golden Rule, Witnesseth: That the Order of the Golden Rule has been conferred upon Hugh Campbell, who is now a member of the order in good standing, Castle Gregg, No. 198, located at Aberdeen, State of Mississippi, and in consideration of the representations and declarations made in his application for this certificate, which is made a part hereof, and full compliance with all the laws of this Order now in force or that may hereafter be enacted, one thousand dollars, together with accrued assessments, will be paid from Benefit Fund of the Second Class of this Order by the Supreme Commandery, Knights of the Golden Rule to his wife, Mrs. A. B. Campbell, or as may hereafter be directed in his application for change hereof: provided, however, when there are not sufficient members in this class to pay the maximum benefit there shall only be paid the sum realized on one assessment in this Class on the death of said Comrade less ten per cent. to the Contingent Fund, as provided by law, together with the full amount of accrued assessments paid by him in this Class." The contingent fund mentioned to which this 10 per cent. was to go was the fund from which, under the laws of the order, all expenses and accrued assessments which were to be returned were to be derived, and the sources of revenue of the order were this 10 per cent. of the assessments and the whole of the membership fees paid by the members. The order was then divided into five classes, designated "1," "2," "3," "Senior," and "Female," and the maximum

* 1. See Insurance, vol. 22, Cent. Dig. § 1855.

benefits payable in these respective classes were \$500, \$100, \$2,000, \$2,000 and \$1,000, respectively, and this certificate was of the second class, entitling the beneficiary to \$1,000 on the conditions above enumerated.

A law of the order at the time of the issuance of the certificate, respecting the disposition of the assessments collected in each class and the payment of benefits, provided that the knights' benefits paid into the supreme treasury by members of each class should be held separate, each from the other, so that members of one class should not be made to contribute to the fund of another. In 1892, at a meeting of the supreme commandery of the order, at which the lodge joined by Campbell was represented, the laws of the order were amended to abolish these classes, and eliminate the limitation upon payment of benefits to assessments derived from members of the particular class in which the certificate was issued, so that thereafter, members of the entire order contributed to payment of benefits on all death losses, which were paid from the common fund, and, for the purpose of apportioning the part of the assessments on the whole membership of the order to be paid on each certificate, three sections were created according to the maximum benefit each should receive, the first receiving \$500, the second \$1,000 and the third \$2,000, and the following law adopted: "The Knights' and Ladies' Benefits paid into the Supreme Treasury by members of different sections shall be held in common. When the amount realized by one assessment, less 10 per cent., shall be sufficient to pay in full a maximum benefit in all three Sections (to-wit, \$3,500), then the maximum benefit in either Section shall be paid. When the amount realized on one assessment, less 10 per cent., shall not be sufficient to pay the maximum benefit in all three sections, then the benefits shall be paid proportionately upon the following basis: In the First Section one-seventh of net amount realized; in the Second Section two-sevenths of net amount realized; in the Third Section four-sevenths of the net amount realized." The payment of accrued assessments was abolished at this meeting by an amendment of the laws. In 1901, defendant, the American Benefit Club Fraternity, was created under the laws of the state of Kentucky, and members of the Knights of the Golden Rule accorded the right to join it without physical examination or payment of initiation fee, and Campbell became a member of the last organization, which assumed the obligations, and was, in effect, a reorganization, of the Knights of the Golden Rule; and up to the time of his death paid accruing assessments to the later body, the defendant herein. The law of this order concerning the payment of benefits was as follows: "Benefits in this order shall be in four sections and be known and designated as 1st, 2nd, 3rd and 4th sections. The maximum benefit in the 1st sec-

tion, shall be \$250, 2nd section \$500, 3rd section \$1,000, 4th section \$2,000. When the net amount realized on one monthly contribution or assessment less the percentage for expenses and reserve fund is sufficient to pay in full a maximum benefit in the 4th section (to-wit, \$2,000), then the maximum benefit in either section shall be paid. When the net amount realized on one monthly contribution, as above, is not sufficient to pay the maximum benefit in the 4th section, then the benefits shall be paid proportionately on this basis: In the first section $\frac{1}{8}$ of net amount realized; in the second section $\frac{1}{4}$ of net amount realized; in the third section $\frac{1}{2}$ of the whole of net amount realized; in the fourth section the whole of the net amount realized on one monthly contribution or assessment."

It was conceded that Campbell, at the time of his death, was in good standing in the defendant company; that he had paid all dues and assessments required of him; that plaintiff, a resident of Mississippi, was the widow of Campbell, and the beneficiary in the certificate; that she had complied with all the terms of the certificate, and that she had demanded of defendant the amount of one assessment in class 2, less 10 per cent. for the contingent fund, as well as the amount of the accrued assessments paid by Campbell in such class; the latter of which the defendant declined to pay, but offered to pay the amount of one assessment in class or section 2, conditioned upon plaintiff's signing the receipt following: "Received of the National Council, A. B. C. Fraternity, \$150, in full satisfaction of all claims and demands against said National Council growing out of the death of said Hugh Campbell, late a member of Castle Gregg, No. 198, in Second K. G. R. Section of said order, located at Aberdeen, Miss., and in full discharge of benefit certificate No. 3036 issued to him in said section; said sum being net amount of collections of one assessment for said section, is hereby accepted, said certificate surrendered and said National Council released from all further liability." Defendant admitted its liability for one assessment, but denied it was liable for the amount of the accrued assessments, relying upon the by-laws of the association enacted after the execution of the certificate which repealed the prior existing law providing for the payment of accrued assessments.

Plaintiff brought this suit originally before a justice of the peace upon a statement formally reciting the facts above stated, and especially alleging that she had repeatedly requested of the defendant the payment of one assessment in class 2 on the death of Campbell, less 10 per cent. to go to the contingent fund, as provided by law and the terms of the certificate, together with the full amount of accrued assessments paid by Campbell in class 2, amounting to \$217.95, as per an itemized statement filed as a part

of the complaint; and that an assessment was levied under such certificate, from which \$150, under the terms of such certificate, was due the plaintiff; that the defendant had declined to pay the amount of such accrued assessment paid by Campbell, and judgment for \$500 was asked. The trial before the justice resulted in judgment for plaintiff for \$391.10, and defendant tendered to the constable to whom execution issued \$170, and deposited that amount with him, \$20 of which was for interest and costs accrued to the date of tender. Defendant appealed to the circuit court, and on May 19, 1902, deposited therein \$170 for plaintiff's benefit. The case was tried mainly upon an agreed statement, which disclosed the preceding situation, a jury being waived, and the court rendered judgment primarily for \$408.90, which, upon order of the court, was reduced by remittitur to \$376.50.

The record presents but two issues, both involving conclusions of law, rather than of fact, which are so intimately connected that they may be considered together. The appellant strenuously urges that the assured, by his application and the terms of his certificate, contracted to be bound by all after-enacted laws of the supreme commandery, as well as by all laws in force when he joined the order; and that under such contract retrospective amendments made in the laws of the order were valid and binding. This proposition has received recent consideration in this court, and is decisively passed upon in the late decision of *Morton v. Supreme Council of the Royal League* (Mo. App. St. L.) 73 S. W. 259, in which the authorities will be found collated and elaborately discussed. The rule therein recognized and approved that although, by the terms of the application therefor, the assured agreed to accept the certificate of membership, subject also to all laws of the organization enacted in the future, and although in express terms the representations and declarations in the application formed part alike of the certificate and of the consideration of its issuance, yet the proper interpretation of the contract and the true intent of the recital in the application were to render obligatory upon the insured only after-adopted laws for the conduct of the order, duties of the members, and the like, but not such as sought to impair or affect the existing contract of insurance, in our judgment is supported by the weight of authority and is controlling and herein approved.

Defendant, however, further contends that the final appellate tribunal of the state of Mississippi has determined the construction of similar contracts, and, as the certificate was issued in that state, its laws control, and are decisive. It may be conceded that the cases in the Supreme Court of that state introduced at the trial and submitted in the argument construe by-laws after-adopted with the full retrospective effect urged by appel-

lant, but no positive law exists in Mississippi by the adoption of any statute upon the subject of the effect and interpretation of such by-laws, and while the rights of parties under contracts made and to be performed in a sister state are usually measured by the laws of such state, even when the enforcement of the contract may be sought in this state, yet we cannot adopt and yield to a mere interpretation of a contract not confined in its performance to that state, but susceptible of execution elsewhere, affirmed by the courts of the state of Mississippi in direct conflict with the rule in this state, and so recently pronounced erroneous by this court, but we adhere to the ruling in the well-considered case above cited. The ruling herein, even after abatement by order of the court, exceeds the amount warranted by the record. Respondent's theory was that benefits became payable to her under the laws of the Knights of the Golden Rule in force when deceased became a member, and which provided for payment of one assessment levied upon those members of the single class of the five existing divisions of that order, and also for repayment of all assessments paid by the insured. Appellant asserted that respondent's right had become restricted to the benefits accruing under its laws, as amended subsequent to the issuance of the certificate, to one-half of the whole sum derived from an assessment upon all members of the order, irrespective of class, but without return of assessments theretofore paid; and appellant, in conformity to its contention, completed the tender and payment of \$170 in the magistrate's court by payment of that sum in the circuit court as the full extent of its liability. The testimony in the record reveals that, adopting the standard of recovery contended for by respondent and herein sustained, the greatest amount derived from an assessment of the former members of class 2 of the Knights of the Golden Rule to which deceased formerly belonged, would not have exceeded \$70. The trial court therefore erred in computing the result of such an assessment at \$150.

The judgment will accordingly be reversed, unless within 15 days respondent shall remit \$80 therefrom, in which event the judgment of the lower court so reduced will be affirmed; costs of appeal to be paid by respondent.

BLAND, P. J., and GOODE, J., concur.

CARMODY v. HANICK.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

APPEAL—HARMLESS ERROR—MISTAKE IN SETTLEMENT.

1. Where the judgment was right, as a matter of law, under the facts admitted, any formal errors in the trial were harmless.

*Rehearing denied March 31, 1903.

2. Plaintiff and defendant having made a settlement of their accounts, except of their claim against L., on the basis of no payment having been made by L., and such claim having been assigned to defendant that he might in the same action sue on it for their mutual benefit, as well as on an individual claim, and it having been decided in that action that a payment of \$500 had been made to defendant on the joint claim, and not on his individual claim, and he not having appealed therefrom, he is liable to plaintiff for half that sum, on the ground of mistake in the settlement.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by John L. Carmody against Michael Hanick. Judgment for plaintiff. Defendant appeals. Affirmed.

C. R. Skinker, for appellant. William F. Woerner and E. E. Schnepf, for respondent.

PER CURIAM. This is the second appeal in this cause. The first is reported in 85 Mo. App. 659, where a sketch of the main features of the litigation is given. On the second trial the parties united in submitting to the circuit court the evidence taken at the first trial, as shown by the bill of exceptions on which the case was reviewed by this court on the first appeal. In addition, however, to the evidence contained in that bill of exceptions, defendant introduced, without objection, two excerpts from the testimony of Mr. Walter C. Taylor, given in a case of the present defendant, Mr. Hanick, against Mr. Taylor, in the circuit court, city of St. Louis, together with the checks and receipts to which the testimony of Mr. Taylor relates. The substance of the testimony of Mr. Taylor, as introduced at the last trial, and supported by the vouchers exhibited, is that the \$500 payment to Mr. Hanick by Mr. Taylor, April 20, 1891, was to Mr. Hanick individually, and was immediately applied to his individual credit. The action is to recover \$250 (one-half of the last item mentioned) which plaintiff charges defendant to have received on account of sewer work done for the property of Mr. Taylor by defendant and Mr. Timothy W. Scott on their joint account. Plaintiff is the assignee of Mr. Scott's claim by transfer in proper form after the death of Mr. Scott. The former report of the case gives all the material facts of the controversy.

At the last trial the following declarations of law were given, the first at the instance of the plaintiff, and the other at defendant's request, viz.:

"The court declares the law to be that if it believes and finds from the evidence that defendant Hanick, having at the time an individual account and also a joint account of himself and Scott (plaintiff's assignor) against Taylor, accepted a payment of \$500 from Taylor, intending at the time to credit same to his individual account against Taylor, but that it subsequently developed in a judicial proceeding between said Taylor and Hanick, in which the latter sued for and

represented both himself individually and himself and Scott jointly, that there was only due at that time from Taylor to Hanick the sum of \$16.47 on his individual claim, which sum said Hanick afterwards accepted in full, without returning to Taylor any part of said \$500, so that said payment of \$500 could not be applied thereon, and, further, that at the time of said \$500 payment by Taylor to Hanick there was owing from Taylor to Hanick and Scott (plaintiff's assignor), on the joint account referred to, a sum in excess of said \$500, and that said sum was, in the case of Hanick v. Taylor, applied in reduction of that joint account due from Taylor to Hanick and Scott, and that Hanick never accounted to Scott for said sum, or any part thereof, and never paid the same or any part thereof to any person, and has the same unaccounted for, and that at the time of the written agreement of April 20, 1895, introduced in evidence, plaintiff was in ignorance of such \$500 payment to Hanick, and that the same was omitted therefrom by mutual mistake, then judgment must be for plaintiff for one-half of said sum of \$500, with interest from filing of this suit."

"If the court shall believe and find from the evidence that the sum of five hundred dollars received by Hanick from Taylor on the 20th of April, 1891, was not received on account of the sewer work which had been done by Hanick and Scott on joint account, then the plaintiff cannot recover in this action."

The learned trial judge furthermore refused the following declaration asked by defendant, viz.:

"If the court shall believe and find from the evidence that the agreement for a settlement, dated '4-20-1895' and read in evidence by the plaintiff, was made as part of a general settlement between defendant Hanick and Scott's administrator; that since that time a judgment has been rendered in the case of Hanick v. Taylor, number 91,860, in favor of the plaintiff; that Hanick has collected from Taylor the sum awarded to him by said judgment for the sewer work done by Hanick and Scott on joint account; and that Hanick has accounted with plaintiff, Carmody, for the sum so collected, and has paid over to him the share thereof due to Scott's estate, as per the terms of said agreement—then the plaintiff cannot recover in this suit."

The trial court found for plaintiff in the sum of \$302.50, and rendered judgment accordingly. Defendant appealed in the ordinary way after duly saving exceptions.

1. Defendant complains of the declaration of law given by the court at the instance of plaintiff, and raises some questions upon the other declarations. It will not be necessary to go into the particulars of those rulings, inasmuch as we think the facts conceded by defendant are conclusive of this appeal, as a matter of law. When facts admitted by

both parties to a case point to one result as a conclusion of law, it is unnecessary to consider whether formal errors occurred in the proceedings of the trial court. It is undoubted law that where, as in the case at bar, the debtor (in this case, Mr. Taylor) directs the application of a payment, when made, to a specific account, and the creditor accepts the application, and applies the payment as directed, the transaction is generally held to be valid and effective as between those parties immediately concerned. But such a state of facts does not preclude the parties themselves from undoing the transaction by their mutual consent, and applying the fund in question otherwise at a later time, when that may be done without prejudice to the interest of any third party. The effect of the decision of the referee in the case of Hanick v. Taylor was to determine that the payment in question of the \$500, April 20, 1891, by Mr. Taylor, although intended at the time as a payment on the several or individual account of Mr. Hanick, was not in fact due upon that account, but that the same should properly have been applied to the other account of Mr. Taylor at the time, namely, the joint account of Scott and Hanick. The referee's finding and the court's judgment thereon became conclusive between Messrs. Hanick and Taylor when the judgment in the former case became final, as all parties to this case concede it did. The effect of that judgment was to apply the payment by Mr. Taylor (originally on the several accounts of Mr. Hanick) to the joint account of Scott and Hanick, and thereby to conclude Messrs. Taylor and Hanick to that application of the payment. As Mr. Hanick, before beginning that case, had accepted an assignment of the joint account of Messrs. Scott and Hanick in order to facilitate the collection of the joint account along with one due Mr. Hanick severally by the same defendant, he became trustee for collection of the Scott interest in the account. The memorandum of April 20, 1895, signed by Mr. Michael Hanick, did not mention this particular payment of \$500. There is not the slightest ground to ascribe any want of good faith to Mr. Hanick in omitting to mention it. He undoubtedly regarded the application of the payment to his personal account as valid and final. That memorandum was made, however, before the finding and judgment in the case of Hanick v. Taylor, the result of which was to alter the application of the payment in question as between Messrs. Taylor and Hanick. Mr. Hanick at the time of the memorandum of April 20, 1895, considered that particular payment as made to him alone; for he claimed the larger amount as his just due. But the referee afterwards found he was not entitled to as much as he claimed on his individual account, and therefore he found in favor of Mr. Hanick for about \$16 only, instead of the larger amount which Mr. Hanick had de-

manded. It is not important to consider whether or not that judgment was conclusive as to plaintiff's right to one-half of the Taylor payment as between him and the defendant in this case. It is enough that it was a conclusive decision between Messrs. Taylor and Hanick as to the application of the payment between them. It had the effect to decide that it was not properly applicable to Mr. Hanick's own account, and there was then left no other account than the joint account of Hanick and Scott to which it could be applied. The adjudication that the payment did not belong to Mr. Hanick necessarily had the effect to change the application of the payment to the joint account, just as the parties to the former judgment might have voluntarily so changed the original application, had they seen fit, and the plaintiff had assented.

2. The refusal of the learned trial judge to give the second declaration of law asked by defendant was proper, in view of the ruling on the former appeal, to which we adhere.

3. It is next insisted that the judgment is excessive in one particular, but we do not so view it.

As Mr. Hanick's recovery of his individual demand for \$16.47 was secured in the other suit, and was independent of this \$500 item of the joint account, the latter should not be reduced by the individual judgment aforesaid, in determining the shares of the parties to this case in the \$500 payment.

The judgment is affirmed.

HERF & FRERICHS CHEMICAL CO. v. LACKAWANNA LINE.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

CARRIER—CONTRACT OF SHIPMENT—DUTY TO NOTIFY CONSIGNEE—USAGE—LIABILITY OF CARRIER—RIGHT OF RECOVERY—WAIVER OF OBJECTIONS—LAW OF THE CASE—QUESTIONS ON APPEAL.

1. Where, on a prior appeal, the Court of Appeals has held that an objection to a reply as a departure from the petition was waived by a failure to raise the objection by special demurrer or motion to strike out before going to trial, such holding is the law of the case.

2. Where a contract of shipment is made in Missouri between a resident corporation of that state and a carrier having an office and doing business there, such contract is governed by the laws of that state, and the carrier is not required to notify the consignee of the arrival of the shipment if it arrives at the destination on time.

3. Where the uniformly observed usage of the place to which goods are shipped requires the carrier to notify the consignee of the arrival of the shipment, such usage will be binding on the carrier unless its observance is dispensed with by an express stipulation to that effect in the contract of shipment.

4. A local usage of a place to which goods are shipped, requiring the carrier to notify the consignee of the arrival of the shipment, is not dispensed with by a stipulation in the contract

*Rehearing denied March 31, 1903.

¶ 2 See Carriers, vol. 9, Cent. Dig. §§ 220, 216, 217.

of shipment that the goods are to be called for on the day of their arrival.

5. Where a carrier claimed that it had notified a consignee by mail of the arrival of a shipment, but the persons having charge of the consignee's mail claimed that such notice was never received, and could not be found in the files in which they were always kept, it was a question for the jury whether the notice was actually received by the consignee.

6. Though it may seem to the appellate court that a finding of the jury is against the greater weight of the evidence, yet that court will not set aside a verdict on that ground.

7. Where there was conflicting evidence as to when a carrier had given personal notice to a consignee of the arrival of a shipment, it was a question for the jury if the notice was given in time, and their finding thereon is conclusive.

8. To authorize a shipper to abandon goods and look to the carrier for their value, or compensation for loss on account of deterioration, it must show not only that it was on account of the carrier's negligence that the goods were not delivered in due time, but also that the carrier negligently kept the goods in an unsafe place until they had materially deteriorated.

9. Where a contract was made for the shipment of goods to a place where the established usage was for the carrier to notify the consignee of the arrival of the goods, a failure to give such notice would constitute a breach of the contract.

10. Where a party has elected to try an action as arising out of contract, he cannot insist on appeal that the action sounds in tort.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by the Herf & Frerichs Chemical Company against the Lackawanna Line. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff is a corporation engaged in the manufacture of chemicals in the city of St. Louis. The defendant is an incorporated association doing business as a common carrier. The substance of the petition is that on September 24, 1900, plaintiff delivered to defendant at St. Louis, Mo., and defendant received from plaintiff, for transportation to New York City, to be delivered to Schoellkoph, Hartford & MacLagan (a corporation), a case of chemicals containing subnitrate of bismuth of the value of \$381.60, which defendant agreed to transport and deliver, in consideration of certain freight charges paid or to be paid; that, in violation of the contract, defendant failed and refused to carry said goods to New York City, and failed and refused to deliver them to Schoellkoph, Hartford & MacLagan, by reason whereof plaintiff was damaged in the sum of \$381.60, for which with interest he prays judgment.

The answer was a general denial and a plea of the following special defenses: That it entered into a special written and printed contract (set forth and quoted) with plaintiff on September 24, 1890, for the transportation of one case of chemicals from East St. Louis to New York City; "that it transported the property described in said special contract in due time and in good order to the city of New York, and that said property remained uncalled for in its possession from the date

of its arrival in New York, to wit, on or about the 4th or 6th days of October, 1890, until the 24th day of December, 1890, at which time the defendant, as it lawfully might, sent said property to a storage warehouse, to be stored there at the owner's risk and expense, as provided in said special contract, hereinabove set forth; and that on or about the 22d day of October, 1891, said goods were sold for the freight charges thereon in said storage warehouse in due conformity to law. Wherefore defendant says that plaintiff ought not to have or maintain this action, and, having fully answered, prays to be discharged, with its costs."

The reply admitted the contract as alleged in the answer, and then proceeded as follows: "And, further replying, plaintiff states that the property referred to in said special contract is the same property sued for in this case; that after the arrival of said shipment in New York, and while same was in defendant's possession, plaintiff and its consignees demanded delivery of same from defendants, tendering to it at the time all freight and other charges against said shipment, but defendant, in violation of its duty, failed and refused to deliver said property as demanded. And plaintiff further states: That at the time of the making of said shipment and special contract, and at the time of arrival of said shipment in New York, there existed in New York an established custom of terminal carriers delivering shipments in New York City, and among them of the defendant Lackawanna Line and of the Delaware, Lackawanna & W. R. R. Co., a member of the defendant line, and the last carrier of said shipment, to the effect that upon the arrival, whether on time or not, of shipments for delivery in New York City, they customarily notified consignees of the said arrival and of the location of goods shipped in manner as follows: Where the address or location of the consignees in New York City was below City Hall Park, a first notice was customarily sent by delivering to consignees on, to wit, the day or the day after arrival, a written and printed notice of the arrival and location, by messenger, who took receipts for first notices so delivered, and thereafter, in the event of said shipment not being called for, two further notices were sent by postal cards, mailed to consignees, at intervals of, to wit, three weeks to a month after arrival. That plaintiff's consignees knew and relied upon said custom of defendant and its terminal member of notifying consignees of the arrival of shipments as aforesaid. That the address of consignees in New York City was located below City Hall Park, and was known to defendant and its said terminal member. That, notwithstanding its said custom, defendant, further violating its duty to plaintiff, carelessly failed and neglected upon and after the arrival of said shipment to notify plaintiff's consignees of its arrival and location, as required by said custom. And, fur-

ther replying, plaintiff states: That on, to wit, November 13, 1890, upon the failure of consignees to receive any notice of arrival, plaintiff requested defendant to trace and locate said shipment so that same might be delivered to plaintiff or its consignees, and thereafter plaintiff repeatedly renewed said request to trace, from time to time; but that defendant, in further violation of its duty, so carelessly and negligently cared for, handled, placed, or stored said shipment, and so failed to use reasonable and ordinary care and diligence in tracing and finding same after its arrival in New York, that it failed to find, locate, and produce said shipment ready for delivery for an unreasonable time, to wit, eight months after the arrival of same at destination, and after plaintiff had requested the tracing, location, and production thereof. That at the time of plaintiff's said request to trace and thereafter said property was and remained in defendant's possession, and might, by the exercise of reasonable care, have been readily located and produced for delivery. That before learning of said arrival, and, to wit, in February, 1891, plaintiff, because of defendant's delay in locating and producing said shipment for delivery, sent other goods to its consignees in place of the goods then in defendant's possession, and plaintiff thereupon demanded from defendant delivery of the goods in its possession, or payment of their value, but defendant failed and refused to deliver them to plaintiff, or to pay therefor. That by reason of defendant's said negligence in failing to notify consignees of arrival, and in failing after arrival to locate said shipment, neither plaintiff nor the consignees learned of the arrival of said shipment at destination until an unreasonable time, to wit, eight months, after its actual arrival, and after plaintiff had requested the shipment to be traced, and that said goods were of a perishable nature, and by reason of said delay were rendered valueless. That by reason of defendant's aforesaid neglect of its duties said goods were lost to plaintiff, and it was damaged in said sum of \$381.60, for which, with interest and costs, it asks judgment as prayed." A motion was made by defendant to strike out the whole of the reply. This motion was overruled by the court.

On the trial it was admitted that the shipment arrived at Pier 19, North river, city of New York, on October 6, 1890, and remained there, uncalled for by the consignees, until December 24, 1890, when it was removed to defendant's warehouse for storage in the city of New York, where it remained until October 22, 1891, when it was sold at auction by defendant to pay freight and other charges; and it was admitted that the sale was in accordance with the laws of New Jersey.

The clauses of the contract of shipment material to this controversy are as follows: "(1) It being distinctly understood that these companies shall not be responsible as common

carriers for said goods while at any of these stations awaiting delivery to such consignee or carrier, but liable as warehousemen only. (2) That freight carried by these companies must be removed from the station during business hours on the day of its arrival, or it will be stored at the owner's risk and expense, and, in the event of its destruction or damage from any cause while in the depot of any company, that the company shall not be liable to pay any damage therefor. (3) That the companies will not be responsible for the decay of perishable articles."

The shipment was consigned to Schoellkopf, Hartford & MacLagan to be sold on account of the plaintiff.

The evidence of both parties is that on the arrival of a shipment a usage or custom prevails in New York, which has been uniformly observed by the defendant and other railroads terminating in said city, of sending a notice stating that the goods have arrived, with book to take receipt for such notice. This notice states that the goods have arrived, and the freight is so much; there may be other things on it sometimes; that the goods must be removed within 24 hours, or some other period; and, if the shipment is not called for within a reasonable time, to follow up this personal notice with notice by postal cards at intervals of a week or such matter. There is no evidence in the record tending to prove that defendant gave the consignees the first, or personal, notice of the arrival of the goods, but there is evidence by two employes of the defendant that at least two notices by postal cards were made out and mailed to the defendant of the arrival of the goods; one on October 8th, and the other on December 16, 1890. Plaintiff's evidence tends to show that these notices were not received by the consignees. A subsequent personal notice was also given to the consignees of the arrival of the goods, and a request that they pay the freight, and take the goods away. This notice came about in this way. Herf, a member of plaintiff's corporation, testified that the goods were reported as lost; that on November 13, 1890, he made a request of defendant to trace the goods at St. Louis. Nichols, defendant's freight claim agent at New York City, testified that in the fall of 1890, either at the request of the shipper or the consignees, he could not remember which, he had the goods traced, and that they were traced and located at Pier 19; that it usually took about 10 days to run such a tracer; that, as soon as the goods were located, he sent his clerk to notify the consignees that the goods were at Pier 19, and to notify them to call, pay the freight, and take them away. Nichols was not able to fix the day or the month when this messenger was sent to the consignees, but stated that it was in the fall of 1890. Foote, Nichols' clerk, testified that about November 10, 1890, he, at the direction of Nichols, went to the office of the cou-

signees, and notified MacLagan that the goods were at the pier. He said: "I told him the goods were on the dock, and asked him what disposition they wanted made of the goods. They told me they were not ready just at that time to take it, but probably would a little later on. I asked them if, when they got ready to do so, would they send the order, or the disposition for it, through Mr. Nichols, at 26 Exchange Place, so that he could answer the tracer, and show delivery. That was what the tracer asked for—to show the delivery. That was as far as I had anything to do with it at that time. * * * I think in about three weeks from that time another tracer came through Mr. Nichols to show delivery, asking to hurry disposition. He handed that to me, and I went down again, and said: "This thing has been laying on the dock a considerable length of time, and we would like to get it delivered, or get some disposition for it. If you don't accept it very shortly, the chances are it will be put in store;" and he replied, "Well, we don't know whether we are going to accept it or not, now." MacLagan said these notices were given, but that they were given in 1891, and about nine months after the shipment was made, and after he had been notified by the plaintiff not to accept the goods. Memoranda of the postal card notices were kept, and witnesses, from these memoranda, swore positively that the postal card notices were made out, and that they were quite certain that they were mailed to the consignees. The evidence offered by plaintiff to show that they were not received was to this effect: That the consignees carefully kept and filed all such notices, which they preserved, and that no such notices were found among the files kept during the years 1890 and 1891; that all mail coming to the office of the consignees came into the hands of either Hartford of MacLagan, both of whom testified that no such postal cards were received by them, or either of them. The bill of lading for the shipment was mailed to the consignees by the plaintiff and received by it in September, 1891. There was evidence tending to prove that after the goods arrived in New York, and were stored at Pier 19, they were exposed to dampness, and that such exposure would deteriorate them, and render them unfit for the purposes for which they were manufactured, to wit, medical purposes. There was evidence offered by the defendant to the contrary, and that, after such a preparation became unsalable, the bismuth in the shipment would be worth from \$40 to \$50 after being melted down and extracted. The goods were tendered the consignees in June, 1891, but they refused to receive them.

At the close of all the evidence defendant offered an instruction in the nature of a demurrer to the evidence, which the court refused to give. Of its own motion, the court gave the following instructions:

"(1) The court instructs the jury that if you

believe from the evidence that a custom of giving arrival notices existed, as explained in another instruction (No. 13); and if you further believe from the evidence that no notice of arrival was given by defendant to plaintiff or consignees at any time after arrival; and if you further believe from the evidence that by reason of such failure by defendant to give any arrival notice, or any notice, the plaintiff and its consignees failed to call for the goods at Pier 19, North river, New York, where the goods were located, but believed said goods to be lost, and, acting upon this belief, made inquiry for them of defendant, and asked defendant to trace and locate the goods, and the defendant negligently failed to locate said goods within a reasonable time after it was requested so to do; and if you further believe from the evidence that after the expiration of such reasonable time for locating, as aforesaid, defendant did trace and locate the goods, and tendered them to plaintiff or its consignees; and if you further find from the evidence that at the time of such tender the goods had deteriorated in value, and that such deterioration was caused, not by inherent defects in the goods, but by their exposure to outside influence while in defendant's possession, and before plaintiff or its consignees had notice of the location of the goods—then your verdict should be for the plaintiff, and the amount of your verdict should be such sum as you may find from the evidence represents the deterioration, caused as above indicated, by the failure, if any, of defendant to locate the goods within a reasonable time after request so to do, and which had taken place up to that time; and to this total you may, if you see fit, add interest thereon at the rate of six per cent. per annum from September 15, 1892, the date when this suit was filed; and if, on the other hand, you find that at the time of the tender back of the goods the sub-nitrate of bismuth had suffered no deterioration in value, then your verdict should be for the defendant."

"(3) The court instructs the jury that the burden of proof is upon plaintiff in this case to establish the following facts by the preponderance or greater weight of the evidence: First, that a custom prevailed in New York in 1890 of giving the consignees located where this consignee then was notice by messenger or by mail of the arrival in New York of the goods for such consignee; second, that the consignee in this case never received from the defendant any such notices concerning the shipment in evidence; third, that the plaintiff or the consignee in this case, without having received any notice of the arrival of the goods in New York, requested the defendant to trace said goods, and that the defendant, after receiving such request to trace said goods, failed within a reasonable time thereafter to locate said goods; and, fourth, that said goods were by such delay, if any, in locating them, dete-

riorated in value; and you are further instructed that, unless such facts are so proved by the evidence in this case, your verdict must be for the defendant."

"(6) The jury are instructed that the failure of the consignee of the goods in question to call and receive the same, if said consignee did so fail, after the arrival of said goods at their destination, if they did so arrive, and within a reasonable time after notice of said arrival, if such notice was given, relieved the defendant from any liability in this case on account of damage to said goods, if they were so damaged, after their arrival at their destination."

"(12) The court instructs the jury that, if three-fourths of their number concur in a result, the jury may return that result as the verdict of the jury; in which event all of the jurors who agree to it shall sign the verdict. If, however, the entire twelve jurors concur in a verdict, the foreman alone may sign it.

"(13) The court instructs the jury that if you believe from the evidence that at the date of the shipment and arrival of the goods in question in New York City a general custom or usage existed at that place, and was observed generally by the defendant and other carriers in delivering goods transported by them for delivery there, and which custom was known and relied on by consignee in this case, to the effect that notices of the arrival of shipments in New York City at the place in said city where same might be obtained from the carrier were uniformly given to consignees located in that part of New York where these consignees were located by delivering to consignees, by messenger, a first notice on the day of or day after the arrival of the shipment, and thereafter, if the goods still remained uncalled for, by sending by mail to consignees two further notices at intervals of from several days to several weeks, then it was part of defendant's duty, upon the arrival in New York City of the shipment in question, to notify the consignees of said arrival, in conformity with said custom or usage, either by messenger or by mail."

The following instruction was given at the request of plaintiff:

"(2) The court instructs the jury that by the phrase 'reasonable time,' as used in these instructions, is to be understood in each case such a period of time as would suffice for the performance of each of the respective acts referred to, if the person whose duty it was to perform used in the performance such diligence, care, and prudence as a person of ordinary diligence, care, and prudence, under like circumstances, would use in the performance of a like duty."

At the request of the defendant the court gave the following instructions:

"(4) If the jury find from the evidence in this case that the goods in question were transported over the defendant's line from

St. Louis to New York, and arrived in New York on or about October 6, 1890; that on or about October 9, 1890, the defendant notified the consignee in New York of the arrival of said goods by mail, and also by a notice delivered thereafter by messenger at the place of business of said consignee in New York; that the consignee made no effort thereafter, or at any time, to call at defendant's pier in the city of New York, where said goods were then stored, and receive the same, and that said goods remained uncalled for at said pier until on or about December 24, 1890, and at that time they were removed to defendant's storehouse in New Jersey, where said goods remained uncalled for by said consignee until on or about October, 1891, and that they were then advertised for sale and sold by defendant to pay the charges thereon—then they are instructed that plaintiff cannot recover in this action, and your verdict must be for the defendant.

"(5) The court instructs the jury that a failure by the carrier to deliver goods within a reasonable time to the consignee does not constitute a conversion of the goods, but is a mere breach of the contract, and the consignee cannot refuse to accept the goods on the ground of delay, and recover their full value, unless the delay destroys the value of the goods entirely, or causes what is equivalent to a total loss. It is the duty of the consignee of goods upon notice of their arrival, whether early or late, to call for and receive the goods, within a reasonable time after such notice; and if he fails to do so the carrier is not responsible for any deterioration in their value thereafter occasioned by the delay of the consignee in failing or refusing to receive the goods.

"If in this case the jury believe from the evidence that the plaintiff or its consignee at any time after they received notice of the arrival of the goods, if you find such notice was at any time given, failed to take the goods, then the defendant is not liable for any deterioration in their value which may have occurred after the giving of such notice and the failure of the plaintiff or the consignee to call for the goods within a reasonable time thereafter."

"(7) With respect to the notices by mail to the consignee of this shipment, in evidence, the jury are instructed that if they find from said evidence such notices were deposited in the United States mail in New York at the time stated in said evidence, addressed to said consignee, then and in that event you may presume or infer that such notices were afterwards received by said consignee; and if you further find from said evidence that thereafter said consignee made no effort to receive the goods described in said notices, whereby said goods were damaged by being kept in store by defendant, then you are instructed that plaintiff cannot recover in this action for such injury to said goods.

"(8) The court instructs the jury that un-

der the contract in evidence, if they find from the evidence in this case that the goods here sued for were perishable, and that said goods deteriorated in quality and became worthless by reason of natural inherent defects in said goods while said goods were stored in defendant's warehouse, then, and in that event, the plaintiff is not entitled to recover in this action on account of such deterioration or destruction of said goods while so stored by defendant.

"(9) If the jury find from the evidence in this case that the defendant gave to the consignee in this case shipment notice on or about either October 6, 1890, or December 15, 1890, by mail, of the arrival of the goods in question in New York, and that said consignee never called thereafter, or at any time, for said goods, at defendant's pier in New York, where said goods then were, then they are instructed that plaintiff cannot recover in this action, and your verdict must be for the defendant.

"(10) If the jury find from the evidence in this case that after the arrival of the goods in question in the city of New York, to wit, on or about the month of November, 1890, the defendant gave to the consignee of said goods personal notice, by messenger, at the place of business of said consignee in New York, of the arrival of said goods, and that said consignee never called thereafter, or at any time, for said goods at defendant's pier in New York, where said goods then were, then they are instructed that plaintiff cannot recover in this action, and your verdict must be for the defendant.

"(11) The court instructs the jury that under the contract in evidence the defendant was not required to make a personal delivery of the goods here sued for to the business house of the consignee."

Geo. S. Grover, for appellant. Nagel & Kirby, for respondent.

BLAND, P. J. (after stating the facts). 1. This is the fourth appeal of this case. The pleadings have not been changed since the first appeal. The motion to strike out the reply is the same as the motion to strike out that pleading on the first trial of the cause, which was then overruled, in respect to which ruling of the trial court this court said: "The reply was not a departure under our practice act, but, even if it were, the only way of taking advantage of it was by special demurrer, or motion to strike out. The appellant, by going to trial without doing either, waived the objection. *Scovill v. Glasner*, 79 Mo. 449; *Spurlock v. Railroad*, 98 Mo. 537, 6 S. W. 349; *Id.*, 104 Mo. 658, 16 S. W. 834; *Gelatt v. Ridge*, 117 Mo., loc. cit. 562, 23 S. W. 882, 38 Am. St. Rep. 683; *Philibert v. Burch*, 4 Mo. App. 470; *Mortland v. Holton*, 44 Mo., loc. cit. 64." *Chemical Co. v. Lackawanna Line*, 70 Mo. App., loc. cit. 280. The ruling on the motion to strike out the reply is, as to this case, *res adjudicata*.

2. It is contended by defendant that its liability as a common carrier under the contract of shipment absolutely ceased upon arrival of the shipment in good order in New York and its storage there at Pier 19, without regard to the question of notice. The evidence of both parties shows that there was a well-established usage theretofore observed by the defendant in respect to its shipments to these consignees, as well as all other consignees, that railroads having their terminal in New York should give a personal notice to the consignees of goods consigned to parties in that city of their arrival on the day of, or not later than the next day after, their arrival. The evidence also shows that the consignees had knowledge of this usage, and relied and acted upon it, and depended upon defendant, in respect to the shipment in question, to give them the customary notice. In respect to the duty of the defendant to have complied with this usage this court on the first appeal said: "No notice to the consignees of the arrival of goods shipped by railway is required under the laws of Missouri, where the shipment arrives on time. *Gashweiler v. R. R.*, 83 Mo. 119, 53 Am. Rep. 558, and authorities cited. The contract of shipment was made in Missouri between a resident corporation of Missouri and a corporation having an office and doing business in Missouri, and is governed by the laws of Missouri. *Cantu v. Bennett*, 39 Tex. 303; *Robinson v. Merchants' Dispatch Co.*, 45 Iowa, 470; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *First National Bank v. Shaw*, 61 N. Y. 283. However, should a usage become established at any locality in Missouri, and be uniformly observed by railway companies, to give notice of the arrival of freight to consignees at such locality, the usage, notwithstanding the general rule dispensing with notice, would be an exception to the general rule, and the carrier would be required to give the notice in order to relieve itself of negligence in the event of loss of or damage to the freight while in its possession as warehouse keeper. *Pindell v. Ry.*, 34 Mo. App. 683; *Frank v. Ry.*, 57 Mo. App. 186. It is admitted that such a usage was uniformly observed in New York City by railways entering that city, and by the D. & W. R. R. Company, the appellant's terminal line. This usage was binding upon the appellant, unless its observance was dispensed with by the special contract of shipment made in this case. The contract nowhere in terms states that notice of arrival of the goods should not be given. Nor does the requirement that the consignee should call for the goods on the day of their arrival, as contended for by the appellant, dispense with an observance of the usage, but, on the contrary, makes its observance the more necessary, in order that the consignee might be able to make a timely call and comply with this requirement of the contract." *Chemical Co. v. Lackawanna Line*, 70 Mo. App., loc. cit. 282, 283. We adhere to that ruling.

3. Defendant contends that: "Upon the admitted fact here disclosed, that the consignees never made any effort to call for and receive the goods at the pier at any time between October 6, 1890, and December 24, 1890, as the contract of shipment required him to do, or at the warehouse from December 24, 1890, to October 22, 1891, although repeatedly notified to call and remove them, as well as the further fact that he positively refused to do so after such notice, the court below should have directed a verdict in favor of defendant." It is an established fact in this case that the goods arrived on time, and were stored by appellant at Pier 19. Its liability as an insurer terminated on the arrival and storage of the goods on October 6, 1900, and it was thereafter only liable as a warehouse keeper, and its liability, if any, must arise on account of its failure to comply with its contract to deliver the goods to the consignees. One of its duties under the contract was to give the consignees the customary notice by messenger of the arrival of the goods. The consignees had a right to and did rely upon such notice. It was, therefore, under no obligation to call for the goods until such notice, or some other notice sufficient to inform it of the arrival of the goods, was given. There is no evidence that notice by messenger of the arrival of the goods was given on the day of their arrival or on the next day thereafter. Appellant failed to observe the usage in this respect, but it introduced evidence tending to show that on October 9, 1890, and again on December 15, 1890, notices were mailed to the consignees informing them that the goods had arrived, and requesting it to call at Pier 19, pay the freight charges, and take the goods away. If either of these notices were received by the consignees, then plaintiff is not entitled to recover. If the notices were mailed, the presumption is that they were received. Hartford and MacLagan testified that all the mail coming to the office of the consignees was received by one or the other of them, and that notices of the arrival of shipments consigned to their company were carefully filed and preserved. They testified positively that they, nor either of them, received the notices claimed by defendant to have been mailed to them, and that no such notices were found among their files, where they should have been if received. On the third appeal of this case (85 Mo. App. 687) we held that this evidence of Hartford and MacLagan was of some value, and of sufficient potency to authorize the question as to whether or not the notices had been received to be submitted to the jury. It was, therefore, a question of fact for the jury to determine whether or not these postal-card notices had been received. The question was fairly submitted to the jury by the instructions, and, while it seems to us that on this issue the verdict is against the greater weight of the evidence, yet it is not competent for us, as an appellate court, to set

aside the verdict on the ground that we regard the evidence, or the weight of the evidence, differently from the jury. The jury may not have believed the appellant's witnesses, and certainly did not, otherwise they would have found a different verdict.

4. In respect to the personal notice given by Foote to MacLagan, it is self-evident that, if he gave those notices at the time he testified he gave them, the verdict should have been for the defendant. MacLagan admits that Foote gave him personal notice of the arrival of the goods, but testified that the notice was not given until nine months after the shipment had been made, and after he had been notified by the plaintiff not to receive the goods. Here again was an issue of fact for the jury to pass upon, and their finding is conclusive on this court, although it appears to us the finding on this issue of fact was against the greater weight of the evidence. To find as they did, the jury must have disbelieved both Nichols and Foote in respect to the time the notices were given. Both of these witnesses, as to the time the notices were given, are corroborated by the evidence of Herf, who testified that he requested the defendant to trace the goods as early as November 18, 1890.

5. To authorize the plaintiff to abandon the goods and to look to defendant for their value, or loss on account of deterioration, it was incumbent on it to show to the reasonable satisfaction of the jury that appellant had, by its misconduct, kept the goods in an unsafe place until they had materially deteriorated. Plaintiff's evidence tended to prove that while kept at Pier 19 they were exposed to dampness, and that such exposure deteriorated the goods, and rendered them unsalable as medicine. There was evidence to the contrary, but the jury on this issue found in favor of the plaintiff.

6. All of the issues of fact raised by the pleadings, and of which there was any evidence, were fully, fairly, and plainly submitted to the jury, by the instructions given by the court. The appellant's refused instructions were either covered by those given, were inappropriate to the issues, or stated erroneous propositions of law, and were rightfully refused.

7. Appellant contends that the action sounds in tort, and that the court erroneously instructed the jury that interest might be allowed by them on the damages awarded. The action is for a breach of the contract to ship and deliver the goods. The defendant breached the contract in failing to give notice to the consignees of the arrival of the goods, as required by the custom prevailing in New York City. The contract of shipment was made with this custom in view, and with the tacit understanding that defendant would observe it. Therefore, the custom formed a part of the contract, and was as much the subject of a breach as any other provision in it. Appellant also, in the trial of the cause,

treated the action as one for breach of contract, and asked and received instructions on the theory that the suit was for a breach of contract. It is the well-settled appellate practice in this state that appellant will not be permitted to shift his position in the appellate court, and have the cause determined on a theory different from the one on which he elected to try it in the court below. *Hall v. Goodnight*, 138 Mo. 576, 37 S. W. 916; *Stewart v. Outhwaite et al.*, 141 Mo. 562, 44 S. W. 326; *State, to Use, v. O'Neill*, 151 Mo. 67, 52 S. W. 240; *Guntley v. Staed*, 77 Mo. App. 155; *Pope v. Ramsey & Ramsey*, 78 Mo. App. 157.

Discovering no reversible error, the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

SUESS et ux. v. IMPERIAL LIFE INS. CO.
(Court of Appeals at Kansas City, Mo. April 6, 1903.)

APPEAL—CONSTITUTIONAL QUESTION—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—JURISDICTION.

1. Where the record discloses that certain evidence, the tendency of which was to prove a waiver, was objected to on the ground that as no waiver was pleaded, to admit evidence of it would be violative of Const. art. 2, § 30, in that it would "be an attempt to take the property of defendant without due process of law," and would be further violative of the fourteenth amendment to the federal Constitution, in that it would have the effect to deny the defendant the equal protection of the laws, and such objection is repeated in defendant's motion for a new trial, a constitutional question is presented, giving the Supreme Court exclusive jurisdiction.

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Action by John G. Suess and wife against the Imperial Life Insurance Company. Judgment for plaintiffs, and defendant appeals. Ordered transferred to Supreme Court.

Conkling & Rea, for appellant. Busby & Kneisley, for respondents.

PER CURIAM. This is an action to recover certain premiums alleged to have been paid by the plaintiff on a life policy of insurance issued by the defendant company. There was a trial and judgment for the plaintiff, and the defendant appealed. The record discloses that the defendant during the progress of the trial objected to the introduction of certain evidence offered by plaintiff, the tendency of which was to prove a waiver, on the ground that, as no waiver was pleaded by plaintiff, to admit evidence of it would be violative of section 30, art. 2, of the Constitution of this state, in that it would "be an attempt to take the property of defendant without due process of law," and would be further violative of the fourteenth amendment to the federal Constitution, in that it would have the effect to deny the defendant

the equal protection of the laws. And again, in the defendant's fourth instruction, the objection so made to the introduction of evidence is repeated; and still again in his motion for a new trial the said constitutional objection is again suggested and emphasized. So it is clear that the case presented by the record is one involving a construction of both the Constitution of the United States and of this state, and therefore should be transferred to the Supreme Court, which is accordingly ordered.

SIMON et al. v. RYAN et al.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

JUSTICES OF THE PEACE—APPEAL—TRIAL DE NOVO—NEW DEFENSE—TIME FOR MAKING.

1. Though, on the trial of an action against partners in a justice court, defendants failed to file an affidavit denying the partnership, as required by Rev. St. 1899, § 746, they could file such affidavit and make such defense on appeal to the circuit court, as the action is tried anew in the latter court.

2. The refusal of the trial court to grant permission to defendants, sued as partners, to file an affidavit denying the partnership, because it was too late—the cause being then on trial—was error.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by J. Simon and another against J. J. Ryan and others. Judgment for plaintiff on trial de novo after appeal from a justice, and from an order sustaining defendants' motion for a new trial plaintiffs appeal. Affirmed.

A. L. Hirsch, for appellants. Willson A. Taylor, for respondents.

Statement of Facts and Opinion.

GOODE, J. This attachment action was begun before a justice of the peace on an account for goods sold and delivered. The statement of account filed before the justice was in this form:

J. Simon. Julian Simon.

J. Simon & Son,
Distillers and Wholesale Liquor Dealers,
No. 817 Franklin Ave.

St. Louis, Mo., Dec. 4th, 1900.

Sold to Mrs. Anna V. Ryan, and J. J. Ryan, E. P. Ryan, and M. V. Hartley, copartners, doing business as Ryan & Company:

1 gal. raspberry syrup.....	\$ 1 00
25 bottles dry catawba.....	3 50
25 bottles sweet catawba.....	3 50
6 bottles angelica, 20c.....	1 20
1 bottle absinthe.....	1 25
Wine bbl. and bottle peppermint.....	2 00
Bottles and stamps.....	2 50

\$14 95

The statement contained four paragraphs similar to the foregoing.

A plea in the nature of a plea in abatement was filed before the justice, but no de-

*Rehearing denied March 31, 1903.

fense to the merits was pleaded. The trial in that court resulted in a judgment in favor of all the defendants on the plea in abatement, and in favor of the defendants Anna V. Ryan and J. J. Ryan on the merits; judgment being entered against the other defendants, E. P. Ryan and M. V. Hartley, for the balance due on the account. Plaintiffs appealed from the judgment of the justice to the circuit court, where the case came on for trial on the merits at the February term, 1902—a jury being waived, and the cause heard by the court—with the result that judgment was entered against all the defendants for \$62.25. During the progress of the trial the plaintiffs offered evidence tending to show they had sold to a firm doing business under the name of Ryan & Co. the goods mentioned in the account. Defendants' counsel endeavored to prove that J. J. and Anna V. Ryan were not members of the firm at the time said goods were sold and delivered. This evidence was excluded by the court because no affidavit had been filed denying the partnership, as is required by section 746 of the Revised Statutes of 1899. When this ruling was made, defendants' counsel asked leave of court to file an affidavit putting the fact in issue. Permission to do this was refused on the ground that it was too late, as the cause was then on trial. After judgment a motion for new trial was filed by the defendants, and sustained by the court, on the ground that the interests of justice would be subserved by permitting the defendants, on terms, to file an affidavit denying the partnership. Plaintiffs appealed from the order sustaining the defendants' motion for a new trial.

Ordinarily a trial court has the right to set aside a judgment and grant a new trial when it thinks justice will be thereby promoted, and it is commendable to do so. Plaintiffs contend, however, that in this instance the new trial was wrongly granted, because, as no issue concerning the partnership was made in the justice's court by a verified affidavit denying that all the defendants were partners, such an issue could not be raised in the circuit court. A case appealed from a magistrate's judgment is tried anew in the circuit court, and the defendant is by no means confined on appeal to the defenses made below, but may make any defense he can to the plaintiff's cause of action. *Phillips v. Bliss*, 32 Mo. 437; *Compton v. Parsons*, 76 Mo. 455; *Moore v. Hutchinson*, 60 Mo. 427; *Meyers v. Boyd*, 37 Mo. App. 532; *Comfort v. Lynam*, 67 Mo. App. 668. In *Moore v. Hutchinson*, supra—an action which was begun before a justice of the peace on a promissory note—it was held, notwithstanding the provisions of section 3949, Rev. St. 1899, requiring the execution of an instrument sued on in a justice's court to be denied under oath, to put its execution in issue, that the plea of non est factum might first be filed in the circuit court. Nor did the re-

quest of the defendants to raise an issue as to the partnership come too late, but it should have been allowed on such terms as were just. *Anderson v. Hance*, 49 Mo. 159; *Carr v. Moss*, 87 Mo. 447.

The order sustaining the motion for new trial provided, in effect, that the issue might be raised on such terms as the court deemed just to the plaintiffs, which was right, and is approved and affirmed; the case being remanded for trial.

BLAND, P. J., and REYBURN, J., concur.

EUBANK v. FINNELL.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

APPEAL — JURISDICTION — VENDOR'S LIEN — TRUST DEED — SURPLUS ON FORECLOSURE.

1. Where the question was whether a vendor's lien for part of the purchase price of land, evidenced by a note merged in a judgment, was superior to the lien of a trust deed given to secure money borrowed to pay the balance of the price, and which had been foreclosed and a surplus realized, the case involved title to real estate, as surplus money arising on a sale under a trust deed is treated as realty, and the Supreme Court had exclusive jurisdiction of the appeal.

Appeal from Circuit Court, Randolph County; Jno. A. Hockaday, Judge.

Garnishment proceeding by Morgan Finnell against J. Roger Eubank. From a decree requiring plaintiff to enforce a judgment by execution and sale of land, he appeals. Case ordered certified to the Supreme Court.

J. H. La Motte, for appellant. John N. Hamilton, for respondent.

SMITH, P. J. The case disclosed by the record may be stated in this wise: E. C. Gibson sold to Eubank 80 acres of land for \$1,500. The latter borrowed of N. P. Hurt \$1,000 with which to make the cash payment of the purchase price, and, with the knowledge and consent of Gibson, executed a deed of trust covering the land to secure the payment of the note given for the amount so borrowed. The deed from Gibson to Eubank conveying the title in fee, and the deed of trust, were executed and recovered on the same day. It does not appear which was first filed by the recorder. Eubank, at the time of the sale of the land, executed to Gibson his promissory note for \$468 for the balance of the purchase money, which note was afterwards assigned by the latter to Finnell, who brought an action thereon against Eubank, claiming a vendor's lien for the amount thereof against the land, and on which action he had judgment for the enforcement of the lien. In the meantime the note given by Eubank to Hurt had matured, and, default having been made in the payment thereof, the trustee, at the request of Hurt, advertised and sold the land in accordance with

the provisions of the deed of trust, and from which sale he realized \$547 in excess of the amount required to pay Hurt's note and the expenses of the trust. Finnell sued out an execution on his judgment against Eubank, and on which he caused the amount so in the hands of the trustee to be garnished. The trustee, in answer to the garnishment, admitted that he had in his hands the said \$547 realized from the sale of the land under the deed of trust, as already stated. He further stated that Eubank, the defendant in the execution, claimed to own the said fund, and he therefore prayed to be permitted to pay the same to the sheriff, and that he be discharged, etc.; and, further, that the said Eubank be made a party to the proceeding and brought into court, and required to assert whatever claim he might have to said fund. Shortly thereafter Eubank voluntarily appeared, and, by leave of the court, filed his interplea, wherein he stated that he purchased the land of Gibson, paying therefor \$935 in cash, and executing his promissory note for \$465, the balance of the purchase price; that Gibson thereupon executed and delivered to him a warranty deed conveying the land to him; that the \$935 he paid Gibson was borrowed by him of Hurt, and to secure the payment of which he executed and delivered a deed of trust on the land to W. R. Samuel, as trustee for the benefit of Hurt; that Hurt loaned said \$935, and accepted said deed of trust, knowing that Gibson had not waived, but claimed, a first lien for said balance of \$465 of the purchase price of the land which had not been paid, and that he—the interpleader—had made and delivered to Gibson his promissory note therefor, there being no agreement that said deed of trust should be other than a second lien on the land. Interpleader further alleged the transfer of the \$465 note to Finnell, the action to enforce his vendor's lien against the land, etc., the rendition of the judgment, the issue of the special execution thereon, the levy of the same upon the land, the failure of the sheriff to sell, and the garnishment of the trustee, etc.; and concluded with a prayer that the fund be ordered paid to him. The plaintiff in the execution replied, putting in issue the allegations of the interplea.

The finding and decree of the court was "that the fund paid into court is subject to any deficiency of the execution debt of said plaintiff in execution, Morgan Finnell, after he shall have enforced his vendor's lien against the real estate hereinafter described, and that the interpleader is entitled to any surplus thereafter remaining. Whereupon it is ordered and decreed by the court that the said plaintiff in the execution aforesaid, Morgan Finnell, shall by the 12th day of July, 1902, enforce his vendor's lien upon the judgment heretofore rendered in this court against the land (land involved in this case) by execution and sale, the proceeds of which shall be applied to the payment of said judgment

debt, and any deficiency in discharging said judgment shall be paid out of the funds in the hands of the clerk of this court, and the remainder, after payment of costs of this proceeding, shall be paid over to the interpleader herein. Upon failure of said plaintiff in execution, Morgan Finnell, to comply with the judgment herein rendered in the enforcement of his vendor's lien as herein required, the whole of the funds in controversy is hereby adjudged to the interpleader."

The question raised by the appeal here is whether or not the vendor's lien for that part of the purchase money evidenced by the \$465 note merged in the judgment is prior and superior to the Hurt deed of trust lien. If the former is prior and superior to the latter, then Finnell ought to satisfy his special execution by a sale of the land, leaving to the defendant Eubank the fund in the hands of the trustee. If, on the other hand, the deed of trust lien is prior and superior to that of the vendor, then the amount of the fund in the hands of the trustee represents the equity of redemption of the vendee in the land, and is subject to the payment of the second lien, or to be seized and impounded by the garnishment proceeding. *Helweg v. Helcamp*, 20 Mo. 569; *Strawbridge v. Clark*, 52 Mo. 21.

Surplus money realized by the sale of land under a deed of trust is treated as realty, and not personalty, in respect to rules of law governing its disposition. It remains real estate in the hands of the trustee, to be disposed of according to the law of real property. *Huffard v. Gottberg*, 54 Mo. 271; *Kreyling v. O'Reilly* (Mo. App.) 71 S. W. 372, and cases there cited.

According to an established precedent by which we must be controlled, the case in hand is one involving title to real estate, and therefore without our jurisdiction, and within that of the Supreme Court. *Truesdale v. Brennan*, 153 Mo. 600, 55 S. W. 147. And it therefore only remains for us to certify the same to that court, which is accordingly so ordered. All concur.

GOODMAN v. CITY OF KAHOKA.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

MUNICIPAL CORPORATIONS—INJURIES—DEFECTIVE SIDEWALKS—NOTICE—SUFFICIENCY OF EVIDENCE.

1. Where there is no showing that defendant was surprised or in any way prejudiced by an amendment to the petition made at the trial, and the introduction of proof in support thereof, he cannot complain of the court's action in permitting such amendment and proof.

2. Evidence in an action for negligent injuries examined, and held sufficient to warrant submitting to the jury the question whether plaintiff was injured by reason of defects in defendant's sidewalk.

3. Whether defendant city, in an action for negligent injuries, had notice of the defects in the sidewalk causing the injury, held, on the facts, to be a question for the jury.

Appeal from Circuit Court, Clark County; Edwin R. McKee, Judge.

Action by Mary A. Goodman against the city of Kahoka. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery, Matlack & Rutherford, for appellant. Smoot, Whiteside & Yant, for respondent.

Statement of Facts and Opinion.

GOODE, J. The jury in the court below having awarded the plaintiff damages, admitted to be reasonable in amount, for personal injuries sustained by her falling while walking along a sidewalk on Union street, in the city of Kahoka, said city appealed from the judgment entered on the verdict.

At the beginning of the trial, appellant objected to the reception of any testimony on the ground that the petition did not state facts sufficient to constitute a cause of action, in that it failed to charge the city with having notice, actual or constructive, of the bad condition of the walk prior to the accident to plaintiff, and in time to have made repairs; and it is now assigned for error that the court below overruled that objection and received testimony. The petition, as originally drawn, contained no averment of that kind; and, when the appellant made the objection mentioned, the court remarked that he would permit the averment to be supplied by amendment at any time, and the transcript shows that it was supplied during the trial by adding this allegation: "Defendant had notice of this defect, or might have had, by the exercise of due diligence—due and reasonable diligence—had due notice." Whatever defect existed in the petition in the first instance was cured by the amendment, and the trial was conducted on the assumption that the petition charged notice, actual or constructive, to the city, and that one of the material issues of fact was whether the city had notice. The amendment was properly permitted. There is no claim that the appellant was surprised by it, or prevented from advantageously proceeding with the trial. The point that error was committed either in receiving testimony or in allowing the amendment is destitute of merit. *Habel v. Railroad*, 140 Mo. 159, 41 S. W. 459.

It is insisted that a demurrer to the case made by the respondent should have been sustained, and also that at the close of the evidence the jury should have been directed to return a verdict in favor of the city, because in all the evidence there was no proof either of defective construction of the sidewalk, or that it was in bad repair when the accident happened, or, if in bad repair, that the city had any knowledge of the fact, or could have known it by reasonable diligence. The petition makes the following charges: "The said sidewalk was by the defendant negligently allowed to be defectively con-

structed and to become and remain out of repair, and in a condition dangerous to those walking thereon; that the said sidewalk is composed of boards nailed upon two stringers, and said stringers were negligently allowed to be placed about eight inches from the end of the boards, leaving as much as eight inches of the end of the boards extending outward beyond the stringers, and the stringers were composed of defective material, which was old and decayed, and said stringers were pieced and patched with old pieces, leaving the same defective and unsafe; that the boards of said sidewalk were negligently allowed to become and remain loose on the stringers to which they had been nailed." Those averments contained two specifications of negligence, to wit, defective construction of the walk, and allowing it to become and remain in a condition unsafe for use. The testimony for the plaintiff was that while she was walking along the sidewalk with her husband, and was immediately in front of the gate leading to the premises of Henry Alexander, a loose board flew up and tripped her, causing her to fall against the adjoining fence, thereby breaking her left leg and injuring the knee cap. Mrs. Matilda Townsend, who had lived for 19 years in the block where Alexander resides, testified she heard of plaintiff's fall, and that she (the witness) was thrown down in the same manner by a loose board about three weeks before plaintiff was. Arch Caskey testified to passing over the walk frequently in going to Mr. Alexander's, and that it was not in first-class condition. A witness by the name of Billings testified to being over the walk some time in December, 1900, and that the stringers on which it was built had decayed, and others had been slipped under. That the walk was what he would call "patched up." Some of the stringers slipped in were pretty short. The old stringers were in a bad condition. The sidewalk was patched and pieced; some of the boards composing it being old, and some new. Thomas O'Day swore he had lived in the city for 16 years. For five or six years he had traveled over this walk, and in the fall of 1900 there were some loose boards in it. It was a little "schackelty," he said. William Pash said he examined the walk where plaintiff was hurt, in company with Mr. Billings and Mr. Goodman, and that the walk was "a patched-up concern," and looked like there were short pieces stuck under the stringers, and the latter looked as though they were rotten and "doty"; that some of the boards were old, and some new. He made this examination in December, 1900. There was much testimony to show the walk was in good condition in January, 1901, when the plaintiff was hurt, but the foregoing shows there was ample evidence to go to the jury on the issue of its condition. So the trial court was right in submitting it. The above evidence, too,

tended to prove the walk had been in bad repair for a month or more prior to the accident, and it was for the jury to say both whether it was safe at the time of the accident, and, if it was not, whether it remained in an unsafe condition long enough for the city authorities to have ascertained the fact by proper diligence. *Bonine v. City of Richmond*, 75 Mo. 437; *Buckley v. Kansas City*, 68 S. W. 1069. In *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709, the Supreme Court noticed certain cases bearing on the law in regard to constructive notice to a city of an unsafe sidewalk, and deduced the following conclusion from them: "As to what length of time would furnish notice to the municipal authorities of such a defect, there is no fixed or definite rule, and each case must depend upon the facts and circumstances attending it. Thus, if the defect existed on a street much traveled and in use, it seems that the duty of the city to the public in looking after its condition required greater diligence in seeing that it was reasonably safe for travel, than if it had been but little used." Mrs. Goodman was injured on a principal thoroughfare of the city of Kahoka, and some of the evidence as to the time the walk had been in bad order showed it had remained in that state long enough for the city authorities to have become aware of its condition by reasonable attention and care, and the court rightly left the evidence to the jury's consideration. On this proposition several instructions were given, of which the following requested by the defendant is an example: "The jury is instructed that the burden of proof is upon the plaintiff, and, before the jury can find for her, she must prove by the preponderance of the evidence (that is, the greater weight of the evidence), to the satisfaction of the jury, each of the following facts: First. That she was injured by reason of defects in the sidewalk in proof. Second. That the town authorities had actual notice of the defects complained of, before the accident, or that the defect complained of had existed or was obvious for such a length of time before the accident that such authorities could, by the exercise of ordinary diligence, have known of such defects, and had reasonable time to repair same; and, if she has not so satisfied the jury by the greater weight of the evidence, they will find for the defendant." We approve that charge, as well as the others given.

The jury were quite fully and carefully instructed, and we have disposed of all the points made by the appellant, except the refusal of two instructions. These are not dealt with for the reason that the points they present are substantially covered by what has been already stated; one of said instructions relating to notice to the city of the bad condition of the walk, and the other to the lack of evidence tending to prove it was defectively constructed. There was evidence

bearing on both those issues, and the given instructions submitted it in the proper light. The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

KENNEDY v. PIERCE'S LOAN CO.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

BANKRUPTCY — INVOLUNTARY PETITION — PLEDGES—TRANSFER OF TITLE—NECESSITY OF ADJUDICATION—RIGHTS OF TRUSTEES.

1. Bankr. Law 1898, § 70, subd. 5 (30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3451]), provides that a trustee shall be vested with the title of the bankrupt as of the date of the adjudication to "property which prior to the filing of the petition he might by any means have transferred, and which might have been levied on or sold on judicial process against him," and section 67d [page 3449] declares that liens given or accepted in good faith for a present consideration, and not in contemplation or in fraud of the bankrupt law, shall not be affected thereby. *Held*, that where a bankrupt, after the filing of an involuntary petition and before adjudication, pledged certain personal property to defendant for loans which defendant made in good faith, without notice of the bankruptcy proceedings, the pledge was valid, and the property could not be recovered by the trustee.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Pierre B. Kennedy, as trustee in bankruptcy of Morris Ellman, against Pierce's Loan Company, to recover certain personal property. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Abbott & Edwards, for appellant. Kinealy & Kinealy, for respondent.

REYBURN, J. This is an action of replevin submitted to the court below upon the pleadings and agreed statement of facts, which reveal the following situation:

On October 4, 1901, an involuntary petition in bankruptcy was filed against Morris Ellman by his creditors, and November 21st following he was duly adjudicated bankrupt in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and plaintiff was duly elected and qualified as trustee of his estate. On October 16, 1901, the bankrupt pledged with defendant, a corporation created under the laws of Missouri, and in business in the city of St. Louis as a duly licensed pawnbroker, certain chattels, consisting of the jewelry mentioned, to secure a loan of \$300 due in 30 days, and on the 18th day of October, 1901, again pledged with the defendant, as such pawnbroker, certain other jewelry described, to secure the further advance of \$300 due in 30 days, said Ellman receiving from defendant the sum of \$300 at each time of such pledges. The period of redemption of the articles thus pawned by the bankrupt on October 16, 1901, expired February 15, 1902, and the period of redemption

for those articles pawned October 18, 1901, expired February 17, 1902, and, at the expiration of the redemption periods, defendant immediately transferred all the articles from a safe in its office, in which it kept only property pawned with it, to a safe in which it kept only its own absolute property. Ellman at the times of pawning the jewelry with defendant was a stranger, not known to the officers or agents of the defendant, and neither defendant nor any of its officers or agents had any knowledge or information that a petition in bankruptcy had been filed against Ellman at any time or by any person, nor did they or any of them have any knowledge or information respecting the financial condition of Ellman. All the property pledged belonged to and was in the possession of Ellman prior to October 4, 1901, and thereafter continued in his possession until pawned by him with defendant, and its total value was \$650.

Upon submission of the case upon the agreed facts, plaintiff asked the court to give a series of declarations of law, embodying the proposition that the filing of the petition of bankruptcy against Ellman conveyed constructive notice of such proceeding to defendant, and that thereafter defendant in its dealings with Ellman was bound to take notice of the filing of such petition, which was, in effect, an attachment and injunction, and that, under the facts, defendant acquired no title to the property involved, which the court refused, and at the instance of defendant gave an instruction that, under the law on the agreed statement of facts, the finding and judgment must be in favor of defendant, and the court, sitting as a jury, found and rendered judgment in favor of defendant.

It is argued on behalf of plaintiff that, after the filing of the involuntary petition in bankruptcy, Morris Ellman had no title to the personal property which he had pledged for personal loans with defendant, but that a bankrupt's estate, assets, and liabilities alike stand as of the date of the filing of the petition, and from that time the prospective bankrupt becomes, at most, a mere trustee for his creditors, and powerless to dispose of his property in any manner.

The filing of the bankruptcy proceeding, it is contended, was constructive notice to all the world of its pendency, and thereafter all persons engaging in any transactions with Ellman dealt with him at their own peril, and charged with notice of the possible adjudication of his insolvency and its consequences. In support appellant quotes the language of the Chief Justice of the United States Supreme Court from the opinion in *Mueller v. Nugent*, 184 U. S. 14, 22 Sup. Ct. 275, 46 L. Ed. 405: "It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and, in effect, an attachment and injunction." This language itself is

borrowed from *Bank v. Sherman*, 101 U. S. 406, 25 L. Ed. 866, which arose under the bankrupt act of 1867. Misguided by the above expressions injected into the *Mueller Case*, the United States District Court of the Southern District of New York has, we apprehend, wandered, and lent a degree of misjudged vigor to appellant's position in the cases of *In re Gutman & Wenk*, 8 Am. Bankr. Rep. 252, 114 Fed. 1009, and *In re Krinsky Brothers*, 7 Am. Bankr. Rep. 535, 112 Fed. 972. The bankrupt law of 1898 provides that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, excluding property exempt, but expressly to the title of (5) "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him." Section 70, Act 1898 (30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3451]). This latter clause limits and determines the class of property passing to the trustee, but, as to this, he is vested with the title as of the date of adjudication. *Brandenburg, Bankruptcy*, p. 691; *Collier, Bankruptcy*, p. 456. Under the act of 1867, as forcibly presented in *Bank v. Sherman*, supra, the filing of a petition in bankruptcy was a caveat to all the world, in effect an attachment and injunction, and thereafter all property rights of the debtor were ipso facto in abeyance until the final adjudication, which, if in his favor, revived such rights, but, if adverse, were divested out of him and transferred to his assignee in trust for his creditors. The trustee's title under the present act manifestly and expressly does not relate back beyond the time of the decree, but, irrespective of the time of his election and qualification, his title attaches and becomes vested as of the date of the adjudication. Under the provisions of the present law, in sharp contrast to the operation of the former law, no interregnum between the filing of the petition and the adjudication is occasioned during which, under the earlier law, the bankrupt was civiliter mortuus—his property rights suspended—awaiting the final adjudication, so that any person dealing with him during such interval dealt at his own peril. The inconvenience and even hardship produced by such intermission created or made possible by the act of 1867, during which the public, in good faith and for full value, might acquire title to the bankrupt's property, subsequently avoided and divested by the bankrupt adjudication, was recognized as an infirmity and evil to be avoided or remedied by the judiciary committee of the House of Representatives in reporting the bill which matured into the present national bankruptcy statute, and the express change in this direction in the law now in force was deliberately designed and intended to afford relief and obviate the pernicious effect of the

former bill in such regard by providing that the title of the bankrupt's estate should be transplanted to the trustee on the date of the adjudication, thus permitting the alleged bankrupt, pending the adjudication, to handle and dispose of his property without restriction, except the limits of good faith, and without exposing the innocent purchaser for value to the danger of being deprived of his property, after its acquisition, by the ensuing adjudication. The committee also comprehended that in section 69 [U. S. Comp. St. 1901, p. 3450] abundant provision was made for the protection of the property of an involuntary bankrupt, if neglected by him and exposed to deterioration in value, by authorizing the bankruptcy court to summarily place it in the marshal's possession; and it may also be suggested that, if such remedy proved inadequate, the safety of the bankrupt's estate is further guarded and assured under the plenary power in the court conferred by paragraph 3, § 2, c. 2, of the present act [U. S. Comp. St. 1901, p. 3421], for appointment of a receiver for its preservation after the filing of the petition and pending the election and qualification of a trustee. *Brandenburg, Bankruptcy*, p. 688; *Collier, Bankruptcy*, p. 455; *In re Scholtz* (D. C.) 106 Fed. 834; *In re Corbett* (D. C.) 104 Fed. 872; *In re Wells* (D. C.) 114 Fed. 222.

The position herein assumed by us is fortified by other provisions of the present act, especially section 67d [U. S. Comp. St. 1901, p. 3449], which declares that liens given or accepted in good faith for a present consideration, and not in contemplation or in fraud of the bankrupt law, shall not be affected thereby. In *Mueller v. Nugent*, supra, *Nugent*, as the agent of the bankrupt, had possession of the funds of the bankrupt's estate, the proceeds of property mortgaged and sold as agent of the bankrupt, and did not assert any claim adverse to the bankrupt; and the sole question before the court was the validity of the summary contempt and imprisonment proceeding by which the trustee sought to recover the money from the agent, and, upon a fair and careful reading of the case, the conclusion is irresistible that the portion of the opinion upon which appellant depends was a mere expression of the writer outside of the case, and in truth and in fact, in the words of the same opinion, quoted from *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, "was an inadvertence, and upon a question not arising in the case before the court," which related exclusively to the jurisdiction of the referee in the summary remedy invoked by the trustee. This case was the subject of review in the recent proceedings, *In re Wells*, in the United States District Court of the Western Judicial District of Missouri, 114 Fed. 222, and that court declined to give it the interpretation or recognize it as authority to the extent contended for by appellant. It

will be remembered that no element of fraud is presented in this record, and respondent confessedly made the loans in good faith, according to the usual course of business, and acquired the liens upon and possession of the personalty innocently, for adequate consideration, and without notice or knowledge of the pendency of the bankruptcy proceeding against the pledgor. With the highest respect for the exalted tribunal and its distinguished presiding member, through whom the decision in *Mueller v. Nugent* was announced, we cannot yield to the obiter dictum relied on, nor recognize as controlling authority an inadvertency evidently erroneous, and in misapprehension of the manifest language of the existing bankruptcy law. "*Aliquando bonus dormitat Homerus.*"

The judgment will therefore be affirmed.

BLAND, P. J., and GOODE, J., concur.

RUTLEDGE & KILPATRICK REALTY CO. v. NEELY.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

~~BROKERS—COMMISSIONS—LEASE—DUAL AGENCY—EVIDENCE—SUFFICIENCY.~~

1. Defendant intrusted to plaintiffs the leasing of certain property, offering to erect a building thereon for a tenant under a long lease. Other parties had come to plaintiffs to find a building suitably arranged for their purposes. Plaintiffs brought these parties and defendant together, the matter was discussed, and an arrangement for a 20-year lease effected; the contract being drawn by plaintiffs. Difficulty occurred in the arrangements, owing to the necessity of a fireproof building, to the increased rental of which the proposed tenants objected; but this difficulty was bridged over by the efforts of plaintiffs, who were in telegraphic communication with defendant. *Held*, that the evidence did not show that plaintiffs were acting to such an extent in the interests of the tenants, as well as in those of defendant, as to preclude the recovery of a commission.

Appeal from St. Louis Circuit Court; J. A. Talty, Judge.

Action by the Rutledge & Kilpatrick Realty Company against Shaw F. Neely. From a judgment for plaintiff, defendant appeals. Affirmed.

Finklenberg, Nagel & Kirby, for appellant. T. G. Rutledge, for respondent.

Statement of Facts and Opinion.

GOODE, J. In this case, which was instituted to recover a commission alleged to be due the respondent for making a lease of appellant's property, the only point made for a reversal of the judgment is that the evidence shows respondent acted as agent for both appellant and his lessees in the transaction. All the declarations of law requested by the appellant, except one in the nature of a demurrer to respondent's case, were given by

*Rehearing denied March 31, 1903.

the trial court, which, however, found the facts in favor of the respondent.

We have read the evidence, and are convinced that appellant's contention that there was nothing on which to base the judgment rendered below is without merit. The Rutledge & Kilpatrick Realty Company is a corporation conducting a real estate business in the city of St. Louis. The appellant, Neely, is a resident of Leavenworth, Kan., but owns much St. Louis property. The transaction which gave rise to respondent's claim for a commission was the leasing in 1901 of a lot owned by Neely on Pine Street, between Seventh and Eighth streets, in the city of St. Louis, to two men by the name of Horn, for hotel and restaurant purposes. The contract between the lessor and lessees provided for the erection of a new building on the lot owned by the lessor, the creation of a leasehold for 20 years, and the payment to Neely of a rental of 5 per cent. on a ground valuation of \$125,000, and 6 per cent. on the cost of the building he was to erect. This rent is to be paid for the first 10 years, at the end of which time there is to be a revaluation of the premises, in order to fix the rent for the second half of the term. Neely denies positively that he ever employed the Rutledge & Kilpatrick Realty Company to act as his agent in the matter, but his testimony is as positively contradicted by the members of that company.

The evidence on this issue is conceded to be conflicting, but appellant contends that the effect of the testimony of the members of the respondent corporation is that, if it represented Neely, it likewise represented the Horns, and was therefore guilty of acting in a dual agency, which precludes it from recovering from Neely for any service rendered to him. The testimony for the respondent tends to prove that two or three years prior to April, 1901, when the negotiation for the lease began, Neely had requested it to lease this Pine street property; that Neely came into respondent's business office frequently from time to time, and spoke to its officers on the subject, saying he wanted to make a lease for 99 years, and would put up a building, and asked said officers to find a tenant, and they agreed to look around for one. In the spring of 1901 the Horns were endeavoring to obtain a leasehold between Seventh and Ninth and Chestnut and Olive streets in St. Louis, for the purpose of carrying on a hotel and restaurant business. They wanted a building arranged for a restaurant on the first floor, with hotel accommodations in the upper stories. The Horns advertised in the newspapers for a lease of that kind, and spoke to several real estate agents, including the respondent; telling one of respondent's officers what they wanted, and receiving a promise from him to find a suitable building for them if possible. In April Neely again went to respondent's office, and brought up the subject of leasing the Pine street proper-

ty. He was introduced by Kilpatrick to Bakewell, the treasurer, and Yourtree, a salesman, of the realty company. A conversation ensued, during which Neely said he wanted to lease his Pine street property for 99 years, and Yourtree told him he did not believe the company could effect a lease for so long a time, but, if he would fix a shorter time, perhaps something could be done for him. Then Yourtree thought of the Horns, and their desire to acquire a leasehold in the locality where Neely's property was. Yourtree stated to Neely what kind of a house the Horns wanted, and Neely said such a building would be satisfactory to him, and that he would rent on terms the same as those heretofore stated. Yourtree then brought Neely and the Horns together, and the matter was fully discussed, an arrangement effected by which the Horns were to guaranty Neely to the amount of \$12,000, and he was to erect a building of the kind agreed on, and give them a lease for 20 years. The officers and employes of the Rutledge & Kilpatrick Realty Company drew the various contracts and examined them for Neely, and, at his request, Yourtree went with him to meet the sureties of the Horns and talk over the business. At that time the contract had been drawn, and Yourtree, thinking it was unnecessary for him to be present at that interview, sought to excuse himself, as he was busy, but Neely insisted on his going. After the arrangements had been consummated, Neely returned to Leavenworth, and while there received a telegram from Richard Horn to come to St. Louis. Thereupon Neely sent the following telegram: "Leavenworth, Kansas, May 8th, 1901. Rutledge & Kilpatrick: Have telegram from Horn to come to St. Louis. What is up? Confidential. S. F. Neely." It turned out that the city building commissioner had required a fireproof building to be erected, which was more expensive than the one contemplated, and hence would result in an increase in the rent the Horns were to pay. On this account they were about to back out, but through the efforts of the respondent's employes the difficulty was tided over, and the contract remained intact.

Such is the substance of the testimony for the respondent, and appellant contends it conclusively shows a dual agency—that the respondent was acting as much for the Horns as for Neely. This view of the evidence is strained. Neely had been talking to the respondent for several years about leasing his Pine street property, and they were hunting for some one to lease it. The mere fact that the Horns spoke to the respondent, among other real estate agents, to find them such a leasehold as they desired, instead of making the respondent the agent of the Horns, enabled it to realize the desire of its patron, Dr. Neely, to lease his property. If an owner has put a building in the hands of a real estate agent to lease, and after-

wards some person asks the same agent to find him a building which he may lease, and thereupon the agent brings the two together, and a lease is effected, can it be said the agent was guilty of disloyalty to his original employer? Obviously no such interpretation can be justly put on his conduct, for he has merely availed himself of circumstances that arose to accomplish a business result satisfactory to all parties. In the particular transaction with which we are at present concerned, there were, of course, many details and disputes before the affair was consummated, and the members of the respondent company labored hard to bring Neely and the Horns to an agreement. Perhaps there was evidence on which to base a finding that they sometimes acted in the interest of the Horns instead of Neely, but undoubtedly the evidence did not compel that finding. It was a matter for the court below to decide. The telegram we have quoted, as well as the facts above stated, strongly tend to prove that Neely regarded respondent as his agent, and everything the respondent's employes did in the matter is entirely consistent with a finding that they were loyal to Neely, and that their labors were directed towards removing such cavils and objections as usually arise in the progress of a business transaction of magnitude, so that the main object of the negotiation might be realized, to wit, the letting of appellant's property on terms agreeable to both him and the lessees.

In several declarations prepared and requested by the appellant's counsel, the court laid down the law to be that an agent who represented both parties in an adverse transaction without disclosing the double agency could not recover a commission; further, that, even though Dr. Neely employed respondent, if the evidence showed that Horn Bros. also employed it to represent them, respondent could not recover; further, that if the respondent during the negotiations secretly, and without the knowledge and consent of Neely, advised the Horn Bros. against the interest of appellant, and endeavored to obtain concessions from the appellant for the benefit of the Horns, respondent could not recover.

The legal theories of the case were accurately declared, and, as there was evidence to support the circuit court's judgment, said judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

GILLESPIE v. HENDREN.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

TRESPASS—CATTLE—FENCES—ADJOINING PROPRIETORS—WAIVER OF TORT—IMPLIED PROMISE—ACTION FOR RENT.

1. Defendant was grazing his cattle on plaintiff's land when plaintiff claimed rent, and in a subsequent action therefor plaintiff's agent

testified that he talked with defendant about it, and defendant replied that he "did not know about it," that he would rather buy plaintiff's land; and in a later conversation, when asked what he was going to do about the matter, he said he was "not going to do anything." *Held*, that it was error to give instructions predicated on the theory that there was an agreement to pay rent.

2. The common law as to adjoining proprietors is in force in Missouri, and each party must fence his own stock.

3. One whose lands are trespassed on by cattle may waive the trespass and sue on an implied promise to pay rent.

4. Where defendant was grazing his cattle on plaintiff's land when notified that he would be required to pay rent, and, although he refused to pay, he continued to graze the cattle there, there was an implied promise to pay a reasonable amount for the use of the land.

Appeal from Circuit Court, Harrison County; P. C. Stepp, Judge.

Suit by Elizabeth Gillespie against Lewis Hendren. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Sallee and C. H. S. Goodman, for appellant. J. C. Wilson and Peery & Lyons, for respondent.

BROADDUS, J. This is a suit for rent of land for the year 1900. The plaintiff was the owner of a life estate in about 20 acres of land, which was inclosed by the land of adjoining proprietors with about 30 acres of land belonging to the defendant. It had been the custom of the owners of the last-named quantity, prior to defendant's ownership, to use all the inclosed land without demand and payment of rent by plaintiff for the value of the grazing on her share of the same. But in 1900, through her agent, Isalah Buzzard, she claimed rent of defendant for her portion. Buzzard testified that he had a talk in May or June, 1900, with defendant about the matter, in which he told him (defendant) that, if he used all the pasture, plaintiff would have to be paid for it, to which defendant replied that he did not know about it, that he would rather buy plaintiff's interest in the land, and that he would figure up and see what he could do about it. However, in a later conversation, when Buzzard asked him what he was going to do about the matter, defendant answered that he was not going to do anything. There was evidence as to the value of the rent of plaintiff's proportion of the land, and also that defendant not only grazed his own stock on the inclosure, but grazed that of others for compensation. The finding and judgment were for the plaintiff, from which defendant appealed.

Defendant contends that, under the evidence, plaintiff was not entitled to recover, and that the court committed error in the giving and refusing of instructions.

Instructions 1, 2, and 3 given on the part of plaintiff are predicated upon the theory that, if the jury should find that there was

¶ 2. See *Animals*, vol. 2, Cent. Dig. §§ 331, 333.

an agreement between defendant and plaintiff's agent, Buzzard, that defendant was to pay plaintiff rent, it would find for plaintiff the value of such rent. We think that in the giving of these instructions the court was in error, for there was no evidence that the defendant would pay rent, and no such inference is to be drawn from the conversation alluded to between said agent and defendant.

The instructions asked by the defendant, and refused by the court, were to the effect that, if the jury found that the lands of plaintiff and defendant were included in a common inclosure, and defendant turned his cattle into this inclosure on his own land, they wandered upon plaintiff's land and grazed there, the finding would be for the defendant. These last-named instructions raise the principal question in the case, viz., the liability of the defendant for use of plaintiff's premises included in the same inclosure with his own.

Defendant's contention is that, under the law, he was not required to fence his own land, but had the right to turn his cattle upon it to graze, and the fact that they went upon that of plaintiff and grazed thereon would not make him liable for rent of the same. This contention would undoubtedly be true if the lands were uninclosed. But the facts are different. The lands of plaintiff and defendant were in a common inclosure, and not open to the cattle of strangers. The question is not a new one in this state. In *Jackson v. Fulton*, 87 Mo. App. 228, it was held that: "The common law restraining cattle from running at large has never been in force in this state, but the common law as to adjoining proprietors without a partition fence is in force, and under it each party must fence his own stock, or pay the damages it may do to the other proprietor." See *O'Riley v. Diss*, 41 Mo. App. 184.

The plaintiff's action is not for a trespass, but for rent. Because, as we have seen, defendant had no right to turn his cattle upon the common inclosure, so that they would in the very nature of things trespass upon plaintiff's lands, it does not follow that her action should be founded in trespass. Independent of her common-law right to waive the trespass and sue on an implied promise, the evidence showed the relation of landlord and tenant. In *Wilkerson v. Wilkerson*, 62 Mo. App. 249, it was held that: "A definite agreement to pay rent is not essential to create the relation of landlord and tenant, and an action for use and occupation will lie where the defendant, with plaintiff's consent, enters upon the land and uses it for his own profit, as that is a complete promise to pay a reasonable compensation." The defendant was notified that plaintiff would require him to pay rent, and although he refused to agree to pay any particular amount, or to pay any sum whatever, his occupation with plaintiff's permission, and with the understanding that rent would be demanded, under the authority

cited, created an implied promise at least to pay a reasonable compensation for the use of the land.

The case seems to have been tried upon a false theory, judging by the instructions, but, as the plaintiff would have been entitled to a verdict upon any theory, this court is not authorized to reverse it, as the statute forbids such action on our part in such cases. Therefore the cause is affirmed. All concur.

ROWE et al. v. CURRENT RIVER LAND & CATTLE CO.*

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

VOID TAX DEED—RECOVERY OF MONEY PAID.

1. One whose tax deed is held void is not entitled to recover of the successful party the amount paid by him at the tax sale and subsequent taxes paid by him; such relief not being afforded by Acts 1897, p. 74, entitled "An act to enlarge the jurisdiction of courts of record in suits to determine and quiet the title to real estate," or by any other act.

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by Thomas J. Rowe and others against the Current River Land & Cattle Company. From the judgment, plaintiffs appeal. Modified.

John C. Brown, for appellants. L. B. Shuck, for respondent.

REYBURN, J. This is an action brought under the provisions of an act of the Legislature of Missouri approved March 15, 1897 (Laws 1897, p. 74), being sections 650-652 of the present statutes, to determine the interests and quiet the title to a tract of realty in Shannon county. The material allegations of plaintiffs' petition were that they owned and claimed to have title in fee simple to the tract described, which was not in the actual possession of any person, but that the defendant claimed some title, estate, or interest in such real estate adverse to the estate of plaintiffs therein; and plaintiffs prayed the court to try, ascertain, and determine the interests and title of plaintiffs and defendant, respectively, to the realty, and by its decree adjudge and define whatever interests the several parties plaintiffs and defendant might have therein. Defendant's answer alleged that it claimed title to the land described in plaintiffs' petition by virtue of a sheriff's deed under a sale for back taxes made on the 14th day of September, 1887, based on a judgment rendered on the 16th day of March, 1887, by the circuit court of Shannon county against the record owners of the land, as appeared from the records of said county, for the back taxes for the years —; that at the sale thereof defendant in good faith purchased such lands, and had ever since claimed title thereto, and,

*Rehearing denied March 31, 1903.

by virtue of such sale and purchase by defendant, defendant liquidated and paid off the sum of \$38.49 taxes then standing against said lands, which were a lien thereon, and that since such purchase defendant had paid on said lands and discharged therefrom the further sum of \$50.42 taxes; and the defendant prayed that, if the title to such land was adjudged in the plaintiffs, the judgment of the court be that plaintiffs refund and pay to defendant the sum of \$86.91, the amount of taxes so discharged and paid by defendant. The reply was a general denial. The cause was tried before the court, which rendered judgment for the plaintiffs, finding that the legal and equitable title to the real estate involved was in the plaintiffs, subject, however, to a lien against it in the aggregate of \$86.90 for taxes extinguished by defendant in purchasing the land at the sheriff's sale for taxes, and for taxes paid by defendant, after such purchase, in favor of defendant, and rendered judgment, in accordance with such finding, that the legal and equitable title was adjudged to be in plaintiffs, subject to the lien above in favor of defendant for the sum of \$86.90.

The case has been submitted to this court upon the following agreed statement of facts: "It is admitted that neither the plaintiffs nor the defendant have ever been in actual possession of the real estate in controversy, and that this is an action to settle, try, and define title to real estate under the provisions of an act entitled 'An act to enlarge the jurisdiction of courts of record in suits to determine and quiet the title to real estate,' approved March 15, 1897. Acts 1897, p. 74. It is further admitted that one David Rowe procured a patent of the land in controversy from the United States in the year 1860, and that said David Rowe duly conveyed said land to the plaintiffs herein on the 12th day of August, 1897. It is admitted that defendant claimed the property under and through a sheriff's deed for back taxes, based on a suit begun in the circuit court of Shannon county, Missouri, on January 2, 1887, in which suit the state of Missouri ex rel. W. M. Freeman, collector of revenue of Shannon Co., Missouri, was plaintiff, and E. E. Zimmerman and Henderson Jennings, were defendants; a final judgment in said cause having been rendered against said defendants on March 16, 1887—all of such tax proceedings being under the provisions of article 6, c. 145, Revised Statutes of Missouri of the year 1879. It is further admitted that Henderson Jennings, one of the defendants in said tax proceedings, appeared by the deed records of Shannon county, Missouri, to be the record and true owner of the real estate in controversy at the time said tax proceedings were instituted, but, on account of one of the deeds through which said Henderson Jennings claimed being a forgery, said Henderson Jennings had no title to said real estate, and the true title thereto was, at the time

of the institution of said tax proceedings, in David Rowe, the original patentee of said property. It is further admitted that the defendant bought the property in controversy at said tax sale in good faith, paying therefor the sum of \$38.49, and, believing that it had thus acquired a good title to said property, paid out and expended the sum of \$50.41 in taxes on said property before receiving any notice that its title thus acquired was defective. It is admitted that the aggregate amount paid by defendant for the property in controversy at said tax sale and taxes subsequently paid thereon is \$86.91, and that the circuit court rendered a judgment in favor of defendant for the aggregate amount thus expended, and declared such judgment a lien upon the property in controversy. The plaintiffs' appeal is taken from the judgment of the circuit court requiring them to pay and reimburse the defendant in the sum of \$86.91 paid by the defendant in purchasing the property in controversy at said tax sale, and taxes subsequently paid thereon, and in making said judgment a lien on the real estate in controversy. And the action of the circuit court in rendering such judgment against the plaintiffs, and making same a lien upon the real estate in controversy, is the only issue to be passed upon by the appellate court. The foregoing statement of facts shall be treated by the Supreme Court as all the evidence introduced by the plaintiff and defendant in the trial in the circuit court of this cause."

The section of the revenue laws found in 2 Wag. St. 1872, § 219, p. 1206, affording relief to the holder of a tax deed defeated in an action by or against him for the recovery of the land sold by requiring the successful claimant to pay such holder the full amount of all taxes paid by the tax purchaser on such lands at the time of purchase, and all subsequent taxes paid by him, with interest, was dropped out of the statutes in 1877, and has never been re-enacted. Respondent, however, appeals to an act adopted by the Legislature in March, 1897, entitled "An act to enlarge the jurisdiction of courts of record in suits to determine and quiet the title to real estate" (Acts 1897, p. 74), but even the liberal interpretation to which this act is entitled by its remedial character will not permit any construction availing defendant, or sustaining the relief afforded by the trial court. This statute was manifestly designed to have no other effect than to broaden the authority of the courts by empowering them in proper proceedings to settle and define the title and estate, legal or equitable, vested or contingent, present or prospective, to disputed realty between the conflicting claimants, irrespective of possession, and to provide in such cases a remedy where the possessory action of ejectment would not lie. The bare or latent equity of the holder of an invalid tax deed or title is lifeless and nonenforceable without express statutory recognition,

and, in the absence of such legislation, the lien of the state does not pass, and the doctrine of subrogation is not applicable to the tax-title purchaser. As to the purchase price representing the taxes for which the sale is made, he has bought at his own peril, and the doctrine of caveat emptor is rigidly applied, and as to such amounts as he may pay for taxes thereafter accruing he is treated as a mere volunteer seeking to obtrude as a creditor, to whom relief will be denied even in equity.

The identical questions involved in this case were presented to this court in *Carter v. Phillips*, 49 Mo. App. 319. An examination of that case shows that the recovery of plaintiff was sought to be maintained by the same line of argument and by citation of the same authorities as are here invoked by respondent. Since the rendition of that decision the legal situation has continued unchanged. No legislation in support of the contention herein has been had in this state, and no ground has been shown for disturbing the conclusion reached in that case, which finds further support in the following additional authorities: *Croskery v. Busch*, 116 Mich. 288, 74 N. W. 464; *State ex rel. v. Casteel*, 110 Ind. 174, 11 N. E. 219; *Harper v. Rowe*, 53 Cal. 233; *McCormick v. Edwards*, 69 Tex. 106, 6 S. W. 32; 2 *Desty, Taxation*, p. 1011.

The judgment of the court below will therefore be modified. In so far as it subjects the realty described to a lien in favor of defendant for its disbursement for taxes in the purchase of such realty and thereafter, it will be reversed; in other respects it will be affirmed; respondent to pay costs of this court; and it is so ordered.

BLAND, P. J., and GOODE, J., concur.

UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., v. FOSKETT-KESSNER FEED CO. et al.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

JUSTICE OF THE PEACE—JURISDICTION—AMOUNT—AMENDMENT—APPEAL—PRESUMPTIONS.

1. Where, on a motion for a rule on a justice to perfect his transcript on an appeal, the clerk of the justice's court made an affidavit that he had inadvertently omitted from the transcript a line from the justice's docket which showed that the case was continued from the 9th of November until the 14th, and that the cause was dismissed on the latter day, in which case the appeal was in time, and the court thereupon overruled the motion, it will be presumed that the court thereby found the facts as stated in the affidavit, and that the appeal was therefore taken in time.

2. Where replevin to recover a horse of the alleged value of \$500, and \$200 for wrongful detention, was dismissed by the justice on the ground that the damages exceeded his jurisdiction, from which an appeal was taken, and a paper attached to the transcript purported to be an amendment omitting the item of dam-

ages, but such paper contained nothing to show that it was filed, it would be presumed that the amendment was not allowed by the justice.

3. Rev. St. 1899, § 4079, provides that, on appeal from justices of the peace, the statement of a plaintiff's cause of action, filed before the justice, may be amended "to supply any deficiency or omission therein when by such amendment substantial justice will be promoted." Held that, where an action was brought before a justice for a sum exceeding the justice's jurisdiction, such section did not authorize an amendment reducing the damages for the purpose of conferring jurisdiction.

Goode, J., dissenting.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by the United States Fidelity & Guaranty Company of Baltimore, Md., against the Foskett-Kessner Feed Company and others. From a justice's judgment dismissing the action for want of jurisdiction, affirmed by the circuit court, plaintiff appeals. Affirmed.

E. M. Grossman, for appellant. Paxson & Clark, for respondents.

BLAND, P. J. The suit was begun before a justice of the peace in the city of St. Louis to replevy one horse, of the alleged value of \$500, and \$200 damages for its wrongful detention. On November 9, 1900, the justice dismissed the suit for the reason that the damages sued for exceeded his jurisdiction. On November 20, 1900, plaintiff filed its affidavit and bond for an appeal to the circuit court. Its bond was approved and the appeal was granted by the justice. In the transcript sent up by the justice is an amended petition, in which the claim for damages is omitted, but there are no file marks on the paper; nor is there any entry in the justice's docket showing that permission was given to plaintiff to amend the petition, or that an amended petition was filed. After the cause reached the circuit court, plaintiff filed an amended petition omitting the item of damages. Defendants moved to dismiss the cause for want of jurisdiction in the circuit court over the subject-matter of the suit. This motion was overruled. The defendants then filed separate answers. After filing answers, defendants filed what they call a supplementary motion to dismiss the suit for want of jurisdiction in the circuit court over the subject-matter of the action. The court sustained this motion and dismissed the cause at plaintiff's costs. A timely motion to set aside the order dismissing the cause and for new trial proving of no avail, plaintiff appealed to this court.

There is a question as to whether or not the appeal was taken in time. The transcript shows that the cause was dismissed by the justice on the 9th of November. The clerk of the justice's court made an affidavit to the effect that he made out the transcript, and in so doing he inadvertently omitted one line from the justice's docket, which showed that the case was continued from the 9th

*Rehearing denied April 26, 1903.

until the 14th of November, and that the cause was dismissed on the 14th. If so, then the appeal was taken within 10 days from the rendition of the judgment. The plaintiff filed this affidavit in support of a motion for a rule on the justice to perfect his transcript, which motion the court overruled, on the ground, as we assume, that the court, as it had a right to do, found from the facts before it that the appeal was taken in time. *Hansford v. Hansford* (St. L.) 34 Mo. App., loc. cit. 270; *In re Webster* (St. L.) 36 Mo. App., loc. cit. 362, 363; *Dowdy v. Wainble*, 110 Mo., loc. cit. 283, 284, 19 S. W. 489.

Plaintiff concedes that the amount of damages sued for in the original complaint exceeded the jurisdiction of the justice, but contends that it filed with the justice an amended complaint that brought the entire subject-matter of the suit within the justice's jurisdiction. A statement purporting to be an amended complaint, (which would bring the case within the justice's jurisdiction) was attached to the transcript and sent up to the circuit court by the justice. Section 3937, Rev. St. 1899, authorized the justice, on motion of the plaintiff, to make the amendment. He was not required to enter in his docket the fact that leave had been granted to amend, or that the amendment had been made. Rev. St. 1899, § 3844. The only evidence that an amendment was allowed is the filing by the justice of the amended paper. The so-called amended complaint had no file marks. Had the amendment been allowed, the justice would have committed error in dismissing the suit for want of jurisdiction of the subject-matter. We are therefore bound to conclude that the amendment was not allowed by the justice, since to hold otherwise would be to put the justice in error, and to find that he allowed the amendment, when there is no evidence that he did so.

2. The amendment made after the cause reached the circuit court was such as to bring the subject-matter of the suit within the jurisdiction of the justice. Defendants contend that the amendment was inadmissible after the cause reached the circuit court. Section 4079, Rev. St. 1899, provides that, in cases of appeal from justice of the peace courts, the statement of a plaintiff's cause of action filed before the justice may be amended in the appeal court "to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted." This section has been very liberally construed by the appellate courts. In *Heman v. Fanning*, 33 Mo. App. 50, it was substantially decided that, if the amendment could have been made had the suit been brought in the circuit court, it might be made on appeal from the justice's court. In *Dowdy v. Wainble*, supra, an amendment was allowed after the appeal to show a jurisdictional fact. The same thing was allowed in an attachment suit in *Daniel v. Atkins*,

66 Mo. App. 342. A like ruling was made in *Kincaid v. Griffith*, 64 Mo. App., loc. cit. 676. The only prohibition against amendments of complaints after appeal seems to be that no new or different cause of action shall be substituted. The jurisdiction of the circuit court of a cause appealed from a justice is derivative. If the justice had no jurisdiction of the subject-matter of the suit, the circuit court can acquire none by the appeal. *Osborne v. Schutt*, 67 Mo. 712; *Ran-kin v. Fairley*, 29 Mo. App. 587; *McCann v. Sawyer*, 59 Mo. App. 480. But it is contended by appellant that, on appeal of any suit of any class over which justices are given jurisdiction, an amendment may be made in the circuit court to cure an omission of a jurisdictional fact. We think this is correct. But appellant's counsel seems to have an erroneous conception of what the courts mean by the word "class" when discussing this question. His contention is that the word embraces every case, regardless of the sum demanded, if the justice is given jurisdiction at all over actions of a like kind. We do not so understand the decisions. As we understand them, the word "class," in this connection, means those cases which the statute has marked out, and given justices of the peace jurisdiction over. When a suit is commenced before a justice which does not for any reason come within the standards set up by the statute, it is not in the class of cases over which justices of the peace have jurisdiction. It affirmatively appears that the suit did not come within the jurisdiction of the justice. While an amendment may be allowed on appeal to supply an omitted jurisdictional fact, no case can be found where an amendment has been allowed for the purpose of conferring jurisdiction, where it affirmatively appeared that jurisdiction over the subject-matter of the suit had not and never could attach in the justice's court.

The judgment is affirmed.

BARCLAY, J., concurs. GOODE, J., dissents.

AMERICAN GUARANTY FUND MUTUAL INS. CO. v. MATTSON.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

INSURANCE COMPANIES—PREMIUM NOTES—ASSESSMENT—NECESSITY—ORDER OF DIRECTORS—BURDEN OF PROOF—SUFFICIENCY OF ORDER—PAYMENT OF LOSS BY GUARANTORS—EFFECT.

1. Under Rev. St. 1899, § 7960, providing that the directors of a mutual fire insurance company shall have the power, whenever they deem it necessary to settle losses and expenses, to assess the premium notes given by the assured, and under a premium note giving the directors the same power, the directors' order of assessment is prima facie evidence of its necessity, and the burden rests on the assured to affirmatively show that no such necessity existed.

*Rehearing denied March 31, 1903.

2. An order and notice of assessment made by the directors of a mutual fire insurance company, reciting the gross amount of notes subject to assessment, and the amount of adjusted losses and of unpaid expenses, were sufficient, without specifying such matters in a detailed schedule.

3. Under Rev. St. 1899, § 7960, providing for the assessment of premium notes by the directors of a mutual fire insurance company to meet the losses, expenses, and other liabilities of the company, the directors have power to order such assessment, although all insurance losses have been paid by the guarantors provided for in section 7958.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the American Guaranty Fund Mutual Insurance Company against Erik Mattson. From a judgment for plaintiff, defendant appeals. Affirmed.

The suit was brought before Justice Spaulding, in the city of St. Louis, on the following premium note:

"\$83.75.

"For value received, in Policy No. —, dated the 20th day of February, 1894, issued by the American Guaranty Fund Mutual Fire Insurance Co., of St. Louis, I promise to pay said company (or their treasurer for the time being) the sum of Four Hundred and Eighty-three & $\frac{75}{100}$ Dollars, in such portions and at such times as the directors of said company shall deem the same requisite for payments of losses and expenses as required and provided by Charter of Company and laws of the State of Missouri, and this note is a lien upon the property insured.

"The company is authorized to insert the number and date in this note.

"Erik Mattson.

[Indorsed on back.]	
No. 342	\$483.75
	483.75
	96.74
Received 10 per cent.	\$48.37
Received assessment No. 1..	4.37
5% amt due, \$24.18 [in pencil].	

face of note 887.01 [in pencil]."

The justice described the suit in the summons issued by him as founded upon an insurance policy. The justice or his clerk was led into this error by the fact that the note and the application for the insurance policy were both on one paper.

The cause was taken from Justice Spaulding to Justice Cline. After the cause had reached Justice Cline's court, plaintiff filed a petition praying for judgment on the note. On the trial, plaintiff recovered judgment for \$24.18, from which defendant appealed to the circuit court.

On the trial in the circuit court, plaintiff introduced the note and the following resolution of the board of directors of plaintiff:

"Resolved, that in order to settle the losses insured against and the expenses and other liabilities of the company, an assessment of fifteen per cent. (15%) be, and hereby is, levied upon each and every premium note given by persons effecting insurance in this company, and said assessment is made upon each and every note above described, which has been in existence for one year prior to this

date, and the secretary is hereby ordered to publish such newspaper notice and mail and deliver such written or printed notice to makers of said notes as is required by law.

"The premium notes to be assessed under the above resolution are numbered 1 to 852, 1001 to 1174, C103 to C139, 1251 to 2215 and D101 to D167, all inclusive.

"The full aggregate amount of all the premium notes on which this assessment is levied is \$112,922.91.

"The amount of losses adjusted and unpaid is \$17,992.21.

"The amount of losses claimed and unadjusted is 'nil.'

"The amount of expenses accrued and unpaid is \$350.00.

"The amount of cash on hand is \$1,392.75."

Proof was made of the publication on June 21, 1901, of the following notice in the Post Dispatch, a newspaper published in the city of St. Louis: "

"Notice is hereby given that an assessment of 15 per cent. was, on the 25th day of September, 1899, by the American Guaranty Fund Mutual Fire Insurance Company of St. Louis, levied on each and every premium note given said company by persons effecting insurance in said company, and which had been at that date in existence for one year prior thereto, to wit: Notes given for policies numbered from 1 to 852 and from 1001 to 1174, Nos. 1251 to 2215, Nos. C103 to C139 and Nos. D101 to D167, all included. Said assessment was levied for the purpose of settling the losses insured against and the other expenses and liabilities of the company. The full aggregate amount for which all the premium notes held by the company were given upon which this assessment was made, was \$112,922.91. The amount of losses adjusted and unpaid was \$17,992.21. The amount of expenses accrued and unpaid was \$350.00. The amount of losses claimed and unadjusted was nothing. The amount of cash on hand was \$1,392.75."

Also proof that a copy of said notice, with the following memorandum added thereto, "And you are hereby notified that under said assessment \$24.18 is due said company upon your note given for policy No. 342," was duly mailed to the defendant at the time of its publication in the Post Dispatch.

The president of the company testified that prior notices of the assessment had been made out and mailed to the defendant, but it was thought they were not full enough to comply with the requirements of the statute, and for this reason the above notice had been published and mailed to the defendant. He testified further that some of the members, including the defendant, had a short time prior to the making of the 15 per cent. assessment paid a 10 per cent. assessment, while others had not, and that it was concluded to give all members who had paid 10 per cent. assessment a credit of that amount on the 15 per cent. assessment, and

for this reason defendant was notified to pay 5 per cent. instead of 15 per cent. of his note. He also testified that he had counted all the premium notes held by the company when the assessment was made; that they amounted to \$112,922.91; that he counted the losses that had been proved up and adjusted at the time, and they amounted to \$17,992.21, and that the unpaid expenses accrued amounted at that time to \$350; that the guarantors of the company had furnished or loaned the company \$18,000 to pay these losses and expenses; and that they looked to the assessment for reimbursement. On cross-examination he was asked to produce the premium notes which formed the basis of the assessment. He said that it was impossible to do this, for the reason many of them had since matured and had been taken up. Defendant testified that the first notice he had of the assessment was when the summons in this suit was served on him by the constable.

At the close of the evidence the defendant offered an instruction in the nature of a demurrer to the evidence, which the court refused. After the court had given its instructions, the defendant's counsel objected to the time allowed by the court for counsel to argue the case before the jury, and asked for further time. The court replied: "No; all the jury want is the amount of the note and the amount of the credits, so that they can make a memorandum of it."

During his argument to the jury, defendant's counsel said: "Now, gentlemen, the court instructs you that you are bound to find from the evidence, before you can find for the plaintiff, that the assessment was absolutely necessary in this case. Now, I submit to you that they have not shown, upon the evidence here, that an assessment was necessary to pay these losses. The Court: That is not the instruction of the court. You did not read that. Mr. Kammerer: Yes, sir. The Court: 'If the directors deemed it necessary,' it ought to be. Mr. Kammerer (reading the first instruction as given by the court): 'The court instructs the jury that if they believe from the evidence . . . that said assessment was necessary in order to settle losses,' etc. The Court: The instruction should read, 'That the directors deemed it necessary.'"

A timely motion for new trial was filed, which the court overruled, whereupon defendant perfected his appeal to this court.

Arthur Kammerer, for appellant. Waddell & Hereford, for respondent.

BARCLAY, J. (after stating the facts). 1. From what we can pick out of the record and from the briefs of counsel, we assume that the plaintiff is a mutual fire insurance company, organized under chapter 119, art. 6, 2 Rev. St. 1899, p. 1857, having its chief office in the city of St. Louis. The note was as-

sessable at the time the board of directors made the assessment, and the uncontradicted evidence is that defendant was notified of the assessment in the manner and by the means provided for by the statutes (section 7960). The section further provides "that if any person shall for thirty days after the mailing and publication of the notice fail to pay the assessment, the directors of the company may sue for and recover the whole of the note." The president of the company testified that a great many persons who were assessed by the board failed to pay the assessment, and that the board ordered him to take those notes and employ Waddell & Hereford, a law firm, to sue for and collect the full amount of the notes, and that he was proceeding under that instruction. Defendant contends that the plaintiff did not show that the condition of the affairs of the company created a necessity for making the assessment. Both the statute (section 7960) and the note committed to the board of directors the duty of determining when the necessities of the company required an assessment to be made, and hence the order making the assessment was at least prima facie evidence of the necessity for making the order, and the burden was on defendant to show affirmatively that it did not exist.

2. Defendant objected to the order making the assessment and the notice on the ground that they were not full enough. The order and the notice stated the gross amount of premium notes held by the company subject to assessment, the amount of losses that had been adjusted, but not paid, and the amount of unpaid expenses. We think this was sufficient; that it was not necessary to incorporate in the order and notice an inventory of the notes or a schedule of the unpaid losses, as contended for by the defendant.

3. Because the guarantors of the company (authorized by section 7958, Rev. St. 1899) had advanced the money and paid the losses, defendant contends there was no necessity for the assessment, and that the company was not indebted. This effected a change in the form of the liability, but did not extinguish or lessen the liability. Authority is given under section 7960, supra, to levy an assessment to pay any liability of the company.

The uncontradicted evidence in the case shows that every step necessary to be taken to mature defendant's note was taken, and regularly and legally taken, by the company. The defenses interposed are without the semblance of merit, and the judgment is so manifestly for the right party that it should be affirmed, regardless of an error that may have intervened at the trial. Hence we refrain from a discussion of errors alleged to have intervened just before and during the argument of the cause by defendant's counsel to the jury, and affirm the judgment.

REYBURN and GOODE, JJ., concur.

MAGINN v. LANCASTER.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

CONTRACT—CONSTRUCTION—PATENT AMBIGUITY—CONSTRUCTION BY ACTS OF PARTIES.

1. B., O., and defendant were members of a corporation. B. borrowed money to pay his share of the amount to be expended by the corporation in the construction of a building to be erected on leased ground, and agreed to pay interest on the loan during the time of the lease. To insure payment of this interest, B., O., and defendant executed a contract referring to the contract of B. with the lender, and providing that out of the profits of the building remaining after payment of all expenses, taxes, and interest on the loan to B., there should be first refunded and paid out of the balance to O. and defendant, pro rata, on the respective amounts advanced by them, "until both such amounts should be paid in full, with interest at 10%," and that when such amounts, with interest, should be paid back, B. should transfer to O. 25 shares of stock, so as to make equal the amount held by him and O., "after which any dividend declared upon said stock" should "be received by defendant, O., and B. in proportion to the amounts of stock held by them. *Held*, that as the consideration for defendant's entering into the contract, and agreeing that the interest on the amount loaned B. should be a first charge on the income from the building, was B.'s agreement to forego participation in the dividends, the consideration failed, and defendant's obligation ceased when he and O. were repaid the amounts advanced by them, and B. began sharing in the dividends.

2. Plaintiff claimed that the parties themselves, by continuing the pool for three years after B. became entitled to dividends on his stock, construed the contract as continuing the pool to the end of the lease. *Held*, that it appearing from the evidence that defendant protested against contributing to the interest on the loan after that time, plaintiff's contention was untenable.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action on a contract by James P. Maginn against Richard D. Lancaster. Judgment for plaintiff, and defendant appeals. Reversed.

The suit was commenced on December 16, 1891, by plaintiff filing in the St. Louis circuit court the following petition (omitting caption):

"Plaintiff states that on August 18, 1866, George I. Barnett, trustee, Thomas O'Reilly, and defendant, Richard D. Lancaster, entered into an agreement in writing, herewith filed, in words and figures as follows, to wit:

"It is agreed between George I. Barnett, trustee of Elizabeth Barnett, Thos. O'Reilly and R. D. Lancaster, all of the city of St. Louis, state of Missouri, as follows:

"That whereas said Barnett, as trustee as aforesaid, said O'Reilly and said Lancaster, own stock in the Insurance and Law Building Company in the following proportions, to wit: Said Barnett, trustee, holds two hundred shares, and said O'Reilly one hundred and fifty shares, and said Lancaster one hundred shares, the par value of said shares being one hundred dollars per share; and where-

as the payments required upon the shares of said Barnett are to be made according to the terms of a certain agreement, dated the 26th day of May, 1866, between James E. Yeatman, trustee of Lucretia Yeatman, and George I. Barnett, trustee of Elizabeth Barnett, and Thomas O'Reilly, and the said O'Reilly and Lancaster are to pay on their shares whatever calls may be made thereon until the full amount of the par value of said shares be paid. And it is agreed between the said parties as follows: That out of the proceeds, rents and profits of the above described shares in said Insurance Law Building Company held by the said Barnett, trustee of Elizabeth Barnett, O'Reilly and Lancaster, after paying all expenses, ground rents, taxes, etc., including the interest to be paid to James E. Yeatman, trustee of Lucretia Yeatman, under the agreement hereinbefore referred to, there shall be first refunded and paid to the said O'Reilly and Lancaster, pro rata, on the respective amounts of fifteen thousand advanced by O'Reilly and ten thousand advanced by Lancaster, until both these amounts shall be paid in full with interest at ten per cent. per annum; and it is understood that the amount of profits paid to said O'Reilly and Lancaster will be computed at the end of every quarter, and the interest on the amounts paid each quarter to cease with the date of said payments. And when the said sum so paid up by said O'Reilly and Lancaster shall have been fully paid back, the said Barnett, as trustee of Elizabeth Barnett, shall transfer to said O'Reilly twenty-five shares of said stock, so as to make equal the amount of stock owned by said Barnett, trustee, and said O'Reilly; after which any dividend declared upon said stock shall be received by said O'Reilly, Lancaster and Barnett, trustee, pro rata, in proportion to the amounts of stock held by them, as by their legal representatives, as aforesaid.

"In testimony whereof, the above parties have hereunto signed their names this 18th day of August, 1866.

"[Signed]

George I. Barnett,

"Trustee of Elizabeth Barnett.

"Thomas O'Reilly.

"R. D. Lancaster."

"Plaintiff states that, pursuant to said agreement in writing, the proceeds, rents, and profits of the above described four hundred and fifty shares, after paying all expenses, ground rents, taxes, etc., including interest to be paid to James E. Yeatman, trustee, or, in other words, the dividends on said shares declared by said Insurance and Law Building Company, less the said interest to be paid the said Yeatman, were duly paid and refunded to said O'Reilly and Lancaster, pro rata, until they were fully repaid their respective amounts, to wit, \$15,000 and \$10,000, with which they had purchased their said shares in said company, and the ten per cent. interest thereon, and this was accomplished in or about the year 1874.

"Plaintiff states that said Barnett duly transferred to said O'Reilly twenty-five shares of the two hundred shares, and that all said parties, including said Lancaster, continued, after said O'Reilly and Lancaster had been thus fully paid up, to contribute, pro rata, out of the dividends declared upon their respective holdings of shares, to the payment of the interest to be paid to said James Yeatman, until about May, 1876, when defendant Lancaster failed and refused to pay the pro rata contribution of the said interest which he had, as aforesaid, agreed to pay; that said Lancaster, as owner of one hundred shares of said stock, was bound to contribute two-ninths of the \$1,600 annual interest charge payable to said Yeatman under the agreement of May 26, 1866, between James E. Yeatman, trustee, and George I. Barnett, trustee, and said Thomas O'Reilly, which said agreement is in words and figures as follows, to wit: -

"This agreement, made this 26th day of May, 1866, by and between James E. Yeatman, trustee of Lucretia Yeatman and others (appointed as such trustee by the Circuit Court of St. Louis County, Missouri, on the 5th day of March, 1866) of the one part, and George I. Barnett and Thomas O'Reilly of the other part, all of said St. Louis county, witnesseth:

"The said Yeatman, as such trustee, to pay to the treasurer of the Insurance and Law Building Company, a corporation existing under the laws of the state of Missouri, in behalf and for account of George I. Barnett, trustee of his wife, Elizabeth Barnett, from time to time as and on the conditions below stated, out of the trust estate in his hands as such trustee, the sum of twenty thousand dollars in all; said payments to be made in sums of not less than one thousand dollars at a time, and the sum or sums paid hereunder from time to time to be equal to—say one-fourth of such amounts as shall at the time of calling for said payments respectively have been actually paid out by said company for work and labor already done and materials used in the erection of the four-story building which said company, as lessee, has by lease of even date herewith contracted with said Yeatman, trustee, to erect in one year from said date upon the lot in block 87, of the city of St. Louis, at the N. W. corner of Third and Pine streets, provided that the work and labor so done and materials used shall correspond with the requirements of said lease in respect to said building; and that the receipt of the contractors or subcontractors and material-men for the amounts so paid out by said company shall be first exhibited to said Yeatman, or his agent if required; and provided also that the said building while erecting shall be kept insured by said company as stipulated in said case.

"And the said George I. Barnett and Thomas O'Reilly agree to and with said Yeat-

man as such trustee, his successors in trust and assigns, that upon the amounts so paid by said Yeatman, trustee as aforesaid, they will pay or cause to be paid to him, said trustee, his successors in trust or assigns, interest at the rate of eight per cent. per annum during the entire term of the lease above mentioned till its expiration by forfeiture or otherwise, said interest to be paid in equal installments, at the end of every three months at the annual rate aforesaid, and to be computed and payable on the several amounts payable hereunder by said Yeatman from the date of such payments respectively. And they further agree that before any money shall be payable hereunder by said Yeatman they will transfer or cause to be transferred to him, said Yeatman, trustee as aforesaid, or such person as he may designate as trustee for him, all the shares of stock held by said O'Reilly and said Barnett as trustee for Elizabeth Barnett in said company, to wit, one hundred and fifty shares held by said O'Reilly and two hundred shares held by said Barnett, trustee as aforesaid, such transfer to be made by way of mortgage or deed of trust in the usual form, securing the several payments of interest above agreed for, containing power of sale in case of failure to pay any installment of said interest, such transfer to be made or noted on the books and in accordance with the by-laws of the company.

"Provided, and it is hereby understood and agreed that upon condition of, and after the erection and completion of said buildings above mentioned in accordance with the stipulation in said lease in respect to the same, the said O'Reilly shall in no event be liable to said Yeatman, trustee, or assigns, under this agreement for any greater sum than fifteen thousand dollars in all.

"In witness whereof, said parties have hereunto set their hands and seals respectively the day and year above written.

"[Signed] James E. Yeatman, [Seal]

"Trustee for Mrs. Lucretia Yeatman.

"George I. Barnett, [Seal]

"Trustee for Elizabeth Barnett.

"Thos. O'Reilly, [Seal]

"George I. Barnett. [Seal]

"That, by reason of the failure and refusal of said Lancaster to continue so to contribute thereto, said Barnett and O'Reilly were compelled to and did pay to said Yeatman the contribution due from said Lancaster, to wit, the sum of three hundred and fifty-five dollars and thirty-five one-hundredths per annum, in quarterly installments, from about May, 1876, until May, 1887. That said payments were made by said Barnett and O'Reilly equally.

"Plaintiff states that said Barnett and O'Reilly have assigned to plaintiff their rights of action against said Lancaster under the said contract of August 18, 1866, to recover the said money and interest thereon as damages for said Lancaster's breach of said con-

tract, and plaintiff therefore asks judgment for six thousand dollars, and for his costs."

The answer was a general denial and a plea of the 10-year statute of limitations. The case was referred to Arba N. Crane, Esq., to try all the issues. After many delays, the referee heard the evidence, and on October 21, 1901, made his report to the circuit court, and found the issues for the plaintiff. He found specially that Yeatman advanced the \$20,000 as he agreed to do in the contract of May 26, 1866, and was entitled to 8 per cent. interest thereon per annum during the life of the lease (twenty-one years), payable in quarterly installments of \$400, and further found that the interest was paid by Barnett, O'Reilly, and Lancaster down to August 1, 1877, each contributing thereto in the proportion his holdings of stock in the corporation bore to the whole amount of the stock issued to them (450 shares); that after August 1, 1877, Lancaster contributed nothing to pay said interest, but that it was paid by Barnett and O'Reilly until the termination of the lease; that by the agreements of May 26th and August 18, 1866, O'Reilly was to pay to the corporation the par value of the stock subscribed by him (\$15,000), Lancaster, the par value of the stock subscribed by him (\$10,000), and Yeatman, the par value of Barnett's stock (\$20,000), as required for the erection of a building on the leased premises; that these several amounts were paid in by the respective parties; that O'Reilly and Lancaster were to have the amounts paid in by them returned, with 10 per cent. interest per annum from the net rents and profits of the premises, i. e., after paying taxes, charges on the property, repairs, etc., and the interest to Yeatman, while the payment of the \$20,000 by Yeatman was not to be returned; that the agreement between Barnett, O'Reilly, and Lancaster, of August 18, 1866, was that the interest becoming due to Yeatman should be paid as expenses, and should come out of the gross rents and profits accruing from the 450 shares of stock held by them; and that this arrangement was carried out until Lancaster and O'Reilly had received the \$25,000, with 10 per cent. interest per annum from the net profits, and that this was accomplished in the year 1874.

The referee in his report says that the real contest between the parties is as to the period when the duty of Lancaster—to contribute two-ninths of the interest to Yeatman—ceased; that the contention of plaintiff is that it continued to the termination of the lease, while Lancaster contends that it ended when he and O'Reilly had received from the net rents and profits the amount they had paid into the corporation, with the agreed interest. The referee found that the obligation of Lancaster to pay two-ninths of the interest to Yeatman continued to the termination of the lease, and awarded to plaintiff two-ninths of all the interest paid by Barnett and O'Reilly to Yeatman within 10 years next

before the beginning of the suit, with 6 per cent. interest on each payment down to the date of the filing of the report.

A motion to set aside the report was filed by the defendant, which the court overruled. The report of the referee was approved, and judgment entered in conformity to his findings. After an unsuccessful motion for a new trial, defendant appealed.

Chester H. Krum, for appellant. J. P. Maginn, for respondent.

BLAND, P. J. (after stating the facts). The execution of the two agreements set out in the petition was admitted. It appears from the evidence that after O'Reilly and Lancaster had been paid the \$25,000 which they had paid into the corporation, with 10 per cent. interest thereon, and after Barnett had transferred 25 shares of his stock to O'Reilly, as per agreement of August 18, 1866, he voluntarily transferred 16 shares of his stock to Lancaster, for the reason, as Lancaster testified, that he (Lancaster) had collected and paid out for the corporation the whole \$45,000 expense in the construction of the building without charge, and that Barnett transferred the stock to him as remuneration for these services. All of Barnett's 200 shares of stock were pledged to Yeatman as collateral security for the interest on \$20,000 he had loaned to Barnett, and Lancaster testified that he continued to pay interest to Yeatman to the end of the lease out of profits in the proportion the 16 shares transferred to him by Barnett bore to the 200 shares formerly held by Barnett, and that the 16 shares were of no profit to him. In 1876, Lancaster transferred 100 shares of his stock to Tiernan, the transfer, in fact, being made to one Keating for Tiernan's benefit. Lancaster was secretary and treasurer of the corporation. Tiernan, being his bookkeeper, carried the Yeatman interest on the books of the corporation as a joint charge against the dividends declared on the stocks of O'Reilly, Barnett, and Lancaster until August, 1877, when Lancaster refused to longer contribute to the payment of the interest.

Lancaster testified that he objected to and protested against the payment of any part of the interest to Yeatman after 1874, when he had been paid the par value of his stock, with interest, and when Barnett became entitled to receive dividends on his own shares of stock, and that he then claimed that his obligation to contribute to the payment of interest terminated in 1874, when Barnett became entitled to receive dividends on his own stock.

The right of plaintiff to recover, if any he has, must be found in the contract of August 18, 1866. The contract has no latent ambiguities, and cannot, therefore, be helped by the parol evidence in the case. In respect to the length of time the Yeatman interest should be treated as a first charge against dividends on the 450 shares of pooled stock,

the contract is somewhat obscure. This obscurity furnished the occasion for this lawsuit.

The contention of plaintiff is that, under the contract, O'Reilly, Barnett, and Lancaster pooled their stock for the life of the lease, and agreed that the Yeatman interest should be paid out of the earnings of the pooled stock until all the interest to become due was discharged. The defendant contends that the pool ended at the point of time when he and O'Reilly were paid, out of the net earnings of the pooled stock, the par value of their stock, with interest. It is claimed by plaintiff that the parties themselves, by continuing the pool for three years after Barnett became entitled to dividends on his own stock, construed the contract as continuing the pool to the end of the lease. In the light of the evidence of Lancaster, that he objected to and protested against contributing to the Yeatman interest after Barnett became entitled to dividends on his own stock, we do not think it can be safely said that he at any time construed the contract as contended for by the plaintiff, or agreed to that construction. The contract must therefore be construed by its terms. These being of doubtful meaning, we must ascertain what was in the minds of the parties at the time the contract was entered into with reference to the subject-matter under consideration, and the purposes to be accomplished by the contract, and from these ascertain the scope and meaning of the agreement as written.

The situation was: O'Reilly, Barnett, and Lancaster had subscribed \$45,000 to the corporation, to be used in the erection of a building to be leased to tenants. Barnett had subscribed for 200 shares of stock in the corporation, and had borrowed \$20,000 of Yeatman to pay for it, agreeing to pay 8 per cent. interest per annum on the loan for 20 years in discharge of the loan, and had pledged to Yeatman his 200 shares of stock as collateral security for the payment of this interest, and had given O'Reilly as personal security for \$15,000 of the interest to accrue after the building was erected, to secure which O'Reilly had pledged to Yeatman his 150 shares of stock. At this time the stock was earning nothing, and could not until the completion of the building on the leased premises. After the erection of the building it was expected that large profits would be made, but the amount of these profits was uncertain. It was not known at that time, and no doubt the parties were uncertain, whether or not the dividends from Barnett's 200 shares would be sufficient to pay the Yeatman interest; if not, then his holdings of stock would be a positive burden, instead of a profit, to him. To provide against this contingency, Barnett proposed to forego all participation in dividends to be declared on his stock until the happening of an uncertain event, if O'Reilly and Lancaster would pool their stock with his, and agree that the Yeat-

man interest should be a first charge on the dividends to be declared on the pooled stock; O'Reilly and Lancaster to receive the balance of such dividends until from such balance they should each receive the par value of his stock, with 10 per cent. interest thereon; thereafter Barnett to receive the dividends on his own stock. This arrangement was satisfactory to all parties, and was agreed to and incorporated in the contract. The contingency provided for in the agreement, upon the happening of which Barnett would be entitled to receive the dividends on his own stock, might never happen, and Barnett never realize any profit on his shares of stock, but he would not be the loser if the whole of the dividends on the pooled stock would have been sufficient to pay the Yeatman interest. On the other hand, it might have turned out that the dividends on Lancaster's 100 shares of stock would have been greater, taking the whole life of the lease, had he not agreed to contribute to the payment of the Yeatman interest. This was the situation when the agreement was made, and these possibilities and contingencies must have been in the minds of the parties at the time, and the contract must be construed with these in mind.

It will be seen by reading the contract that Lancaster did not make himself a party to the prior agreement between Yeatman, Barnett, and O'Reilly, nor did he become unconditionally bound to Barnett and O'Reilly, or to Yeatman, to pay any part of the interest. He agreed to pool his stock with that of O'Reilly and Barnett, and that the payment of the Yeatman interest should be a first charge on the earnings of the pooled stock.

When, if at all, during the life of the corporation did this agreement terminate? is the question in controversy. It seems to us that it was to run and be in force "until" the amounts paid by O'Reilly and Lancaster into the corporation, with 10 per cent. interest thereon, should be earned in net dividends on the 450 shares of pooled stock and be paid to them. After the attainment of this result, Barnett was to transfer to O'Reilly 25 shares of his stock, and the profits (dividends) were to be divided pro rata between the three of them in proportion to the amount of stock held by each. When this changed condition was brought about, the shares held by O'Reilly and Lancaster had paid for themselves, with 10 per cent. interest. The shares held by Barnett were still purged with the payment of the Yeatman interest hypothecated as security therefor.

It is contended by respondent that the last clause of the contract, to wit: "And when the said sum so paid up by said O'Reilly and Lancaster shall have been fully paid back, the said Barnett, as trustee of Elizabeth Barnett, shall transfer to said O'Reilly twenty-five shares of said stock, so as to make equal the amount of stock owned by said Barnett, trustee, and said O'Reilly, after

which any dividend declared upon said stock shall be received by said O'Reilly, Lancaster and Barnett, trustee, pro rata in proportion to the amount of stock held by them, as by their legal representatives, as aforesaid"—would be meaningless if the pool of the shares of stock is made to end at the point of time when O'Reilly and Lancaster had received from dividends of the 450 shares of pooled stock the amounts they severally had paid into the corporation, with 10 per cent. interest thereon; that the purpose of this paragraph was to continue the aggregation of these shares and the dividends thereon, charged with the payment of the Yeatman interest, to the termination of the lease. It seems to us this clause was introduced in the contract for an entirely different purpose. It is not connected with the preceding clause, and its purpose, it seems to us, is to provide that, after the pool arrangement had accomplished the purposes of the pool, a new arrangement, as between O'Reilly and Barnett, in respect to their shares of stock should be made, to wit, that all the pledged stock, Barnett's 200 shares and O'Reilly's 150 shares, should be equally divided between the two, by Barnett transferring 25 of his shares to O'Reilly, and that thenceforth they, O'Reilly and Barnett, should share equally in the earnings of this stock, if such earnings should exceed the amount required to discharge interest to become due to Yeatman. Lancaster's shares were not pledged, and hence he was not brought into this new arrangement for the partition of stock.

The stipulation that after the transfer of 25 shares of stock to O'Reilly the dividends declared should be received by O'Reilly, Barnett, and Lancaster pro rata in proportion to the amount of stock held by them, without mentioning the Yeatman interest, seems to us to exclude the idea that the pool of 450 shares should longer continue, and that this was written into the contract to show that Barnett should participate in the dividends and the proportion he should be entitled to. There is certainly nothing in the paragraph to indicate that dividends on Lancaster's stock should contribute to the payment of the Yeatman interest, or that his stock should be any longer pooled with that of O'Reilly's and Lancaster's, unless the word "until" used in the preceding paragraph of the contract carries forward the pooling clause therein to the last paragraph. Respondent contends that this word has this effect, and that its proper office is to connect these two separate and distinct clauses together.

The contract should be construed as a whole, and not by piecemeal, and if one part or clause has reference to another the two should be construed together. But the separate and distinct clauses providing for separate and distinct things can be considered together only in so far as the one throws light upon the other, and we are required in

the construction of contracts to give words their ordinary meaning, when they have one. The word "until" is a word of limitation, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist or have any further force or effect. In the connection in which it is used in the contract it can have no other meaning than that the pool contract should continue up to the time when O'Reilly and Lancaster received from the dividends on the pooled stock the amounts respectively paid into the corporation by them, with 10 per cent. interest thereon. It appoints the time when the pool contract shall end.

"In open prospect nothing bounds our eye,
Until the earth seems joined unto the sky."

The argument that the word "until" joins the last to the preceding paragraph of the contract seems to us as delusive as is the optical illusion that the earth joins the sky at the extreme point of unobstructed vision. The last clause does not serve to explain the first any further than to show when the agreement contained in it should terminate.

Another obstacle in the way of plaintiff's construction of the contract is that the interest due to Yeatman was Barnett's debt, not Lancaster's. Why should Lancaster continue to contribute to the payment of Barnett's debt after the inducement to do so had been withdrawn by Barnett's stepping in and participating in the dividends or profits? For it must be kept in mind that the only consideration that could have moved Lancaster to enter into the agreement of August 18, 1866, was that Barnett agreed to forego participation in the dividends on the 450 shares of pooled stock on condition that O'Reilly and Lancaster would agree to treat the Yeatman interest as a first charge on said dividends. It seems to us that, when the consideration for the contract failed, Lancaster's obligation under the contract ceased.

After providing that the \$400 of interest becoming due quarterly on the Yeatman note should be included as an expense of the corporation, the contract provides as follows: "There shall be first refunded and paid to the said O'Reilly and Lancaster pro rata on the respective amounts of \$15,000, advanced by O'Reilly and \$10,000, advanced by Lancaster, until both these amounts shall be paid in full with interest at the rate of ten per cent. per annum." The right of O'Reilly and Lancaster to receive all the dividends, after paying expenses, including interest to Yeatman, is made to depend upon the application of dividends to the payment of interest on Barnett's note to Yeatman. These are interdependent stipulations, both of which were to run together and continue "until" O'Reilly and Lancaster should receive the respective amounts paid into the corporation by them, with interest. The preposition "un-

til" is a restrictive word, a word of limitation (State ex rel. v. Perkins, 139 Mo. loc. cit. 115, 40 S. W. 652), and means, in this contract, that the payment of the Yeatman interest out of the profits of the corporation shall be limited to the point of time when O'Reilly and Lancaster should receive from the profits the amounts respectively paid in by them, with the stipulated interest. These were the purposes of the bargain, and it should be restrained to these purposes. *Blair v. The Chicago & Alton R. R. Co.*, 89 Mo. loc. cit. 393, 1 S. W. 350.

The purposes of the bargain between Barnett, O'Reilly, and Lancaster, so far as Lancaster was interested or concerned, were accomplished when he received his \$10,000, with the agreed interest, when Barnett became entitled to and did receive the dividends on his own stock.

The construction of the contract contended for by the respondent was given it by Judge Bakewell, a former judge of this court, by the referee, and by the judge of the circuit court. It was ably presented on the first hearing by the respondent's counsel, and we gave the case careful consideration before preparing our first opinion, and hesitated long before committing ourselves to the result then reached, for the reason the views we entertained were opposed to the views of the three learned jurists above mentioned. When the motion for rehearing was filed we readily sustained it, and granted a rehearing, not because we had changed our views, but for fear that we might be in error. The case has been again very ably argued by counsel for both parties. With these arguments fresh in our minds, we have again gone over the case and given it the best consideration we are capable of, with the single object of arriving at a correct interpretation of the contract. After doing so, we find it impossible to change our views as expressed in our former opinion, and therefore reverse the judgment. All concur.

In re DAVISON'S ESTATE.

DAVISON v. DAVISON.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

PROBATE COURTS—CONCLUSIVENESS OF JUDGMENT—COLLATERAL ATTACK—PRESUMPTION OF VALIDITY—GRANTS OF LETTERS.

1. Probate courts are courts of superior, though limited, jurisdiction, whose judgments are not subject to collateral attack, but are presumably valid, unless set aside in a direct proceeding.

2. Under Rev. St. 1899, § 4, providing that letters on the estate of a decedent shall be granted in the county in which he had a house or place of abode, where a testator died out of the state, leaving a place of abode in one county, letters testamentary granted by the probate court of another county cannot be disregarded

by the probate court of the county in which deceased had his abode, and letters granted there.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

In the matter of the estate of Livingston E. Davison, deceased. On application for letters of administration de bonis non. Application refused, and applicant appeals. Affirmed.

Frank K. Ryan, for appellant. H. A. Hauessler and G. K. Ballengal, for respondent.

Statement of Facts and Opinion.

GOODE, J. Livingston E. Davison died March 6, 1901, at El Paso, Tex., leaving a will dated February 13, 1901, in which he spoke of himself as of the county of Jackson, in the state of Missouri, bequeathed all his property to his children, Guy P. and Elise Davison, and appointed his brother executor. The will was admitted to probate in the probate court of Jackson county, Mo., March 26, 1901, and letters testamentary granted the executor. In May of the same year the probate court of the city of St. Louis granted letters of administration on the decedent's estate to the St. Louis Trust Company, but revoked those letters in September, 1901, as having been improvidently issued. On October 13, 1901, Lettilla T. Davison, the appellant, applied to the probate court of the city of St. Louis for letters of administration de bonis non, as the widow of the deceased, which application was refused on account of the previous grant of letters to the executor of the will in Jackson county. Appellant appealed from the order refusing her letters to the circuit court of the city of St. Louis, where the cause was tried anew, with the same result, and an appeal taken to this court.

The decedent formerly lived with his family in Jackson county, but was divorced from his wife in 1895. Prior to that event he met the appellant in New York in 1893, and they lived together, holding themselves out as man and wife, for some time after that date—until the death of Davison. For about five years appellant and Davison resided in St. Louis, boarding at different places, sometimes under the name of Lloyd, and sometimes under that of Davison.

The contention on this appeal is that the grant of letters testamentary by the probate court of Jackson county was a nullity and utterly void because Davison's home when he died was in St. Louis, and that therefore appellant, as his widow pursuant to a common-law marriage, is entitled to letters of administration in the city of St. Louis.

The statutes provide that administration shall be granted on the estate of a decedent in the county in which he had a mansion house or place of abode; or if he had no mansion house or place of abode when he died, but possessed lands, in the county in

which the greater part of the lands lie; or if he had no mansion house, place of abode, or lands, in the county in which he died or where the greater part of his estate may be; or if he died out of the state, leaving no mansion house or place of abode or lands in this state, letters may be granted in any county. Rev. St. 1899, § 4.

So far as the evidence shows, the deceased had no mansion house or lands. He died outside this state, and hence the letters testamentary were properly granted to his executor in Jackson county unless his abode was in St. Louis when he died. The evidence tends to show it was, and apparently the court below found that way.

Granting that his abode was in St. Louis, the question arises, was the action of the probate court of Jackson county in granting administration on his estate to his executor void, so that the probate court of St. Louis should have ignored it and granted letters to the appellant? We have no doubt that this question should be answered in the negative; for, while there is some conflict among foreign decisions and some inconsistencies in the opinions of the appellate courts of this state, it seems to be settled law that, when a probate court has granted letters of administration on a decedent's estate, the grant has validity until it is set aside in a direct proceeding or on appeal, and cannot be ignored by some other probate court, and letters granted to a different person. Before granting letters a probate court must judicially determine the facts necessary to give it jurisdiction, and under our statutes its jurisdiction may depend on where the decedent's abode was. The acts and rulings of probate courts enjoy the same presumptions in respect to validity that those of courts of general jurisdiction do; probate courts being treated, not as inferior tribunals, but as courts of superior, though limited, jurisdiction, whose judgments are impregnable to collateral attack. *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129. Having found the fact necessary to warrant it in assuming jurisdiction of a particular estate, if such finding may be wholly disregarded and for naught held by another similar court, confusion will occur in the administration of many estates, and important orders, on which titles acquired at administration sales and other property rights depend, will be shaken or annulled. If such a course were followed there might be several concurrent administrations of the same estate in as many probate courts, each one treating the jurisdiction of the other as a usurpation. These considerations have gradually established the rule in most states that the administration first granted is collaterally unassailable, and can only be vacated by a direct proceeding; that is, by an application to the court which granted it to set it aside. *Woerner's Administration Law* (2d Ed.) § 204, and cases cited.

This subject was carefully and exhaustive-

ly considered by our Supreme Court, and the law settled as we have stated it, in *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276. To the same effect is *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483—a case cited by the appellant, but which, on careful examination, will be seen to be opposed to her position. In said case the title to certain land was involved, and whether the defendant, Boyce, held the title, depended on the validity of a sale of the land by the guardian of Cox's child pursuant to an order of the probate court of Howell county. It was contended the sale was void because the Howell county court had no jurisdiction of the minor's estate, inasmuch as Slater, the curator, had been first appointed by the probate court of Lincoln county. Slater afterwards moved to Howell county, and years later, wishing to sell the land, procured an order of sale there. The exact point decided was that the acts of the Howell probate court were not void, so that they could be treated as a nullity in an ejectment suit for the land; but the reasoning of the opinion is clearly to the effect that the finding by a probate court of a fact necessary to give it jurisdiction, even if such finding is erroneous, is conclusive in collateral proceedings, and dicta in other cases indicating that where an administration is granted by a court which, in point of fact, was not authorized to grant it, it may be treated as void, are condemned. The great weight of argument and authority consists with this statement of the law, which supports the judgment rendered in the present case, and said judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

REITZ v. HAYWARD.*

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF A SHAREHOLDER—WITHDRAWAL—ALLOWANCE OF CREDITS—INSOLVENCY OF ASSOCIATION—PREFERENCE—RIGHT TO ACCRUED DIVIDENDS—INTEREST CHARGED—EFFECT OF TENDER—SET-OFF—NOTICE OF WITHDRAWAL—WAIVER.

1. Rev. St. 1899, § 1370, providing that stock in a building and loan association, pledged as security for a loan, may not be withdrawn, does not forbid the withdrawal of such stock and credits thereof on payment of a loan, as section 1368 expressly provides for the credit of the withdrawal value of shares on the payment of a loan.

2. Where a building and loan association raised no objection to the repayment of a loan and surrender of pledged stock on the ground that the notice required by Rev. St. 1899, § 1368, was not given, but disputed merely the amount owed, notice was waived.

3. Notice by a shareholder of withdrawal from a building and loan association gives him no right to a preference in the distribution of the company's assets, when the company was insolvent before withdrawal was accomplished.

*Rehearing denied March 31, 1903.

although such fact was unknown to the shareholder.

4. Where a member of a building and loan association institutes his action to withdraw from the association while it is still a going concern, his right to be credited on his loan with the withdrawal value of his pledged stock and dividends previously declared cannot be affected by the subsequent insolvency of the association and assignment of its assets.

5. Under Rev. St. 1899, § 1368, providing that a withdrawing member of a building and loan association, on repayment of his loan, shall be allowed credit, if he so desires, for the withdrawal value of the shares pledged, the credit to be allowed on the shares is to be computed according to their actual value.

6. A withdrawing shareholder in a building and loan association whose loan was \$500, subject to deductions of \$10 attorney's fees and \$16.50 premium, should be charged interest on the full \$500, since, although the premium was illegal, it was credited on the loan.

7. A tender of settlement of a loan advanced by a building and loan association releases the further payment of interest.

8. It was error for the court, in computing the amount due a building and loan association on the withdrawal of a member, to allow said member interest on interest rightly paid by him, on the theory that it was usurious.

9. A withdrawing shareholder in a building and loan association is entitled to be credited on his loan with dividends earned previous to the associations' insolvency.

10. A set-off in favor of a withdrawing shareholder in a building and loan association, on account of stock assigned to him by another member subsequent to the loan in settlement, no notice of the withdrawal of which had ever been given by the withdrawing member, as required by Rev. St. 1899, § 1368, was properly refused.

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Victor W. Reitz against James Hayward, assignee of the *Ætna* Loan Company, to enjoin the sale of land under a deed of trust. From a judgment decreeing the satisfaction of the deed of trust on payment of \$40.36, defendant appeals. Modified.

Thos. M. & C. H. Jones, for appellant.

Statement of Facts and Opinion.

GOODE, J. Victor Reitz, the respondent, was a stockholder and borrower in the *Ætna* Loan Company, with which company he negotiated a loan of \$500, March 9, 1894, and gave his note for said sum on said date, secured by deed of trust on a property he owned in the town of St. James, Mo. The note provided that he should pay the company, 10 years after date, or sooner, said sum, with interest at the rate of 6 per cent. per annum, payable monthly on the 5th day of each month, in installments of \$2.50.

Reitz owned two shares of stock in the *Ætna* Company, of the par value of \$500, which he had taken out in July, 1893, and these were mortgaged, along with his real estate, to secure the loan. Besides the note for \$500, he gave a note for \$333, secured by deed of trust on the same property covered by the first deed, payable in monthly install-

ments of \$3 each, as premium bid for the loan.

The company deducted from the amount of the loan \$10 for an attorney's examining fee, and \$16.50 dues and premium for the months of March, April, and May, and paid Reitz \$473.50 in June, when the loan was concluded.

Fred Steen owned a share of stock in the *Ætna* Company of the par value of \$500, issued to him in June, 1893, which he assigned to Reitz, April 23, 1898, the transfer being regularly made on the books of the company. Reitz paid dues, interest, and premium on the loan and stock until November, 1898, as well as we can tell from the record. About that time he demanded a settlement with the company, tendering his stock and offering to take for it what he had paid in, but the company demanded \$105 more of him, which he refused to pay. On account of his refusal to make further payments, the company advertised his property for sale under the first deed of trust. The plaintiff brought the present suit to enjoin the sale and for an accounting, on December 19, 1899.

The court struck the following balance:

Reitz. Debit.	
Amount cash received on loan.....	\$473 50
Interest thereon	127 71
Attorney's fee	10 00
Total	\$611 21
Reitz. Credit.	
Stock	\$140 00
Interest on same.....	18 90
Premiums paid on loan....	168 00
Interest on same.....	30 14
Dividend on stock.....	60 21
Amount due on account of installments paid on stock	153 60
Total	\$570 85 570 85

Balance due company..... \$ 40 36

Judgment was entered for the company for that sum, and that, on payment of it by Reitz, the deed of trust be satisfied.

The decree recites that the premiums paid on the loan were \$198, but this is obviously a clerical error; for the testimony shows \$168 were paid, and that sum has to be accepted in order to make the court's computation come out right. It is evident the court only gave interest on the loan from March 9, 1894, to October 25, 1898—we suppose on the theory that Reitz endeavored to pay his loan on the last date—so that thereafter it ceased to draw interest. It is admitted the premium charged was usurious, because it was not fixed by bidding, and that hence Reitz was entitled to credit for what he had paid as premiums. The respondent disputes the correctness of the decree, but he submitted to it.

The appellant assigns these exceptions: First, the credit of \$153.60 for monthly stock payments was wrongly allowed, because the evidence made it clear the company had been insolvent for a long time, and the respondent

was bound to share in the losses with the other stockholders. Second, the credit of \$18.90 allowed by the court as interest payment was erroneous, because, in effect, it was giving the plaintiff compound interest. Third, the court erroneously deducted \$16.50 from the face of the loan, when in fact the respondent had received credit for that sum on his monthly dues for March, April, and May. Fourth, the court computed interest on the loan to October 25, 1898, whereas the interest should have been computed to the date of the judgment. Fifth, the credit of \$61.20 allowed Reitz for dividends declared by the company while a going concern should not have been allowed, because the testimony showed said dividends were declared while the company was in fact insolvent.

It should be stated that after the institution of this action, to wit, on March 17, 1900, the Aetna Company made a general assignment to James Hayward for the benefit of creditors, and Hayward was afterwards substituted as defendant, and filed an answer that the company had long been insolvent, and Reitz was not entitled to charge against the defendant the amount paid by him for stock dues, because he, as a stockholder, was liable for his proportion of the losses of the company.

1. Appellant contends that Reitz had no right to withdraw his shares while they were pledged, citing in support of that contention the statute which says stock pledged as security for a loan or for any other charge in favor of the association may not be withdrawn. Rev. St. 1899, § 1370. That section means such shares cannot be withdrawn while the loan stands, so as to deprive the association of a lien on them, and does not mean that the loan may not be paid off and the value of the stock taken into account in settling it, otherwise it would be in conflict with section 1368, besides producing an unreasonable result. The theory on which loans are made, unhappily too rarely realized in practice, is that, when the stock has been fully paid, according to the ordinary course of business, the stock, at its matured value, will discharge the loan. If, however, the losses are so heavy that the stock does not go to par, whatever value it has when the borrower pays he is entitled to have credited on his indebtedness. *Brown v. Archer* (K. C.) 62 Mo. App. 278; *Clark v. Ass'n* (St. L.) 85 Mo. App. 388.

2. The appellant company was insolvent, as the evidence shows, in October, 1898, when Reitz says he tendered payment of his loan, although it kept going until March 7, 1900. But, on the date mentioned, its liabilities to its shareholders were far in excess of its assets, which constituted insolvency. *Continental Soc. v. People*, 167 Ill. 195, 47 N. E. 881; *Towle v. Society* (C. C.) 61 Fed. 448.

We might not be willing to agree fully to the definition of insolvency of a building and loan association given in the last-cited case;

but, according to any conceivable definition, the appellant company was insolvent, for the evidence shows its assets fell below its liabilities 40 or 50 per cent. And indeed it will be seen the circuit court found it was then insolvent.

Reitz gave no notice, as the statutes require, of an intention to pay off his loan and surrender his stock; but it is contended notice was waived, and we think it was waived, so far as a settlement of the loan account and surrender of the pledged stock was concerned; for the only dispute between the company and Reitz was as to the amount he owed the company, and no objection was made on the score of notice. *Clark v. Ass'n*, supra. But the law is settled that if a member of a building and loan association serves notice of an intention to withdraw, that step gives him no right to a preference in the distribution of the company's assets, if its activity is terminated by insolvency proceedings before the withdrawal is accomplished. In re *Progressive Investment & Building Society*, 54 L. T. (N. S.) 45; *Hanney v. Ass'n*, 16 Wkly. Notes Cas. 450. A member is not entitled to surrender his shares and be paid their full value if the corporation is insolvent, as has never been doubted, provided the insolvency is known or notorious. In re *Sunderland 36th Universal Bldg. Soc.*, 24 Q. B. Div. 394. And according to the better view, it seems to us, and the one adopted in this state, it is immaterial that the withdrawing member was ignorant of the association's financial condition. *Hohenshell v. Ass'n*, 140 Mo. 566, 41 S. W. 948; *Christian's Appeal*, 102 Pa. 184.

The point of difficulty is not whether the court erred in refusing to credit Reitz with the full amount he had paid on his shares, and in crediting him instead with their withdrawal value in October, 1898, but whether he was entitled to be credited with any part of his stock payments after the corporation had become insolvent and its assets had passed into the hands of an assignee; and this point turns, we think, on whether Reitz's rights were fixed by the institution of his suit for a settlement, or by the company's subsequent assignment for the benefit of creditors. Well-considered cases relied on by the defendant hold that a borrowing member of a defunct association is not entitled to have any part of the dues paid on stock credited on the loan, but must wait for dividends until final distribution of its assets. Meanwhile the assignee or receiver may recover the amount of the loan without any credit being allowed for stock payments. The company's assignment, receivership, or cessation of business because of insolvency, puts an end to or greatly modifies the contract between the borrower and the company, so that the latter's responsibility is placed on a different basis. The debtor is charged only with simple interest on the money received by him, and is credited with the premium

paid; and this for the reason that the consideration for the premium is gone, which consideration was that the borrower be permitted to pay the debt in installments extending over years, his stock getting its share of benefit from the payments. Most decisions hold the association is entitled to collect the money advanced, with simple interest, the debtor being credited with the interest and premium paid, but, as stated, with no portion of payments made on stock, or with any dividends which may have been declared on the stock but not collected. As to those demands against the association, borrowing members are left, like the nonborrowing or investing members, to the final distribution of the assets, when they will receive their pro rata; and this is the rule in Pennsylvania, from which our building and loan law was taken, and whose decisions have been followed in construing it. *Strohen v. Ass'n*, 115 Pa. 273, 8 Atl. 843; *State Ass'n v. Carroll*, 4 Pa. Dist. R. 6; *Woerheide v. Johnston* (St. L.) 81 Mo. App. 193; *Towle v. Society*, supra; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *City Loan Ass'n v. Goodrich*, 48 Ga. 448; *Choisser v. Young*, 69 Ill. App. 252; *Rogers v. Raina*, 100 Ky. 295, 38 S. W. 483; *Post v. Ass'n* (Tenn.) 37 S. W. 216, 34 L. R. A. 201; *Globe Building & Loan Co.'s Assignee v. Stephens* (Ky.) 60 S. W. 723; *U. S. B. & L. Ass'n's Assignee v. Rowland* (Ky.) 60 S. W. 707.

This case does not fall within the above rule; for the plaintiff instituted his action while the company was still going, and that circumstance puts him in a different position with reference to obtaining credit for stock payments and dividends from what he would occupy if no suit had been instituted prior to the failure. An assignment does not prevent the plaintiff in a pending litigation against the assignor from obtaining judgment, just as he would have done if no assignment had been made. The court which first obtained jurisdiction of the litigation proceeds to judgment in that particular matter, and this has been held to be true in the case of building and loan associations. *Connolly v. Ass'n*, 6 Wkly. Notes Cas. 176; *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272, 26 N. W. 802, 805; *Turner v. Mason*, 65 Mich. 667, 32 N. W. 846; *Howitt v. Blodgett*, 61 Wis. 376, 21 N. W. 292; *Eureka Steam Heating Co. v. Sloteman*, 67 Wis. 118, 30 N. W. 241; *Collier v. Bickley*, 33 Ohio St. 523. The rule is that, when an assignment is made for the benefit of creditors, the assignee takes the estate cum onere, and subject to all fixed and accrued rights. *Drew Glass Co. v. Baldwin* (K. O.) 27 Mo. App. 44; *Drew v. Drum* (St. L.) 44 Mo. App. 25. Plaintiff's right to surrender his stock and pay off the loan at any time was a substantive part of his contract with the association (*Bertche v. Ass'n*, 147 Mo. 343, 48 S. W. 954, 71 Am. St. Rep. 571; *Latimer v. Equitable Co.* [C. C.] 81 Fed. 776), and, as he had previously begun this

suit to enforce that right, his relief cannot be curtailed because the company thereafter assigned. We hold, therefore, that the plaintiff was entitled to be credited with the value of his pledged stock at the time he demanded a settlement, and also with the dividends which had been theretofore declared.

3. But it does not follow that he should receive credit for the whole amount of stock dues he had paid, nor did the circuit court allow him credit to that amount, although the case is argued here by the appellant as if he received credit for the full sum paid on his stock. The testimony showed he had paid \$256 on the shares of stock which he pledged to secure his loan, and the court allowed him \$153.60 on that score, or exactly 60 per cent. of what he had paid, making him bear a loss of 40 per cent.

The statutes provide that a borrowing member may repay his loan at any time, by giving 80 days' notice in writing, on the terms and conditions prescribed by the by-laws of the association; and that, in the absence of a by-law, the member, on settling, shall be charged with the full amount of the loan as originally made, together with all installments of dues, interest, premium, and fines remaining due and unpaid, and shall receive credit, if he desires to surrender his shares, for the withdrawal value of the shares pledged for the loan. *Rev. St. 1890, § 1368*. The withdrawal value of the shares must be computed, therefore, and the shareholder allowed a credit for what they are actually worth; for the underlying idea of building and loan associations is mutual-ity of loss and profit by all the shareholders, who are, in a sense, partners, as has been many times decided. *Hohenshell v. Ass'n*, 140 Mo. 568, 41 S. W. 948; *Bertche v. Association*, 147 Mo. 343, 48 S. W. 954, 71 Am. St. Rep. 571; *Schell v. Association*, 150 Mo. 103, 51 S. W. 406. As stated, the learned trial judge recognized this rule, and endeavored to ascertain and credit Reitz with the cash value of his stock, and thus force him to bear his proportion of the company's losses.

The evidence introduced by the assignee, which was all the evidence on the subject, showed that not more than 55 or 60 cents on the dollar of what had been paid by stockholders would remain in solvent assets after discharging the company's outside liabilities. In other words, the course of its business had been such that, instead of earning a profit, there had been a loss of from 40 to 45 per cent. The court took the view of the evidence most favorable to Reitz, and, as stated, allowed him 60 per cent. of what he had paid on his shares.

No scheme for fixing the amount to be returned to a withdrawing stockholder of a building and loan corporation which will not prove unjust if the company fails to mature its stock has been devised, or can be, as far as we can see, and for this reason: The withdrawal of stock or the payment of loans

before the shares mature are privileges not contemplated in the scheme of a building and loan association, but are departures from it, tolerated for practical reasons. Members are permitted to withdraw their shares instead of being compelled to hold them until maturity, because the privilege has been found necessary to enable associations to secure a sufficient membership. So, borrowers are permitted to pay loans at their pleasure, instead of by installments until their stock matures, and the loan is thereby discharged in the normal evolution of the association, because the exigencies of business have shown that privilege to be necessary. Both privileges are opposed to the central idea of the building and loan association scheme, and cannot fail to work injustice if an association becomes insolvent; for it may continue going, with its insolvency unknown for a long time except to the inner management. Meanwhile withdrawals occur, by which some members get back all they paid in, when, on account of losses, they are entitled only to part. The law, therefore, does not in theory permit withdrawals after an association is insolvent; but if the surrender of stock was perfected while it was still a going concern, though, in fact, insolvent, it is an executed transaction, and the proceeds may be retained, unless fraud can be imputed to the withdrawing stockholder. *Booz's Appeal*, 109 Pa. 592, 1 Atl. 36; *Strohen v. Ass'n*, 115 Pa. 273, 8 Atl. 843; *Christian's Appeal*, 102 Pa. 184; *Mechanics' Ass'n v. Swartz*, 5 Pa. Dist. R. 318; *Emerson v. Schmitt*, 24 Wkly. Law Bul. 56. The circuit court acted in accordance with our statutes, and the mode they prescribe is likely as fair as any.

4. The decree of the court contains the item of credit in Reitz's favor, "to stock \$140"; but this is conceded to mean interest paid by Reitz, and, in fact, he paid just that much interest, at the rate of 6 per cent., from March, 1894, when he made the loan, to October, 1898, the date at which the court below treated the rights of the parties as having been fixed by a tender.

5. The circuit court only charged Reitz with the actual cash received by him (\$473.50) and interest thereon (\$127.21), and credited him with said interest which he had paid, to wit, \$140. While the reason for this ruling is not stated in the decree, it was obviously made on the theory that the association charged interest on \$500 when in fact it only lent \$473.50, and therefore the \$140 interest was usurious, as being in excess of the rate of 6 per cent. stipulated in the note. But we are unable to see why Reitz should not pay interest on the whole \$500, nor does he contend he should not. He agreed to pay \$10 attorney's fee, and it is conceded the sum of \$16.50 was rightly deducted for interest and premiums already due when the money was advanced. True, the premiums were illegal; but if he was

credited with them on his loan, as he was in another item, he should have been charged with them to make up the full amount of the loan. There was no difference between handing Reitz \$500 and receiving back from him \$28.50, and deducting that from the face of the loan and then paying him the difference. The court should have allowed interest, we think, on the \$500.

6. Reitz was credited with \$168 as premiums and \$30.14 interest thereon, which items are not contested.

7. The next exception taken by the appellant relates to the refusal of the court to compute interest on the loan to the date of judgment. Interest was computed to the latter part of October, 1898, on the evidence of Reitz that he had offered to pay what he owed at that time and tendered his stock in payment, but a settlement was refused unless he paid \$106, the balance the company claimed was owing. Reitz had the right to pay off his loan at any time, and the tender of settlement stopped the interest.

8. The trial court allowed the respondent interest on the \$140 interest he had paid on his loan, presumably on said court's theory that it was wrongly exacted on the whole amount of \$500; but, as we hold the company was entitled to interest on the \$500, that theory of computation is not admissible, because \$140 was the interest the loan actually earned for the company.

9. As to the dividends allowed, as they were earned and declared on the pledged stock while the company was active and long before it failed, we think plaintiff was entitled to be credited with them. The court allowed no credit for the dividends earned by the Steen stock.

10. The Steen stock was acquired long after the loan was made, was not pledged to secure it, and was totally unconnected with it. As no notice of withdrawal of that stock had ever been given by Reitz, whatever equitable claim he had for its value and dividends against the association was not due at the date of the assignment, and hence did not constitute a set-off in his favor as against the demand of Hayward, the assignee, for the payment of Reitz's note. The question is not really before us, as respondent did not appeal, but we think the court did right not to take into account the Steen stock. *Homer v. Bank*, 140 Mo. 225, 41 S. W. 790; *Storts v. George*, 150 Mo. 1, 51 S. W. 439.

The refusal of the court to compute interest on the full face of the note was error, as was its resultant action in allowing Reitz credit for interest on the interest paid. Those two items being changed, the balance due the appellant is \$88.05, and, with a modification of the judgment to that effect, it is affirmed, the respondent to pay the costs of the appeal.

BLAND, P. J., and REYBURN, J., concur

MEYERS v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

STREET RAILROADS—REGULATION—MUNICIPAL ORDINANCES—SPEED—VIGILANT WATCH—COLLISION WITH VEHICLE—COMPLAINT—COMMON-LAW AND STATUTORY NEGLIGENCE—JOINDER—VIOLATION OF ORDINANCE—NEGLIGENCE PER SE—LAST CLEAR CHANCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. A city ordinance providing that operatives of street railway cars shall keep a vigilant lookout for obstructions on the track is a police regulation binding on all street railways operating cars in the city limits, whether accepted by such railways or not.

2. In an action for injuries to the driver of a vehicle by collision with a street car, plaintiff is entitled to join in the same count or cause of action negligence arising from a breach of defendant's common-law duty to use due care and negligence arising from defendant's breach of a city ordinance requiring a vigilant lookout.

3. Where at the time of a collision between a street car and a vehicle the motorman was running the car at a rate of speed prohibited by a city ordinance, defendant was guilty of negligence per se.

4. Where a motorman operating a street car, after having seen plaintiff on the track, attempting to move a balky horse, continued to run his car at a rate of speed prohibited by a city ordinance, and made no effort to stop or check the car, which came into collision with the vehicle, he was guilty of both common-law negligence and of a violation of an ordinance requiring motormen to keep a vigilant watch for obstructions.

5. When plaintiff drove into a street on which a street railway line was operated, he saw a car coming toward him at a distance of 150 to 200 feet. He would have had sufficient time to have crossed the track in front of the car, but when his horse got partly over the track he balked and would not proceed. At the time the horse stopped, the car was from 100 to 125 feet distant, and could have been checked in time to avoid a collision, but the motorman made no effort to do so. Plaintiff knew that his horse was balky, and might have escaped injury by jumping from the wagon before the collision. *Held*, that the motorman had the last clear chance of avoiding the injury, and plaintiff's contributory negligence, if any, was no bar to a recovery.

6. Whether plaintiff, by remaining in his wagon, was guilty of contributory negligence, which continued down to the injury, and directly contributed thereto, was a question for the jury.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Action by Emil S. Meyers against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff recovered a \$1,000 judgment against defendant for injuries he received in a collision with one of defendant's street cars on June 4, 1900, on Washington avenue, where the avenue is crossed by Beaumont street, in the city of St. Louis. From this judgment, defendant appealed.

For the plaintiff, the evidence tends to prove that plaintiff was driving a one-horse open spring wagon north on Beaumont street, with a few buckets of sand in the wagon,

and his brother sitting on the wagon seat beside him. He testified that when he reached Washington avenue he saw a car coming from the west on Washington avenue, at a distance of 150 to 200 feet from the crossing; that when his horse reached the railway track the car was something like 175 feet away; that after the horse and the fore wheels of the wagon had gotten over the track, and just as the hind wheels of the wagon struck the south rail, and when the car was from 100 to 125 feet away, the horse stopped and refused to go. Plaintiff had no whip, but tried to make the horse go on by slapping him with the ends of the lines. The horse shook his head, but would not go forward. Plaintiff testified that he had owned the horse six or eight years; that he would balk anywhere, but, if let alone for awhile, he would move on himself; that he had lived in the city of St. Louis and used a horse and wagon for 20 years, and was familiar with street railway crossings. Plaintiff also testified that when the horse stopped he had time to get out of the wagon and to walk to the sidewalk before the collision occurred, but that he was trying to get his horse and wagon over the track, and supposed he did not have the presence of mind to get out of the wagon. He further testified that the car was running pretty fast. Other witnesses on his behalf testified that it was running at a speed of 20 miles per hour, and that the motorman made no effort whatever to stop or check the car, and, when the wagon was struck, plaintiff was shot up into the air as high as the trolley line, and fell into the gutter on Washington avenue; that the wagon was wrecked and the horse injured. Plaintiff's brother, after the collision, was found hanging on the front platform of the car. He was uninjured, but so frightened that he could not account for how he got out of the wagon, or how he got hold of the car. It is manifest, however, that he was not in the wagon when it was struck by the car. The plaintiff read in evidence an ordinance limiting the speed of cars to 10 miles an hour east of Grand avenue, and also the vigilant watch ordinance. The evidence tended to prove that plaintiff's injuries were quite serious, that he was laid up for seven or eight weeks, and that one of his hips was permanently injured.

For the defendant, the motorman in charge of the car testified: "Coming east on Washington avenue I got to within 100 feet of Beaumont street, when I noticed a wagon coming north on Beaumont. I rang my bell, and the driver heard it, because he pulled up, with his horse's head on a line with the street curbing on Washington avenue, and stopped. By that time I was within about 75 feet from him. I rang my bell again, and had proceeded about 10 feet further, about 25 feet off from him, and I saw him standing looking at the car, and I reached over and cut off my brake, and applied the power;

and I can't say whether he used the whip or line, but he reached up and hit his horse a cut over the back, and the animal jumped, and I saw that there was going to be an accident, and I shut off the power and pulled back the reverse, and had no more than done that than I hit him. The Court: You stated right in the beginning that you saw the plaintiff, but you didn't say where he was when you first saw him? A. He was about 75 feet from the curb back on Beaumont." He further testified that the car was running at a speed of about 6 miles per hour; that a special police officer—one Keyser—was riding on the front platform of the car with him at the time the collision occurred. Keyser's evidence corroborates that of the motorman, and it was also corroborated as to the speed of the car by other witnesses.

The negligent acts alleged in the petition were, first, that the defendant's car ran into plaintiff's wagon without the servant in control thereof making any effort to control its speed or to slow up or stop; second, the non-observance of the vigilant watch ordinance of the city of St. Louis; third, running the car at a greater rate of speed than 10 miles per hour, in violation of the city ordinance. The answer was a general denial and a plea of contributory negligence.

Boyle, Priest & Lehmann and Morton Jourdan, for appellant. Taylor & Benteen, for respondent.

BLAND, P. J. (after stating the facts). 1. On the theory that plaintiff had joined in the same count a cause of action arising out of contract with causes of action arising out of tort for common-law negligence, the defendant moved the court to compel the plaintiff to elect upon which cause of action he would proceed to trial. The court denied the motion. This ruling is assigned as error. Defendant's assumption that a cause of action growing out of contract is alleged in the petition is based on the notion that the vigilant watch ordinance is not binding on a street railway company until it is accepted by the company—in other words, that street railway companies in the city of St. Louis are not bound by the ordinance until they have contracted with the city to be governed by it. At one time the Supreme Court held to this view of the ordinance, but this view has been repudiated by later decisions, and the ordinance is now held by the Supreme Court to be a police regulation binding upon all street railways operating cars in the city limits. We had occasion to review these decisions in the late case of Gebhardt v. St. Louis Transit Company, 71 S. W. 448, and it would serve no useful purpose to repeat that review here. In the same case, following *Senn v. Southern Ry. Co.*, 135 Mo., loc. cit. 519, 38 S. W. 367, we held that the plaintiff might join common-law and statutory negligence in the same count or cause of action. In the light of these authorities, the

motion to compel plaintiff to elect was properly overruled.

2. Defendant offered a demurrer to the evidence, which was denied. This ruling is assigned as error. The contention of defendant is that plaintiff's own evidence shows conclusively that he was guilty of such contributory negligence as precludes his right to recover, and that for this reason the court should have taken the case from the jury. In considering this question, we should view the whole evidence in the most favorable aspect it presents in behalf of plaintiff. *Baird v. Citizens' Ry. Co.*, 146 Mo. 265, 48 S. W. 78; *Buesching v. The St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503. If this is done, we have before us the facts that defendant's servant was running its car at an excessive and prohibited rate of speed, thereby being guilty of negligence per se; that after seeing, or when he should have seen, the plaintiff's perilous situation, the motorman continued this unlawful speed, without making any effort whatever to stop or check the car, thereby being guilty of both common-law negligence and a violation of the vigilant watch ordinance. As to plaintiff's negligence, the evidence is that when he drove on Washington avenue the car was from 150 to 200 feet away, and that he had plenty of time to cross the track before the car would arrive, which he would have done, had not his horse balked; that when the horse balked the wagon was across the track, and the car was something like 100 to 125 feet distant from him. If this is true—and we must assume it to be true for the purpose of this discussion—the motorman saw, or by the exercise of ordinary diligence could have seen, the plaintiff's wagon stopped on the track 100 to 125 feet in front of him, and in time to have checked or stopped the car and avoided the collision, but he made no effort whatever to slow up or stop the car; hence the collision, which he knew or should have known would occur if he did nothing to avoid it. It is no answer or excuse for this gross negligence to say that the motorman had a right to assume that plaintiff would drive on and across the track before the car would reach him. The motorman made no such claim for himself in his evidence. The wagon was at a standstill, and plaintiff was making an ineffectual effort to urge the horse on. This situation was seen, or could have been seen, by the motorman, and it was his bounden duty to take cognizance of the situation as he saw or should have seen it. If such was not his duty, then a teamster about to drive over a railroad crossing (seeing no car near enough to prevent him from doing so in safety), who drives on the track, and his team balks there or is unable to pull the load over, if he remains with his team, urging it on, in the hope of getting out of the way of the car, is without remedy if he is struck and injured by the negligence of the motorman.

But it is contended that plaintiff's horse was known to him to be balky; that he knew he would not move until he got ready; that plaintiff knew urging or whipping him would not avail to make him go forward; that plaintiff had time to get out of the wagon and escape danger, and for this reason was guilty of such negligence as to bar recovery. Granting that plaintiff knew these facts, and that he was negligent in failing to get out of the wagon and thus avoid injury, it does not follow that the motorman owed him no duty, and that plaintiff's negligence was the proximate cause of the injury. The motorman had the last fair chance of avoiding the injury, and the doctrine in this state is well settled that the party who has the last fair opportunity of avoiding the accident is not excused by the negligence of any one else. *Klockenbrink v. St. L. & M. Riv. Co.*, 81 Mo. App., loc. cit. 356, 357, and cases cited; *McAndrews v. Railway*, 83 Mo. App. 233; s. c. on second appeal, 88 Mo. App. 97; *Guenther v. Railway Co.*, 108 Mo., loc. cit. 21, 18 S. W. 846; *Reardon v. Railway*, 114 Mo., loc. cit. 406, 21 S. W. 731; *Sinclair v. Railway*, 133 Mo., loc. cit. 239, 34 S. W. 76; *Morgan v. Wabash Ry. Co.*, 159 Mo., loc. cit. 280, 60 S. W. 195.

We conclude that the court did not err in refusing to take the case from the jury.

3. The defendant asked the following instruction: "If the jury find from the evidence that the plaintiff drove upon the track after having seen the approaching car, and that after so going upon said track his horse balked, and that thereafter the plaintiff had ample time to avoid the injury to himself by jumping, leaving, or alighting from said wagon, then he cannot recover in this case for any injury to himself." The instruction as asked was refused by the court, but it was given in the following modified form: "If the jury find from the evidence that plaintiff drove upon the track after having seen the approaching car, and that after having gone upon said track his horse balked, and that thereafter the plaintiff had ample time to avoid injury to himself by jumping, leaving, or alighting from said wagon, and that he negligently failed and refused to do so, then he cannot recover in this action for any injury to himself." It was a question for the jury to determine from all the facts and circumstances in evidence whether or not the defendant, by remaining in his wagon, was guilty of negligence which continued down to the injury, and directly contributed thereto. Plaintiff knew that it was the duty of the motorman to keep a vigilant watch for persons and vehicles upon the track, knew that his situation was seen by the motorman, knew that it was the duty of the motorman to stop his car to avoid a collision, knew that he had time and space in which to stop, if running at a lawful speed, and had a right to assume that he would observe the ordinance and the dictates of humanity by

stopping his car, which, if he had done, there would have been no collision and injury. In such circumstances, it seems to us, it would be monstrous to hold that plaintiff, by remaining in his wagon when he might have gotten out, was guilty of such contributory negligence as to preclude his right of recovery. We think the instruction as modified presented this phase of the case to the jury more favorably for defendant than the facts warranted, and that the one asked was wholly inadmissible. The instructions given for plaintiff have met the approval of the appellate courts of this state, and they, with those given for the defendant, presented all the issues raised by the pleadings and the evidence.

The plaintiff's injuries were severe, and the evidence tends to prove that the injury to his hip is permanent. We do not think that for such injuries \$1,000 are excessive damages.

Discovering no reversible error in the record, the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

REED et al. v. MORGAN et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

TRIAL—SUFFICIENCY OF EVIDENCE—COMPETENCY OF WITNESS—APPEAL—RECORD.

1. Where a will in question in an action was embodied in the petition, and the trial court in its findings of fact affirmed the probating of the instrument, the case will be treated on appeal as containing the will, though by oversight it was not formally offered in evidence at the trial.

2. A party to a suit against an administrator is not competent to testify in his own favor as to admissions made by the decedent in regard to matters in controversy in the suit.

3. Testimony in a civil action as to admissions by a decedent is to be received with great caution.

Appeal from Circuit Court, Shelby County; Nat. M. Shelton, Judge.

Action by Wilbur T. Reed and others against John R. Morgan, administrator of the estate of T. W. P. Reed, deceased, and another, for the recovery of a trust fund under a will. Judgment for defendants, and plaintiffs appeal. Affirmed.

The plaintiffs brought suit at the April term of the circuit court of Shelby county, setting forth their alleged cause of action in the following petition: "Now at this day come the said plaintiffs, by their attorneys, and, for cause of action against the said defendants, state: That on the — day of September, 1880, one Mary Reed departed this life in the county of Shelby, state of Missouri, leaving a last will and testament in words and figures following, to wit: 'I, Mary Reed, of the county of Shelby, and state of Missouri, being weak and feeble in body but sound of mind, do proceed to

make this my last will and testament, and wish the following distribution to be made of my property, to wit: First, I wish all my just debts to be paid, after which my grandson, L. S. Reed, is to have \$200 set apart to his use and benefit when he arrives at the age of twenty-one years. After which my executor to pay my son, Wilbur T. Reed, the sum of \$1,000 to make him equal to his brothers, Charles M. Reed and T. W. P. Reed, they having received advancements during my life. I also wish my son, T. W. P. Reed, to have the use of \$2,000 during his natural life, after his death the same to go to my sons Charles M. Reed and Wilbur T. Reed, should they be living; otherwise, to my grandsons (to wit) L. S. Reed and Frankie R. Reed, after which I wish the remainder of my estate, both real and personal, to be divided into three (3) equal parts, one (1) part I give and bequeath to my son, Charles M. Reed, and one (1) part to my son T. W. P. Reed. Out of the third part I give to each of my two grandsons (namely) L. S. Reed and Frankie R. Reed, the sum of \$1,000 each, and the remainder I give and bequeath to my son Wilbur T. Reed. I leave F. M. Harrison my executor. In witness whereof I have hereunto set my hand and affixed my seal this 30th day of August, A. D. 1880. [Signed] Mary Reed. Witnesses: B. G. Dysart, Thomas P. Sharp.' That the said will was duly proved and admitted to probate by the probate court of Shelby county, and Charles M. Reed, a son of the deceased, was duly appointed as the administrator with the will annexed of the said Mary Reed, deceased, and the said estate had been fully administered, and the said administrator was duly discharged. Plaintiffs further state that the said Mary Reed, deceased, left surviving her three sons, namely, the said Wilbur T. Reed, Charles M. Reed, and T. W. P. Reed, who were the only heirs of the said Mary Reed; that the said Charles M. Reed and T. W. P. Reed have both departed this life since the death of their said mother, Mary Reed; that the said Charles M. Reed died intestate long prior to the death of the said T. W. P. Reed, leaving no children or other descendants; that the said T. W. P. Reed died intestate in the county of Shelby in the month of March, 1900, leaving as his sole heir a daughter, the defendant Laura Morgan, who was and is his only child and heir at law; that the plaintiffs L. S. Reed and Frankie R. Reed are sons of their co-plaintiff Wilbur T. Reed, and grandsons of the said Mary Reed, deceased, and the said Laura Morgan is made a party defendant as she claims or may claim some interest in the fund sued for. Plaintiffs further state that the said will of the said Mary Reed, deceased, contains the following item and bequest, to wit: 'I also wish my son, T. W. P. Reed, to have the use of \$2,000, during his natural life, after his death the same to go to my sons Charles M. Reed and Wilbur T. Reed,

should they be living, otherwise to my grandsons (to wit) L. S. Reed and Frankie R. Reed.' Plaintiffs further state that, in pursuance of the said provision and bequest, the said Charles M. Reed, in his lifetime, and while administrator of the estate of the said Mary Reed, deceased, and soon after his appointment, in the year 1880, and intending to carry out the provisions of the said bequest, turned over and paid to the said T. W. P. Reed the sum of \$2,000 in trust, to be held and used by him during his natural life, which said sum of \$2,000 was received by him, the said T. W. P. Reed, and the same was held, used, and enjoyed by him, with the interest and income thereof, until his death as aforesaid in the month of March, 1900. Plaintiffs further state that, upon the death of the said T. W. P. Reed as aforesaid, the defendant John R. Morgan applied for letters of administration upon his estate, and he, the said John R. Morgan, was duly appointed as the administrator of his estate by the probate court of Shelby county, in the state of Missouri, on or about the — day of March, 1900, and he is now duly qualified and acting administrator of the estate of the said T. W. P. Reed, deceased; that the said T. W. P. Reed died seised of a large estate in real and personal property, in value not less than \$10,000, all of which came into the hands of the said administrator, John R. Morgan, together with the said trust fund of \$2,000, and the said defendant John R. Morgan, as administrator as aforesaid, now holds and has the custody of the said trust fund hereinbefore mentioned. Plaintiffs further state that the said Charles M. Reed died before the said T. W. P. Reed, and hence took no interest in said trust of \$2,000, as plaintiffs are informed and believe; that the plaintiffs Wilbur T. Reed, L. S. Reed, and Frankie R. Reed are the persons mentioned in the said provision and bequest, and are the sole surviving beneficiaries of the said trust fund of \$2,000; that when said Charles M. Reed died his half of said trust fund went to and vested in the said plaintiffs L. S. Reed and Frankie R. Reed; the other half to the plaintiff Wilbur T. Reed, upon the death of said T. W. P. Reed; that is to say, the said Wilbur T. Reed is entitled to the one-half thereof, and the said L. S. Reed and Frankie R. Reed are entitled to the remainder thereof, as plaintiffs are informed and believe. Plaintiffs further state that a controversy has arisen between the plaintiffs and defendants as to the construction of that item and bequest above quoted, and the plaintiffs and defendants cannot agree upon the proper construction of the said provision of the said will of Mary Reed, deceased, and the said defendant John R. Morgan, as the administrator of the estate of the said T. W. P. Reed, deceased, declines and refuses to pay said trust fund to the plaintiffs, or either of them, without the order of this court, and a judicial construction of the said item and

bequest involving the said trust fund of \$2,000; and plaintiffs aver that it is important and necessary that the said item of the said will be construed by this court, so that the administration of the said estate may not be delayed or obstructed, and that the said administrator may be protected by the judgment of this court in the disposition and payment of the said trust fund so held by him. Wherefore these plaintiffs pray the court to give a proper judicial construction of the said item and bequest hereinbefore quoted and set out, having reference to the said trust fund of \$2,000, and that this court order and adjudge to whom the said trust fund belongs, and to whom the same ought to be paid, and, upon a final hearing of this cause, that plaintiffs may have judgment against the said defendant John R. Morgan, as administrator aforesaid, for the sum of \$2,000, with such interest as they may be entitled to in the premises, and in what proportion the said trust fund shall be apportioned as between the plaintiffs."

The answer of defendants was as follows: "Now come defendants, and, for their answer herein, admit that John R. Morgan is the duly qualified and acting administrator of the estate of T. W. P. Reed, deceased, as alleged in plaintiffs' petition, and, further answering, they deny each and every allegation in said petition contained; and, having fully answered, they pray to be discharged, with their costs in this behalf expended."

At the conclusion of the evidence, plaintiffs requested the court to make a special finding of facts separate from its conclusions of law, in the following form: "The court finds the facts under the testimony as follows, to wit: That the will of Mary Reed gave to T. W. P. Reed the use of two thousand dollars, to have and to hold during his natural life, and after his death the same to go to her two sons, Charles M. Reed and Wilbur L. Reed, if living; 'otherwise' to her grandsons L. S. Reed and Frankie R. Reed. That Mary Reed died in the year 1881, and her will was duly probated in the probate court of Shelby county, Mo., and that Charles M. Reed was duly appointed as administrator with the will annexed. That the said Mary Reed died seised of and owning a large estate in real and personal property, sufficient to pay all devises and bequests provided for in said will. That the said administrator, at or soon after his appointment, paid over to the said T. W. P. Reed the said sum of \$2,000, which he held and enjoyed, with the interest and income thereon, during his lifetime, and that he, the said T. W. P. Reed, died on or about the — day of March, 1900, owning a large amount of property, real and personal, not less than ten thousand dollars in value, and having in his possession and control the said trust fund of \$2,000. That the said John R. Morgan is the lawful administrator of the estate of him, the said T. W. P. Reed, and now holds the said trust

fund of \$2,000. And the court finds, on a construction of the said will, that the plaintiff Wilbur T. Reed is entitled to one-half of said trust fund, and that the other plaintiffs, L. S. Reed and Frankie R. Reed, are entitled to the remainder thereof."

The court rejected the plaintiffs' finding of facts, and made the finding following: "The court finds: That Mary Reed, deceased, by her last will, duly probated, bequeathed to T. W. P. Reed, defendant John R. Morgan's decedent, the use of \$2,000 during his natural life; after his death, same to go to her sons Charles M. Reed, now deceased, and plaintiff, Wilbur T. Reed, should they be living; otherwise to her grandsons, the plaintiffs L. S. and Frankie R. Reed. That said Mary Reed in her said will also bequeathed \$200 to plaintiff L. S. Reed, and the sum of \$1,000 to each of the plaintiffs. That said Wilbur T. Reed, Charles M. Reed, and T. W. P. Reed were residuary legatees under said will, and took the remainder of the estate of said Mary Reed, deceased, after the payment of debts and said specific legacies. That Charles M. Reed was appointed, duly qualified, and acted as administrator with the will annexed of the said Mary Reed, deceased, and, as such, fully administered said estate. That no personal assets came into the hands or possession of said administrator. That the residuary legatees advanced money to pay the said specific legacies to L. S., Frankie R., and Wilbur T. Reed, and made a voluntary division amongst themselves of the estate of the said Mary Reed, deceased, without further regarding the terms of said will. The court further finds from the evidence that the alleged trust fund of \$2,000 was not paid to T. W. P. Reed by Charles M. Reed as the administrator of the estate of Mary Reed, or otherwise; hence the judgment of the court is that the plaintiffs are not entitled to recover in this case, and that they shall therefore take nothing by their writ."

Judgment was entered for defendants, from which the plaintiffs, after proper steps, have appealed.

Jewett & Son and Mr. Dysart, for appellants. Geo. W. Humphrey, for respondents.

REYBURN, J. (after stating the facts). It is insisted by respondents that appellants failed to formally introduce in their proof the will of Mary Reed, deceased, as attested by the printed abstract of record, and therefore they wholly failed to establish any cause of action at the trial, by the omission of so important a link in their chain of evidence. The petition of plaintiffs embodied the will, and the trial court, in its finding of the facts, affirms the probating of the instrument, so that it is apparent that the case was tried as if it were before the court; and, even if by oversight the document was not formally in evidence, we shall treat the case as if it had been so formally tendered, on the general

rule, approved in the following and many other cases in this state: *School Dist. v. Holmes*, 53 Mo. App. 487; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463.

The respondents offered no proof, and the testimony of the appellants upon the paramount issue, whether the trust fund of \$2,000 had ever been paid to T. W. P. Reed by the administrator of Mary Reed, was made up of the deposition of James P. Williams, then a nonresident, formerly of Monroe county, Mo., and the oral testimony of Mary L. Reed, widow of Charles M. Reed, both to the effect that T. W. P. Reed had received a letter from his brother Wilbur T. Reed. Mrs. Reed stated T. W. P. Reed had received such letter in the spring of 1897; that she had read it, and therein Wilbur Reed asked his brother to send him \$1,000; that he was in hard circumstances and needed the money; and T. W. P. Reed said he did not think Wilbur had any right to ask him for the money; that he would need it worse after a while, when he was older; and that it would be time enough for him to have it when he was through with it. The conversation narrated by Williams was at a street corner in Shelbyna, about the same time as the period fixed by Mrs. Reed of the admissions made to her by T. W. P. Reed. Williams deposed that he did not see the letter T. W. P. Reed spoke of having from his brother in California, asking him for \$1,000 he was supposed to get at his death, and speaking of being hard up and needing the money badly, and T. W. P. Reed went on to say that he thought his brother would need it worse after he got through with it; that he did not propose to give it to him until then. There was testimony to support the other facts found by the court, but plaintiffs made no effort, except by the parol admissions of T. W. P. Reed, above narrated, to prove that he ever received the sum of money as averred. The administration of the estate of Mary Reed by Charles M. Reed did not tend to prove that the latter had ever paid such sum to defendant's intestate. The inventory scheduled no personalty, and the administrator, in his first settlement, did not charge himself with any personal assets, and in his final settlement debited himself with \$3,200 as the amounts of money received by him, as administrator, from T. W. P. Reed and Charles M. Reed, in dividing between them and W. T. Reed the realty left by Mary Reed, and took credit for the same sum as disbursed under the provisions of the will to L. S. Reed, Frank Reed, and W. T. Reed, legatees therein named. Appellants sought to examine Frank R. Reed respecting admissions in a conversation with T. W. P. Reed, but he was excluded by the court. He was a coplaintiff, and at common law would have been disqualified by his interest in the result of the action. *Greenleaf, Evidence*, §§ 390, 392, 396. T. W. P. Reed being dead, he was debarred from testifying in his own favor; and if this position seems

antagonistic to the ruling of the Supreme Court in the case of *Reed v. Painter*, 145 Mo. 341, 46 S. W. 1089, it is in harmony with decisions of that tribunal prior and subsequent. *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990; *Rice v. Shipley*, 159 Mo. 399, 60 S. W. 740; *Luis v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17; *Meier v. Thieman*, 90 Mo. 433, 2 S. W. 435.

The plaintiffs' testimony to establish the collection by T. W. P. Reed from the administrator of Mary Reed of the sum in dispute consisted wholly of statements of witnesses of parol admissions of T. W. P. Reed, deceased, prior to the suit—a character of testimony of limited probative force, which has been pronounced by eminent authorities dangerous and the most unreliable of all evidence, to be received with great caution, and tolerated rather than favored by the courts. *Pitts v. Weakley*, 155 Mo. 109, 55 S. W. 1055. The verbal admissions depended upon by appellants are far from being strong, unequivocal, or convincing, but are obscure, vague, and inferential, and are not corroborated by any attending circumstances. The files of the estate of Mary Reed, deceased, offered by appellants, tend to discredit, rather than to corroborate, any inference to be properly drawn from the meager conversations detailed.

The finding of facts by the court is a substitute for a special verdict, though not to be considered so critically as a special verdict (*Nichols v. Carter*, 49 Mo. App. 401; *Land Co. v. Bretz*, 125 Mo. 418, 28 S. W. 656); and, after a careful review and consideration of the testimony, we cannot say that, from the grade and measure of proof relied on by plaintiffs for their recovery, the judgment of the court upon the principal issue was unwarranted, or its finding thereon, or that any error was committed in determining that the fund had not been paid over from the estate of Mary Reed to T. W. P. Reed, and the judgment will accordingly be affirmed.

BLAND, P. J., and GOODE, J., concur.

DWYER v. ROHAN.

(Court of Appeals of St. Louis, Mo. March 17, 1903.)

TRUST DEED — FRAUDULENT FORECLOSURE SALE — PURCHASE BY TRUSTEE — PRINCIPAL AND SURETY — SUBROGATION — REDEMPTION — ESTOPPEL — ADVERSE TITLE — PLEADINGS — EVIDENCE.

1. Where a party replies after his motion to strike out new matter stated in an answer as both a defense and a counterclaim is overruled, he waives the objection.

2. Where facts specially pleaded as a defense were repeated by way of a counterclaim, and it was apparent that the counterclaim did not entitle defendant to affirmative relief, the court so finding, the error in refusing to strike it out, if any, was harmless.

3. Where the maker of a note gives a trust deed to secure the same he has a right to have

a sale under the deed honestly conducted, so that the land will realize the best price possible, to be applied in payment of the note.

4. As the maker of a note who gives a deed of trust to secure it, and subsequently sells the property to one who assumes and agrees to pay the note, is thereafter responsible as surety on the note, the trustee, as much as ever, owes him the duty of fairly conducting a foreclosure sale under the deed.

5. Defendant gave a deed of trust to secure his note, and thereafter sold the land to one who assumed and agreed to pay the note, but failed to do so. A fraudulent foreclosure sale was made to plaintiff who conveyed the land to an innocent third party. *Held* that, as defendant, on payment of the debt, could have redeemed the land after a voidable sale, by right of subrogation, of which right he was deprived by plaintiff's conveyance to an innocent purchaser, defendant should be relieved from liability on the note to the extent of the loss he sustained by the fraud of plaintiff and the trustee.

6. Where an averment of fraud in a replication is shown by the party's own evidence to be untrue, the sustaining of a demurrer to such pleading is harmless error.

7. Where a trust deed is given to secure a note, and the trustee and payee are advised of flaws in the title, but nevertheless accept it as security, and afterwards, by a fraudulent foreclosure sale, coupled with a conveyance to an innocent third party, deprive the grantor of his right to redeem, they cannot maintain, as against the grantor's claim to have the value of the land applied to the payment of the debt, that it was not worth the amount of the debt, because after such fraudulent foreclosure, a hostile interest was asserted.

8. Where a trust deed is given to secure a note, the trustee cannot purchase at a foreclosure sale under the deed without the grantor's consent.

9. To secure a note given to one member of a firm, the maker executed a trust deed of land to another member of the firm. On default in payment a foreclosure sale was had, and the land bought for the benefit of the firm for a mere nominal sum, and afterwards sold for 40 times as much. *Held* to show a wrongful appropriation of the security.

Appeal from St. Louis Circuit Court; W. B. Douglas, Judge.

Action on a note secured by deed of trust by Walter P. Dwyer against James J. Rohan. Judgment for defendant, and plaintiff appeals. Affirmed.

R. M. Nichols, for appellant. E. W. Pattison and A. P. Hebard, for respondent.

Statement of Facts and Opinion.

GOODE, J. James J. Rohan, respondent, borrowed \$1,250 from the Rice-Dwyer Real Estate Company September 14, 1899, giving a note therefor, secured by a deed of trust on two lots in the city of St. Louis—one in Brantner Place, the other on Grand avenue, opposite the Fair Grounds. Said real estate company was a copartnership composed of James and Thomas Rice and Walter P. Dwyer. These lots had been owned by the respondent's father, who had given a deed of trust on them, and, default being made in the payment of the debt secured thereby, the deed of trust was foreclosed, and respondent became

the purchaser of the lots at the foreclosure sale. He applied to the Rice-Dwyer Company to borrow money to pay the purchase price of the lots, and in the course of the negotiations the parties had the title examined by August Gehner. Gehner said the title was good, and that, if the Rice-Dwyer Company would not make the loan, he would. Certain defects in the record title were detected at that time, and shown in the certificate of title given by Gehner. One was an alleged imperfection in the acknowledgment by a married woman, Artlissa Begley, who joined with Bernard Begley in a conveyance of the property in 1868—26 years before the deed of trust in question was executed. This conveyance was of the Brantner Place lot. The other alleged defect related to the Grand avenue lot, the title to which, it seems, was derived through a tax sale in 1873—21 years prior to the execution of the deed of trust—in which suit one John Walton, a one-time owner of the land, was defendant, and evidence was offered to show that said Walton died before the judgment in the tax suit was rendered. These defects became known to both the Rice-Dwyer Company and Rohan in the investigation of the title preliminary to the loan, but were disregarded as of no consequence on account of the long time the property had been in the possession of respondent and those under whom he claimed. In the deed of trust executed by the respondent said Thomas Rice was trustee, the note secured being made payable to the order of James Rice. After the execution of the deed of trust Rohan conveyed the property to W. H. Denham, who assumed and agreed to pay the incumbrance. Denham defaulted, and respondent Rohan refused to pay, contending that the debt was Denham's; so the property was advertised for sale, and sold under the deed of trust by Thomas Rice in August, 1897, at public vendue at the east door of the courthouse in the city of St. Louis, for \$25, appellant, Dwyer, being the purchaser. The note secured by the deed of trust was, as stated, originally the property of the Rice-Dwyer Real Estate Company, though James Rice was named as payee. At the time of the foreclosure sale the note was owned by said partnership, but was subsequently assigned to the appellant, who instituted this action to recover the balance due on it for the benefit of the firm.

The answer, besides a general denial, contains a count setting up a defense of new matter, and another count pleading the same new matter by way of counterclaim. Those two counts consist of a recital of the partnership of the Rices and Dwyer; the facts in regard to the loan, and the execution of the deed of trust; that the deed of trust provided for a sale by the trustee, Thomas Rice, at public vendue, to the highest bidder, for cash, in the event of default, but that the said trustee, being at the time of the foreclosure sale appellant Dwyer's partner and joint own-

[1. See Mortgages, vol. 35, Cent. Dig. § 1081.

er and holder of the note secured by the deed of trust, advertised the lots for sale, and struck them off for the nominal sum of \$25 to his partner and co-owner of the note, the appellant, who was the only person who attended the sale and bid. The answer further states that, though the lots were of the value of \$2,000, the trustee, professing to have lawfully executed the trust vested in him, conveyed the same to Dwyer by a deed, legal in form, for said consideration of \$25; that appellant, Dwyer, having thus procured the title to said property, was able to hold himself out as its owner, and sold and conveyed it in 1898, by a properly executed deed, to an innocent third party for the sum of \$1,000.

After reciting the above facts, the answer proceeded as follows: "Defendant says that the conduct aforesaid of said trustee and of the plaintiff in the premises was wrongful and fraudulent, and was not a due and lawful exercise of said power of sale, vested by the said deed of trust in the said trustee, and did not, in contemplation of law, foreclose said deed of trust, or take away the right of the said defendant to redeem said lands, or to cause the same to be duly applied to the payment of said note, because the defendant says that the said trustee, being a joint owner and holder of said note, had no power, without the consent of the defendant, which was not obtained, to become the purchaser of said property at his own sale, which he did by fraudulently conspiring with the plaintiff, his partner, and other joint holders and owners of said note, to buy in the said property for their joint benefit and interest, and that, too, for the trivial sum aforesaid; and because the conduct of said trustee, in striking off said property to plaintiff herein at less than one-eightieth ($\frac{1}{80}$) of its real value, instead of adjourning said sale for want of bidders, was wrongful and fraudulent, and the result of a fraudulent understanding between the trustee and the plaintiff; and because the sum so bid for the said property was purely nominal, and not substantial in contemplation of law; and because it was fraudulent on the part of the trustee to entertain such a bid, and on the part of the plaintiff to seek to acquire the property aforesaid for such an unconscionable pittance. Defendant says that by reason of the fraudulent and wrongful conduct aforesaid of the said trustee and of the plaintiff herein the defendant has been wrongfully deprived of the power to redeem the said property by paying off the said note, as well as of the power to cause said property to be applied to the payment of the said note; that said lands now are, and always have been, ever since the date of the execution of said note and deed of trust, of a cash value more than sufficient to fully pay the said note and all interest thereon, together with all proper costs and commissions which could arise from the sale of said lands under said deed

of trust. Wherefore the defendant says that plaintiff should not be allowed to maintain this action upon the note aforesaid, and defendant prays judgment that he may be hence dismissed, with his costs in this behalf." As stated, another count sets forth the same matter as the foregoing, and asks judgment against the appellant by way of counterclaim.

Appellant filed a motion to strike out the new matter pleaded in the answer on the ground that it stated no defense to plaintiff's cause of action, but matters *ex delicto*. This motion was overruled, and an exception saved. After the overruling of the motion to strike out the new matter contained in the answer, appellant filed a replication containing a general denial and also a special reply. The burden of the special reply is that Rohan had no title to the lots when he executed the deed of trust to secure the note in controversy, by reason of the defects heretofore mentioned. It is alleged that at the trustee's sale, when the lots were bid off by the appellant, Dwyer, no title passed to Dwyer, because Rohan had none to convey to the trustee, Rice; further, that Rohan knew at the time he made the deed of trust that he had no title to the lots, but falsely represented that he could convey a good and sufficient title. The replication then states that, after the property had been conveyed by the trustee, Rice, to appellant, pursuant to the foreclosure sale, Fresha A. Browning and Artlissa Begley, who held the title, conveyed them to one Justin E. Joy; that afterwards Joy instituted an action of ejectment against appellant, Dwyer, to recover possession of said lots, which litigation was compromised by Dwyer conveying to Joy all the right, title, and interest in the lots which he (Dwyer) had acquired by the trustee's deed. A demurrer to the new matter contained in the reply was filed and sustained on the ground that it constituted no avoidance of the defense stated in the answer.

The case went to trial on the petition, answer, and the general denial contained in the reply, and, after hearing the evidence, it was adjudged that the respondent take nothing by his counterclaim, and appellant nothing by the cause of action stated in the petition. From that judgment an appeal was prosecuted to this court.

The first error assigned relates to the refusal of the court to strike out the new matter stated in the answer as both a defense and a counterclaim. The appellant, having replied after his motion to strike out was overruled, waived his exception on that score. *Scovill v. Glasner*, 79 Mo. 449; *Walser v. Wear*, 141 Mo. 443, 42 S. W. 928; *Barkley v. Cemetery Ass'n*, 153 Mo. 300, 54 S. W. 482. The waiver would, perhaps, warrant us in refusing to examine further the question of pleading propounded by the appellant; but we are satisfied the ruling of the circuit court was right in refusing to strike out the

facts specially pleaded as a defense. Said facts were repeated by way of a counterclaim, but it is apparent the respondent had no counterclaim which entitled him to affirmative relief, because, as he had conveyed the equity of redemption to Denham, his loss by the alleged fraudulent collusion of the trustee, Thomas Rice, and the appellant could not exceed the amount of the note which he might be called on to pay. As the court found against the respondent on the counterclaim, if there was error in refusing to strike it out, the error was harmless.

Under the Code the plea of new matter in bar does not coincide exactly with a confession and avoidance at common law, as it may set up defenses which the logical severity of the common-law system of pleadings would not tolerate. A plea of confession and avoidance admits that the cause of action alleged in the petition or declaration once existed, but avers other facts which discharged or satisfied it. A plea of new matter under the Code admits the allegations of the petition, and states facts not alleged in the petition, which suffice to defeat a recovery, but not necessarily by way of discharging the plaintiff's cause of action. *Pomeroy's Remedies* (3d Ed.) § 673. Under the Code, as legal and equitable procedures are largely blended, equitable defenses may be set up to defeat a plaintiff's case; that is to say, demands which at common law could not be pleaded in defense of a legal action, but had to be enforced by a separate suit in equity.

Respondent had a right of which the alleged tortious acts of the appellant and the trustee, Rice, deprived him, to wit, the right to have the sale under the deed of trust honestly conducted so that the lots would realize the best price possible, to be applied in payment of the note. *Worcester Bank v. Thayer*, 136 Mass. 459. Appellant fallaciously argues that, because Rohan had conveyed the equity of redemption, he had no interest in the foreclosure sale, and the trustee owed him no duty in making it. Rohan was responsible for the note as surety after he sold the lots to Denham and the latter agreed to pay the incumbrance on them. *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755. Rohan was, therefore, directly interested in the foreclosure sale; the trustee, as much as ever, owed him the duty of conducting it fairly; and, if the trustee and Dwyer conspired to get the property for a nominal sum, leaving the note unpaid, they committed a wrong which entitled Rohan to relief. If Dwyer had retained the lots, Rohan, by the law of subrogation, could have redeemed them after a voidable sale by paying the debt. As Dwyer sold them to an innocent purchaser, thus depriving Rohan of the right to redeem, the latter should be relieved from liability on the note to the extent of the loss he sustained by the fraud of Dwyer and the trustee. Hence the new mat-

ter in the answer stated a good defense. This point has been directly adjudicated in identical cases. *Jones v. Moore*, 42 Mo. 413; *Worcester Bank v. Thayer*, supra; *Savings Bank v. Munson*, 47 Conn. 390; *Bank v. Gifford*, 79 Iowa, 300, 44 N. W. 558; *Palmer v. Hendrie*, 27 Beav. 349; *Walker v. Jones*, L. R. 1 P. C. 50; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Polak v. Everett*, 1 Q. B. Div. 669.

Appellant also raises the proposition that Rohan could have been sued on the note in the first place without the security being enforced against the latter's right to complain of the trustee's sale. True enough; but in that event, as said above, Rohan, by paying the note, would have become subrogated to appellant's ownership of the security, and therewith might have reimbursed himself; and the very gist of his defense is that he was deprived of the benefit of the deed of trust by a fraud in which the appellant participated.

The next point relates to the demurrer to the replication, which was sustained by the circuit court. We are not prepared to say that no sufficient reply to the defense above considered was made by the replication, because, as stated, that pleading contained the charge that Rohan knew when he procured the loan he had no title to the lots, but falsely and fraudulently represented and pretended he could convey a good and sufficient title thereto. If those facts had been true; if Rohan had been aware that he did not own the lots, and had made the Rice-Dwyer Real Estate Company believe he did own them by false representations, on which they relied in advancing the loan, never knowing to the contrary until after the foreclosure sale—a serious question would be presented by the ruling on the demurrer; for it is difficult to see how Rohan could have suffered substantial loss by a sale of lots in which he had no interest, no matter how dishonestly the sale was conducted. *Crumb v. Wright*, 97 Mo. 13, 10 S. W. 74. But the replication stated the alleged imperfections in Rohan's title, and the evidence for appellant—indeed, his own evidence—shows that, instead of Rohan making any fraudulent representations, appellant was informed of those defects during the negotiation for the loan, distinctly waived them, and made the loan with full knowledge of their existence. Therefore whatever error may have been committed in sustaining the demurrer to the replication as being an insufficient pleading, was harmless error, since the appellant's evidence demonstrates that the averment of fraud on the part of Rohan is untrue.

Appellant offered evidence to show respondent's title to the lots was bad, that the deed of trust given to secure the loan conveyed nothing to the trustee, and that the trustee's deed pursuant to the foreclosure sale conveyed nothing to the appellant; which evidence, tending to show the flaws heretofore mentioned, was excluded. Appellant con-

tends this ruling was erroneous, as he had a right to prove the defects, not only to overcome the respondent's defense based on the theory of loss by the fraudulent trustee's sale, but also in mitigation of the damages, as the lots would not sell for full value on account of the imperfect title. Rohan, and those under whom he claimed, had been in possession of the lots for more than 20 years at the time the deed of trust was given, and meanwhile, so far as appears, no interest hostile to his had been asserted. Dwyer and his partners were apprised of the state of the title, and accepted it as security notwithstanding its flaws. If thereafter they wrongly appropriated the lots, so to speak, shall they now be heard to say, against Rohan's claim to have their value applied to the extinguishment of his obligation, that they were not worth the obligation, because, after said wrongful appropriation, a hostile interest was asserted? Justice to Rohan requires that the value of the lots at the time of the tortious sale be applied to discharge the note on which he was surety.

Generally speaking, a pledgee, mortgagee, or bailee of personal property, who has unlawfully converted it to his own use, cannot, when sued for the conversion, question the ownership of the party from whom he received the property. *Sherwood v. Neal*, 41 Mo. App. 416; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229. The estoppel in such instances arises from the duty incumbent on one to whom the property was delivered by another for a special purpose to redeliver it to the person from whom he got it when the purpose has been served. We see no reason why that principle should not apply to a case like this, which contains facts in all respects similar to a conversion of personal property, although not showing, of course, a technical conversion. And, indeed, the principle does apply to contracts regarding real property; for a lessee cannot dispute his landlord's title, and a vendee in possession of land who is bound to pay for it, cannot deny his vendor's title. *Smith v. Busby*, 15 Mo. 388, 57 Am. Dec. 207; *Mattison v. Ausmuss*, 50 Mo. 554; *Pershing v. Canfield*, 70 Mo. 140; *Crumb v. Wright*, supra; *Davis v. Watson*, 89 Mo. App. 15. Land having been conveyed on the condition that intoxicating liquors should not be sold on it, with a proviso that if they were the premises should revert to the grantor, an ejectment suit was brought by the grantor for breach of the condition. To that action defendant sought to interpose the defense that the grantor's title was bad when he sold the land; but it was held that, inasmuch as the defendant received the possession from the grantor on a condition which the defendant had broken, he was estopped to deny the validity of the title granted. *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *O'Brien v. Wetherell*, 14 Kan. 616. Possession must be restored to a vendor by a vendee who is still under an obligation with re-

spect to the land before the former's right can be questioned.

The trustee, Rice, got all his title to the lots in question from Rohan, as did also Dwyer, who got possession as well. Rohan was entitled to subrogation on satisfaction of the debt; a right not extinguished by a voidable foreclosure sale—that is, Rohan was still entitled to pay the note, and then enforce the security in order to make himself whole. This being true, on what theory can Dwyer be permitted to question Rohan's title? If such a course was allowed, a grantee could take a conveyance of land on condition, hunt a flaw in the title, and defy the condition on the assumption that the grantor owned no estate to convey, although the latter's title had not been questioned, nor his possession disturbed, and perhaps never would have been. For aught we know, Rohan's title might never have been questioned if he had kept the property, or, if questioned, might have been successfully defended. To exonerate Dwyer on the ground that Rohan's estate was less than a perfect fee simple would be to make the latter bear a loss which he had no chance to defend against, and was powerless to prevent. If Dwyer had acted in good faith in buying the lots, and had sustained loss through an imperfect title, he could have had recourse on Rohan's covenants.

The only point remaining is as to the sufficiency of the evidence to maintain the defense of a fraudulent and collusive trustee's sale, and we are not inclined to interfere with the finding of the court below on that issue. To begin with, Rice had no right to buy the property at his own sale, as, in effect, he did when Dwyer bought for the benefit of the Rice-Dwyer Real Estate Company. Rohan gave no consent for Rice, as his trustee, to act that way. *Moore v. Thompson*, 40 Mo. App. 195; *Byrne v. Carson*, 70 Mo. App. 126. Then the price for which the lots sold was but a trifle. Nobody bid but Dwyer, and, shortly after he bought the property, he sold it to Joy for 40 times as much as he gave for it. Those facts uphold the finding that the sale was a wrongful appropriation of the security to the detriment of Rohan, and, as the value of the lots when sold exceeded the amount due on the note, appellant was justly denied a recovery.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

ROBERTS et al. v. STONE et al.*

(Court of Appeals at Kansas City, Mo. Feb. 18, 1903.)

SUMMONS—SERVICE—JURISDICTION.

1. Under Rev. St. 1899, § 562, providing that suits by summons shall be brought either in the county in which defendant resides or in the

*Opinion rewritten on motion for rehearing and cause reversed April 6, 1903.

county in which plaintiff resides and defendant may be found, and when there are several defendants, and they reside in different counties, the suit may be brought in any such county, where plaintiff, residing in L. county, commences action therein against G., residing in C. county, and M., residing in A. county, by service of the summons on M., in L. county, by delivery to her of a certified copy of the petition and writ, and subsequent service on G., in C. county, by delivery of a certified copy of the petition and writ, the service is insufficient to confer jurisdiction over the persons of defendants, so that the default judgment against them is void.

Appeal from Circuit Court, Livingston County; J. W. Alexander, Judge.

Suit by G. G. Roberts and others against S. A. Stone and others. Decree for defendants, and plaintiffs appeal. Reversed.

Miller Bros., James W. Boyd, and Jno. Geo. Parkinson, for appellants. Charles A. Loomis, for respondents.

SMITH, J. This is a suit in equity to obtain an injunction against the defendants to restrain the sale of real estate under an execution. The material facts to be gathered from the record may be grouped in about this way, that is to say: The plaintiffs G. G. Roberts and Minnie C. Roberts, by the name of M. C. Roberts, executed their note, the latter as surety for the former, to the defendant Stone, for \$200, which they neglected to pay at maturity, so that an action was brought against them by the payee Stone in the circuit court of Livingston county to recover the amount due thereon. At the time of the commencement of the action the payee resided in Livingston county, and one of the makers, G. G. Roberts, resided in Carroll county, while the other, Minnie C. Roberts, resided in Caldwell county. The return of the sheriff on the writ of summons shows that the service thereof on the last-named defendant was in Livingston county by the delivery to her of a certified copy of the petition and writ. And it further appears from the return made on the writ by the sheriff of Carroll county that the defendant G. G. Roberts was served in that county, at a date subsequent to the service on his co-defendant, by the delivery to him of a certified copy of the petition and writ. At the return term of the writ, neither of the defendants appearing, judgment by default was given against them for the amount due on the note. Subsequently a writ of execution was issued on the judgment directed to the sheriff of Livingston county, which was levied on certain real estate, in which the defendants had since the rendition of the judgment by descent acquired an interest. Defendants, after the acquisition of the interest in the said real estate and prior to the execution levy, conveyed that interest by deed to a brother, A. G. Roberts. This suit was brought by the said A. G. Roberts and the two judgment defendants against the judgment plaintiff and the sheriff, the object of which was as stated at the outset.

The plaintiffs' petition alleged, *inter alia*, that the writ of summons in the action on the said promissory note was never served on the defendants or either of them; that the return of service indorsed on said writs was false, and that the court in which the judgment was given was without jurisdiction of the person of the defendants therein or either of them; that the defendants therein had a meritorious defense to said action, in that said note therein sued on was without any supporting consideration, and was given to avoid a threatened criminal prosecution, etc. The answer was a general denial.

There was a hearing of the case by the court, resulting in a decree setting aside the temporary injunction which had been previously granted, and a dismissal of the petition. The plaintiffs appealed.

The decisive point raised by the plaintiffs' appeal is whether or not the service of the original process in the action, just referred to, was sufficient under the statute (section 562, Rev. St. 1899), to confer jurisdiction over the person of the defendants, and according to the ruling of the Supreme Court in *Christian v. Williams*, 111 Mo. 436, 20 S. W. 96, it was not. The judgment so rendered was void.

The action of the trial court in holding it valid cannot be upheld, and the decree will accordingly be reversed. All concur.

HOUCK et al. v. PATTY et al.

(Court of Appeals at St. Louis, Mo. March 17, 1903.)

EQUITY — PLEADING — DEPARTURE — TRESPASS—CUTTING TIMBER—INJUNCTION—PARTIAL DEFENSES — CONVEYANCE PENDING SUIT — PAROL EVIDENCE — FRAUDULENT DEEDS—EVIDENCE—CONSTITUTIONAL LAW—REVIEW BY APPELLATE COURT.

1. Where a petition alleged that plaintiff was the owner of certain timber lands; that defendants were wrongfully cutting timber therefrom; that the timber constituted the principal value of the land; and that if defendants, who were insolvent, were not enjoined, plaintiff would be deprived of the timber without any adequate remedy at law; and prayed an injunction—an amended petition, alleging the value of the timber which had been removed to be \$500, and another paragraph, alleging generally that plaintiff had been damaged, but neither stating in what sum nor praying judgment therefor, was not subject to a motion to strike, as a departure from the original petition.

2. In an action to restrain defendants from cutting timber on land alleged to belong to plaintiff, an answer alleging that on the day of October, 1900, plaintiffs conveyed to a corporation all their right, title, and interest to the timber growing on the land described was available only to limit the scope of plaintiff's recovery as a partial defense.

3. In a suit to restrain defendants from cutting timber on land alleged to belong to plaintiff, parol evidence that since the institution of the suit plaintiffs had conveyed the timber to a third person was inadmissible over objection that the deed was the best evidence thereof.

4. Where swamp lands donated to the state were patented to a county, and conveyed by the grantee through mesne conveyances to plaintiff,

as authorized by Act Gen. Assem. Oct. 26, 1857, an objection that the conveyance from the county was void must be based on the ground that the act was unconstitutional and therefore is not within the jurisdiction of the court of appeals.

5. Where swamp lands were conveyed by a county, to which they were patented by the state, by mesne conveyances to plaintiff, and plaintiff had been in actual possession of a part of the land by a tenant claiming title to the whole, her title thereby acquired was superior to a title acquired by virtue of an execution sale of the land on a judgment against the county, after the county had parted with its title.

6. Where, in a suit to restrain defendants from cutting timber on plaintiff's land, plaintiff alleged that deeds under which defendants claimed were shams, and manufactured for the purpose of defeating criminal prosecutions for taking the timber, plaintiff was entitled to show such facts at the trial in order to invalidate such conveyances.

Appeal from Circuit Court, Iron County; Frank R. Dearing, Judge.

Action by Mary H. G. Houck and others against John Patty and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

L. R. Thomason, for appellants. H. S. Shaw, for respondents.

BLAND, P. J. Omitting caption, the petition is as follows: "Plaintiffs state that they are husband and wife, and further state that they are seised and possessed in fee of, in, and to the following described land, situate in Stoddard county, Mo., to wit: All of section twenty-four (24); all of section twenty-five (25); all of section twenty-six (26); all of section twenty-seven (27); all of section twenty-nine (29); all of section thirty-six (36); and all of the W. $\frac{1}{2}$ of section thirty-four (34); and all of the E. $\frac{1}{2}$ of section thirty-one (31); the N. $\frac{1}{2}$ and S. W. $\frac{1}{4}$ of section No. thirty-five (35); the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section thirty-three (33); also the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of section twenty-three (23); and all in township twenty-four (24), range eleven (11) east, in Stoddard county, Mo. That on or about the 10th day of February, 1898, the defendants, and other persons in the employ of the defendants and under their directions, and whose names are unknown to plaintiffs, did threaten to unlawfully enter upon the above-described land, and did, by themselves, their agents, servants, and employes, whose names are unknown to plaintiffs, enter upon the premises described above, and the property of the plaintiffs then and now, and have continuously from said date threatened to unlawfully and forcibly, and against the will of plaintiffs, to cut down from off said lands ties and timber standing and growing thereon, consisting of trees of great number and of great value, and to remove the same from off said land, and that the defendants, their agents, servants, and employes, have, ever

since the 10th day of February, 1898, and prior to that day and date, been engaged in unlawfully entering upon the described lands of the plaintiffs, and have continuously from said date been guilty of unlawfully and forcibly, and against the will of plaintiffs, of cutting down upon said land aforesaid a large number of valuable trees growing and standing on said lands, and being thereon at said times, and have removed and are about to remove the trees cut and severed from the said land, and are threatening to appropriate and have appropriated the same to their own use and benefit of defendants. That the defendants then well knew and still know that the plaintiffs are the legal owners of the said land, and defendants then knew and still know that they did not have then and they have not now any right, title, claim, or interest in and to said real estate, or the trees and timber thereon, save and except such as they have manufactured and executed among themselves, or caused to be fraudulently made and manufactured to protect themselves from being criminally prosecuted for theft, and to force these plaintiffs to prosecute their action against them at great cost in the civil courts of this state. Plaintiffs further state that the defendants, by the means aforesaid, are still carrying on the trespasses above pleaded, and that they threaten to continue the same in the manner and by the means aforesaid, unless restrained by this court. Plaintiffs state that said real estate is principally valuable for and on account of the timber and trees, which have been and are a part of said above-described real estate; that the timber and trees now standing on said lands are of great value, and that the land without the timber would be comparatively valueless; and that said plaintiffs will suffer irreparable injury to said real estate at the hands of said above-named defendants unless they are each restrained from cutting and removing the timber and trees from said lands, or causing the same to be done by their agents, servants, or employes, or those under them. Plaintiffs further state that the defendants are wholly insolvent, and that they have no adequate remedy at law by an action for damages, wherefore the plaintiffs pray that the defendants may be perpetually enjoined and restrained from in any way doing and performing and continuing any of the acts above charged against them, and that they may be perpetually enjoined and restrained from entering in and upon the above-described lands, or any part thereof, for the purpose of cutting trees or timber, or removing the same therefrom, or from causing their agents, servants, or employes to do so, and that in the meantime a temporary injunction and restraining order may be allowed by some court having jurisdiction to issue such an order restraining the defendants, and each of them, and their agents, servants, and employes, from proceeding to

do or carry on the trespasses and wrongs heretofore in this petition set forth and complained of, until the final order of the circuit court of Stoddard county, Missouri, or until the final order of some court and judge of this state having jurisdiction to pass in final judgment on this petition and application. And plaintiffs further pray the said court for such further order as may be just and proper in the premises."

Notice that the plaintiffs would apply to the judge of the probate court for a temporary restraining order on February 21, 1898, was duly and timely served on defendants. On the day named in the notice plaintiffs presented their petition and injunction bond to the judge of the probate court of Stoddard county, and obtained from said judge a temporary order restraining the defendants from cutting or removing timber from the land described in the petition. At the March term, 1898, of the Stoddard county circuit court, defendants filed their motion to dissolve the injunction, and also an application for change of venue of the cause. The venue was changed to the Iron county circuit court. In April, 1901, after the cause had reached the latter court, plaintiffs filed an amended petition incorporating a new paragraph, wherein the value of the timber that had been removed by defendants was alleged to be \$500; and in another paragraph alleged generally that plaintiff had been damaged, but did not state in what sum, nor pray judgment for such damages. In all other respects the amended petition was like the original, and the same relief was prayed for in both petitions. Defendants moved to strike out the amended petition on the ground that it was a departure from the original one. The court sustained the motion, and struck out the amended petition.

This ruling of the court is assigned as error.

The amended petition alleged the same trespass upon identically the same land, and asked the same relief, and none other. The general allegation that the plaintiffs were damaged, without stating in what sum, would not authorize a money judgment for any amount. Like the original, the amended petition is in one count, and asks only for equitable relief. There was no departure. We do not see, however, how the plaintiffs were prejudiced by the action of the court in striking out the amended petition, for it is, in substance, the same as the original, and required the same evidence to sustain it, and no more.

2. The answer of defendants was a general denial and the following affirmative allegation: "That on or about the — day of October, 1900, the said Louis H. Houck and Mary H. G. Houck, his wife, conveyed to the Standard Oil Well Supply Company, a corporation, all their right, title, and interest in and to the timber standing and growing on the land described in plaintiffs' peti-

tion." Plaintiffs moved to strike out the affirmative defense, on the ground, principally, that the allegation of the sale of timber on the land by plaintiffs was subsequent to the commencement of the suit, and because it was, in effect, a plea of defect of parties. The court overruled the motion. This ruling is assigned as error by plaintiffs. The affirmative part of the answer, if true, would not defeat plaintiffs' right to recover. It would only limit the extent and scope of their recovery. For this purpose the answer was available as a partial defense. The lands claimed by plaintiff are known as "swamp lands," and were donated to the state of Missouri, by act of Congress, September 28, 1850. The lands in question were patented to Stoddard county by the state. In pursuance of an act of the General Assembly approved October 26, 1857, they were conveyed by Stoddard county to the Cape Girardeau & Bloomfield Macadamized & Gravel Road Company, a corporation, and from the Cape Girardeau, etc., Road Company by mesne conveyances to Mary Houck, who acquired title June 20, 1882. The evidence tends to prove that there was a dwelling house on one section of the land, which had been occupied by tenants of plaintiffs for the past 20 years; that about 20 acres of said land were in cultivation; and that the plaintiffs had paid taxes on the land since Mrs. Houck acquired title thereto. The evidence is that John Patty, one of the defendants, by himself and employes, cut and sold timber from the land for several years prior to the commencement of the suit, and continued to cut timber therefrom after the temporary injunction had been issued and served; that John Patty claimed a part of the land, and had had a sawmill on it; that the timber he cut was white and red oak, and was used in manufacturing wagons; that he had never resided on the land. His claim to the land comes through the other defendants in this way: On September 17, 1879, the sheriff of Stoddard county sold 13,000 acres of swamp land, including the land described in plaintiff's petition, on an execution issued on a judgment which had been rendered against Stoddard county. At this sale John Liles, John Miller, and David Hicks were the purchasers, and received a sheriff's deed for the land bid in. Afterwards, in 1898, Liles conveyed his interest in one-third of the lands to W. A. Price, L. Stewart, and C. D. Bailey. Bailey, Stewart, and Price subsequently conveyed the S. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of section 30, township 24, range 11, to defendant John Patty. The deed from Liles to Price and others expressed a consideration of \$2,500. Plaintiffs offered to prove that the consideration was fictitious, that no consideration was in fact paid, and that the deed was a mere contrivance to shelter the defendants in the trespasses they had committed and intended to commit on the lands. This evidence was excluded by

the court. Defendants offered parol testimony tending to show that since the institution of the suit plaintiffs had conveyed the timber on the lands to a third party. Plaintiffs objected to this evidence on the ground that, if any such conveyance had been made, the deed was the best evidence thereof. The court overruled this objection. This was palpable error.

The Legislature in 1857 (Laws 1857, p. 268) authorized the county of Stoddard to convey the lands in question to the Cape Girardeau, etc., Company, and it seems, from what we can gather from the abstracts, the county conveyed the lands, in pursuance of that act, to said company. Defendants claimed the conveyance to be void. If void, it is so by reason of some constitutional inhibition on the Legislature to pass the act of 1857. If defendants desired to raise this question, they should have done so on the trial by way of objection to the deed as evidence, or in some other appropriate manner, and preserved their objections in the record, had the court ruled against them, and thus preserved the constitutional question, and, had the judgment been against them, taken the case to the Supreme Court, the only appellate court in the state vested with power to interpret the present and past Constitutions of the state. We shall not consider this feature of the case, but will accept the deed as valid.

The deed being valid, Mrs. Houck was unquestionably the owner of the lands. Her title antedated by several years the pretended title set up by the defendants, and, as the evidence tends to show she had been in actual possession of a part of the land by her tenants, claiming title to the whole, we can see no obstacle in the way of granting the relief prayed for. If the deeds to Bailey and others from Liles and from Bailey and others to Patty were mere contrivances to defeat criminal prosecutions for taking the timber from the land, then these deeds would furnish no defense, and we think that plaintiffs should be permitted to show, if they can, that these conveyances were shams.

The court, on the evidence, rendered judgment for the defendants, and dismissed plaintiffs' bill, from which action of the court the plaintiffs duly appealed. For the reasons stated herein, we think this judgment is erroneous. It is therefore reversed, and the cause remanded. All concur.

CHICAGO COTTAGE ORGAN CO. v. STONE.

(Supreme Court of Arkansas. March 21, 1903.)

AGENCY—CONTRACT—RATIFICATION—SUFFICIENCY OF EVIDENCE.

1. Plaintiff agreed with defendant's consignment agent to receive and sell defendant's goods, and at the same time, or shortly thereafter, forwarded through the agent his application for the agency for his vicinity, which application defendant promptly returned, with its disapproval, to the agent, but he failed to de-

liver it to plaintiff for some weeks. Except by plaintiff's unsupported testimony, it was not shown that the agent had authority to appoint other agents, nor that he acted for defendant in forwarding the application. *Held*, that the evidence clearly showed that defendant had not entered into a contract with plaintiff to act as its agent.

2. It further appeared that during the time plaintiff was waiting for a reply to his application he received and sold some goods, took notes payable to defendant and indorsed them, and made out a report of his doings; but this it was not shown that defendant received. *Held*, that there was no evidence to establish an agency by ratification of plaintiff's acts.

Appeal from Circuit Court, Washington County; J. A. Rice, Special Judge.

Action by W. C. Stone against the Chicago Cottage Organ Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. B. Wall, for appellant. Walker, Walker & Walker, for appellee.

BUNN, C. J. This is a suit by the appellee, W. C. Stone, against the appellant, the Chicago Cottage Organ Company (now the Cable Company), for money paid out at its request, for its use, in the sum of \$600, to wit, \$200 for freight charges on goods, \$250 to assistant salesman as salary, \$100 for rent of room, and some other small items. Defendant answered, denying all material allegations of the complaint specifically.

The facts, briefly stated, are in substance as follows: The consignment agent of the defendant company in the vicinity of Fayetteville, Ark., was F. S. Trow, between whom and the appellee, who was a dealer in pianos and other musical instruments at Fayetteville, there was an arrangement of some kind made, by which the latter was engaged to sell the goods of the appellant company, to be furnished him for that purpose; and subsequently it was arranged between them that Stone was to make application to the company at Chicago, through Trow, for the appointment of consignment agent in the Fayetteville locality. Stone made his application, and sent forward the same through Trow; and in due time the company responded, through Trow, that the application was rejected. It seems that Trow, who was a traveling man, kept this refusal some weeks without communicating the same to Stone, and in the meantime he continued to have shipped to Stone the goods for sale; and it develops that the latter made one monthly report of goods on hand to the company, which was required of such dealers to make. Having expended the sums claimed in suit, the contention of appellee is that the company first delayed so long in communicating its refusal to him that he was induced to deal in the matter as if the appointment would certainly be made.

The evidence in this case shows, in brief, that in October, 1895, one F. S. Trow, the consignment agent of the Chicago Cottage Organ Company, came to the place of business of appellee, W. C. Stone, in the city of

Fayetteville, Ark., and entered into an agreement with him to receive and sell the defendant company's pianos and organs, to be placed in his storerooms for that purpose; that then, or some time thereafter, with the assent and advice of Trow, Stone, on one of the company's blanks, used for that purpose, made out an application, in form, to be appointed the company's general consignment agent at Fayetteville and vicinity, and this was delivered to Trow to transmit the same to the company for its approval. It appears, also, that promptly on receipt of the same the company returned the same to Mr. Trow with its disapproval indorsed thereon, but that Trow did not communicate the response of the company to Stone for several weeks. In the meantime Stone claims to have transacted some business for the company as if upon the contract, which he thought would surely be made, as it had the indorsement of the company's agent, Mr. Trow. Among other things he did during this period of time, he made report, as he claims, of his consignments and disposal of the goods of the company, and exhibits, as Exhibit B, with the evidence in the case, what purports to be an original report, dated 12th January, 1896, signed, "W. C. Stone, Dealer," and marked, "Sent January 16, 1896," and that he took notes for the goods, payable to the company and indorsed by himself, and also some indorsed by himself and Trow.

The question in the case is whether the company was liable for the acts of Stone as its agent. It is quite clear from the testimony, except the unsupported statement of Stone as to what Trow told him, that Trow had no authority to appoint agents; and this the parties acted upon, in the very act of forwarding Stone's application for approval by the company. It is also apparent from the evidence that in forwarding this application to the company, and in receiving the response to the same, Trow was the agent of Stone, as this was not a duty he owed to the company. It follows that the delay in the delivery of the response to Stone was the fault of Trow as such agent of Stone, and not that of the company, and in so far there was no liability to Stone on the part of the company. But it is contended by Stone that the company ratified his acts as its agent, in that it shipped him goods, and he disposed of them, making report of the same to the company, and it raised no objection. From all that appears from the record evidence, Trow's name figured in all these transactions, and Stone's acts thus induced could as well or more reasonably be attributed to a personal arrangement between himself and Trow, than to anything in the nature of a contract of agency between himself and the company. In fact, there is no evidence to the effect that the company ever received the alleged report; and, if it did, it is shown in evidence by the plaintiff himself that it should have been kept on file with the com-

pany, and yet it was found in the possession of plaintiff, without explanation. The conclusion is inevitable that the company, if it ever received such report, returned it without action thereon. Finally these alleged acts and doings of Stone in regard to the goods and the disposal of the same, from all that appears in evidence, were not inconsistent with the contention of the defendant company that Stone dealt with the goods in his individual character, in pursuance of an arrangement between himself and Trow, and not as the agent of, or as having any authority from, the company. The burden of proof was on the plaintiff to show that the company was liable to him for the sum claimed, either by its contract with him as its agent, or by subsequent ratification of his acts. There was certainly no contract of the kind between them. On the contrary, the proof is that the company absolutely and positively refused to contract with him as its agent. And there is no legal evidence to establish liability by ratification. There is no evidence to sustain the verdict.

Reversed and remanded for new trial.

HEARD et al. v. THRASHER et al.

(Supreme Court of Texas. April 6, 1903.)

VENDOR AND PURCHASER—MORTGAGE DEBT—PAYMENT BY PURCHASER—DEDUCTION FROM PURCHASE PRICE.

1. Defendant purchased mortgaged land, agreeing to pay certain purchase-money notes given by the vendor if the vendor should cause the mortgage to be paid. If defendant was compelled to pay any part of the mortgage debt, such part was to be deducted from the amount of the notes. The mortgage debt was also secured by a trust deed on other realty, which was sold to pay the debt, and purchased by defendant at a price insufficient to pay all the mortgage debt. *Held*, that defendant was entitled to a deduction from the notes assumed by him, equal only to the difference between the price of the property sold under the deed of trust and the amount of the mortgage debt, and was not entitled to a deduction for taxes paid on the land purchased at the trustee's sale, or for attorney's fees for examination of the title to that land, or money expended for repairs thereon.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. S. Heard and others against Hugh Thrasher and others. Judgment for defendants was affirmed by Court of Civil Appeals (71 S. W. 803), and plaintiffs bring error. Reversed.

Prendergast & Sanford and O. V. Birkhead, for plaintiffs in error. Richard I. Munroe, for defendants in error.

BROWN, J. J. S. Hall was the owner of 150 acres of land of the S. P. Wilson survey, in McLennan county, described in plaintiffs' petition, which land was incumbered by a mortgage given by J. I. Moore to secure a note for \$1,000 then held by Minnie Adams. Hall did not assume that note, but Moore

executed to Hall a deed of trust upon a place in Waco known as the "Sink Place," to secure the said Hall against the enforcement of the \$1,000 note upon the land conveyed to him by Moore. On the 1st day of November, 1897, J. S. Hall conveyed the land to Hugh Thrasher, and, to secure a part of the purchase money, Thrasher executed to Hall two notes of that date; one for \$200, which contained this statement: "This note is collectible only when the \$1,000 due and owing by J. I. Moore against said land shall be paid by said Moore or some one for him." The other note was for \$300. Hall transferred to Thrasher a deed of trust given to him by Moore on the Sink place, and Hall and Thrasher entered into a written agreement which recited the sale of the land by Hall to Thrasher, the execution of the two notes, and the transfer of the deed of trust on the Sink place, as well as the existence of the prior mortgage before mentioned, and provided as follows: "If Moore paid or caused to be paid said \$1,000 without expense to Thrasher, he was then to pay said \$200 and \$300 notes; but, should Moore fail or refuse and Thrasher be put to any expense to protect himself, such expense to be deducted from the said \$200 and \$300 notes, and he pay Hall only the balance thereon." Hall had released to Moore the deed of trust given to secure the payment of the \$1,000 note on the 19th day of February, 1897, which release was duly recorded at once. J. I. Moore did not pay the \$1,000 note, but renewed the same from time to time, and it was extended by the owner thereof upon a valuable consideration paid by Moore. On February 19, 1897, J. I. Moore executed to Ben Alexander, as trustee, a deed of trust conveying to him the Sink place, for the purpose of securing Mrs. Adams and Frazier against the said \$1,000 note. The deed empowered the trustee to sell the land in case Moore failed to pay the money. Moore having failed to pay the \$1,000, and demand being made for the sale of the property by Minnie Adams, the owner of the note, the trustee advertised and sold the Sink place in accordance with the terms of the said deed of trust, which was purchased by Hugh Thrasher for the sum of \$775. The Sink place was worth at least \$1,200 at the time Thrasher purchased it. The \$200 note was paid, except the sum of \$75, and the two notes belonged to the plaintiffs in error at the time the suit was brought.

This suit was instituted against Hugh Thrasher as maker, and Hall as indorser, of the two notes, and to enforce the vendor's lien upon the 150 acres in the S. P. Wilson survey. Thrasher pleaded the facts before stated, and that he had been compelled to pay for his protection a sum greater than that which was due upon the said notes, wherefore he claimed that nothing remained due thereon. Thrasher testified that on the 3d day of July, 1900, he paid to Mrs. Adams \$1,119 in satisfaction of the note for \$1,000,

and that he afterwards paid \$18.45 taxes on the Sink place, \$3.45 for repairs made on the property since he bought it, and \$10 to an attorney for examining the title to the property. There were still due and unpaid for city taxes on the Sink place the following sums. For 1896, \$27.25, and \$5.50 costs; for 1897, \$29.25. That the taxes were not assessed for the years 1898 and 1899, but the taxes for each year would be \$15.90, and for 1900, \$15.96. All of the \$200 was paid, except \$75 of the principal, of which Hall transferred \$45 to G. W. Hathaway, retaining \$30 thereof. Hall transferred \$235 of the principal of the \$300 note to W. S. Heard, and the remainder, \$65, to J. C. Birkhead. It was agreed between Hall and his several assignees that any claim of Thrasher for expenses should be first taken out of the \$200 note, and, if not satisfied, then out of Birkhead's interest in the \$300 note, before the interest of Heard should be so appropriated. The case was tried without a jury before the judge, who held that Thrasher had incurred expenses more than equal to the balance due on the notes, and gave judgment for Thrasher.

The trial court erred in its judgment by allowing the defendant Thrasher, as set-off against the notes sued on, the sum paid by him for taxes which accrued against the property before his purchase, and for taxes which had not been paid by Thrasher, as well as for the attorney's fee paid by Thrasher for the examination of the title to the Sink place, and the amount paid for repairs made by him upon the said place after his purchase. Thrasher stands in the same attitude as if another person had purchased the property and had paid the sum of \$775 to Mrs. Adams, Thrasher paying the balance on the note. The taxes, attorney's fee, and repairs were not, in any sense, within the terms of the contract, which allowed Thrasher such sum as he might be compelled to pay to protect his land against the \$1,000 note. The only sum that he paid for that purpose was the balance remaining unpaid upon that note after the price of the Sink place was credited upon it. Deducting \$775 from the amount, \$1,119, paid by Thrasher on July 3, 1900, there would remain \$344, which Thrasher had the right to have credited upon the two notes. Of the principal of the two notes given for the purchase money of the 150 acres of land, there remained unpaid \$375, with interest from the 1st day of November, 1897, to the 3d day of July, 1900—say \$473.19. Deduct the \$344 paid to Mrs. Adams, and there remained, on July 3, 1900, \$129.19, balance upon said notes.

Since the testimony of Thrasher establishes all the facts necessary to enter judgment in this case, this court will reverse the judgment herein, and render such judgment as the district court should have rendered.

It is alleged by the plaintiffs that by agreement among themselves, as the holders of

the said notes, and Hall, any sum which Thrasher might be entitled to as a set-off should be first taken out of the \$200 note, and, if that should not be sufficient, then the balance should be taken out of the interest of J. C. Birkhead, before the interest of W. S. Heard could be appropriated for that purpose. It is undisputed that the notes were given for a part of the purchase money of the land described in the plaintiffs' petition.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be, and the same are hereby, reversed, and judgment is entered that the plaintiffs recover of Hugh Thrasher and J. S. Hall the sum of \$129.19, with 10 per cent. interest from the 3d day of July, 1900, to this date, and 10 per cent. thereon for attorney's fees. It is also ordered that the vendor's lien of the said notes be foreclosed upon the land described in plaintiffs' petition, and that the clerk of the district court of McLennan county issue an order of sale to the proper officer, directing him to sell said land as under execution, and that, after paying the costs of court and the cost of executing the writ, he shall pay out of the balance, if any, the amount of this judgment, and interest, to W. S. Heard, paying whatever may remain to the defendant Hugh Thrasher. It is further ordered that the plaintiffs in error recover from the defendants in error, Hugh Thrasher and J. S. Hall, all costs in all of the courts.

SALTER v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

CRIMINAL LAW—UNLAWFULLY PRACTICING MEDICINE—INDICTMENT NOT NEGATING EXCEPTIONS IN STATUTE.

1. An indictment for unlawfully practicing medicine contrary to act approved February 22, 1901 (Acts 27th Leg. 1901, §§ 8, 13, pp. 14, 15), which fails to show that the defendant was not within the exceptions contained in the act, is defective.

Appeal from Clay County Court; Jas. F. Carter, Judge.

J. M. Salter was convicted of unlawfully practicing medicine, and appeals. Reversed.

W. T. Allen, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of unlawfully practicing medicine, and his punishment assessed at a fine of \$50.

The charging part of the indictment is as follows: "That J. M. Salter, on one hundred successive days thereafter, and on or about the 1st day of April, A. D. 1902, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and

there unlawfully practice for pay as a regular practitioner of medicine, and as such practitioner did visit and prescribe for ten patients, without having obtained or received a certificate from the board of medical examiners for the state of Texas, or the board of eclectic medical examiners for the state of Texas, or the board of homeopathic medical examiners of the state of Texas, and without having such certificate recorded as required by law; and that said defendant had recorded in said county of Clay a diploma since January 1, 1901," etc. Appellant filed a motion to quash the indictment because it does not allege that defendant was not practicing medicine in the state of Texas prior to January 1, 1885, and said indictment does not allege that defendant began the practice of medicine after January 1, 1885, and had not complied with the laws of this state regulating the practice of medicine in force prior to the passage of the act approved February 22, 1901. Section 8, p. 14, of the Acts of the 27th Legislature, 1901, provides: "From and after the passage of this amendment it shall be unlawful for any person to practice medicine, surgery or obstetrics in this state, except: (1) All those who were practicing medicine in Texas prior to January 1st, 1885; (2) all those who began the practice of medicine in this state after the above date who have complied with the laws of this state regulating the practice of medicine, in force prior to the passage of this act;" and all other exceptions in section 8 except the fifth. Section 13, p. 15, of said act, contains the provision "that this act does not apply to persons treating diseases who do not prescribe or give drugs or medicine." These, being exceptions in the act itself, become part and parcel of the offense, and must be negated before there can be a valid indictment under this statute. Therefore we hold that appellant's motion to quash the indictment should have been sustained.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

DOULTON v. STATE

(Court of Criminal Appeals of Texas. March 25, 1903.)

CRIMINAL LAW—MISCONDUCT OF JURY—FAILURE OF DEFENDANT TO TESTIFY—DISCUSSION.

1. Where affidavits show that, after the jury in a criminal prosecution had retired, and before they had agreed on a verdict, they discussed the failure of defendant to testify, their verdict of guilty will be set aside, notwithstanding affidavits of the jurors stating that the discussion did not influence their conclusion.

Appeal from District Court, Delta County; H. C. Connor, Judge.

H. J. Doulton was convicted of false swearing, and appeals. Reversed.

§ 1. See Physicians and Surgeons, vol. 29, Cent. Dig. § 2.

L. L. Wood, Ed. H. Bennett, and Holmes & Sharp, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of false swearing, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant made a motion to quash the indictment on various grounds. We have examined the indictment, and, in our opinion, the grounds are not well taken. The explanatory averments in the latter portion of the indictment sufficiently show the meaning of the instrument set out to which the alleged false oath was made. However, the judgment must be reversed because of the misconduct of the jury. The affidavits show that the failure of defendant to testify was discussed in their retirement, and before they had agreed on a verdict. It is true the jurors all swear that the discussion did not influence them, but the question came up in a way that suggested they considered his failure to testify as a matter of importance. A new trial should have been granted on this account. *Buessing v. State* (Tex. Cr. App.) 63 S. W. 318; *Tate v. State* (Tex. Cr. App.) 42 S. W. 595; *Wilson v. State* (Tex. Cr. App.) 46 S. W. 251; *Thorpe v. State* (Tex. Cr. App.) 50 S. W. 383.

The judgment is reversed, and the cause remanded.

CUBINE v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

GRAND JURY—DISQUALIFICATION OF MEMBERS—MOTION TO QUASH INDICTMENT—DISQUALIFICATION OF TRIAL JURORS—WAIVER—MOTION FOR NEW TRIAL—REFUSAL OF CONTINUANCE—REVIEW—BILL OF EXCEPTIONS—ASSAULT WITH INTENT TO MURDER—AGGRAVATED ASSAULT—INSTRUCTIONS.

1. The constitutional amendment adopted in November, 1902, requiring the payment of poll taxes before the 1st of February, not having a retroactive effect, an indictment returned January 15, 1903, is not invalid because some members of the grand jury had not then paid their poll taxes.

2. The question of the disqualification of grand jurors cannot be raised on a motion to quash an indictment.

3. The disqualification of trial jurors is waived where it is not taken advantage of until motion for a new trial.

4. The refusal of a continuance cannot be reviewed where a proper bill of exceptions has not been reserved.

5. In a prosecution for assault with intent to murder, it appeared that accused fired but one shot, at close range; there being nothing to prevent him from hitting the prosecuting witness. Accused denied that he fired at the witness. *Held*, that it was error to fail to charge on aggravated assault.

Appeal from District Court, Montague County; D. E. Barrett, Judge.

Will Cubine was convicted of assault with intent to murder, and appeals. Reversed.

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 481.

Fooshe & March and W. S. Jameson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction of assault with intent to murder.

Motion was made to quash the indictment because the grand jury presenting it was an illegal body, by reason of the fact that several of its members had not paid their poll taxes before the 1st of January, 1903. In regard to the date of the payment of the poll tax, the amendment to the Constitution fixes the time as the 1st of February, and not the 1st of January. This indictment was presented on January 15th. There was still 16 days of January in which the grand jurors could pay their poll tax, conceding it was necessary under existing legal conditions. This amendment to the Constitution was adopted at the election in November last, and has no retroactive effect. So it could not operate to prohibit citizens from voting at elections occurring prior to February 1, 1903. But in no event was the motion to quash well taken. The disqualification of grand jurors cannot be raised on motion to quash. *Doss v. State*, 28 Tex. App. 506, 13 S. W. 788; *Lienburger v. State* (Tex. Cr. App.) 21 S. W. 603; *Reed v. State*, 1 Tex. App. 1; *Hudson v. State*, 40 Tex. 12. So, from any standpoint, it would not constitute a cause for challenge or ground of motion to quash.

It is also contended that some of the jurors who tried him were disqualified because they had not paid their poll tax, as required by the recently adopted constitutional amendment. This question, however, is raised on motion for new trial, and comes too late. *Sutton v. State*, 31 Tex. Cr. R. 297, 20 S. W. 564; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398; *Lane v. State*, 29 Tex. App. 310, 15 S. W. 827; *Loggins v. State*, 12 Tex. App. 65. The amendment as to voters does not apply to petit jurors, for reasons above indicated, under existing legal status.

The refusal of the court to grant the continuance will not be revised, because proper bill of exceptions was not reserved.

In the motion for new trial it is urged that the court should have charged on aggravated assault and battery. It is a very serious and doubtful question, under the facts, if appellant did shoot at Tally, whether he intended to kill. The firing at Tally is denied by appellant. Appellant fired the shot at close range, and there was but one shot fired at Tally. There was nothing to prevent appellant from shooting him. There was no interference of any sort. It was a serious question, bearing directly on the intent of appellant, and tended strongly to show that the specific intent to kill was wanting.

We are of opinion that a charge on aggravated assault should have been given, and, because it was not, the judgment is reversed, and the cause remanded.

EDDISON v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

INDICTMENT—ERRONEOUS DESIGNATION OF ACCUSED—EFFECT—MOTION TO QUASH—SUGGESTION OF TRUE NAME.

1. It is not a variance in an indictment, subjecting it to a motion to quash, that, after properly designating accused as "R. D. E." in a latter clause it refers to him as the "said R. H. E."

2. A motion to quash an indictment because erroneously designating accused, is properly overruled where his true name is not suggested therein.

Appeal from District Court, Hill County; A. P. McKinnon, Special Judge.

R. H. Eddison was convicted of theft from the person, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for theft from the person, three years in the penitentiary being assessed as the penalty.

The record is without statement of facts or bill of exceptions. Among other things, appellant moved to quash the indictment because of the discrepancy in alleging the name of the accused. In the first part of the indictment his name is set out as "R. D. Eddison." In the latter clause of the indictment it charges the appropriation by the "said R. H. Eddison." The court properly refused to sustain the motion to quash upon this ground. The name having once been properly set out, the subsequent reference to it by using the word "said" sufficiently designates the name as set out in the first instance. It is not a variance that in latter clause of the indictment the middle initial is different from that originally set out. Besides, if appellant was not satisfied with the name given him, it was his duty to suggest to the court one more satisfactory.

The judgment is affirmed.

ALLEN v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

INTOXICATING LIQUORS—PROSECUTION FOR ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.

1. On a prosecution for selling liquor on Sunday, it was error to admit evidence that defendant had made sales on other Sundays after the sale charged in the indictment.

Appeal from Dallas County Court; Ed S. Lauderdale, Judge.

W. D. Allen was convicted of selling liquor on Sunday, and appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the Sunday law, and fined \$20.

The first bill of exceptions complains that while appellant was on the stand, testifying

in his own behalf, and after he had denied the facts upon which the prosecution is predicated, state's counsel, on cross-examination, asked appellant if since the 23d of June, 1901 (the date alleged in the indictment), he had not kept his saloon open for business, and had not sold stuff to different parties. To which appellant objected for the reason that what he did since the indictment would not be relevant evidence in the case on trial against him, and could not possibly throw any light on his guilt or innocence. Whereupon the court overruled said objections, and stated that it made no difference whether it was before or after. Appellant stated, after the objections were overruled, that since said indictment he had sold on Sunday, or, in other words, violated the law, for which he was on trial. Appellant's counsel also objected to the prosecuting attorney asking defendant the following questions: "You are not too good to violate the Sunday law, are you, and you don't claim you are not guilty because you are too good?" Appellant objected because irrelevant, illegal, hurtful, highly prejudicial to defendant, and had its birth in a desire upon the part of counsel for the state in an attempt to belittle defendant, and arouse in the minds of the jury a prejudice against him. To this bill the trial court appends this explanation: "June 10, 1902. This bill presented to me late in afternoon of last day it could be filed, and is disapproved because it is incorrect. Attorney for state did ask defendant if his saloon had not often before and since June 23, 1901, been open for traffic on Sunday, and defendant's attorney objected, and objection was overruled; and defendant answered that it had been open at other times on Sunday. And attorney for state did ask other questions mentioned in bill, and defendant's objection was overruled. And court did use substantially the language used in the bill." As we understand this qualification, it practically concedes appellant's contention as stated in the bill, and under the following cases the testimony would be admissible: *Lynn v. State* (Tex. Cr. App.) 22 S. W. 878; *Dickey v. State* (Tex. Cr. App.) 56 S. W. 627. However, in *Freedman v. State* (Tex. Cr. App.) 38 S. W. 993, and *Long v. State*, 39 Tex. Cr. R. 537, 46 S. W. 821, we held that evidence of other crimes than the one on trial is not admissible unless they form part of the res gestæ, or serve to identify the offense or connect the accused therewith. In *Denton v. State*, 60 S. W. 670, 1 Tex. Ct. Rep. 567, separate and distinct crimes were held inadmissible on the trial of accused for the crime charged in the indictment. We do not think the evidence above detailed was admissible. It was no part of a system, nor did it show system in the commission of the offense; and the fact that appellant may have sold the whisky on other Sundays than the one charged in the indictment would be no evidence of the fact that he sold on the day

alleged in the indictment. The decisions above cited, in so far as they hold to the contrary, are overruled.

For the error discussed, the judgment is reversed, and the cause remanded.

HENDERSON, J. I agree with the majority of the court in the disposition of the case, on the ground that the court should not have permitted evidence of subsequent offenses. See *Smith v. State* (Tex. Cr. App.) 68 S. W. 995; *Ball v. State* (decided at present term) 72 S. W. 384. It was not necessary to discuss or overrule *Clements v. State* (Tex. Cr. App.) 34 S. W. 111. I believe it was competent on cross-examination to ask the defendant how he regarded the Sunday law. *Levine v. State*, 35 Tex. Cr. R. 647, 34 S. W. 969.

NELSON et al. v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

BAIL BOND—SIGNATURE—NECESSITY—FORFEITURE—PLEA—EVIDENCE.

1. A plea of non est factum is not necessary in scire facias on a forfeited bail bond, where the bond is not signed at all.

2. A bail bond not itself signed by the parties thereto is absolutely void, and the fact that they have signed an affidavit which follows the place where they should have signed the bond, and which refers to the bond as having been signed by them, is insufficient.

3. In scire facias on a forfeited bail bond, it is essential that the judgment nisi be introduced in evidence.

Appeal from Dallas County Court; Ed S. Lauderdale, Judge.

Scire facias by the state against Walter Nelson and others. Judgment against defendants, and they appeal. Reversed.

Hudson & Hudson, for appellants. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This is a scire facias case on a forfeited bail bond, and appellants insist the judgment should be reversed because they allege said bond is not signed. The bond set forth in the record is in the usual form of bail bonds. There is a place for signatures at the bottom of the bond, but no signatures appear here, either of the principal or sureties. Following this is the approval of the sheriff, and then follows this affidavit: " * * * This day personally appeared — and — whose names are signed as sureties on the above bond, after being duly sworn, deposes and say, each for himself separately, that they are each of them worth in property subject under the law to execution, the amount for which they each render themselves liable as sureties on said bond, over and above all their separate liabilities." This affidavit is signed by "Walter Nelson. J. A. Hill. D. C. McCord, Jr." There is no plea of non est factum to said bond, and it has been held that, before the

question as to the signatures of the principal and sureties on said bond can be raised, there must be a plea of non est factum, as in civil cases. *Holt v. State*, 20 Tex. App. 271. However, we take it that this plea is required only where the bond is signed somewhere, not where no signature at all appears to the bond. It has been held in a number of cases that if the parties—principal and sureties—sign the bond, if not at the end, where it is proper to be signed, but in the middle, or to any portion of the bond, intending that the same shall be their signatures thereto, this is sufficient. *Fulshear v. Randon*, 18 Tex. 275, 70 Am. Dec. 281; *Price v. State*, 12 Tex. App. 235; *Taylor v. State*, 16 Tex. App. 514. In this particular case the parties do not appear to have signed the bond either at the bottom thereof, or in the body of the bond. So that here there is in fact no signature to the bond, but a signature merely to the affidavit reciting the fact, and referring to their signature to the bond. We hold the signatures to the affidavit were insufficient to bind the parties.

Appellants also insist that this cause should be reversed because the statement of facts fails to show that judgment nisi was introduced in evidence. This has been held to be essential. *Houston v. State*, 13 Tex. App. 560; *McWhorter v. State*, 14 Tex. App. 239; *Hester v. State*, 15 Tex. App. 418; *Baker v. State*, 21 Tex. App. 359, 17 S. W. 256. We have examined the transcript carefully, and the statement of facts fails to show that the judgment nisi was introduced in evidence.

For the errors discussed, the judgment must be reversed, and the cause remanded.

GORDON v. STATE

(Court of Criminal Appeals of Texas. March 18, 1903.)

LOCAL OPTION—GIVING PRESCRIPTIONS.

1. Under Pen. Code 1895, art. 405, not prohibiting the giving of prescriptions in local option territory, other than counties, justice precincts, cities, and towns, it is not an offense to give prescriptions in local option territory consisting of a school district.

Appeal from Parker County Court; D. M. Alexander, Judge.

Dr. W. F. Gordon appeals from a conviction. Reversed.

Martin & Martin, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of giving a prescription in Springtown school district, No. 3, after local option had been put in operation in said school district.

Motion was made to quash the indictment—among other reasons, because article 405, Pen. Code 1895, under which the indictment was framed, does not prohibit and punish the giving of prescriptions in local option ter-

ritory, other than counties, justice precincts, cities, and towns. An inspection of said article sustains this contention. The Legislature has not prohibited the giving of prescriptions in local option territory, other than those mentioned in said article, and until this has been done there can be no offense. Articles 3, 6, Pen. Code 1895.

Because there is no law creating the offense for which appellant was convicted, and none denouncing the punishment against the matter set up in the indictment, the motion to quash should have been sustained; and the judgment is here reversed, and the prosecution dismissed.

HENDERSON, J., absent.

BARNETT v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

RAPE—EVIDENCE—FORMER OFFENSES.

1. On a trial for rape on a girl under the age of consent, the testimony of the prosecutrix was of a positive character, and the defendant was proved to have confessed to the intercourse. *Held*, that proof of prior rapes on prosecuting witness was inadmissible.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

A. J. Barnett was convicted of rape, and appeals. Reversed.

F. E. Johnson and J. B. Warren, for appellant. Mason Cleveland, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of rape on his stepdaughter, a girl under the age of 15 years, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

The rape was alleged to have been committed on Ruthie Walker on or about the 16th day of March, 1902, with her consent. The prosecution and conviction were had on a rape, which the testimony for the state showed was committed on or about the 16th day of March. During the trial, and while the testimony was being developed, the state introduced a number of other rapes shown to have been committed by appellant on prosecutrix; the first rape having been committed some 4 years before, when prosecutrix was only 9 years of age. The details of this offense were gone into, and it was shown to have been done by force, against the will and consent of prosecutrix. This was followed by a number of other rapes and cruel treatment on the part of appellant toward prosecutrix, the details of some of which were gone into. Appellant objected to all this testimony on the ground that it was not connected with the rape in question, and did not tend to solve any issue in the case, but merely served the purpose of prejudicing the jury against him. In *Hamilton's Case*, 38 Tex.

Cr. R. 372, 37 S. W. 431, this character of testimony was held admissible under the facts of that case, and that case appears to have been subsequently followed. *Manning v. State* (Cr. App.) 65 S. W. 920, 3 Tex. Ct. Rep. 566; *Cooksey v. State* (Tex. Cr. App.) 58 S. W. 103. Without discussing the relevancy of the testimony under the peculiar facts of said cases, so far as they conflict with the principle here announced they are overruled, and we here hold that in a case of rape, where the prosecutrix is under the age of consent, such testimony is only admissible where it tends to solve some disputed fact or issue in the case. In other words, we can see no difference, in the introduction of testimony as to other offenses, between a case of rape and any other criminal charge. Indeed, the reason of the rule excluding such testimony would appear to be stronger in a rape case than in any other character of offense, inasmuch as evidence of such extraneous crimes is more calculated to inflame the minds of the jury in a rape case than in any other. With regard to the admission of extraneous crimes in evidence, the rule is stated thus in the authorities: "If the evidence tends to establish the *res gestæ*, or to prove a relative or competent fact or circumstance connecting defendant with the crime charged, or to explain the intent of defendant in connection with the property he is charged with stealing, or to make out his guilt by circumstances, it is competent for the state to adduce evidence of such extraneous crimes." *Kelley v. State*, 31 Tex. Cr. R. 211, 20 S. W. 365, and authorities there cited. We would be understood as holding that in a trial of a case of rape, where prosecutrix is under the age of consent, testimony of former acts of intercourse between the parties is not admissible, unless it has some unmistakable bearing on the case, and tends to solve some issue presented by the state or made by defendant. We have examined the facts of this case, and, in our opinion, the admitted testimony has no particular bearing on any issue in the case. The evidence of the prosecutrix as to the offense alleged to have been committed on the 16th of March, 1902, was of a positive character. And we understand, also, that it was proven by the state that appellant confessed to this act of carnal intercourse with prosecutrix. Of course, appellant entered the plea of not guilty, and this brought in issue the truth of her testimony, in contradiction of the testimony of appellant; but proof of prior offenses between the same parties would be no more admissible here, in order to show the likelihood that the alleged offense was committed, than, in a case where a party is on trial for the theft of a horse, it could be shown that he previously stole another horse from the same party. We would not be understood as holding that the relationship between the parties could not be shown, or that evidence indicating a domination and

control of the will of prosecutrix by appellant might not, under certain circumstances, be adduced. But there is nothing in this case to suggest any reason for departing from the rule; that is, that extraneous offenses should not be introduced in the trial of a case, unless such testimony is pertinent and relevant as tending to shed light upon or solve some disputed issue. In the absence of such showing, the admitted testimony could serve but one purpose; that is, to inflame the minds of the jury against appellant, and enhance his punishment, and so prove hurtful to him. The testimony in this case of other offenses of like character between the same parties, and the details thereof, should not have been admitted. We also hold, in this same connection, that the testimony showing assaults and batteries by appellant on prosecutrix some time prior to the alleged offense was not admissible.

Appellant complains that the court rejected certain testimony offered by him as indicating a conspiracy on the part of his wife and others of the family to send him to the penitentiary. It does not occur to us that the rejected testimony tended to show this, and the court did not err in refusing to admit it.

There are other assignments, but we do not deem it necessary to pass upon them. The judgment is reversed, and the cause remanded.

STANLEY v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

CRIMINAL LAW—EVIDENCE—OPINION—WITNESSES—CROSS-EXAMINATION—IMPEACHMENT—APPEAL—OBJECTIONS TO EVIDENCE—BILL OF EXCEPTIONS—REQUISITES.

1. In a prosecution for abortion, evidence that deceased stated to witness, prior to her death, in defendant's presence, that it was the cotton-root tea that caused her abortion, was inadmissible as a conclusion.

2. The exclusion of a question, asked of a state's witness on cross-examination, as to whether witness, with her husband, had talked with the county attorney in the county jail, offered for the purpose of impeaching the witness, and showing an agreement with the county attorney to dismiss a prosecution against the husband for perjury in consideration of witness' testifying in behalf of the state, cannot be held error where the bill of exceptions does not show what the purport of the conversation was, or that the dismissal of such prosecution would have resulted from the witness' testimony.

Appeal from District Court, Blanco County; Clarence Martin, Judge.

W. P. Stanley was convicted of abortion, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for abortion; two years in the penitentiary assessed as the penalty.

The witness Pehl was permitted to testify

"that deceased, Clementha Stanley, stated before her death, in the presence of himself and of defendant, that it was the cotton-root tea that had caused her abortion." Objection was urged on the ground that it was irrelevant, immaterial, and incompetent to prove or tend to prove that fact, and was but a conclusion of said Clementha Stanley, and was injurious and prejudicial to defendant. The court appends this qualification: "That said statement was made while at her bedside, and while he was attending her, and heard all that deceased said; saying further, 'I told you all you would kill me when you gave it to me.'" This was but the conclusion or opinion of the witness that cotton-root tea was the cause of the abortion. She could not have given this opinion had she been upon the witness stand, and her hearsay statement of opinion could not be introduced. In *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542 (which was a case of abortion, alleged to have been produced by the husband upon the wife), the wife was permitted to testify, in effect, that appellant, in a fit of jealousy, had kicked her on the abdomen, accompanying the act with words, etc.; that nine days subsequently she gave birth to a still-born child, its skull being crushed or mashed in three places; and after the lapse of another nine days another was born, and that decomposition had so far set in that its sex was not distinguishable. She was further permitted to testify, over objection, that the abortion was the result of the kick described. The court reversed the judgment because of the admission of this testimony, and in doing so said: "It is sometimes difficult to fix the point at which the competency of a nonexpert witness to assign a certain cause to a named result ends. Assuredly, if one receive a blow which leaves an immediate marked impress that is appreciable by the sense of him who receives it, or that is in a like manner made sensible to bystanders, neither the injured party nor the onlooker need be an expert to qualify him to testify that the injury received was the result of the blow given. But when a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, then the nonexpert witness may only state physical facts and symptoms experienced, leaving the conclusion from them to the jury trying the cause. We are of opinion that the testimony was inadmissible, it coming within the last-named class, and the witness not having been qualified as an expert." See, also, *Poyner v. State*, 40 Tex. Cr. R. 640, 51 S. W. 376. Hence we say, if Clementha Stanley could not have testified as a witness to the conclusion, then her hearsay conclusion or opinion could not be used.

There are several bills of exception reserved to other rulings of the court, some of which we deem unnecessary to notice. The third bill was reserved to the refusal of the court to permit defendant to ask Julia Pehl,

state's witness, on cross-examination, whether it was not true that said witness, with her husband, Joe Pehl, also a witness for the state, had talked with the county attorney in the county jail, it having been offered for the purpose of impeaching the witness; and, further to show that said witness was testifying in behalf of the state under agreement and in the hope that the prosecution on a charge of perjury against her husband might and would in that event be dismissed. It will be noticed, as stated in the qualification of the judge, that the question was very general, and only inquired as to whether a conversation occurred between the parties and the county attorney at the jail. The court states in this qualification "that counsel were informed they could ask witness as to any conversation had with any person at any time or place, but that the general question, 'Did you talk with the county attorney?' would be excluded." Of course, if Pehl had an agreement with the county attorney that the perjury case would be dismissed against him in case he testified against appellant, that fact could be proved. But the bill does not show what the purport of the conversation was, nor that this would have been the result. The facts are not stated, but simply that he asked the question. Pehl being a witness for the state, it was permissible to attack him, by showing that he had entered into an agreement with the state to rid himself of the pending prosecution against himself.

We have examined the other bills, and do not believe they present any error.

Because of the admission of the testimony of the witness Pehl as to the statement of Clementha Stanley, the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

RAPE—EVIDENCE—REPEATED OFFENSES—TESTIMONY OF ACCUSED—USE ON RETRIAL—STENOGRAPHER'S MINUTES—AGE OF CONSENT—PROOF BY PHYSICIAN'S BOOKS—KNOWLEDGE OF DEFENDANT—CRIMINAL INTENT—MITIGATION—INTENDED MARRIAGE—ACCOMPLICE TESTIMONY.

1. In a prosecution for rape, evidence of acts of intercourse committed with the prosecutrix subsequent to the offense alleged in the indictment is inadmissible in corroboration, or to convict accused on general principles.

2. Where accused has been sworn on trial as a witness in his own behalf, his testimony can be used by the state on a retrial, although accused does not testify on such trial.

3. In a criminal prosecution, it is competent to prove on a retrial facts testified to on the former trial, by the stenographer's notes taken at such former trial.

4. In a prosecution for rape, a book of original entry, kept by a family physician, found in the possession of the physician's son after his father's death, stating the date and fees char-

ged by the physician for the delivery of prosecutrix, was admissible on the issue of her age.

5. In a prosecution for rape, evidence that prosecutrix's mother kept in the house with her an unchaste woman was inadmissible.

6. It is no defense to a prosecution for rape on a child under the age of consent that defendant believed her to be over such age.

7. An instruction that, to constitute the crime of rape, it was necessary that defendant had the criminal intent to violate the law and to commit the crime of rape, was properly refused.

8. It is no defense or mitigation of the crime of rape that accused intended to procure a divorce from his wife and marry prosecutrix.

9. In a prosecution for rape, it was error to admit a conversation relative to marriage, had between prosecutrix and defendant subsequent to the commission of the alleged crime.

10. Prosecutrix, under the age of consent, who consents to intercourse, is not an accomplice to the crime of rape.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Jack Smith was convicted of rape, and appeals. Reversed.

Rice & Bartlett, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 37 years. Upon a former appeal the judgment was reversed, and, for a statement of the facts, see *Smith v. State*, 68 S. W. 995.

The first bill of exceptions complains of the following matter: Over the objections of the defendant, the state was permitted to prove by Elma Walker, prosecutrix, the following: "I left home because defendant asked me, while my mother was gone, if I would leave home with him, and I told him I would. There was a gate close to our house, and he told me if he motioned to me to go to the gate, it meant for me to go at night, and he would come for me and we would go off. The evening of the day I left home he was up at the store, and I motioned to him if I must go to the gate, and he said 'Yes'; and after that he wrote me a note, and sent it to the house by a colored man, but the colored man didn't get to give it to me. And so I went down to the gate that night after my mother and father had gone to bed, and when I got there no one was there. While I was at the gate a negro passed along the road, and I asked him if defendant was up at the store, and he said he was. I told him to tell defendant to come down there. Defendant afterwards came, and I told him that I had left home. He says, 'Well, come on, and we will go down the road a piece and wait for Curt York and Mr. Fuller.' We did not stay at this gate any time after defendant came to me, but went from there to another gate, north of town, and stayed there until close to daylight in the morning. He had intercourse with me one time that night. From there we went down to old Aunt Lina Coleman's, a negro woman living in this county, and stayed there about five days. I left there with defendant and George Fuller.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1239.

While at Lina Coleman's, defendant had intercourse with me one time. I knew George Fuller by sight at the time we went to Lina Coleman's. I had seen him pass our house several times. Before I left home the defendant had not said anything to me about George Fuller. Before I left home, defendant told me that we could wait until he got a divorce from his wife, and then he and I would marry. These acts of intercourse occurred at the section house and in the woods and at Lina Coleman's, all in Falls county. At the time I was fourteen years of age. I consented to these acts of intercourse." "To all of which evidence defendant objected because it appeared that said transactions were subsequent to the alleged offense in the indictment, and could and did not tend to elucidate same or throw any light thereon, and was calculated to prejudice the minds of the jury against defendant, and was irrelevant and immaterial to any issue in the case, either collateral or direct." It is not permissible to prove independent and distinct crimes to the one on trial, unless they form part of a system or part of the *res gestæ*, or to identify the accused. Proof of such other crimes is not admissible, except as stated, under the rules of evidence in this state, and the court was in error in so holding. And in so far as the cases of *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431; *Callison v. State*, 37 Tex. Cr. R. 216, 39 S. W. 300; *Hanks v. State* (Tex. Cr. App.) 38 S. W. 173; *Cooksey v. State* (Tex. Cr. App.) 58 S. W. 103—announce a contrary rule, the same are hereby overruled.

The ninth bill of exceptions complains "that, after the testimony was all in, the state made its election on which act it would rely upon for a conviction, and did elect to ask a conviction for the alleged acts of carnal intercourse at the section house before the prosecutrix left home; that after prosecutrix left home she was permitted by the court to testify as set out in the above bill as to other acts of intercourse with defendant, and conversations and conduct with him, and after such election the court failed and refused to instruct the jury to disregard and not consider the testimony of prosecutrix as to such subsequent acts and transactions." The court should have instructed the jury to disregard this testimony, since, as stated above, the testimony was not admissible for any purpose. However, we are apprised of the fact that we held in *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431, *Cooksey v. State*, 58 S. W. 103, and perhaps other cases, that such testimony should not be limited, but was admissible to show the probability that defendant committed the offense as charged, in corroboration of the testimony of the prosecutrix. However, we were in error in so holding, inasmuch as said testimony is not admissible for the purpose of corroboration; and where the crimes are extraneous, not connected with, entirely independent of, and distinct

from the one on trial, they can shed no light on the trial of accused, and its sole purpose would be to convict accused on general principles—that is, to show that accused was guilty of the crime of rape on trial because he had previously committed other rapes. It could not be corroborative of the prosecutrix for her to testify to one rape, and then corroborate this fact by testifying to another rape. There is no rule of law supporting the proposition that a witness can corroborate herself by swearing to one fact, and then swearing to another fact, and insisting that such other fact was corroborative of the previous statement.

By the second bill it is made to appear: "The state introduced J. W. Spivey, who testified he was a stenographer and took down correctly the testimony of defendant, Jack Smith, while on the witness stand at the former trial; that said stenographic reports, which the state offered as evidence, showed that, upon cross-examination of defendant, he testified (reading from said report): 'I don't remember when was the first time I had intercourse with Elma. It was a short while before we went off, but I don't remember how long. I was going along the road, and we met. I don't remember whether that was before or after her mother had left to go to Bosque county. I had intercourse several times with her after that at the section house. I don't know that I was dividing my favors between her and Emma York, but sometimes I would take one of them, and sometimes another. This did not continue up to the time I left the county, because after her mother came back she was here some bit before we left, and I did not talk to her after her mother came back for some time. The first time I spoke to her after her mother came back was when I met her at the gate the night she left home. I don't recollect the date when we first made arrangements to have some one marry the girl, but, after her mother came back from Bosque county and tried to make the girl indict me, I asked my nephew to take her and marry her, and he would not do it. The reason he would not do it was because he was not twenty-one, and he could not get his own license. I met George Fuller in Gurley. I don't know how long he had been living there—only a short time. I explained to Fuller that Mrs. Walker was trying to get the girl to indict me for having intercourse with her, and Fuller agreed that he would marry her. I did not pay him anything.' To all of which testimony defendant then and there objected because the defendant at the time of giving such testimony so reproduced was under arrest, and he had not been warned before the giving of same that it could be used against him." This objection is not tenable. After defendant is placed upon the stand he becomes a witness, and after being sworn, if he testifies, his testimony can subsequently be used by the state, although on the sub-

sequent trial he does not testify. However, we would suggest that upon another trial the court should admit none of said testimony except that portion which details the act of intercourse for which appellant is then on trial.

Appellant further objected because it was incompetent to prove any fact by stenographer's report of evidence taken on the former trial. The court adds this qualification to the bill: "Upon a former trial defendant, Jack Smith, testified as a witness in his own behalf, which testimony was then and there taken down by J. W. Spivey, a sworn stenographer, and it was this stenographic report which the state offered in evidence, and to the admission of which defendant objected; he having failed to testify on this trial." In our opinion, this testimony was admissible. *Stringfellow v. State*, 61 S. W. 719, 2 Tex. Ct. Rep. 232.

The third bill complains that the state was permitted to introduce F. L. York, who testified: That his father was a physician, and practiced in the family of C. W. Walker, the father of Elma Walker. Witness then produced a book in which he said his father kept his accounts as a physician, and which contained an account against C. W. Walker, which was in the handwriting of witness' father. That witness had had the book in his possession since his father's death, and that it had undergone no change. That Dr. York did not keep any other book, save and except this one, except he kept a small account book, and sometimes he drew from this book, which witness exhibited, any account he wanted to put in his pocket and collect. He also kept a memorandum book that he would note these matters in—such matters as the account against C. W. Walker—and would take that and put it in the book before witness. "This small book was a book that he carried with him all the time, and from it made these entries in the book which I have, I suppose. I don't know whether my father always entered his charges in the pocket memorandum book that he carried all the time, and afterwards transferred them to the book which I now have, but he had such a book in his pocket all the time. I don't know where the pocket memorandum book is, and never made any search for it." On cross-examination by defendant's counsel in reference to such book and account, the following took place: "Q. Do you know whether your father had any other book or not—kept any other book—of your own knowledge? A. He kept a small account book, and sometimes he would draw from this book here any account that he wanted to collect. Q. Do you know whether or not he kept any memorandum book in which he would note these matters? A. Yes, sir; and he would take that and put it on his book here. Q. by the Court: I understand from the witness that this is a book of account that his father kept at home of his business transac-

tions? Witness: A. Yes, sir. Q. And the other is a memorandum book that he carried with him all the time? A. Yes, sir. Q. And from that he made these entries, as you suppose? A. Yes, sir. Q. by Defendant's Counsel: As I understand you, the memorandum was the first entry book—the memorandum book that he carried with him and took entries in—and they were afterwards transferred to this book here? A. Well, I don't know whether he did that all the time or not, but he had such a book in his pocket all the time. Q. Do you know whether or not these entries in this book were made at the time of the transactions, or made subsequent to that time? A. No, sir; I don't know anything about that. Q. by the state: Where is the little memorandum book? A. I don't know, sir. Q. by defendant: You never looked for it, did you? A. I don't know that I ever did." The state then offered in evidence the following account, taken from page 34 of the book which the witness had, as follows:

"Walker, Columbus, Dr. to I. S. York.
Nov. 13th, 1886. To visit and deliver-
ing girl baby..... \$10 00
Sept. 1st, 1888. To visit and deliver-
ing girl baby..... 10 00"

Counsel for the state stated that it was offered on the question of age. Appellant objected to the same on the ground that it was an account made by a party not connected with the family, except as family physician, and was not a record required to be kept; that the party making the record was not a member of the family, and it was a collateral matter; that the book from which the account was proposed to be read was not the book of original entry, and the book of original entry was not sufficiently accounted for, nor was it shown that the entries proposed to be read were made at the time of the transactions. Which objections were overruled. The court appends the following qualification to the bill: "The evidence showed that the book offered in evidence was the only book in which said account was ever entered. The witness York testified: That he did not know anything about what was in the memorandum book usually carried by his father in his lifetime. The book in evidence was the only record his deceased father had, showing any account against C. W. Walker, and that said book was his father's regular book of accounts. That his father had been dead several years." As we understand this explanation, it contradicts in some respects the bill, and to that extent must control. The explanation shows that this book in question was a book of original entry kept by a physician. It shows that the same was found in the possession of the son of the physician after the father's death. Mr. Greenleaf, in his excellent work on Evidence, has decided this question against appellant. He says, "Where the question was upon the precise day of a person's birth, the account book of

the surgeon who attended his mother on that occasion, and in which his professional services and fees were charged, was held admissible in proof of the day of the birth." To support the text a great array of authorities are cited, which hold that the fact that the book was kept by a third party would not render the same inadmissible.

The fourth bill insists that the court erred in not permitting appellant to show that Emma York, who lived with prosecutrix's mother, was known by said mother to have a child, and yet she was an unmarried woman. There was no error in this ruling, because, if the mother of the prosecutrix saw fit to bring to her home persons who were unchaste, it would not be any excuse or legal justification to appellant for raping prosecutrix.

Appellant complains of the following charge given by the court on the request of state's counsel: "The fact that one accused of the crime of rape believes the female to be over the age of fifteen years will not constitute any defense for the offense, if in fact the female be under the age of fifteen years." This charge is correct. *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431; *Manning v. State* (Tex. Cr. App.) 65 S. W. 920.

Appellant complains of the refusal of the court to give the following charge: "Before you can convict defendant, you must believe he had the criminal intent to commit the crime of rape; and if, in passing upon the facts and circumstances in evidence, you are not convinced beyond a reasonable doubt that defendant had the criminal intent to violate the law and commit the crime of rape (that is, commit the crime of rape), you will acquit him, or, if you have a reasonable doubt thereof, you will acquit him." There was no error in the refusal of the court to give this charge. We think the court, in his charge, gave the law applicable to the facts adduced, and it is in all respects a correct charge.

He also complains of the court's refusal to give the following charge: "You are charged that, if you believe from the evidence that at the time of the alleged acts of criminal intimacy between defendant and Elma Walker, the same was participated by and between them with the understanding that defendant should procure a divorce and marry said Elma Walker, and for this reason, and no other, then you will take this fact, if you find such to be the case, in mitigation of whatever penalty you may see fit to impose, provided you should determine to find him guilty under all the facts and circumstances in evidence." The fact that defendant intended to get a divorce from his wife and marry prosecutrix would be no defense to this crime of rape, and the court did not err in refusing this requested charge.

Bill No. 8 complains "that the court permitted prosecutrix to testify to her leaving home, and about one Fuller going to Waco to get a license," etc. Appellant's objection

to said evidence was because it appeared that such conversation occurred subsequent to the acts charged in the indictment, and were irrelevant and immaterial, and could tend to throw no light on the transaction. The conversation alluded to was one with the defendant, and the court erred in admitting it.

The fourteenth ground of the motion for new trial is that the court erred in refusing appellant's special charge on the subject of accomplice testimony, as applied to prosecutrix and her mother. This was not error. Prosecutrix is not an accomplice, nor is her mother, under the evidence in this case. *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431; *Danley v. State* (decided at the present term) 71 S. W. 958.

For the errors discussed, the judgment is reversed and the cause remanded.

HENDERSON, J. I agree with the majority of the court in the disposition of the case, but do not deem it necessary to discuss the *Hamilton*, *Callison*, *Hanks*, and *Cooksey* Cases. I think the opinion on the former appeal in this case (*Smith v. State*, 68 S. W. 995) disposes of the question decided in this case.

McANALLY v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

CRIMINAL LAW—BURGLARY—RES GESTÆ—EX-
TRANEOUS CRIMES—EVIDENCE—CONSTITUTION—
RIGHT TO BE CONFRONTED WITH WIT-
NESSES.

1. The fact that defendant was charged with burglarizing a store of the prosecuting witness does not render admissible evidence that he burglarized a store of the witness in another town the preceding night.

2. In a prosecution for burglary, a witness was permitted to testify that he found a coat, some pistols, razors, and some wrapping paper in a lumber yard about a week after defendant was arrested and placed in jail. The pistols were those taken from the burglarized house, and were wrapped in a coat identified as that worn by defendant the day before the burglary. When arrested, some 30 minutes after the burglary, defendant had on no coat, and was in possession of some of the stolen goods. Held, that such evidence was admissible to support the theory of the state that defendant wrapped the goods found in his coat, and hid them in the lumber yard.

3. In a prosecution for burglary, the fact that some of the stolen goods were not found until a week after the burglary affects only the probative force of evidence as to such finding.

4. In a prosecution for burglary, evidence as to the finding of some of the stolen goods is not rendered inadmissible by the fact that they were found while defendant was in jail.

5. In a prosecution for burglary, some razors found with defendant's coat, and bearing a certain brand, were properly admitted in evidence, where the clerks of the burglarized store testified that they carried razors with that brand in stock in their store in another town, which store was burglarized the preceding night, although they could not say whether or not they had lost any, owing to the size of the stock.

6. In a prosecution for burglary, a witness was properly permitted to testify that he arrested one N. some 10 or 15 minutes after the

arrest of defendant, and took certain articles from him, where defendant was arrested about 50 minutes after the burglary, and the articles taken from N. were identified as coming from the burglarized house.

7. Where defendant proved the statement of his deceased mother as to his age, and the state contradicted it by offering in evidence a school census containing a record of the ages of the children of defendant's father, who testified that the signature to the record was that of his deceased wife, it was not in violation of that clause of the state constitution guarantying to defendant the right to be confronted with the witnesses against him.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Fred McAnally was convicted of burglary, and appeals. Reversed.

Thompson & Payne, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant complains in the second bill that the state was permitted, over his objections, to exhibit and show to the jury certain wrapping paper, which was not used in the store alleged to have been burglarized, and did not belong to said house, and had not been missed out of said house, "to which action of the court permitting said evidence, defendant then and there promptly excepted, for the reasons that same was immaterial, irrelevant, and tended to, and did, prejudice the defendant's case in the mind of the jury." We do not see any error in the action of the court as presented by this bill.

The third bill of exceptions complains of the following matter: "H. B. Sones was permitted to testify, over appellant's objections, that one certain knife found on the person of defendant at the time he was arrested had been owned by his hardware firm, in the town of Dublin, and that he had not sold same to defendant, and that one certain target gun exhibited to witness was the same make of guns kept by him in Dublin; also that certain cartridges were like cartridges kept by his house, and that he had no recollection of selling same to defendant." Defendant excepted, because same, was not shown to have been connected with defendant, except the knife, and that none of said articles were claimed to have been taken from the alleged burglarized house, or was in any way connected with the house, or alleged breaking of same; that same was too remote, and did not tend to throw any light on this transaction, was irrelevant, immaterial, and tended to, and did, prejudice the jury against defendant. The court appends the following explanation: "That defendant had testified, as a witness for himself, that he got said knife and gun from a man in Ft. Worth who was running a gunshop and hardware store, and this Sones' evidence was in

rebuttal of defendant's testimony; and further it appeared that the Dublin Higginbotham house had been burglarized on Friday night, and the gun, knife, and other things taken therefrom, and on the next night said company's house in Stephenville was burglarized, and defendant lived in Dublin, and left there on the 12:45 a. m. train Friday night, and came to Stephenville, a distance of 14 miles, and the burglary for which he was on trial was committed at Stephenville Saturday night following." The writer apprehends that the learned trial judge admitted this testimony under the authority of *Hamilton v. State* (Tex. Cr. App.) 34 S. W. 280; *Felder v. State* (Tex. Cr. App.) 49 S. W. 376; *Hayes v. State*, 36 Tex. Cr. R. 146, 35 S. W. 983, and *Kelley v. State*, 31 Tex. Cr. R. 211, 20 S. W. 365; and, in the opinion of the writer, these cases should be overruled, in view of the disposition of this case. The fact that appellant burglarized the Dublin store of prosecuting witness would not render admissible testimony that he burglarized their Stephenville store on the succeeding night. It does not tend to prove the offense on trial, for appellant may be innocent of one and guilty of the other. He may be guilty of the one on trial, and innocent of the previous burglary. When such extraneous crimes do not go to show intent, part of the *res gestæ*, or serve to identify the defendant with the crime on trial in some way, they should be rejected and not admitted. If appellant burglarized the house on trial, it is a distinct, substantive crime. If he burglarized the Stephenville store on the night succeeding, this would be a distinct and substantive crime, for which he is amenable to the law. Accused should be tried upon the merits of each case, and criminative facts tending to prove one case are not admissible in the other. This case, in many of its aspects, is similar to that of *Denton v. State* (Cr. App.) 60 S. W. 670, 1 Tex. Ct. Rep. 567, which is referred to for a further discussion of the matter. It follows, therefore, that the court erred in admitting this testimony.

The fourth bill of exceptions complains of the following: "While the witness Dick Wright was on the stand, he was permitted to testify that he found a coat and some pistols and three razors and wrapping paper in the Hardin lumber yard about one week after defendant was arrested and placed in jail. Defendant excepted to this, because defendant had been in jail for one week prior to the time said articles were found, and same were not identified as articles taken from the store alleged to have been burglarized; that it was irrelevant and immaterial, and prejudiced defendant with the jury." The court appends the following explanation to the bill: "The pistols found were those taken from the burglarized house, and were wrapped in a coat, and was identified as the coat defendant had on on the Saturday morning before the burglary on that night, and defend-

ant, when arrested, some thirty minutes after the burglary, had on no coat, but was in possession of some goods that were taken out of the burglarized store; the theory of the state being that defendant hid the goods found wrapped in the coat under a block of shingles in the lumber yard, and that they were not found until a week later." This explanation of the court renders the testimony clearly admissible. The fact that the goods were not found until a week after the burglary would only affect the probative force of the testimony, and not to its admissibility. The fact that appellant was in jail would not, under any circumstances, render the testimony inadmissible.

Over the objections of appellant, the state offered in evidence a coat, wrapping paper, two razors, two boxes of cartridges, two pocketknives, pieces of money, some checks, and a key. Appellant objected because none of said articles were identified as articles taken from said house at the time of the alleged burglary, and none, except the money, key, checks, and pistols, were ever claimed by the injured party to have been in said burglarized store; because said coat, pistols, cartridges, paper, and razors were in no way connected with defendant, were found a week after defendant was arrested and placed in jail, and it was too remote in point of time to throw any light on the transaction; was irrelevant, immaterial, and tended to prejudice the jury against defendant. The court appends the following explanation to this bill: "Approved, with the explanation attached to the fourth bill, and, further, that the razors were branded, 'The Higginbotham Razor,' and the clerks testify that they carried in stock that razor in the Stephenville house, but could not say whether or not they had lost any razors, as they had quite a lot in stock." We think this testimony was admissible. However, in view of another trial, we would suggest that, if any of these articles were stolen from any other house than the one appellant was on trial for burglarizing, then, under the authority of the Denton Case, *supra*, such testimony would be inadmissible. However, we understand the rule to be that the mere fact that the owner cannot positively identify the articles, if they correspond with articles he had handled, would be a circumstance to go to the jury; and if they believed from the evidence that he did steal these articles, as well as those thoroughly identified, the same would be proper to be considered by them.

In the sixth bill of exceptions, appellant complains that Will Fulkerson was permitted to testify: "I arrested Ulpin Norwood some ten or fifteen minutes after the arrest of defendant. When I arrested him he was standing in front of the Balkeney corner, counting some money. I asked him, 'What are you doing?' and he replied, 'I am counting my money.' I took the money and checks from him, and told him I would arrest him; and

then took him on to jail. I found on him a knife, razor, some trip checks, and some small pieces of money, which I turned over to the sheriff, and which I recognized as the same exhibited." To which appellant objected because defendant was not present, and could not be bound by the acts and declarations of Ulpin Norwood not in his (defendant's) presence and hearing. The court appends the following explanation: "That Norwood was arrested about thirty minutes after the house was burglarized, and within five minutes after defendant was arrested, and the articles taken from Norwood were identified as coming from the burglarized house." This bill shows that Norwood was arrested within 10 or 15 minutes after the arrest of appellant. However, it does not show that appellant and Norwood were not principals in the commission of the crime, or that the evidence does not indicate that they were not joint principals in the commission of the burglary. If they were joint principals, or if they jointly committed the burglary, or if the circumstances were such as authorized this conclusion, then property found in the possession of Norwood which should be identified by witness as property taken from the burglarized house would be admissible against defendant, although he was not present and knew nothing of the fact of said stolen property being found in the possession of Norwood. While it is an established rule that the acts, conduct, and declarations of one co-conspirator subsequent to the consummation of the conspiracy are inadmissible as evidence against another conspirator, yet this rule cannot be extended so as to exclude evidence of the subsequent finding of the fruits of the crime in the possession of one of the co-conspirators, whose complicity in the perpetration of the crime has been fully established. Under this rule, it is not competent for the state to prove that 10 days subsequent to the robbery a part of the fruits of the robbery were found in the possession of defendant's co-conspirator. *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Pierson v. State*, 18 Tex. App. 524; *Pace v. State* (Tex. Cr. App.) 20 S. W. 762; *Foster v. State*, 32 Tex. Cr. R. 39, 22 S. W. 21; *Conde v. State*, 33 Tex. Cr. R. 10, 24 S. W. 415. However, the last-cited case on this question was overruled in *Conde's Case*, 35 Tex. Cr. R. 98, 34 S. W. 286, 60 Am. St. Rep. 22; but we now hold that the last decision is not in consonance with the established rule in this matter, and to the extent that *Conde's Case*, 35 Tex. Cr. R. 98, 34 S. W. 286, 60 Am. St. Rep. 22, varies from the other authorities cited, it is hereby overruled.

The seventh bill complains that the state was permitted to offer in evidence "the record of the school census of the town of Dublin, and that page of same purporting to be the record of the ages of the children of defendant's father, to which defendant except-

ed because said record was not made by any person present, was the declaration of witness not before defendant, and was in violation of that clause of the state Constitution and the statute guarantying to defendant the right to be confronted with the witnesses against him." This bill is approved, with the following explanation by the court: "Witness McAnally, defendant's father, testified that defendant's mother was dead, but that some two years ago she had told him defendant was fourteen years old; that witness did not know defendant's exact age, and on cross-examination the district attorney presented the witness with the school census for the year 1901, and the witness stated that, in his best judgment, his wife signed the statement; that he had often seen her write; and that it was her signature to the statement. The court admitted this statement of the mother in rebuttal of said witness' statement as to what the mother said the defendant's age was. That is, the defendant having proved statement of the mother as to age, the state was permitted to offer one on the same point which tended to contradict it." We think the testimony, under the explanation of the court, was admissible.

We do not deem it necessary to review the other errors assigned by appellant. But for the reasons indicated, the judgment is reversed, and the cause remanded.

DAVIDSON, P. J., and HENDERSON, J. We agree to the result reached, but do not agree that the cases of *Hamilton v. State*, *Fielder v. State*, *Hayes v. State*, and *Kelley v. State* should be overruled. This case is not analogous to those cases. The *Kelley* Case lays down the rule recognized by all the authorities as the correct one.

LEE v. STATE.

(Court of Criminal Appeals of Texas. March 26, 1903.)

VIOLATION OF LOCAL OPTION LAW—EVIDENCE OF PRIOR PROSECUTION—ADMISSIBILITY—IMPEACHMENT OF WITNESS.

1. On a prosecution for violation of the local option law, it was error to allow the state to prove that, six or eight months prior, defendant had pleaded guilty to a similar offense.

2. Where a witness for the state, who had admitted that he was being confined in jail on criminal charges, refused to answer as to the nature of such charges, the indictment against him was admissible for the purpose of attacking his credibility.

Appeal from Fannin County Court; W. A. Evans, Judge.

Toney Lee was convicted of violating the local option law, and appeals. Reversed.

Jas. H. Lyday, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punish-

ment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The state was permitted to prove by defendant, on cross-examination, over his objections, that six or eight months prior to the institution of this prosecution he (defendant) was indicted for selling, in violation of the local option law, a drink called "Waukesha"; that he pleaded guilty in one case, and was fined and sent to jail for 20 days. Appellant objected to said testimony because the same in no way tended to prove the charge for which he was on trial, that the same would prejudice his case, and that the same was a separate and distinct crime. These objections are well taken. *Johnson v. State* (Tex. Cr. App.) 62 S. W. 756; *Denton v. State*, 70 S. W. 217, 1 Tex. Ct. Rep. 567; *Walker v. State* (Tex. Cr. App.) 72 S. W. 997; and *McAnally v. State* (just decided) 73 S. W. 404. In *Ware v. State*, 36 Tex. Cr. R. 599, 38 S. W. 198, we used this language: "Such evidence was not introduced with reference to the identity of this transaction, or with reference to the intent of defendant in committing the burglary in this case, or as developing the *res gestæ* of this transaction. They may or may not have been contemporaneous crimes, but, when contemporaneous crimes are admitted for the various purposes for which they may be used, it means that character of contemporaneous crimes that sheds some light on the transaction then under discussion. The defendant may have committed the burglary, and stole the property of other people. He may have stolen Mr. Haege's pig, or Mrs. Ewing's cup, or Mr. Jackson's hay, but they are not shown to have had any connection with or to shed any light upon the question that was then being tried by the jury." And so with this transaction. The fact that appellant had previously been convicted and paid a fine for selling Waukesha, beer, or other intoxicants, would not be evidence of his guilt of the charge now on trial.

The second bill complains that, while the witness "Charley Oldham was being cross-examined by defendant, he admitted that he was at that time confined in the Fannin county jail on three criminal charges pending in said court, and, on being asked the nature of the charges, refused to testify, and would and did not testify as to the nature of said charges against him, whereupon defendant offered to introduce the clerk of said county court, to identify the record of said charges, and offered to read in evidence the information in each of said cases, charging said Oldham with theft, for the purpose of attacking his credibility as a witness in said case, and for the purpose of allowing the jury to consider it in weighing the credibility of said witness, and for no other purpose. But the court excluded said testimony." In *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428, we held it was competent to introduce evidence of the fact that appellant had been in the

penitentiary for a crime, for the purpose of discrediting him. This case overrules *State v. Ezell*, 41 Tex. 35, announcing the contrary doctrine. In *Woodson v. State*, 24 Tex. App. 162, 6 S. W. 184, the *Lights Case* was reaffirmed. In *Carroll v. State*, 32 Tex. Cr. R. 434, 24 S. W. 100, 40 Am. St. Rep. 786, both of said cases are quoted with approval; the court stating (quoting from *Real v. People*) "that a witness on cross-examination may be asked whether he has been in jail, penitentiary, or other place that would tend to impair his credit," and whether he has been convicted, or whether he has had a charge preferred against him, and that such inquiry may be made even if the party is out on bond. The court states: "This character of cross-examination is permitted upon the theory that, where a man's life or liberty depends upon the testimony of another, it is of the highest importance that they whom the law makes the exclusive judges of the facts and the credibility of the witnesses should know how far the witness is to be trusted." The rule that a witness may be impeached by asking him if he has been convicted or charged with a crime that disgraces him, such as theft, was reaffirmed in the case of *Combs v. State* (Tex. Cr. App.) 49 S. W. 585. And see, also, *Ware v. State*, 36 Tex. Cr. R. 599, 38 S. W. 198; *Tippett v. State*, 37 Tex. Cr. R. 186, 39 S. W. 120; *Payne v. State*, 40 Tex. Cr. R. 290, 50 S. W. 363; *Bruce v. State*, 39 Tex. Cr. R. 27, 44 S. W. 852. But in *Brittain v. State*, 36 Tex. Cr. R. 406, 37 S. W. 758, it was held that the court will permit an investigation as to other cases imputing moral turpitude of a defendant witness, only for the purpose of affecting the credit of such witness; they cannot be permitted for the purpose of laying a predicate to impeach by showing contradictory statements; and, where the state is permitted to ask a defendant on cross-examination if he is under indictment for other crimes or misdemeanors, his answer is conclusive, and, if he answers that he does not know, it is error to permit the introduction in evidence of the indictment charging him with such other crimes. We understand the rule laid down in the books and authorities above cited to be that the witness can be compelled to answer that he has been convicted or indicted for a crime imputing moral turpitude, if such is the fact, or the indictment or record of conviction can be introduced to attack his credibility. In other words, the witness can be attacked as well by one method as the other. The right to ask the question and elicit an answer carries with it the right to force an answer. We are not unmindful of the fact that this is a collateral matter, but it is not that character of collateral attack that makes the witness' obstinacy preclude an answer. Therefore we hold that the learned judge erred in refusing to force the witness to answer the question, and also erred in refusing to permit the introduction of

the indictment showing prosecuting witness Oldham was indicted for theft.

For the errors discussed, the judgment is reversed and the cause remanded.

HENDERSON, J. I agree with the majority of the court as to a disposition of the case, but do not agree to overruling *Brittain's Case*, 36 Tex. Cr. R. 406, 37 S. W. 758. That was a unanimous opinion, and, though it is not in harmony with some prior decisions, yet I believe it accords with sound legal principle. As discussed in that case, it is a rule of law that a witness may be discredited by showing on his cross-examination that he had been previously charged with some felony or misdemeanor imputing moral turpitude. I apprehend it will not be contended that this evidence is not purely on a collateral issue; that is, the testimony simply goes to the credit of the witness, and, while he may be cross-examined as to crimes with which he may have been charged, if he denies the imputation he cannot then be contradicted. Why? Because the matter is collateral. See authorities cited in *Brittain's Case*, supra. And in addition, see *Jackson v. State*, 33 Tex. Cr. R. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30; *Conway v. State*, 33 Tex. Cr. R. 327, 26 S. W. 401. Under these authorities, in cross-examination a witness may be asked a question, the answer to which, if given in the affirmative, may tend to disgrace him, as showing that he had been formerly charged with crime, had been in jail, etc. But if he deny this, the state must be content with his answer, because, the issue being purely collateral, it is not permissible to introduce other testimony to impeach the witness. This, as I understand, is the general doctrine, and I see no reason for an exception to it as to this character of collateral testimony.

STAACKE BROS. v. WALKER & CHILCOAT.

(Court of Civil Appeals of Texas. March 25, 1903.)

ACTION AGAINST PARTNERSHIP—SERVICE ON ONE PARTNER—FINALITY OF JUDGMENT FOR DEFENDANTS—JUDGMENT—CLERICAL ERROR—FAILURE TO STATE FORMULA—EFFECT.

1. Under Rev. St. 1895, art. 1347, providing that in an action against partners for a firm debt service upon one partner only is sufficient to sustain a judgment against the firm, under which the interest of all its members in the firm property and the separate property of the individual served may be subjected, a judgment for defendants in an action against a partnership, in which service was had on but one partner, is final, from which an appeal will lie.

2. A judgment recited that, "It is therefore ordered and adjudged by the court that plaintiffs * * * take nothing by this verdict." Held, that the use of the word "verdict" instead of the word "suit" was manifestly a clerical error, and harmless.

3. The failure of a judgment to state the formula "that defendants go hence without delay" did not affect its finality.

Appeal from Navarro County Court; A. B. Graham, Judge.

Action in justice's court by Staacke Bros. against Walker & Chilcoat. Judgment was rendered for defendants, and from a judgment of the county court dismissing an appeal plaintiffs appeal. Reversed.

Staacke Bros., a firm composed of A. E., H. G., and Adele Staacke, on September 20, 1901, filed suit in the justice's court of Precinct No. 1 of Navarro county against Walker & Chilcoat, a partnership composed of Geo. B. Walker and M. Benjamin Chilcoat, to recover a balance of \$166.35, alleged to be due on account. On the same day citation was issued and properly served on Geo. B. Walker, one of the defendants. The record does not show service on Chilcoat, the other defendant. On February 27, 1902, a trial of the case was had in the justice court, and judgment there entered as follows: "This day came the parties by their attorneys, and thereupon came a jury of good and lawful men, who, being duly impaneled and sworn, upon their oath do say they 'find for the defendant.' It is therefore ordered and adjudged by the court that plaintiffs, Staacke Bros., take nothing by this verdict, and that the defendants, Walker & Chilcoat, do have and recover of said plaintiffs, Staacke Bros., all costs in this behalf expended, and that they have their execution for the same." Upon an appeal from the judgment by Staacke Bros. the defendants moved to dismiss the appeal on the following grounds: (1) The judgment was not final, in that it does not dispose of all the parties; (2) the judgment does not contain the essentials of a judgment for the defendants, in that it fails to state that plaintiffs take nothing by their suit, and to state or adjudge that "defendants go hence without day." The county court, upon hearing and considering the motion, sustained it, and entered judgment dismissing the appeal, from which judgment of dismissal Staacke Bros. have appealed.

Willie & Mayo, for appellants. Callieutt & Call, for appellees.

NEILL, J. (after stating the facts). In an action against the partners for a partnership debt, service upon one partner only is sufficient to sustain a judgment against the firm, under which the interest of all its members in the property of the partnership and the separate property of the individual served may be subjected, but not the separate property of those not served. Rev. St. 1895, art. 1347; Alexander v. Stern, 41 Tex. 193; Guimond v. Nast, 44 Tex. 114; Burnett v.

Sullivan, 58 Tex. 535; Hedges v. Armistead, 60 Tex. 276; Tex. & St. L. Ry. Co. v. McCaughey, 62 Tex. 271; Patten v. Cunningham, 63 Tex. 606; Sanger v. Overmier, 64 Tex. 57; Henderson v. Banks, 70 Tex. 400, 7 S. W. 815; Halsell v. McMurphy, 86 Tex. 102, 23 S. W. 647; De Camp v. Bates (Tex. Civ. App.) 37 S. W. 645; Sugg v. Thornton, 132 U. S. 531, 10 Sup. Ct. 163, 33 L. Ed. 447. In actions against partners, it is only when the plaintiff does not seek to subject the interest of all the members of the firm in the partnership property that he may discontinue as to those not served, and take judgment against those who are cited. Bates on Partnership, 1003. But under article 1347, Rev. St. 1895, the partners not served ought not to be dismissed from the cause, since, to bind the partnership property, the judgment should be rendered against all, for the interests of those not served are as much affected as those served. Burnett v. Sullivan, 58 Tex. 535; Frank v. Tatum, 87 Tex. 207, 25 S. W. 409. From this it follows that Staacke Bros., if they had made out their case, would have obtained a judgment subjecting the partnership assets to their debt, and against Geo. B. Walker personally, who was actually served, though no personal judgment against Chilcoat, the member of the firm not served, and that such judgment would have been final. If, then, such a judgment in favor of plaintiffs would have been final, one rendered against them, if properly entered, would be final also; for if, upon the trial of a cause, a judgment rendered in favor of the plaintiff would be final, it would necessarily be final if rendered in favor of the defendant upon the trial of the same issues. Upon the verdict recited judgment could have only been rendered against the plaintiffs, and in favor of the defendants for costs. Such was the effect of the one rendered in the justice's court. The use of the word "verdict" in the phrase, "It is therefore ordered and adjudged by the court that plaintiffs, Staacke Bros. take nothing by this verdict," is manifestly a clerical error, it being apparent that the word "suit" was intended. Such an error or mistake should not be taken as changing the obvious meaning and intention of the judgment entry. Nor does the failure of the judgment to state the formula "that defendants go hence without day" affect or render the judgment any the less final than it would have been had such formula been used. We therefore conclude that the judgment of the justice's court was a final adjudication of the matters in controversy between the parties to the suit, such as gave the county court jurisdiction on appeal from it, and that the court erred in dismissing the appeal.

The judgment is reversed and the cause remanded for trial on its merits. Reversed and remanded.

CORNICK et al. v. ARTHUR et al.
(Court of Civil Appeals of Texas. March 11, 1903.)

PLEA IN ABATEMENT—PRIOR ACTION FOR LIKE CAUSE—IRRIGATION—PRIORITY OF RIGHTS—EASEMENTS—ENFORCEMENT—EJECTMENT—TRESPASS TO TRY TITLE.

1. Where a cause of action set out in a plea in abatement as a bar to an action pending was practically identical with that part of the case at bar to which the plea was applicable, the plea was properly sustained.

2. The rights of an upper riparian proprietor to the use of waters of a stream for irrigation purposes are superior to those of a lower proprietor.

3. The owner of a mere easement is not entitled to maintain ejectment or trespass to try title as against the fee owner of land rightfully in possession.

Error from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Mrs. Louise Cornick and others against S. D. Arthur and others. From a judgment in favor of defendants, plaintiffs bring error. Affirmed.

Jos. Spence, Jr., and D. D. Wallace, for plaintiffs in error. B. W. Rimes and Hill & Lee, for defendants in error.

FISCHER, A. J. This is a suit of trespass to try title, brought by plaintiffs in error as plaintiffs below, to wit, Mrs. Louise Cornick, joined by her husband, Boyd Cornick, Bige Duncan, and Gus Thomas, against defendants in error, as defendants below, to wit, S. D. Arthur, J. J. Arthur, and B. D. Arthur, in district court of Tom Green county, Tex., for recovery of the land described in plaintiffs' petition. Plaintiffs also prayed for a mandatory injunction to compel defendants to remove from said premises a dam, which they alleged defendants had constructed across Dove creek where the creek flowed past said land. Plaintiffs' original petition was filed February 1, 1902. Defendants answered (1) by plea in abatement; (2) by general demurrer and special exceptions; (3) plea of not guilty; and (4) by special answer setting up title in themselves. The case was tried by the court without a jury, and resulted in a judgment rendered May 13, 1902, sustaining defendant's plea in abatement to all that part of plaintiffs' petition setting up rights in plaintiffs acquired under and by virtue of judgment rendered in cause No. 1,239, entitled "Francisco Maldonado vs. S. D. Arthur et al.," in district court of Tom Green county; (2) also sustaining defendants' demurrer to all that part of plaintiffs' petition alleging that Dove creek is a natural stream, and useful for irrigating, and that the erection of the dam by defendants thereon interferes with the rights of plaintiffs to use the water, and deprives them of the use thereof; and (3) that plaintiffs take nothing by their suit, and that defendants go hence, etc.

There is no controversy about the facts.

They are fully set out in the record, and will not be copied here. The trial court found the following conclusions of fact and law:

"(1) On January 31, 1901, Francisco Maldonado was the owner of the land involved in this suit. (2) On said 31st day of January, 1901, said Maldonado conveyed to plaintiffs an easement in the land sued for, conveying to them a perpetual and exclusive right to use said land as a site for dam and appurtenances thereto. (3) Defendants have entered upon and erected dam abutting on the land sued for. (4) On December 24, 1901, said Maldonado conveyed by deed to defendants the title to the land sued for.

"Conclusions of law: As this is a suit of trespass to try title, and inasmuch as there can only be two kinds of judgment entered in such actions—that is, to wit, one for the title and possession of the land sued for, and the other for the possession of such land—a person holding only an easement cannot oust the owner of the fee from his possession; hence the defendants ought to recover."

The ruling of the court in sustaining the plea in abatement presented by the defendants in error was correct. The cause of action there set out in the plea is practically identical with that part of the case disclosed by the record to which the plea in abatement is applicable. The case mentioned in the plea in abatement was, subsequent to the disposition of this case by the trial court, affirmed by this court.

The court was correct in sustaining the demurrer to that branch of the plaintiffs' case in which they attempted to set up an exclusive right in the waters of Dove creek for irrigation purposes. If any such rights existed, there were no facts pleaded that would take the case out of the rule announced by this court in *Barrett v. Metcalfe*, 33 S. W. 758, and *Irrigation Co. v. Vivion*, 74 Tex. 170, 11 S. W. 1078. The plaintiffs were lower proprietors on the stream in question, and, according to the rule announced in the cases cited, the facts pleaded in that portion of the plaintiffs' petition to which the court sustained demurrers did not state a case that would authorize the lower proprietors to interfere with the rights of the defendants in error and others situated on the stream above to use the waters therein for irrigation purposes.

We are also of the opinion that the trial court is correct in the legal conclusions reached on that branch of the case that related to trespass to try title. The plaintiffs, by virtue of their easement acquired from their vendor, sought to eject and oust the defendants in possession, who owned the fee to the land bordering on the stream in question. The plaintiffs may have had a remedy, but ejectment at common law or trespass to try title under the form of procedure in this state was not the remedy. The owner of the fee

rightfully in possession cannot be ousted and deprived of possession of his premises by one whose adverse right merely consists in an easement. Washburn on Easements, p. 10; Sedgwick & Waite on Trial of Title to Land, §§ 95, 97, 146, and 147; Pinkum v. Eau Claire, 81 Wis. 301, 51 N. W. 550.

We find no error in the record, and the judgment is affirmed. Affirmed.

PELFREY et al. v. TEXAS CENT. RY. CO.*

(Court of Civil Appeals of Texas. March 7, 1903.)

NEGLIGENCE—FAILURE TO USE ORDINARY CARE—INSTRUCTIONS—UNDUE PROMINENCE TO DEFENSE.

1. In a personal injury action, an instruction that a failure to exercise such care as an ordinarily prudent man would have exercised under like circumstances would "ordinarily" constitute negligence was error. Such failure would invariably constitute negligence.

2. In a personal injury action, it was error to unnecessarily and repeatedly call the attention of the jury to the defense of contributory negligence.

Appeal from District Court, Eastland County; N. R. Lindsay, Judge.

Action by H. C. Pelfrey and others against the Texas Central Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed.

D. G. Hunt and W. E. Conner, for appellants. Clark & Bolinger and Warren & Webb, for appellee.

STEPHENS, J. It must be held to have been confusing and misleading for the court to instruct the jury, as was done in this case, that if they found from the evidence that appellee's foreman, in causing the steam shovel which injured appellant H. C. Pelfrey to be moved as alleged by him, "failed to exercise such care, caution, and prudence as an ordinarily careful, cautious, and prudent man would have exercised in performing said act under like circumstances, such failure would ordinarily constitute negligence." We are at a loss to know what the jury would have understood the word "ordinarily," as used in this charge, to mean, unless it be treated as suggesting to them that although they should find that appellee's foreman, in causing the steam shovel to be moved, failed to exercise such care as a person of ordinary prudence would have exercised under the same circumstances, they might yet find that no negligence was shown. In another portion of the charge "negligence" was properly defined as being the want of such care as a person of ordinary prudence would ordinarily exercise under like circumstances, but it is not the equivalent of this to charge, in applying the law to the facts, that the want of such care would ordinarily constitute negligence. It would invariably do so.

Too much prominence was also given in the charge to the defense of contributory negligence, in that the attention of the jury was several times unnecessarily called to it. Lumsden v. Railway (Civ. App.) 67 S. W. 168, 4 Tex. Ct. Rep. 516.

The judgment must therefore be reversed, and the cause remanded for a new trial.

GALVESTON, H. & S. A. RY. CO. v. MATHES et al.

(Court of Civil Appeals of Texas. April 8, 1903.)

CARRIERS—INJURIES TO PASSENGER—INTERMEDIATE STATION—RIGHT TO ALIGHT—ATTORNEYS—INTEREST IN CAUSE OF ACTION—PARTIES—REQUESTED INSTRUCTIONS.

1. Where plaintiff in an action for injuries assigned to her attorneys an interest in the cause of action; the attorneys did not thereby become necessary parties to the suit, and could not be made parties thereto on motion of the adverse party.

2. Since a passenger is entitled to leave a train at an intermediate station for a purpose not inconsistent with his character of a passenger, an instruction in an action for injuries to a passenger in so doing that defendant owed plaintiff no duty to stop for any length of time at such station, or to have its depot there lighted, or to stop at any intermediate station before reaching plaintiff's destination, was properly refused.

3. In an action for injuries to a passenger in attempting to alight, an instruction that if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight without the knowledge of defendant's employees, and was injured in such attempt, she was not entitled to recover, was improperly refused.

4. The requested instruction was not covered by a charge that if plaintiff negligently failed to hear the station announced, and, under the impression that she had reached her destination, attempted to alight, without the knowledge of defendant's employees, after the train had been held at the station a reasonable time for passengers to alight, "and that said train, when started, was started without any jerk," the finding should be for defendant.

Appeal from District Court, Brewster County; J. M. Goggin, Judge.

Action by Fannie M. Mathes and others against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiffs, defendant appeals. On rehearing. Reversed.

This suit was brought by appellees against appellant to recover damages for alleged personal injuries sustained by Mrs. Mathes while a passenger upon appellant's railroad. The allegations in appellees' petition are substantially as follows: That Mrs. Mathes, having purchased from appellant a ticket which entitled her to transportation from Sanderson to Marathon, on the night of July 9, 1901, took passage on one of appellant's trains at the first for the last named station; that

*Rehearing denied April 11, 1903.

¶ 1. See Assignments, vol. 4, Cent. Dig. § 213.

when the train was nearly approaching the intermediate station of Haymond, one of appellant's servants, whose duty it was to call the names of the stations, distinctly called out "Marathon" in her presence and hearing; that being a stranger in that part of the country, and ignorant of the location of Marathon, and relying upon the announcement of appellant's servant, and believing therefrom that that station had been reached (it being dark and the depot unlighted, and on that account being unable to distinguish the mistake in the announcement), she made due haste to alight, and, while in the act of doing so (with one foot reaching the ground, the other on the lower step, with her hand grasping the railing of the platform), the train, not having stopped reasonably long enough to enable passengers to alight therefrom, was negligently started, without warning, by a violent jerk forward, and put in rapid motion, whereby she was hurled to the ground, and thereby seriously and permanently injured, to her damage, etc. The defendant answered by general and special exceptions, by a general denial, and by special denials to each and every material allegation of negligence on its part, and specially pleaded contributory negligence, in that she was injured in attempting to alight from the train when it was in motion. The trial of the case, which was before a jury, resulted in a verdict and judgment in favor of appellees for \$7,750. Except as to Mrs. Mathes being a passenger, and having been injured in alighting at night from its train at Haymond, there is a conflict of evidence upon all other material issues—there being evidence on the part of appellant tending to show (1) that, just before its train upon which Mrs. Mathes was a passenger reached Haymond, that station was clearly and distinctly announced several times by its servant in the presence and hearing of appellee, and evidence tending to show that she was asleep at the time such announcements were made; (2) that the train stopped at Haymond a reasonably sufficient time to allow passengers to disembark with safety, and that the depot was sufficiently lighted; (3) that the train was not started forward with a violent jerk, but moved off gradually, in the ordinary way; and (4) that appellee's injury was caused by jumping off the train after it had started from the station. The testimony offered by appellees was in conflict with that of appellant upon all these matters. Inasmuch as the judgment will be reversed upon a matter of law, we deem it improper for us to take further notice of or intimate in whose favor the testimony on any of these issues preponderates.

Baker, Botts, Baker & Lovett and Ellis, Garner & Love, for appellant. H. E. McMains and Joseph Jones, for appellees.

NEILL, J. (after stating the facts). The plaintiffs having filed their affidavit entitling

them to sue in forma pauperis, defendant filed its motion to make Joseph Jones and H. E. McMains, plaintiffs' attorneys, parties plaintiff, on the ground that they were necessary parties by reason of the fact that they were peculiarly interested in the result of the suit, and offered in support of its motion to introduce McMains as a witness to prove that he and Jones had a parol contract with plaintiffs whereby they were to receive one-half of any amount they might recover in the suit, and that by its terms Jones & McMains were to pay in advance the necessary cash expenses in the prosecution of the suit, to which testimony plaintiffs, by their attorneys, objected; and their objection being sustained, and motion to make new parties being overruled, a bill of exceptions was taken by the defendant to the action and ruling of the court, which is made the basis of appellant's first and second assignments of error. When a plaintiff suing for tort assigns to his attorneys an interest in the cause of action declared upon, the attorney does not become a necessary party to the suit by reason of such assignment, and said attorney cannot be made a party to the suit upon motion of the adverse party; it being only parties to suits against whom a motion can be maintained for costs. Rev. St. art. 1435; *The Oriental v. Barclay*, 16 Tex. Civ. App. 206, 41 S. W. 117; *Railway v. Scott* (Tex. Civ. App.) 23 S. W. 457; *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768. Hence the assignments of error are not well taken.

It is asserted as a proposition under appellant's third and fourth assignments of error—the first based upon the court's overruling a special exception to plaintiff's petition, and the second upon its failure to give a special charge—that, plaintiff's destination being Marathon, defendant owed her no duty to stop for any length of time at Haymond, or to have its depot there lighted, or stop its train at any intermediate station between Sanderson and Marathon. A passenger is not required to remain upon a train from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. He remains a passenger in getting off at intermediate stations so long as his object in doing so is not inconsistent with his character as a passenger. *Ry. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684; *Ry. v. Goldman* (Tex. Civ. App.) 51 S. W. 275; *Ry. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942; *Ry. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990. As is said by Justice Fly in *Ry. v. Goldman*, supra, "It would seem clear that the right to alight at a regular intermediate station would not depend upon notice having been given to the conductor that the passenger desired to alight, but that it is an absolute right enjoyed by a passenger." In view of these authorities, the proposition contended for by appellant cannot be maintained.

The third special charge, the failure of which to give is made the basis of appellant's fifth assignment of error, is as follows: "If you believe from the evidence that plaintiff was a passenger on defendant's train traveling from Sanderson to Marathon, and if you believe from the evidence that as said train was approaching Haymond, an intermediate station between Sanderson and Marathon, said station was distinctly announced in the car in which plaintiff was riding, and that plaintiff negligently failed to hear said station announced, and, under the impression that she had reached Marathon, attempted to alight from said train without the knowledge or consent of defendant's employes in charge of said train, and was injured in such attempt, and if you further believe from the evidence that defendant's train was held at Haymond a reasonable time for passengers to board and alight from said train, then you will find for the defendant." According to her own testimony, Mrs. Mathes would not have attempted to leave the train at Haymond, had it not been for the mistaken belief, induced by the alleged miscall of the station, that she had arrived at Marathon. If, then, the station of Haymond was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the call, and the train was held a reasonable time for passengers to disembark, it follows that the company had discharged towards her, as a passenger, the full measure of its duty, and that her injury was proximately caused by her negligent failure to hear the proper announcement of the station, as well as by her failure to leave the train before it was set in motion. As is said by Justice Finley in *T. & P. Ry. Co. v. Mitchell* (Tex. Civ. App.) 26 S. W. 154, "If the train was stopped a sufficient length of time for passengers to get off, and plaintiff failed to do so, without fault of defendant's servants, and the conductor, not knowing, and having no reason to believe, * * * she was in the act of getting off, caused the train to start, and she was injured, she would not be entitled to recover." Citing *Ry. v. Williams*, 70 Tex. 161, 8 S. W. 78; *Straus v. R. Co.*, 6 Am. & Eng. Ry. Cases, 384; *Hunter v. Ry.* (N. Y.) 26 N. E. 958, 12 L. R. A. 429; 47 Am. & Eng. Ry. Cases, 543, note; *Davis v. Ry.*, 18 Wis. 175; *Ry. v. Slatton*, 54 Ill. 133, 5 Am. Rep. 109; *Imhoff v. Ry.*, 20 Wis. 344. The supplemental charge given by the court is word for word the one quoted, except that, immediately following the word "alight," it commences and concludes with these words, "and that said train, when started, was started without a jerk, then you will find for the defendant." This change nullifies and completely destroys the effect intended by the charge requested, and prevented the jury from finding for the defendant, though they may have believed from the evidence that the station of Haymond was distinctly announced in the hearing and pres-

ence of appellee, and she negligently failed to hear the announcement, and the train was held at Haymond a reasonable time for passengers to board and alight, unless they believed further that the train was started without a jerk. As it is almost impossible for a train to be started without a jerk of some kind, the effect of the supplemental charge was to induce the jury to believe that the defendant was liable if it started the train when appellee was in the act of alighting therefrom. The petition charged that it was started with a "violent jerk," but, regardless of the kind of jerk, the defendant would not be liable for appellee's injuries if through her negligence she failed to hear the proper announcement of Haymond station, and attempted to get off the train after it had been held there a reasonably sufficient time to enable passengers to alight therefrom with safety, unless it knew she was in the act of alighting when the train was set in motion.

Our judgment of affirmance rendered at a prior day of the term is set aside, our former opinion withdrawn, and, for the errors indicated, the judgment of the district court is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. MATTHEWS et al.

(Court of Civil Appeals of Texas. March 25, 1903.)

RAILROADS—PERSONS ON TRACK—LYING ON TRACK—CONTRIBUTORY NEGLIGENCE— EVIDENCE—SUFFICIENCY.

1. A person lying on a railroad track is guilty of contributory negligence, as a matter of law.

2. Evidence in an action against a railroad company for death of one run over by a train examined, and held to show that deceased was lying on the track when struck.

Error from District Court, Grayson County; Rice Maxey, Judge.

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant brings error. Reversed.

This suit was brought by Maggie Matthews, as the surviving wife of J. L. Matthews, deceased, for herself and as next friend of Katie May Matthews and Beulah Marie Matthews, his minor children, against the plaintiff in error, to recover damages for its alleged negligent killing of the deceased. The substance of plaintiffs' petition is that on the 8th day of May, 1899, J. L. Matthews, while walking along on plaintiff in error's railroad track, where it was commonly used by the public with the knowledge, consent, and acquiescence of the company, within the corporate limits of the city of Ft. Worth, was, by the negligence of the railroad company's servants operating one of its freight trains, in running such train within the city limits at a rate of speed greatly in excess of that prescribed by an ordinance of said city,

in negligently failing to keep a lookout for persons on its track, and in negligently failing to ring the bell of the engine, knocked down, run over, and killed by said train, to plaintiffs' damage in the sum of \$50,000. The defendant railway company answered by a general denial and plea of contributory negligence, as well as by several other special pleas, which, in view of the disposition we shall make of the case, are not necessary to state here. The case was tried before a jury, and the trial resulted in a judgment for \$14,000 against the company, from which it has appealed.

J. W. Terry and Cowan, Burney & Lee, for plaintiff in error. Wolfe, Hare & Semple, for defendants in error.

NEILL, J. (after stating the facts). The plaintiff in error presents, in its brief of 170 pages, 61 assignments of error, each of which is urged as a reason for the reversal of the judgment. These assignments are answered by defendants in error by a brief of 87 pages, in which it is contended that none of them furnish any grounds for disturbing the judgment. In response, plaintiff in error has filed in this court a supplemental brief of 30 pages. While we have read with interest all these briefs, and considered carefully each assignment of error presented, the conclusion we have reached in determining this appeal renders it necessary for us to consider only those assignments which relate to the question of deceased's contributory negligence. It is to this question that our statement and discussion of the evidence will be mainly directed.

J. L. Matthews owned teams and a grading outfit, with which, up to a few days before May 7, 1899, he had been working for the Santa Fé Railroad near Heidenheimer, which teams and outfit had been carried from there to Cleburne, Tex. On that day Matthews left Cleburne on the afternoon train for Ft. Worth; telling his employé before leaving that he was going there to get work, which he expected to procure either from the Texas & Pacific Railway Company, or at a gravel pit in the last-named city; at the same time instructing his employé to carry his teams and grading outfit overland to Ft. Worth; promising to meet him there on the next day at 3 p. m. at a watering trough on lower Main street, and that he would in the meantime find and provide in or near Ft. Worth a camping place for his teams and outfit. Matthews arrived in Ft. Worth that evening, accompanied by a companion, T. W. Turner, who left him at a hotel on Main street about 10 o'clock that night, with the understanding that they should meet at 7 o'clock next morning on Front street, and would together look out for a camping place. Before Turner left him, according to his testimony, Matthews had taken two drinks of whisky, and was slightly under the influence of the beverage.

Turner also heard Matthews speak to the hotel clerk about procuring a bed. The clerk at the hotel testified that Matthews told him he wanted a bed, but did not care to go to sleep right then; that he was going away, but would be back in about an hour and occupy the room. The room was shown him by the clerk, and Matthews then left; it being somewhere between 10 and 1 o'clock. He was never afterwards seen alive by any one who recognized him. He did not return to the hotel, and it is not shown from the evidence where he went from there, or where he spent the remainder of the night. The clerk testified that when he came to the house to get a bed he was intoxicated to such an extent that he would stagger as he walked, and that it was easy to see that he was drinking a good deal.

The length of plaintiff in error's road lying within the corporate limits of Ft. Worth is about three miles, its general direction being north and south. Old Cemetery is situated within the city limits, on the west side of the road, about a mile and a half north of the depot, and from the center of the city. From the northeast corner of the cemetery, where the railroad crosses the north boundary line of the city, is 865 feet. Bridge 210 of the road is 435 feet north from Peach street. Bridge 211 is 475 feet north of bridge 210, and bridge 212 is 270 feet from 210. A curve in the road begins near bridge 210, and ends some distance north of the cemetery, near bridge 212. From the north side of Peach street, extending north to Trinity river, probably more than a mile, the road is built upon an embankment, which between bridges 210 and 211 is 15 feet high, and is down grade. The stockyards are about three miles north of Ft. Worth. North of and near Old Cemetery were grounds that had been used for campers for a long time. An ordinance of the city of Ft. Worth makes it a penal offense to run a train anywhere within the city limits at a greater rate of speed than six miles per hour.

On the 8th day of May, 1899, at 6 o'clock a. m., a freight train, loaded with cattle, of plaintiff in error, left its depot at Ft. Worth with orders to meet another train at the stockyards at 6:15 that morning, and en route, while running at a speed of 25 or 30 miles an hour, ran over an object which the engineer and fireman saw was lying near the north end of Old Cemetery. The train never stopped or slackened its speed until it reached the stockyards. Then, upon examining the wheels and appliances of the cars, blood, particles of flesh, and parts of viscera, which were thought to be of a human being, were found. Early that morning a witness, John Woods, who lives with his mother near the railroad, north of the cemetery, in going down to the business part of the city, while walking down the railway track, met a freight train, loaded with cattle, going north, and stepped aside to let it pass. He then

resumed his journey, and, after proceeding about 100 yards from the point where the train passed him, came upon the body of a dead man, lying on the track between bridges 210 and 211, which it is admitted was that of J. L. Matthews. It was badly mangled; the top of the skull being mashed off; the brain exposed; legs cut and broken in several places; the abdomen torn open, and viscera exposed and lacerated; both feet severed and hanging merely by the skin; and nearly all of the clothing torn off; and the body was warm, bleeding profusely, and the flesh quivering. It is evident that this body was the object seen by the engineer and fireman, and run over by plaintiff in error's freight train that left its depot at 6 o'clock that morning.

For the purpose of eliminating the case of every question except that of contributory negligence on the part of deceased, it will be conceded that the railroad track along where Matthews was run over was constantly used, with the knowledge and acquiescence of the company, as a pathway by pedestrians; that the company was negligent in running its train in the city limits at a speed greatly in excess of six miles an hour; that its servants negligently failed to ring the bell of the engine; and that such negligence of the company contributed to Matthews' death. This leaves us to consider and determine from the evidence the bare question as to whether deceased was guilty of contributory negligence. This is primarily a question of fact for the jury, and, except in cases where the plaintiff's own evidence raises a presumption of such negligence, the burden of proof is on the defendant; and a court will not disturb the verdict of a jury unless from all the evidence it so clearly and palpably appears that he was guilty of contributory negligence that men of ordinary minds could form no other conclusion.

If Matthews was lying down on plaintiff in error's railroad track—whether drunk or sober, asleep or awake—at the time he was struck and run over, it cannot be denied that he was guilty of negligence proximately contributing to his death. It is not alleged or contended that he was discovered in such an attitude by the operators of the engine in time for them to prevent the train from running over him; nor that, if the speed of the train had not been greater than six miles an hour, it would have been possible, after seeing the object on the track, to stop the engine before reaching the place where it was lying.

The defendants in error base their case solely upon the theory that deceased was walking along the track in front of the engine when he was struck by the train, and that he was not negligent in being there. Therefore, if he was lying down on the track, or, if not, his walking along it in front of the train was negligence, they are not entitled to recover. This raises the questions: (1) Does the evidence show that deceased was lying on the track when struck? (2) If

not, was he walking in front of the engine, and, if he were, was it negligence?

The undisputed evidence shows that a fog so dense enveloped the city of Ft. Worth at the time of the accident that it prevented any one from seeing an object along the railroad track further than 75 feet from him.

H. E. Bemis, the engineer of the train, testified: "I remember running over an object at north end of Old Cemetery in Ft. Worth, May 8, 1899, that I was told afterwards was a man. I was pulling seventeen cars of stock, including caboose. Left Ft. Worth, going north, about six o'clock a. m. It was an exceptionally foggy morning—as bad as we ever have on the Trinity river. I had an order to meet a train at stockyards, three miles north of Ft. Worth. The train had rights over our train—had the right to go to Ft. Worth if I didn't arrive at 8:15—and on account of the dense fog it was necessary that I should be there. We couldn't see each other if we came together, so I was in considerable hurry, so they wouldn't meet on the main line, and passing this point I could see this object on the main track; and, not seeing any stock on there, it impressed me it might be a man; that it was something besides stock; and, as I came over it—it was done in a flash, almost—I concluded it must be human. We were going about twenty-five miles an hour, I should think. I saw an object right close to cemetery. On account of its being foggy, I couldn't see far. It couldn't have been over fifty feet, I think, ahead of the engine—about seventy-five feet from me. It was about twenty-five feet from where I sat in cab to front of engine. The headlight was burning that morning. The headlight is no help to a man on the engine seeing ahead of the engine in a fog, but you can see the headlight in a fog further than you can see a train. As I went along the track I was looking ahead all I was capable of doing, to tell whether anything was on the track. It was my business to watch ahead all the time, and under these circumstances I was more anxious than if it was clear. I blew the whistle shortly before we passed around corner of cemetery, and bell was ringing. I blew whistle to give warning to those beyond the curve that train was coming. The track curves to the left there. As I went over this object on the track I could not tell what it was. The object might have been seventy-five feet ahead of the engine, but not further than that. You couldn't see it distinctly over thirty feet. As to the best impression I have now as to how it looked, we couldn't tell whether it was a hog lying there, or a dog, or it might have been some kind of an old coat. It was a dark object—there was nothing to discern it or tell what it was—lying there quietly as we passed over it. We struck the object just a few minutes after six o'clock that morning. I did not see a man walking on the track that morning. I would have seen

him if I had come close to him; seventy-five feet—something like that—I could have seen him. After I saw the object on the track I could not, by the use of my appliances at hand, or all of them, have stopped the train before it ran over the object.”

A. R. Woodward, the fireman on the engine, testified: “I remember the accident in question. I was fireman on the engine. I don’t remember the exact hour we left Ft. Worth; about daylight, I guess. When we passed the Old Cemetery that morning, and as we were going along the side of the cemetery, going north, I should judge we were running twenty to twenty-five miles an hour. We were increasing speed when we passed the cemetery. It was down grade. We ran over something in the neighborhood of the north end of the cemetery. I was sitting on the seat box, ringing the bell and looking ahead; and, as we rounded the curve north of the cemetery a short distance, I saw an object on the track. It was just about daylight, and a foggy morning, and we were right on it before I saw the object. I couldn’t have seen it very far, of course. The first thought was to look, and I looked the best I could, and I looked to the engineer, and says, ‘What is that?’ and he says, ‘I don’t know. That’s what I would like to know.’ I says, ‘Believe it is a human form,’ and he says, ‘It might be a hog or dog, or something like that.’ The object was not over 65, 70, or 80 feet from us when I saw it. When this conversation occurred between the engineer and myself, the engine was right on the object. There was a very heavy fog that morning.”

These two witnesses were the only ones to the accident. From where the evidence shows the body of the deceased was found, and where it indicates he was first struck by the engine, it is clear that the object they testified to seeing on the track was his body; and it is equally clear that he was not walking nor standing, but was lying on the track, when he was struck by the engine. While there is some evidence of conflicting statements made by Bemis, nothing was ever said by him that would tend in the least to discredit his testimony we have quoted. To our minds, it is consistent with all the other testimony in the case that would tend to show any light upon the question under consideration. A number of locomotive engineers—expert, it seems, in striking, killing, and wounding human beings walking or standing on railroad tracks, with their engine pilots—testified that a man standing or walking on a railroad track, if struck by an engine running at a speed of 25 miles an hour, would not go under the train, but would be knocked off the track, if he did not fall back on the front end of the engine, and in that event he would fall from the side of the pilot off the track. It was held upon a prior appeal of this case that the question of whether a train striking a man standing or

walking on a railroad track would throw him off or run over him is one peculiarly within the knowledge of locomotive engineers and other persons familiar with such accidents, and therefore a proper subject of expert testimony. 66 S. W. 588, 4 Tex. Ct. Rep. 152. If, then, we add such expert testimony to that of Bemis and Woodward, and then consider in connection with it the testimony of the hotel clerk to the effect that Matthews was so drunk that he staggered, and in that condition left the hotel the night before the accident without returning to the room he engaged, the conclusion is irresistible that he was lying down on the track when he was struck and run over by the train. There is no use in citing authorities to demonstrate that it is contributory negligence for one to lay down on a railroad track over which trains may be run at any moment. If this be not contributory negligence, negligence of such character has disappeared from our system of jurisprudence.

Of course, if deceased was lying down upon the track when the engine struck him, he was neither standing nor walking, and the conclusion that he was lying there renders it unnecessary for us to consider the matter further. But it is contended by defendants in error that there is evidence sufficient to warrant a jury, in spite of the testimony to the contrary, in finding that Matthews was walking along the track in front of the engine, and that he was struck, knocked down, and run over by the train. If this were conceded, the burden would not be upon plaintiff in error to prove that, in walking along the track in front of an approaching train, deceased was guilty of contributory negligence, for in that event defendants in error’s own evidence would render it necessary that they should explain the conduct of the deceased to exculpate him from contributory negligence. *G., C. & S. F. Ry. v. Hill*, 69 S. W. 136, 5 Tex. Ct. Rep. 235; *Railway v. Reed*, 88 Tex. 447, 31 S. W. 1058. No explanation tending to exculpate him from such negligence is shown.

Here is the testimony upon which defendants in error rely to show that deceased was walking along the track:

W. C. Prince testified: “My house is situated about thirty-five yards west of the track. I had seen one train pass that morning going north. I noticed two persons walking on the track that morning going north. I do not know who they were. They were about 60 or 70 yards apart. I saw them before the train passed, and before the discovery of the dead body. I do not know just when the dead body was discovered, but I saw the men going along the track five or ten minutes before the train passed. I do not undertake to say that I believe one of the men I saw walking along the track was the one that was killed. It is my opinion that such is a fact, from the resemblance of the dead man, in form and clothes, to the sec-

ond man I saw going along the track. The first man I saw go by on the railroad that morning was carrying under his arm what seemed to me to be a small bundle. The second man had in his right hand what appeared to me to be a very small grip. I was about thirty-five yards from the parties, sitting in my kitchen, eating breakfast, when I saw them pass. The first man I saw looked like a laboring man, and had on blue-ducking pants and a jumper. The second man had on a light-colored suit."

Clide Baptiste testified: "I was living at the section house, Peach street, Ft. Worth, which house is about fifty feet west of defendant's track, and about one-fourth of a mile south of where the body was found. On that morning I saw a man walking up the Santa Fé track, north. I did not know him. He was about five feet six inches high, medium build, and wore a dark suit of clothes, slouched hat. I don't know the color. Think it was brown. I saw a stock train pass over the track going north. The man passed along the track about five minutes before the stock train did. He was walking very brisk when he passed the section house. He was walking a little over an ordinary walk—about like a business man would to and from his business. He carried something on his right side, but, it being on the opposite side from me, I could not tell whether it was a valise or a bundle. He was about fifty feet from me. I found one-half of a vest something near a mile from the point where the body was found, north of said body. It was at the end of the ties on the west side of defendant's track, near a small bridge. Don't know how far from the bridge. I think, about 150 feet north. The piece of goods found appeared to be about same quality of goods worn by the dead man when found. This piece of goods found, in my judgment, was same quality of goods the man was wearing who passed the section house going north. I don't notice any blood on the piece found."

The deceased was five feet six inches high, and a witness testified: "He was especially quick and active in his manner and style of walking, and I think any one would notice it. It was materially different from any other person. I could identify Matthews by his walk, independent of anything else." Another witness testified: "It was materially different from other persons I know. I think I could identify Matthews by his walk, independent of anything else."

The wife of the deceased testified that when he left home, about two months prior to his death, among the clothing he carried away with him in his trunk were a brown suit and a black one, and a black hat and a drab one; that, when the trunk was received after his death, it had in it the dark suit, the dark brown pants, and the black hat, but that she never received back the brown coat and vest like the brown pants; that the pair

of pants she received was still lighter than the coat and vest she didn't get back; and that she has never seen the drab hat since he left home.

This is the testimony upon which defendants in error rely to show that Matthews was walking on the track when he was struck by the engine. Can it with any degree of certainty be deduced from it that one of the men seen by Prince or the one seen by Baptiste was the man who was killed by the train? If it should be said one of them was, can it be said which one—the first one or the second one seen by Prince, or the one seen by the other witness? For the one seen by Baptiste may or may not have been one of the two seen by the other witness. Of the men seen on the track, there is nothing to show that one was more likely to be caught and run over by the train than the other. Each certainly would have been, had he not got off the track. All did leave the track, if one of them was not Matthews. Prince gives it as his opinion, from the resemblance to the dead man and his clothes, that the second man he saw on the track was the deceased. This man, according to his testimony, had on a light suit of clothes, and was carrying in his right hand what the witness took to be a small grip. If this description is correct, he could not have been the man seen by Baptiste, for his man had on a dark suit of clothes; nor could the man seen by Baptiste have been the first man seen by Prince, for that man had on "blue-ducking pants and a jumper." There is no testimony tending to show with any degree of certainty how Matthews was dressed. His clothing, with the exception of an undershirt wrapped and twisted about his shoulder, was torn from him; and, unless the piece of vest picked up by Baptiste was his, not a particle of it was ever found and identified as clothing worn by him. Neither Turner nor Salisbury, the only witness who testified to seeing him in Ft. Worth the night before his death, said anything about how he was dressed. Nor did Turner, whom deceased parted with in Cleburne in the afternoon before that night. There is no testimony that deceased had a grip. No grip, bundle, or particles or contents of either, was picked up or discovered near the scene of the accident or along the railway track. The testimony of Baptiste as to the height of the man he saw on the track, when the distance he was from him and the fog considered, can, at best, be taken only as a mere guess. That the man he saw was walking about as a business man would be going to and from his business did not tend or prove the "unusual, distinctive, characteristic walk" of Matthews. Nor is the evidence that Matthews had a brown suit of clothes when he left home, the coat and vest of which was not returned to his wife with his trunk, taken by itself or in connection with all or in connection with any other part of the testimony, of any value

upon the question as to whether deceased was walking on the track when he was struck by the engine. It is only from such inferences that may be conjured up from this testimony arising one from the other in a perfect fog of doubt that it can be conjectured Matthews was standing or walking on the track when struck by the train. To prove the principal fact, it is not permissible to go into the domain of conjecture and pile one presumption upon another. "As the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if it were the very fact in issue." *United States v. Ross*, 92 U. S. 284, 23 L. Ed. 707; *Gillet Ind. & Collat. Ev.* § 52; *Railway v. Porter*, 73 Tex. 305, 11 S. W. 324; *Railway v. Kizziah*, 86 Tex. 88, 23 S. W. 578. Evidence incapable of affording any reasonable presumption or inference as to the principal matter in dispute is no evidence at all. *Kellogg v. McCabe*, 92 Tex. 201, 47 S. W. 520.

We conclude from all the evidence that the deceased was lying on the track when struck, and in doing so was guilty of contributory negligence, as a matter of law. *Railway v. Shiftet*, 94 Tex. 131, 58 S. W. 945; *Railway v. McDonald* (Tex. Civ. App.) 52 S. W. 650; *Railway v. Ryan*, 80 Tex. 59, 15 S. W. 588.

The court erred in not peremptorily instructing the jury to find for the defendant, for which error the judgment of the district court is reversed, and the cause remanded.

RUTHERFORD v. LOVING.*

(Court of Civil Appeals of Texas. March 21, 1903.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST PROPERTY—POWER TO CONVEY.

1. Where a trust company, while holding property in trust as an assignee, made an assignment of "all its properties, rights, claims, and demands which it owns or in which it has any interest," to be equally distributed among its creditors, such assignment did not include such trust property, nor divest the company of the power to convey the same.

Appeal from District Court, Young County; A. H. Carrigan, Judge.

Action to recover land by J. C. Loving against Clint Rutherford. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jno. C. Kay, for appellant. R. F. Arnold, for appellee.

STEPHENS, J. The Germania Safety Vault & Trust Company, a private corporation doing "a general trust business" at Louisville, Ky., the agreed common source of title, made a general assignment for the ben-

efit of its creditors March 9, 1897, conveying to the Columbia Finance & Trust Company, as its assignee, also a private corporation of same city and state, and doing a general trust business, "all its properties, rights, claims, assets, and demands of every description which it owns [owned] or in which it has [had] any interest, and wherever the same may [might] be situated," to be equally distributed among its creditors. At the date of this assignment the land in controversy, situated in Young county, Tex., was held in trust by the Germania Safety Vault & Trust Company as assignee of the Masonic Savings Bank. March 4, 1902, the Germania Vault & Trust Company, as assignee of the Masonic Savings Bank, by deed duly executed, and with the consent of the Columbia Finance & Trust Company, conveyed the land to appellee, J. C. Loving; who brought this suit and recovered it. His right to this recovery is denied by appellant upon the ground that the Germania Safety Vault & Trust Company divested itself of the power to convey the land to appellee by making the general assignment. But as property held in trust, as was the land in controversy, did not pass by the assignment, but only such as the insolvent corporation owned or had an interest in, and undertook thereby to distribute among its creditors, we must overrule this contention and affirm the judgment.

PENNSYLVANIA FIRE INS. CO. v. JAMESON BROS.*

(Court of Civil Appeals of Texas. March 21, 1903.)

FIRE INSURANCE—PETITION—SUFFICIENCY ON GENERAL EXCEPTION—ALLEGATION OF INSURABLE INTEREST.

1. A petition on a fire insurance policy, alleging that the parties entered into a contract of insurance whereby defendant issued a policy and insured plaintiffs on wool owned or held by assured, while contained in a certain house on assured's premises, against all direct loss or damage by fire, and that, while the contract was in force, the property insured was totally destroyed by fire, whereby a direct loss occurred to plaintiffs, etc., is sufficient as against a general exception, although it does not specifically allege that plaintiffs were owners of the property insured, or that they had any insurable interest therein.

Appeal from District Court, Bosque County; Wm. Poindexter, Judge.

Action by Jameson Bros. against the Pennsylvania Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Crane, Greer & Wharton and Lockett & Cureton, for appellant. S. C. Padelford and Robertson & Robertson, for appellees.

SPEER, J. The sole question presented upon this appeal is the sufficiency of appel-

*Rehearing denied April 11, 1903.

¶ 1. See *Assignments for Benefit of Creditors*, vol. 4, Cent. Dig. § 514.

*Rehearing denied April 11, 1903, and writ of error denied by Supreme Court.

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 1533.

tees' pleadings as against a general exception. The action is one to recover upon a contract of fire insurance, and the point here raised is that appellees' petition nowhere specifically alleged that they were the owners of the property insured, or that they had any insurable interest therein. The contention of appellant finds some support in the decisions.

In *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125, it was said: "The appellee's interest in the property covered by the policies at the time of the fire being one of the essential facts upon which her right to recover depends, it should have been alleged in the petition, and, in the absence of the specific averment of such fact, it cannot be supplied by reasonable intendment." A general exception to the petition was sustained.

So in *Alamo Fire Ins. Co. v. Davis* (Tex. Civ. App.) 45 S. W. 604, the court say: "A contract of insurance is purely one of indemnity, and one seeking to collect an insurance policy must show that he had an insurable interest in the subject of insurance at the time the loss occurred. In other words, a plaintiff seeking to collect a fire insurance policy must show that he was the owner of the property, or was otherwise interested in it, at the time of its destruction; and, unless he alleges such facts in his petition, no cause of action will be stated, and therefore no judgment can be rendered in his behalf." In that case the petition alleged the contract of insurance to have been with Davis, and a subsequent assignment of the same to a building association, but did not allege any further facts to show that such association had an insurable interest in the property, and it was held that as to the association no cause of action was shown.

In *Northwestern Nat. Ins. Co. v. Woodward* (Tex. Civ. App.) 45 S. W. 185, the court, in an opinion by the same justice who wrote the opinion in the *Everett* Case, supra, expressly repudiate that decision, and say the reasoning should be applied to those cases only where the absence of such specific averment is specially excepted to, and not to those cases where the exception is general and does not point out the defect.

The petition in *German Ins. Co. v. Pearlstone* (Tex. Civ. App.) 45 S. W. 832, averred that the defendant insured the plaintiffs against loss by fire "on their stock of merchandise, consisting of dry goods, etc.," and further charged that the policies were in force and effect at the time of the fire; that the defendant insured the plaintiffs against loss of their property by fire, that it was destroyed by fire, and thereupon the defendant became liable to the plaintiffs for the sum of \$3,500, the face of the policies. These averments were sufficient to show a cause of action as against a general exception.

The case of *German Ins. Co. v. Gibbs* (Tex. Civ. App.) 35 S. W. 679, in an opinion by the late Justice Collard, holds that an allegation

that the policy was issued to plaintiff is equivalent to an averment of ownership.

Appellees' pleadings are replete with averments which we consider sufficient to show a cause of action. The following excerpts will illustrate: "Plaintiffs would further aver that on the 29th day of December, 1900, the plaintiffs and the defendant made and entered into a contract of insurance whereby the defendant, for the consideration of eighteen dollars paid as a premium, * * * executed and issued to the plaintiffs a policy of insurance whereby the defendant * * * contracted to and did insure the plaintiffs * * * for a term of four months, beginning on the 29th day of December, 1900, at noon, and ending on the 29th day of April, 1901, at noon, against all direct loss or damage against fire, except as provided in said policy, to an amount not exceeding eighteen hundred dollars, * * * on wool owned or held by the assured while contained in a frame dwelling house known as the 'Lacy Place,' located detached on premises of the assured. * * * Plaintiffs would further aver that by reason of the execution of said policy by the defendant, and the payment to the defendant as a consideration thereof by the plaintiffs of said sum of eighteen dollars, the defendant agreed and contracted to insure the plaintiffs against all direct loss or damage by fire on the above-described wool. * * * Plaintiffs would further aver that while the said above contract was still in full force and effect, and during the life of the said policy, on, to wit, about the 7th day of March, 1901, the property mentioned and described above, and which was included in and insured by said policy, was totally destroyed by fire, whereby a direct loss occurred to the plaintiffs, not including within any reservation or proviso set forth and contained in said policy * * * all of said wool named in said policy and covered thereby, * * * and that by reason of the destruction of said wool by said fire the defendant became liable and bound to pay plaintiffs, and it promised to pay plaintiffs, the full amount of said insurance policy, to wit, the amount of eighteen hundred dollars, * * * that proofs of loss were made out under and in accordance with the terms of said policy, * * * that the defendant * * * acknowledged its liability under said policy, * * * fails and refuses to pay said policy, * * * to plaintiffs' damage of eighteen hundred dollars, * * * and to plaintiffs' great damage in the sum of nineteen hundred dollars, * * * the above-described property of the plaintiffs. * * * That, by reason of such loss occurring under such contract of insurance, the defendant became liable and promised to pay to the plaintiffs. * * * That, by reason of the failure of the defendant to pay said loss, the plaintiffs have been damaged in the said amount of nineteen hundred dollars," etc.

A special exception would possibly have

required the petition to have been more specific, but by a general exception the appellant has admitted the truth of the allegations, which we hold are sufficient to show a cause of action. See *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Phoenix Ins. Co. v. Pickel* (Ind.) 21 N. E. 546, 12 Am. St. Rep. 393; *Fowler v. Ins. Co.*, 26 N. Y. 422; *Ins. Co. v. Heart*, 24 Ohio St. 331, 5 Ohio Dec. 237; *Quarrier v. Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

There is no error in the judgment, and the same is affirmed.

TEXAS & P. RY. CO. v. BALL.*

(Court of Civil Appeals of Texas. March 14, 1903.)

RAILROADS—INJURING BOY ON TRACK—NEG-
LIGENCE—EVIDENCE—CONTRIBUTORY NEG-
LIGENCE—TRESPASSER—LICENSEE—DAM-
AGES—INSTRUCTIONS.

1. Where the track was unobstructed and straight, and the engineer testified that he was looking in the direction he was going, and there was evidence that while the boy who was struck by the engine was crossing the track his hat blew off, and he was detained on the track by his effort to recover it, and the estimates as to the speed of the engine, which had no cars attached to interfere with rapid stoppage, varied from 8 to 40 miles an hour, while an ordinance prohibited a speed of more than 6 miles an hour, the evidence authorizes an instruction submitting the issues of the operatives of the engine discovering the boy on the track, in a position of imminent peril, in time to have avoided injuring him, or so discovering him, but being unable to avoid injuring him, on account of the unreasonable and dangerous speed of the engine, though the engineer testified that he did not see the boy till after the engine struck him.

2. Evidence that the engineer discovered the boy on the track, in a perilous position, and that no effort was made to stop the engine till after the accident occurred, authorizes submission to the jury of the question of the operatives of the engine failing to use proper care to avoid the accident after the danger was discovered.

3. One struck by an engine on a pathway crossing the track which had been commonly used by the public for a long time without objection by the railroad company is not a trespasser, but a licensee.

4. A boy otherwise a licensee is not a trespasser because he had gone to the place to see a fight.

5. Though a boy 11 years old has the intelligence, education, and experience common to youths of his age, and knows the danger of being on a track when the engine passes, he may lack the discretion, on account of undeveloped judgment, to appreciate the imprudence of attempting to cross the track as an engine is approaching, so as to free him from contributory negligence.

6. A father is not guilty of contributory negligence in permitting his boy to frequently cross a railroad track without warning of the danger, unless the boy lacks the discretion to appreciate the danger.

7. Whether a boy is negligent in attempting to cross a railroad track without looking to see whether an engine is approaching—the place being a crossing commonly and habitually used by the public, and the engine being run with-

out warning of its approach, and in violation of an ordinance prohibiting a greater speed than six miles an hour—is a question for the jury.

8. There being no conflicting evidence as to the amount of plaintiff's expenses for certain items incident to his injury, an instruction, if the jury find for him, to allow the expenses incurred by him for such items, is not erroneous, in failing to limit the recovery to such expenses as were reasonable; no request for such a limitation being asked.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by George P. Ball against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. J. Freeman and Head & Dillard, for appellant. Richard B. Semple and T. M. Barnes, for appellee.

TEMPLETON, J. Ashley Ball, a boy 11 years old, was struck and injured by one of the engines of the Texas & Pacific Railway Company while attempting to cross the track of the company. The boy's father, George P. Ball, brought this suit against the company to recover the expenses incurred by him in consequence of the injuries to his son, and also the damages sustained by him on account of the loss of his son's services. A jury trial resulted in a recovery by the plaintiff, and the defendant has appealed.

The court instructed the jury that if the operatives of the engine discovered Ashley Ball on the track, in a position of imminent peril, in time to have avoided injuring him, or if they so discovered him, but could not avoid injuring him, on account of the unreasonable and dangerous speed of the engine, then the plaintiff was—other facts concurring—entitled to recover. Appellant contends that the evidence did not authorize the submission of these issues to the jury. The engineer testified that he was looking in the direction he was going as the engine approached the place where the accident occurred, and that he did not see the boy until after the engine struck him. As the track was unobstructed and practically level and straight, the conclusion is admissible that if he was on the lookout, as he testified he was, he must necessarily have seen the boy. There was evidence to the effect that while Ashley Ball was crossing the track his hat blew off, and that he was detained on the track by his efforts to recover it. The inference is reasonable that his peril, as well as his presence, was observed by the engineer. The witnesses differed widely as to the speed of the engine. The engineer estimated its speed at 8 miles per hour. This was the lowest estimate. The other estimates ranged from 10 or 12 to 40 miles per hour. As there were no cars attached to the engine, it could have been stopped in a few feet if it was running at the rate of speed shown by the lower estimates. If the engine was running at the speed shown by the higher estimates, then it may have been impossible, because of the

*Rehearing denied April 4, 1903, and writ of error granted by Supreme Court.

unreasonable speed, to have stopped the engine, after the boy was discovered on the track, before striking him. The evidence raised the issues which were submitted to the decision of the jury, and appellant's contention is not well taken.

Appellant complains of another paragraph of the charge, relating to the issue of discovered peril. The complaint is that the evidence was not sufficient to authorize the submission to the jury of the issue as to whether the operatives of the engine failed to exercise proper and reasonable care and diligence to use all reasonable means within their power to avoid injuring the boy after they discovered him in a position of imminent peril on the track. If the boy was discovered on the track, in a position of peril, it was the duty of the operatives of the engine to use all reasonable means at their command to avoid injuring him. We have seen above that the evidence tended to show that the engineer did discover the boy on the track, and observed that he was in a perilous position. The evidence shows that no effort whatever was made to stop the engine until after the accident happened. The court was therefore justified in submitting to the jury the question as to whether the operatives of the engine failed to use proper care to avoid the accident after the danger to the boy was discovered. A further complaint of the charge is that the same was too broad, and left too much to the discretion of the jury, without proper explanation as to what was meant by "proper and reasonable care and diligence, and all reasonable means within their power to avoid injuring him." In another part of the charge "proper care and diligence" is defined as being such care and caution as a person of ordinary prudence would exercise under like circumstances. This explanation occurs in connection with a paragraph which declares the general duty of the operatives of an engine where they discover a person in a position of peril on the track. The criticism of the charge is without merit, and the assignment bearing thereon is overruled.

What is said above is sufficient to dispose of the assignment which urges the contention that the verdict of the jury is without evidence to support it, in finding that the operatives of the engine discovered Ashley Ball's peril, and that he was in danger of being injured in time to have avoided the accident. In this connection, we will state that the fireman was putting in coal at the time of the accident, and did not know that the boy was on the track until after the accident had occurred.

There was evidence tending to show that, at the place where Ashley Ball was struck and injured, a pathway crossed the track, which had been commonly used by the public for a long time prior to the accident without objection on the part of the company; and the court instructed the jury that if they found there was such pathway, and that Ash-

ley Ball was crossing the track on said pathway when he was struck, then he would not be a trespasser. We believe the charge to be a correct expression of the law, and that one crossing a railway track by such pathway should be held to be a licensee, and not a trespasser. The place of the accident was within the corporate limits of the city of Bonham, and near one of the public schools of the city. The pathway appears to have been much used by the school children, and, if this was without objection on the part of the railway company, a license to use will be implied.

Appellant complains of the refusal of a special charge to the effect that Ashley Ball was a trespasser on the track. The charge was based on the fact that the evidence showed that he had gone to the scene of the accident, in company with some other boys, for the purpose of witnessing a fight. The refusal of the charge was not error. The boy was not engaged in any unlawful act; and, such being the case, it was immaterial what purpose took him to the spot, or induced him to attempt to cross the track.

Complaint is made of that part of the charge which reads thus: "As to the degree of care and circumspection required of Ashley Ball, whose age is alleged to have been eleven years when such accident happened, I instruct you that a child of tender years is not held in the same degree of accountability as an adult man, but the question of his intelligence and mental capacity must be left for your determination upon all the facts and circumstances in evidence before you." It is insisted that, under the evidence in this case, the court erred in submitting to the jury the issue as to the want of accountability on the part of Ashley Ball, on account of his age, intelligence, and mental capacity. The evidence showed that he had the intelligence, education, and experience common to youths of his age. He knew how trains were operated, and must be held to have known that, if he was on the track when the engine came along, it would strike and injure him. But while he knew the danger of being on the track when the engine passed, he may have lacked the discretion to appreciate the imprudence of attempting to cross the track under the circumstances which surrounded him. If a person of ordinary prudence would not have attempted to cross the track as he did, nevertheless, if the boy lacked the discretion, on account of his undeveloped judgment, to appreciate the danger, his act would be excusable. The evidence raised the issue, and it was the duty of the court to submit such issue to the jury. The portion of the charge quoted above, when considered by itself alone, is not free from criticism, but, when considered in connection with other paragraphs of the charge, did not constitute error. The jury was instructed that a child of tender years was required to exercise such care and caution as children of his age and

intelligence would commonly exercise under like circumstances, and that a failure of a child to exercise such care and caution to avoid injury to himself would be negligence. The rule stated was applied to the facts, and the jury were instructed to return a verdict for the defendant if they found that Ashley Ball was guilty of negligence. While it is true, as contended by appellant, that, if a child knows and appreciates the danger of his act, he is held to the same degree of accountability as an adult person, the charge, considered as a whole, cannot be construed as declaring a different rule. The question as to whether Ashley Ball was possessed of sufficient intelligence to know it was dangerous to go upon the track at the time he did was expressly left to the decision of the jury, and the charge directed a verdict for the defendant if the jury found that he was sufficiently intelligent to know the danger. The evidence was such as to justify a finding by the jury that, even if Ashley Ball knew that the engine was approaching when he went on the track, he lacked the discretion to appreciate the danger of attempting to cross the track under the circumstances.

It is contended that the court erred in submitting the issue as to the boy's want of intelligence, in connection with the issue as to whether the plaintiff was guilty of negligence in permitting his son to frequently cross the track by said passway without warning him of the danger; the contention being that if the plaintiff was negligent he was not entitled to recover, regardless of whether the boy was guilty of negligence. We concur in the proposition of law stated, but are of opinion that the plaintiff could not be held guilty of negligence unless the boy lacked the discretion to appreciate the danger incident to crossing the track at the point where the accident occurred. If the boy possessed sufficient intelligence to know that the crossing was dangerous, and sufficient discretion to appreciate and avoid the danger, it was unnecessary for his father to warn him of it. If a necessity to warn did not exist, then negligence could not be based on a failure to warn.

The evidence was conflicting as to whether Ashley Ball knew that the engine was approaching when he went upon the track. It was not shown that he looked to see whether the track was clear before he attempted to cross. The defendant requested the court to instruct a verdict in its favor on the ground that Ashley Ball was guilty of negligence in going on the track in front of an approaching engine without using proper care to avoid injury therefrom. The special charge was refused, and appellant complains thereof, and insists that it was entitled to a verdict on the said issue. As stated above, the accident happened within the corporate limits of the city of Bonham, at a crossing commonly and habitually used by the public. There was an ordinance prohibiting the operation of an en-

gine within the city limits at a rate of speed greater than six miles per hour. It was shown beyond controversy that the engine in question was being run in violation of said ordinance. It appears that no warning signal of its approach was given. The question as to whether the boy was negligent in attempting to cross the track without looking to see whether the same was clear was properly left to the decision of the jury. It follows that we are of opinion that the contention of appellant is not well taken, and this holding disposes of the further contention that the court erred in refusing to instruct the jury that, if Ashley Ball went upon the track without using any precautions or making any effort to guard against cars and engines running thereon, then the plaintiff was not entitled to recover. This charge is also objectionable because it ignored the issue as to the boy's discretion.

The court instructed the jury that in case they found for the plaintiff, in estimating his damages, to allow the expenses incurred by him for nursing, medical attendance, and medicine on account of the injuries to his son. The jury allowed \$84 for nursing, \$100 for doctor's bill, and \$4 for medicine. The plaintiff testified that he and his wife nursed the boy constantly, day and night, for three weeks, and that their services were worth \$4 for a day and night. He also testified that his bill for medicine was as much as \$5, and that the medicine was worth that sum. The attending physician testified that his bill was \$100, and that his services were worth that much. There was no conflicting evidence. In this state of the evidence, we cannot say that the charge was materially erroneous, in failing to limit the recovery to such expenses as were reasonable, especially in view of the fact that the defendant did not, by special charge, ask that the recovery be so limited. We find, however, that the plaintiff, in his petition, claimed only \$50 for doctor's bill, and the verdict as to that item is therefore excessive. The appellee having offered to remit the amount recovered in excess of that claimed in the petition, the judgment will be reformed by reducing the recovery for medical attendance to \$50, and, as reformed, will be affirmed.

Reformed and affirmed.

MERRILL v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.*

(Court of Civil Appeals of Texas. March 14, 1903.)

TELEPHONE MESSAGE—NEGLIGENCE—OBJECT OF CALL—EVIDENCE—ADMISSIBILITY—KNOWLEDGE IMPUTED TO PRINCIPAL.

1. On an issue as to whether a telephone company knew that the object of a call to plaintiff in another town was to inform him of his mother's death, evidence of a witness that

*Rehearing denied April 4, 1903, and writ of error denied by Supreme Court.

¶ 1. See Evidence, vol. 20, Cent. Dig. § 701.

in talking to another party he had heard the central office relating that fact was inadmissible.

2. A principal is bound by the knowledge of an agent only when such agent acquires his knowledge in the transaction of his principal's business.

Appeal from District Court, Fannin County; Ben. H. Denton, Judge.

Action by Griff Merrill against the Southwestern Telegraph & Telephone Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. M. Rowland, for appellant. McLaurin & Wozencraft, for appellee.

RAINEY, C. J. Appellant sued the appellee to recover damages for mental anguish suffered on account of absence from his mother's funeral, alleged to have been caused by the negligence of appellee in failing to notify him at Cisco, Tex., of a call put in for him at Ladonia, Tex., for the purpose of notifying him of his mother's death. Verdict and judgment resulted for appellee, from which this appeal is prosecuted.

The facts are that on the night of February 4, 1901, the mother of appellant died in Ladonia, Tex. One of her children—Bob Merrill—requested G. A. Marvin to call up appellant at Cisco, Tex., and notify him of his mother's death. Marvin put in a call at the Ladonia office. A short time thereafter the Ladonia office reported to Marvin that appellant was out of town (Cisco). Marvin then put in a call for appellant's wife, and in a few minutes was notified that the Cisco office had closed for the night. There was telegraphic communication between Ladonia and Cisco, but no telegram was sent. Had plaintiff been notified that night, he could have reached Ladonia in time for the burial. Appellant and wife left Cisco for Ladonia via Dallas about 2:16 a. m., February 5, 1901, reaching Dallas between 8 and 9 o'clock that morning. They could have caught a train out for Ladonia in time for the funeral, but, not having heard of his mother's death, he took time to look after his baggage, and was delayed until after the train left. The office at Ladonia was not informed of the object of the calls put in for appellant and wife.

The first assignment of error relates to the exclusion of a part of the testimony of G. A. Marvin given by deposition, which appellant offered in evidence. The interrogatory propounded was: "If you know, please state whether or not the persons in charge of the Ladonia telephone office on the night of February 4, 1901, or any of such persons, knew, at the time you put in said call, that Mrs. Sarah E. Merrill had died that night. If you know, you will also state whether said persons, or any of them, knew the plaintiff, Griff Merrill, and knew the relationship between him and the said Mrs. Merrill?" The part of the answer excluded was, "They knew of her death, because I reached the

Merrill Bros. through their office, and heard central office relating the fact of Mrs. Merrill's death." A bill of exception was reserved, to which the court appended the following explanation, viz.: "That defendant's counsel further objected that the answer, when taken with the whole of the witness' deposition, showed that the witness did not know that the said conversation by him overheard was in fact in the central office of the defendant; that he did not in fact know who was doing the talking he heard; the witness did not of his own knowledge know whether it was one of the defendant's servants relating the fact of the death, or a stranger to defendant; that he did not know whether any one representing defendant was present at the place where the talking was, or heard the same." This explanation of the court is supported by the testimony of Marvin, as shown by the statement of facts. We are of the opinion that the evidence was properly excluded. It was not shown that Marvin, or any one connected with putting in the call, notified the employes of the office the object of the call, or that they came in possession of the object of the call in the transaction of that matter. At the time Marvin states that he heard the conversation he was talking over the phone with Merrill Bros., and not with any one in the central office. Nor does he state any fact that authorizes the presumption that the employes in the office were doing the talking in connection with the call so as to bind appellant. Had Marvin been in direct communication with the central office—that is, had he called up the central office, and held a conversation with some one in answer to that call—then he could testify as to what that party said relative to the transaction, notwithstanding he did not know who it was with whom he was talking. *Railway Co. v. Heldenheimer* (Tex. Sup.) 17 S. W. 608, 27 Am. St. Rep. 861; *Wolfe v. Railway Co.* (Mo. Sup.) 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331. But the nature of the circumstances surrounding the evidence here sought to be introduced renders it inadmissible. To admit in evidence telephone communications under such circumstances would be too uncertain for the basis of a reasonable conclusion. Had the evidence been admitted, it was of so little probative force as to preclude a finding that appellee had notice of the object of the call.

The following paragraph of the court's charge is assigned as error, viz.: "I further instruct you that any testimony as to the knowledge of the fact (if it was a fact) that the employes of defendant knew of the death of Mrs. Merrill, and that the purpose of the call to get Griff Merrill at Cisco in communication with Marvin, in order to notify plaintiff of his mother's death, must have come to the knowledge of the said employes through some transaction or act while they were transacting the business of the defendant in connection with the call put in."

There was no evidence that at or during the time the parties were communicating with the central office about the call for appellee and wife, the central office was informed by them of Mrs. Merrill's death, which was the object of the call. The only evidence as to the knowledge of the operators in the central office of Mrs. Merrill's death and the relation between her and appellant is shown by the testimony of one Lon Allen. He lived in Ladonia, and was a printer. He was learning the board—wanted to secure a position. He had been promised one by the manager, and was in the office by agreement with him. Miss Fannie Kean was night operator, who received the call in question. Allen came in on the board just as she was receiving the call. Just before he went up into the office, he heard on the street that Mrs. Merrill was dead. Nothing was said about it in the office. He knew that appellee was the son of Mrs. Merrill. He was in the office learning the long distance business. The proposition advanced by appellant in this connection is, in effect, that the principal is bound by the knowledge of the agent acquired in connection with the transaction, "or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retains it." The principle thus stated is supported by some other jurisdictions, but it is stated broader than the rule laid down by our Supreme Court in *Texas Loan Agency v. Taylor*, 88 Tex. 49, 29 S. W. 1057, and *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264. In the first case cited, Mr. Gaines, C. J., in speaking of the doctrine of knowledge of the agent being imputed to the principal, says: "This principle only applies where the agent acquires his knowledge in the transaction of his principal's business, and we therefore think that the doctrine of imputed notice should be limited to cases of that character." The charge was in strict accord with these authorities, and was applicable to the facts; hence not erroneous.

There are other assignments, which we have duly considered, but deem unnecessary to discuss, because the evidence fails to disclose any liability of appellee to appellant for mental anguish, there being no evidence showing notice to appellee's employes of the object of the call for appellant.

The judgment is therefore affirmed.

CITY OF SHERMAN v. GREENING et al.*
(Court of Civil Appeals of Texas. March 7, 1903.)

CITIES—DEFECTIVE STREETS—NOTICE—INJURIES—LIABILITY—BURDEN OF PROOF—INSTRUCTIONS.

1. Under Laws Tex. vol. 10, p. 1035, providing that before the city of Sherman shall be liable in damages for personal injuries caused by

defective streets, sidewalks, etc., the person alleging the injury shall show that the city had either actual or constructive notice of the defect, the burden is on plaintiff in an action for injuries by the caving in of a sewer ditch to show that the city had notice of the defect, or could have had notice by the exercise of proper diligence.

2. Where refused charges were not in all respects correct, but were sufficient to call the court's attention to an omission in its own charge, the court should have given a proper charge covering the point in question.

3. Where the evidence in an action against a city for negligent injuries by reason of a defective street showed that the city had no actual notice of the defect, and did not show that the city had failed to use ordinary care to discover the defect, the city was entitled to a peremptory instruction in its favor.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by J. M. Greening against the city of Sherman and Black & Laird. Judgment for plaintiff and defendants Black & Laird, and defendant city appeals. Affirmed in part, and reversed in part.

R. L. Caruthers, for appellant. Wolfe, Hare & Semple, for appellees Black & Laird.

BOOKHOUT, J. This suit was instituted by appellee J. M. Greening against the appellant, city of Sherman, and appellees Black & Laird, a firm composed of J. L. Black and M. R. Laird, to recover damages for personal injuries caused by appellee's horse stepping in a sewer ditch, and the same caving in and throwing appellee against the horn of his saddle, thereby breaking one of his ribs. Appellee alleges that both of said defendants knew, or by the use of ordinary care could have known, of the defect in the sewer. The appellant, city of Sherman, answered by general demurrer, general denial, plea that the injury occurred on place for sidewalk which was safe for footmen, and that it had provided a safe street, of sufficient width, and was not liable, plea of contributory negligence by appellee, and a violation by him of certain ordinances of the city, and also plea for judgment over against said firm, as being primarily liable. Appellees Black & Laird answered by general demurrer and general denial to both petition and cross-bill, and specially pleaded that they were not liable because said appellee was not a party to the contract, and that said firm, under said contract, were agents and employes of the city, and the acceptance by the city of the work prior to the injury. Trial was had before a jury September 16, 1902, and resulted in a verdict and judgment in favor of said firm against both parties, and against the city in favor of plaintiff. The city has appealed.

Appellant groups its first, second, and third assignments of error, and thereunder the contention is urged that, before the city can be made liable for a defect in its street or sidewalk, it must be shown that the city had notice of such defect, or could have had no-

*Rehearing denied April 4, 1903.

tice, by proper diligence, prior to the injury. The injury occurred by the plaintiff's horse stepping in a sewer ditch constructed in one of the streets, which ditch caved in and caused the horse to pitch, thereby injuring the plaintiff. There was evidence that the ditch or sewer was properly constructed. It is provided by its charter that before the city of Sherman shall be liable "to any person for any damage for personal injury alleged to have been received by reason of any defect in its streets, sidewalks, alleys, bridges, or any other portion of said city, the person alleging such injuries shall show that the city has had notice, or could have had notice by proper diligence, of such defects prior to such alleged injury." Laws Tex. vol. 10, p. 1035. There is no evidence in the record showing notice to the city of any defect in the street or sewer. The burden was on the plaintiff to show that the city had notice of the defect in the street, or that it could have had such notice by proper diligence. The special charges requested by appellant and refused by the court, although not in all respects correct, were sufficient to call the attention of the court to the omission in its main charge on the question of notice, and required the court to submit this issue in a proper charge. *City of Dallas v. Jones* (Tex. Sup.) 49 S. W. 577; *City of Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *City of Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

Under the fourth and fifth assignments of error, which are grouped, and under which the contention properly arises, it is insisted that the trial court erred in not instructing a verdict for the city because there was no evidence that the city failed to use ordinary care and diligence to discover the defect in the street, and the evidence does show that the city had no actual notice of the defect therein. The evidence fails to disclose negligence on the part of the city in failing to discover the defect in the street. It affirmatively shows that the city had no actual notice of the defect. In the absence of such evidence, the city was entitled to a peremptory instruction in its favor; and, should the evidence be the same upon another trial, such instruction should be given.

For the errors indicated, the judgment is reversed as to the city, but affirmed as to appellees Black & Laird. Affirmed in part, and reversed and remanded in part.

MARTINEZ v. DRAGNA.

(Court of Civil Appeals of Texas. March 25, 1903.)

LIMITATION OF ACTIONS—ARREST OF STATUTE—INSTITUTION OF SUIT—DEFECTIVE PETITION—EFFECT.

1. A petition on a note, misnaming defendant, on which citation was issued, but not served, and to which no appearance was entered, did not arrest the statute of limitations, so that an

action could be maintained on an amended petition filed after the statute had run, correcting the mistake, but showing no excuse therefor.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by P. P. Martinez against B. Dragna. From judgment for defendant, plaintiff appeals. Affirmed.

W. A. Kemp, for appellant. Evans & Davis, for appellee.

JAMES, C. J. The original petition, filed January 2, 1901, was against D. Dragna on a note executed by defendant therein (D. Dragna), which was payable on January 1, 1897. Citations were issued on that petition, but not served. No appearance was entered. On April 10, 1902, plaintiff filed an amended original petition in the case, which alleged the defendant's name was by mistake in the petition stated as D. Dragna, when his real name is B. Dragna, and then charged that the note was executed by B. Dragna, setting forth its terms the same as in the original petition, and asked for citation for B. Dragna. On May 1, 1902, B. Dragna answered, setting up, among other things, that the note was barred, claiming that he had not been sued thereon until by the amended petition. The court appears to have given judgment for defendant on this plea. We think the judgment should be affirmed. There was no proof that appellee was known by either name, nor was there any proof which would have shown an excusable mistake in bringing the original action against D. Dragna. *Pritchard v. McCord-Collins Co.* (Tex. Civ. App.) 71 S. W. 303. The names are dissimilar, and indicate different persons. The defendant, as originally named, was D. Dragna, and the note that petition declared on was a note executed by D. Dragna, a different defendant and a different note than were designated in the amended pleading. In the absence of some showing such as above indicated, the court did not err in holding that the original petition did not arrest the statute.

Affirmed.

RIEDEN v. KOTHMAN.

(Court of Civil Appeals of Texas. March 11, 1903.)

ABATEMENT OF ACTION—JUDGMENT IN GARNISHMENT—PENDENCY OF APPEAL.

1. The pendency of an appeal by a creditor from a judgment in favor of a garnishee is not ground for the abatement of an action brought in the same court against the garnishee by the debtor, but such action should be postponed until the appeal is decided.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by Frank Rieden against John Kothman. Judgment for defendant, and plaintiff appeals. Reversed. Motion for rehearing overruled.

Geo. Powell, for appellant. Webb & Goeth, for appellee.

FLY, J. This suit was instituted by appellant against appellee to recover a debt of \$301. A plea in abatement, alleging the pendency of another suit involving the same subject-matter, was sustained by the court, and the suit was dismissed.

The plea in abatement is as follows: "Now comes the defendant, and, pleading in abatement to plaintiff's suit, says that before the filing of this suit, to wit, on the 18th day of August, 1900, in this same court, this same defendant was impleaded in a plea of debt in a suit styled 'H. Faseler v. John Kothman, Garnishee,' numbered 414 on the docket of this court, involving identically the same matters and issues that are involved in this suit; that said suit was brought against this defendant by reason of the fact that H. Faseler obtained a judgment against Frank Rieden; that, said Rieden being insolvent and not having any property subject to execution, said H. Faseler sued out a writ of garnishment against this defendant, alleging that there was an indebtedness due said Frank Rieden, plaintiff in this case, by reason of the same facts alleged in plaintiff's petition in this case; that a substantial copy of the petition of H. Faseler in said cause No. 414, styled 'H. Faseler v. John Kothman, Garnishee,' is hereto attached, and marked 'Exhibit A,' and made a part of this answer; that said suit No. 414 was tried in the county court of Bexar county, Texas, and that a verdict for the defendant, the garnishee in said suit, was rendered on the 9th day of October, 1901, and that on the same day the court rendered judgment upon said verdict for the defendant, garnishee in said suit, a substantial copy of which judgment is hereto attached, and marked 'Exhibit B,' and made a part of this answer; that said cause was appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and that the said cause is there now pending on appeal, styled on the docket of said court, 'H. Faseler, Plaintiff in Error, v. John Kothman, Defendant in Error, No. 2-588,' that by reason of said former suit, involving the same matters, this defendant cannot be required to answer or be impleaded in this cause; that by reason of said former suit this defendant, as garnishee therein, may be required to pay to H. Faseler such amount, if any, that this defendant may be indebted to said Frank Rieden. And this the defendant is ready to verify."

The court erred in sustaining the plea in abatement and in dismissing the suit. The rule of law which prohibits the prosecution of two suits at the same time not only requires that they shall be for the same cause of action, but the plaintiff must be the same in both suits. *Langham v. Thomason*, 5 Tex. 127. When it was made known to the court by the plea that a suit had been pending in

the same court, involving the same subject-matter, and that it was on appeal, a trial of this suit should have been postponed until the appeal was decided, and then the necessary step should have been taken to protect appellee. As is judicially known to this court, the case of *Faseler v. Kothman* has been remanded for another trial; and, if a trial in this case had been postponed, appellee could have been readily protected by a consolidation of the two suits.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

(April 8, 1903.)

Appellee contends that this court, in its former opinion, has reversed various and sundry decisions of the Supreme Court—particularly the cases of *Miller v. Taylor*, 14 Tex. 538, and *Burk v. Hance*, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28. We held in our former opinion that it was error in the trial court to abate this suit against Kothman on account of the pendency of a garnishment suit in the same court by Faseler v. John Kothman; and if we understand the language of the opinion in *Miller v. Taylor*, which is approved in *Burk v. Hance*, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28, the Supreme Court held identically the same thing. The court said: "The general principle seems to be that the pendency in the same court of an action on behalf of the defendant against the garnishee will not preclude the garnishee's being charged. But where the proceedings are in different jurisdictions, or where the action is pending in one court and the garnishment in another, and the courts are of different jurisdictions, the rule appears to be different. Then the proceeding which was first instituted will be sustained." That is to say, John Kothman has no right to have the suit brought against him by Frank Rieden abated because of the pendency in the same court of a garnishment suit brought by Faseler, a creditor of Rieden, and still pending in that same court. The reason for the rule is that where the two actions are pending in the same court the interests of the defendant and garnishee can be readily protected, as we stated in our former opinion.

The motion for rehearing is overruled.

CHANDLER v. HOWELL et al.

(Court of Civil Appeals of Texas. March 21, 1903.)

WRONGFUL ATTACHMENT—COMPLAINT—CONSTRUCTION.

1. The allegation of the complaint, in an action for wrongful suing out of an attachment against cotton, that the attachment suit was determined in plaintiff's favor, and the cotton was by the court released from the levy, will be held, as against a general demurrer, to be merely a recitation of the effect of the judgment, and not an allegation of return of the property

to plaintiff, or inconsistent with the allegation that the constable had refused to deliver the property to plaintiff.

Appeal from Ellis County Court; J. E. Lancaster, Judge.

Action by A. J. Chandler against W. B. Howell and others. Judgment for defendants. Plaintiff appeals. Reversed.

Tom. P. Whipple, for appellant. J. L. Gammon, for appellee W. L. Howell. A. L. Love, for appellees H. E. Howell and B. C. Henderson.

RAINEY, C. J. Appellant brought this suit in the county court against appellee W. B. Howell and his sureties on an attachment bond for damages alleged to have arisen from the wrongful and malicious suing out of a writ of attachment and the levy thereof upon appellant's property. A general demurrer was sustained, and plaintiff's cause dismissed.

The allegations of the petition material for this discussion are, in effect, that the writ of attachment was sued out in the justice court, and levied by the constable on six bales of cotton belonging to plaintiff, which were of the value of \$240; that said constable took possession of the same, and "refused, and still refuses, to deliver same, or any part thereof, to this plaintiff, although requested so to do," and plaintiff was actually damaged to that extent; that the suit in the justice court had been determined in plaintiff's favor, and "said six bales of cotton theretofore levied on were by the court released from the levy of said writ." In addition to the value of the cotton, the plaintiff alleged certain exemplary damages. The proposition advanced by appellee is that the allegations of the petition did not show any actual damages, in the absence of which a recovery could not be had for exemplary damages. On a former day of this term we accepted this view, and affirmed the judgment of the court below. Our construction of the petition was that the allegation that "the six bales of cotton theretofore levied on were by the court released from the levy of said writ of attachment" was equivalent to stating that said cotton had been returned to plaintiff, which was inconsistent with the allegation that the constable retained possession and refused to deliver same to plaintiff. If this were correct, then, there would be no actual damages shown, in the absence of which a cause of action would not be alleged. Upon reconsideration, however, we have concluded that, the allegation as to the levy being released by the court is merely a recitation of the effect of the justice's judgment, and should not be construed as a return of the property to the plaintiff, and inconsistent with the allegation that the constable had refused to deliver the cotton to plaintiff. We can see that the court may have, by its judgment, decreed that the levy

was released, and still the constable may not have complied therewith, but retained possession of the cotton. This construction of the petition is in accord with the general rule that "on general demurrer every reasonable intendment will be indulged in favor of the plea excepted to."

The motion for rehearing is granted, the judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. et al. v. BYERS BROS.

(Court of Civil Appeals of Texas. March 25, 1903.)

CARRIERS—LIVE STOCK SHIPMENT—CONTRACT—PLEADING—VERIFICATION—FEEDING AND WATERING—CONNECTING CARRIERS.

1. The petition in an action against connecting carriers for injury to cattle shipped, alleging that one of the defendants, acting for itself and as agent for its codefendant, presented to plaintiffs a contract, which they signed, but not alleging that it was signed by defendants, does not require a denial under oath; the mere allegation of agency, in the absence of allegations charging the execution of an instrument in writing, not demanding a denial under oath.

2. Where shippers, at the time they delivered cattle to a carrier, expected to sign the written contract which they afterwards signed, it governs on the question of the carrier's liability.

3. Where an interstate contract of shipment in terms limits each carrier's liability to its own line, and there is no agency or partnership between them, they are not jointly liable for what happens on either or both lines.

4. Under a contract of shipment of cattle, providing that the shipper shall take care of, feed, water, and tend the stock during transportation, and his agent goes along with them, the carrier must furnish reasonable facilities for feeding and watering, but has no duty to feed and water.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by Byers Bros. against the Texas & Pacific Railway Company and another. Judgment for plaintiffs. Defendants appeal. Reversed.

E. B. Perkins, Head & Dillard, and T. J. Freeman, for appellants. Smith, Templeton & Tolbert, for appellees.

JAMES, C. J. This is an action for damages to cattle shipped from Paris, Tex., to East St. Louis, Ill. The shipment began at Paris on the Texas & Pacific Railway Company's road, and at Texarkana was received by the connecting carrier, the St. Louis Southwestern Railway Company, which transported them to Cairo, Ill., from where the Illinois Central carried them to destination. The action was brought against the Texas & Pacific Railway Company and the St. Louis Southwestern Railway Company. Judgment against both defendants for \$642.34.

We have concluded that there was error in the charge, in authorizing the jury to find a

¶ 4. See Carriers, vol. 9, Cent. Dig. § 228.

joint judgment against both defendants. The petition said nothing about a written contract of shipment, and, of course, under such pleading it could prove either a written or oral one. The petition did allege that the two defendants were agents for each other in the carrying of freight and passengers, and were partners. Defendants denied partnership on oath, and set up that the cattle were shipped under a written contract between plaintiffs and the Texas & Pacific Railway Company, in which the carrier limited its liability to what occurred on its own line. This being an interstate matter, the limitation was legal. In a supplemental petition, plaintiffs alleged that the cattle were not shipped upon any written contract, except as hereinafter shown. They then proceeded to allege facts showing that the cattle were received for shipment under a verbal arrangement, but that after this the Texas & Pacific Railway Company, acting for itself and as agent for its codefendant, presented to plaintiffs a stock contract used for the transportation of such freight, which plaintiffs were required to sign, and which they did sign, as a condition to the further transportation of their cattle; that they received no consideration for so doing; that it was signed by plaintiffs practically through duress, etc. Wherefore they claimed that said writing was void and of no effect. Plaintiffs clearly were relying upon an oral contract, and not upon any written one, and their pleadings will be searched in vain for an allegation charging that the written contract was signed by either defendant. Under such circumstances, neither defendant was required to deny the execution of the written contract under oath. The mere fact of agency, in the absence of allegations charging the execution of an instrument of writing, need not be denied on oath. The testimony failed to show either agency or partnership. From plaintiffs' own testimony, it clearly appeared that they expected to sign and contemplated signing the written contract alleged by defendants at the time they delivered the cattle; hence, as a matter of law, the written contract governed. This seems to have been the view of the trial judge. The contract being the written one, which in terms limited each carrier's liability to its own line, and no agency or partnership being shown, we cannot conceive how defendants could be held jointly for what occurred on either or both lines. Each carrier was liable only for what injury the cattle received while in its custody.

There was no error in the court's charge respecting the measure of damages, nor in the court's action with reference to notice of damages. *Ry. v. Withers*, 16 Civ. App. 506, 40 S. W. 1073.

The contract provided that the owner should take care of, feed, water, and tend the stock during the transportation, and the evidence shows that plaintiffs' agent went along with them. In such a case the carrier would

be liable to plaintiffs for not furnishing reasonable facilities for feeding and watering the cattle, and similar acts of negligence on its part. The court's charge was erroneous, in leaving it for the jury to determine whether or not plaintiffs assumed the duty of feeding and watering the cattle; the contract being plain on that subject, and the evidence undisputed that an agent of plaintiffs accompanied them. We mention this in view of another trial. The other alleged errors it is not deemed necessary to discuss. Most, if not all, of them will probably not arise on another trial as they do here.

Reversed and remanded.

LUMSDEN v. CHICAGO, R. I. & T. RY. CO.

(Court of Civil Appeals of Texas. March 14, 1903.)

RAILROADS—KILLING PERSON ON TRACK— CONTRIBUTORY NEGLIGENCE— INSTRUCTIONS.

1. Instructions submitting the issue of contributory negligence in an action for death of a person killed by a train while crossing a railroad track are required by evidence that he did not look or listen for a train before going on the track, and that there was nothing to have prevented his discovering the danger if he had done so.

2. For the court to give a new instruction on contributory negligence on the jury asking for an additional instruction on the subject is not giving undue prominence to the subject.

Appeal from District Court, Wise County; J. W. Patterson, Judge.

Action by Debra Lumsden, by her next friend, against the Chicago, Rock Island & Texas Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

R. E. Carswell and A. M. Carter, for appellant. N. H. Lassiter and T. J. McMurray, for appellee.

SPEER, J. R. E. Lumsden, as next friend to her minor daughter, Debra, brought this suit against the Chicago, Rock Island & Texas Railway Company to recover damages for the negligent killing of Debra's father, and from a judgment denying recovery she has perfected this, her third appeal to this court. 56 S. W. 605, and 67 S. W. 168. There are but three assignments of error, all of which are predicated upon the charge of the court.

The three assignments complain of the following charges, respectively, viz.:

First. "(5) If you find and believe from a preponderance of the evidence in this cause that John W. Lumsden failed to look and listen for cars before going upon the track where he was killed; and if you believe such failure to look and listen for approaching cars was negligence on the part of the said Lumsden as the same is hereinbefore defined; and if you believe that the said Lumsden, by so looking or listening, could have discov-

ered the approaching cars—you will find for the defendant.”

Second. “(9) If you believe from a preponderance of the evidence that the said John W. Lumsden attempted to cross the defendant's track in front of the moving cars, and that he was thereby run over and killed by the cars of defendant; and if you believe that the said Lumsden, in so attempting to cross said track, was guilty of negligence as the same is hereinbefore defined, you will find for the defendant.”

Third. “Gentlemen of the jury, in response to your inquiry made verbally in open court, you are charged that, if you find and believe, from a preponderance of the evidence, that the agents and employes of the defendant were guilty of negligence in running over and killing the said John W. Lumsden, and you further believe, from a preponderance of the evidence, that the said John W. Lumsden was himself guilty of negligence in going upon and being upon the track of the railroad at the time, and if you believe that such negligence on the part of the said Lumsden contributed proximately to his death, then, if such you find the facts to be, the plaintiff cannot recover, and should, if you so find, return a verdict for the defendant railroad company.”

It is insisted that the first two, being parts of the court's general charge, should not have been given, because there was no evidence authorizing the submission of such issues to the jury; and that the third, given, as the charge indicates, in response to the inquiry of the jury, was erroneous for the same reason, and for the additional reason that it gave undue prominence to the feature of contributory negligence.

We are of opinion the evidence was amply sufficient to require the submission of these issues to the jury. The circumstances attending the accident, as well as the testimony of the witnesses who were near by, tend very strongly to show, if, indeed, they do not do so, that the deceased did not look or listen for an approaching train before going upon appellee's track. There was nothing to have prevented his discovering the danger if he had exercised even this slight precaution. On the other hand, if he did look or listen, it cannot be doubted but that he saw or heard the approaching cars, and thought to cross before they could be upon him. In either event, it was for the jury to find whether or not his conduct amounted to negligence, and in this state of the evidence the trial court could not safely omit either of the paragraphs of the charge complained of. *Gulf, C. & S. F. Ry. Co. v. Wilson*, 59 S. W. 592; *Tucker v. Int. & G. N. R. Co.*, 67 S. W. 914, 4 Tex. Ct. Rep. 471, 708; *Sanchez v. S. A. & A. P. Ry. Co.*, 30 S. W. 481.

We are also of opinion there was no error in giving the additional charge complained of. Such practice is specially authorized by statute (*Sayles' Civ. St. art. 1321*), and, where a

jury makes request for such additional instruction, if the same be upon a question of law properly arising in the case, the trial judge has either to prepare and submit to them an additional charge, or indicate that the subject is embraced in the instructions already given; in either of which cases it may be said in a sense that prominence is given the issue thus referred to. It is the theory of the law that the court will give to the jury such instructions as will enable them to apply the law to the facts as they find them. It should be so in practice. When jurors are honestly seeking to arrive at a verdict, and in a proper manner ask for information as to the law of the case, the trial court should be free to instruct them. This will better conserve the public interests in the promotion of justice than to deny the requested information because of a possible prominence that may be thereby given to some feature of the case. The principle involved in the proposition that the oft-repeated presentation of a phase of a case by the court in his charge to the jury amounts to an undue prominence given to such phase or issue is that the mind of the jury will be thus unwittingly drawn to a consideration of such phase or issue, and give to the same a weight out of proportion to that which it is justly entitled to. In other words, that the jury will be unduly impressed with the belief that the trial judge attaches great importance to the matter thus frequently called to their attention. The principle itself does not apply to a case like the present. Here the mind of the jury is already resting upon a particular phase of the case, and, not fully comprehending the law to govern them, the jury asks for information upon that question, and it is the duty of the court to answer the inquiry in such manner as will enable them to intelligently determine the matters submitted to their arbitration.

We find no error in the judgment, and the same will be affirmed.

GULF, C. & S. F. RY. CO. v. STATE.*

(Court of Civil Appeals of Texas. March 7, 1903.)

CARRIERS — FREIGHT RATES — ESTABLISHMENT—RAILROAD COMMISSION—CHARACTER OF SHIPMENT—INTRASTATE TRANSPORTATION.

1. Corn was shipped from Hudson, S. D., to Texarkana, Tex., with the privilege of inspection and transfer at Kansas City, under a through, prepaid bill of lading. On arrival at Kansas City the corn was unloaded and placed in elevators for sacking and cleaning, and transferred to other cars and shipped to Texarkana. The corn was sold to the H. Co. at Kansas City for delivery in Texarkana, and was by them sold to the ultimate consignees at G., Tex. On the arrival of the corn at Texarkana the agent of the H. Co. at that place transhipped the corn in the same cars, under a new bill of lading, to the purchasers, at G. There was no evi-

*Rehearing denied April 4, 1903, and writ of error granted by Supreme Court.

dence that the stoppage in Kansas City was colorable, merely, or that the transshipment at Texarkana was a mere pretext to avoid the operation of the interstate commerce law, and to obtain a lower freight rate to G. Held, that the interstate shipment terminated at Texarkana, and that the further shipment to G. was intrastate business, for which defendant was only entitled to charge the rate fixed by the Texas Railroad Commission.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by the state of Texas against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and Cowan, Burney & Lee, for appellant. O. K. Bell, Atty. Gen., for the State.

CONNER, C. J. This suit was duly instituted by the state of Texas, acting by her Attorney General, to recover a penalty for an alleged violation of article 4573, Rev. St., in that appellant demanded and received a greater sum for freight than allowable under the rate fixed by the Railroad Commission of Texas upon a shipment of corn by the Samuel Hardin Grain Company from Texarkana, Tex., to Goldthwaite, Tex. The trial was before the court without a jury, and resulted in a judgment in favor of the state. The facts as found by the trial court seem to be practically undisputed; the same not having been challenged, save in a single particular, as to which, however, we think the evidence is sufficient to support the finding, and which therefore need not be further noticed. The trial court's conclusions of fact are as follows:

"(1) The Railroad Commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad, or by two or more lines of railroad, whether under the same management and control, or not, for the transportation of corn between points within the state of Texas, in car-load lots, at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March 10, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific Railroad Company received legal notice before the rates prescribed became effective.

"(2) The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific Railway to Ft. Worth, and from Ft. Worth over the G., C. & S. F. Ry. to Goldthwaite, Texas, is more than 165 miles.

"(3) The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Ft. Worth, Texas, and the defendant from Ft. Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the state of Texas.

"(4) The Texas & Pacific Railway Com-

pany executed a bill of lading, dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company, at Texarkana, Texas, of one car of sacked corn, same being car 3845, P. & G., and which bill of lading purported to show that the said corn was consigned to shipper's order, notify Saylor & Burnett, Goldthwaite, Texas.

"(5) Said car load of corn was transported by the Texas & Pacific Railway Company to Ft. Worth, and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902; and Saylor & Burnett, who were acting for Samuel Hardin Grain Company, tendered to the defendant's agent at Goldthwaite \$82.50 in payment of the freight charges thereon. The said agent declined to accept said amount of \$82.50 in payment of said charges, and demanded \$165 for the transportation of said car load of corn from Texarkana, Texas, to Goldthwaite, Texas.

"(6) The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded, and received from Samuel Hardin Grain Company \$165 for the transportation of said car load of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas. In so charging, collecting, demanding, and receiving said \$165 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant company, who believed and advised that said shipment was interstate commerce, and his action in so doing was subsequently ratified by the defendant.

"(7) The Samuel Hardin Grain Company made complaint to the Railroad Commission of Texas of the action of the defendant in charging more than 12½ cents per hundred pounds for transporting said corn, whereupon the Railroad Commission investigated such complaint, and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

"(8) On December 23, 1901, the Samuel Hardin Grain Company, at Kansas City, Mo., offered to sell Saylor & Burnett, at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on railway track at Goldthwaite, and this offer was accepted for two car loads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn, but on December 24, 1901, to fill the order, it contracted with the Harroun Commission Company, at Kansas City, for the purchase of two 66,000-pounds cars of No. 2 mixed corn at 75½ cents per bushel, to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the

purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to, and did, fill the order of the Hardin Grain Company. These cars had originated at Hudson, S. D. The receiving carrier at Hudson was the Chicago, Milwaukee & St. Paul Railway Company, who issued bills of lading limiting its liability to losses occurring on its road, with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to 'Forrester Bros., Texarkana, Texas,' and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Railway at Kansas City, Mo., with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17, 1901, was there unloaded, sacked, and transferred to the Kansas City Southern Railway Company, who on December 31, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3,845, P. G., and No. 4,189, P. G.; that same was received of Forrester Bros., and consigned as follows, 'Shipper's order, notify Harroun Commission Company, Texarkana, Texas,' and reciting further that freight, 14 cents per hundred lb., was prepaid; and one of these cars, to wit, car No. 3,845, P. G., is the car in controversy in this suit.

"(9) The Harroun Commission Company paid no freight on the corn from Hudson, S. D., to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"(10) The freight on the corn from Hudson to Texarkana was as follows, 18 cents per 100 lb. from Hudson to Kansas City, and 14 cents from Kansas City to Texarkana, all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson, South Dakota, to Goldthwaite, Texas, was 46 cents per 100 lb., which would have been apportioned as follows: 18 cents from Hudson to Kansas City, and 28 cents from Kansas City to Goldthwaite, Texas. The G., C. & S. F. Ry. Co., the T. & P. Ry. Co., and the Kansas City Southern Railway Company, together with other connecting lines from Kansas City, Mo., to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 lb. on shipments from Kansas City to Goldthwaite via Texarkana, and originating in Kansas City, had agreed on a division of that rate between them, and had filed tariffs establishing such rate with the Interstate Commerce Commission, and by such steps had brought itself within the provisions of the interstate commerce laws.

"(11) The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the state commission rates, and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at

Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City, and had shipped from Kansas City to Goldthwaite.

"(12) At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin, the manager of the former company, intended that the corn to be thereby acquired should go to Saylor & Burnett, and should be shipped to Goldthwaite from Texarkana as soon as practicable; and on December 26, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

"(13) On December 31, 1901, the date of shipment from Kansas City to Texarkana, Harroun Commission Company informed the Hardin Grain Company that the corn to fill the latter order had been loaded to start to Texarkana, and requested instruction as to how the corn should be shipped from Texarkana, for the guidance of F. L. Adkins, their agent at that place, who would attend to such reshipping for the Hardin Grain Company, as per former understanding. Thereupon, and in compliance with such request, blank bills of lading were made out by the Hardin Grain Company in Kansas City, and furnished to the Harroun Commission Company, to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company and F. L. Adkins, as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Texas, consigned to 'Shipper's order, notify,' etc., giving the numbers and initials of cars, which information had been furnished by the Harroun Commission Company; and on January 14, 1902, the reshipment having been made as per instructions, the bills of lading, duly executed by the Texas & Pacific Railway Company, were by Harroun delivered to Hardin Grain Company, who thereupon paid the Harroun Commission Company \$1,779.64, the purchase price previously agreed upon for the corn, and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"(14) Neither Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but, under the agreement between the two companies (Hardin and Harroun), one F. L. Adkins, who was the agent of the Harroun Commission Company, and stationed at Texarkana, reshipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pa-

cific Railway Company and the G. C. & S. F. Ry. Co., by bill of lading reciting its receipt from Hardin Grain Company, and consigned to 'shipper's order, notify Saylor & Burnett, Goldthwaite, Texas,' and was transferred, under original seals, and without breaking packages, to the Texas & Pacific Railway Company, after having remained at Texarkana five days. The only thing done by F. L. Adkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the T. & P. Ry., and take a bill of lading from the latter company. The corn reached Texarkana January 7, 1902, and was shipped out from Texarkana January 13, 1902. The defendant was not a party to the bill of lading executed at Texarkana.

"(15) On December 31, 1901, Hardin Grain Company mailed to Saylor & Burnett an invoice of the corn, in the form of an account, stating the car numbers and initial, the amount of corn, and price to be paid by Saylor & Burnett."

The assignments of error present, in substance, the single question of whether the trial court properly held that the shipment or commerce in question was intrastate, rather than interstate, as is contended in behalf of appellant. If the shipment can be properly denominated local or intrastate, then it is admitted that the judgment must be affirmed. If otherwise, then it is as frankly admitted, as it must be, that the Texas railroad commission law and regulations have no application, and that the judgment should be reversed, and here rendered for appellant. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Hardy v. A., T. & S. F. Ry. Co.*, 32 Kan. 698, 5 Pac. 6; *Houston Nav. Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; *Fielder v. M., K. & T. Ry. Co.* (Tex. Sup.) 46 S. W. 633. We have found no case that, as seems to us, presents the precise state of facts; and the difficulty we have had in the solution of the question presented has been in the construction of the facts, rather than in the consideration of the numerous cases which have been considered, but which, in the interest of brevity, we will not undertake to distinguish. We have, however, finally concluded that we cannot disturb the trial court's conclusion.

That the transportation of the two cars of corn from Texarkana, Tex., to Goldthwaite, Tex., to which, at the instance of the Railroad Commission of Texas, the Attorney General has sought by this suit to have the freight rate fixed by that commission applied, comes literally within the terms of the Texas commission statutes, which undertake to regulate transportation "between points within this state," cannot be denied; but the insistence on the part of appellant is that said transportation was but a part of a more extended and continuous shipment from South Dakota or Kansas City, Mo., to Goldthwaite, Tex., and therefore an interstate shipment, subject alone to the through freight

rate agreed upon and filed with the Interstate Commerce Commission by the several carriers interested.

It is undisputed that the grain in question was originally shipped from Hudson, S. D., to Texarkana, Tex. When this shipment began in South Dakota, the subject-matter of the shipment became an article of commerce between the states of South Dakota and Texas; and this interstate character continued until its arrival at Texarkana, but no longer, as we think must be conceded, unless it can be said that the stoppage in transit at Kansas City, or the fact of a change in ownership at that point, is of controlling effect to the contrary. The findings and evidence show that the corn constituting the subject-matter of the shipment in question had arrived, and had been purchased and placed in the elevators of the Harroun Commission Company at Kansas City, for the purpose of cleaning and sacking, before the contract of the Hardin Grain Company to purchase it. It is not shown or contended that a shipment with stop-over privileges for such purpose is a regulation in contravention of the acts of Congress or of rules of the Interstate Commerce Commission, or that such stipulation is unreasonable, or that it ipso facto changes the character of the original shipment. Such stoppage in transitu is not shown to be colorable, and, if not, seems to be an aid to, and in the interest of, the commerce of the country, rather than the contrary, in that at convenient centers, where facilities therefor have been prepared, large quantities of the subjects of commerce may be concentrated or condensed, and its further transportation largely facilitated, as is the constant practice in the case of cotton in our own state; and we know of no case in which it has been held that a stoppage of such character, and with such temporary purpose, destroys or alters the status of the commodity as fixed by the original shipment. The case of *Waggoner v. Whaley*, 50 S. W. 153, by this court, may be referred to as tending to so show. The cattle constituting the shipment in that case were driven from Oklahoma Territory to Waggoner, Tex., and there shipped under a contract fixing Chicago, Ill., as final destination, but with provision for stoppage in transit at Bowie, Tex., for purpose of feeding. From an examination of that case, however, it will appear that Chicago was not the definitely fixed place or ultimate destination at the time of the inception of the transit at Waggoner. The freight had been paid to Bowie only. No definite time of stoppage had been fixed, and, when finally again started on their journey, new shipping contracts were made, and some of the cattle were shipped to Chicago, some to Kansas City, and some to New Orleans for export; the owner testifying in relation to the original contracts of shipment that "I always had the right, and exercised it, to ship the cattle out from Bowie to any other

place, or to sell them to other parties, to be transported from Bowle in any manner or to any place that they might choose, or to do anything else with them that might be desired." The appellants in that case had exclusive control and management of the cattle while at Bowle, and we held that the purpose of the original carriage contracts evidently was to enable the appellants in that case to fatten the cattle at their pens at Bowle, and have them carried to market without the expense of the local freight charge from Waggoner to Bowle; and, so concluding, we held, in effect, that the transit of the cattle, as shown on the face of the original contracts, had been so interrupted as that such cattle had acquired a situs within the state of Texas, within the meaning of our laws on the subject of taxation.

In the case before us now, however, no finding requires the conclusion that at the time of the original shipment in South Dakota any place other than Texarkana was intended as the final destination. As stated, the freight was prepaid to that place, and, after cleaning and sacking, the corn was continued on its journey to Texarkana, consigned to the order of the original shipper, and over the railway in care of which it had been first shipped. We hence conclude that the character of the original shipment was not altered by the mere stoppage in Kansas City. If not, we fail to see why such effect should be given the several sales or contracts of sales shown. The Harroun Commission Company had purchased or contracted for the corn to be delivered at Texarkana some time prior to the later contracts of sale, and, to fill its order therefor, the Hardin Grain Company contracted for Texarkana delivery; not knowing at the time but that the required corn was then there situated. These transactions are not impugned by the findings as having been done in bad faith, or with a purpose to thereby avoid the effect of the interstate commerce law. It is true that the court finds that the Hardin Grain Company bought with delivery at Texarkana, because thereby they could procure corn with which to fill their order for about $1\frac{1}{2}$ cents per bushel less than had the corn been purchased with delivery at Kansas City, and that this difference in price evidently could result only by an application of the freight rates of the Texas Railroad Commission from Texarkana to Goldthwaite, instead of the interstate commerce rate between the same points. But we cannot think that these facts require the conclusion that the purchase by the Hardin Grain Company, with delivery at Texarkana, was a mere pretext to avoid the operation of the interstate commerce law. It seems, under the circumstances, rather to have been an advantage taken of an existing condition. The commission company had corn to be delivered at Texarkana. The Hardin Grain Company desired corn, which, if

delivered at that point, would enable them to fill the order of Saylor & Burnett at less cost than if the corn had been purchased and delivered in Kansas City. And while the well-established doctrine of exclusive control of Congress over interstate commerce may be important, yet freedom of contract in relation to the subject-matter of such commerce is likewise of vital importance; and such contracts, when made, that in no wise are forbidden by law, and that are not found to be designed with a view of avoiding the legitimate exercise of the power of Congress over the subjects of interstate commerce, should be upheld. The Hardin Grain Company acquired no title or fixed right in the grain in question until its delivery at Texarkana. It was evidently not so intended in advance of delivery, as held in the case of *Irvin v. Edwards* (Tex. Sup.) 47 S. W. 719, nor was there an examination and acceptance of the corn in Kansas City, so as to there pass title to the Hardin Grain Company, within the principle decided in *Maud v. Coppinger* (Tex. Civ. App.) 56 S. W. 127. Until actual delivery by the Harroun Commission Company at Texarkana, its mere contract to sell to the Hardin Grain Company could lawfully have been complied with by a seasonable delivery at Texarkana of any other corn of like grade, quality, and quantity. But when delivered as was done, not only the title, but also the actual possession, passed to the Hardin Grain Company. The commission company then lost all further control. The carrier from Kansas City had then entirely fulfilled its contract of carriage; not being required by any law or shipping contract to deliver to a connecting carrier, as in the case of the *Houston Nav. Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17. After delivery to the Hardin Grain Company at Texarkana, the corn was in possession and control of no other person or carrier in any capacity until that company entered into an absolutely necessary new contract for further transportation. When so delivered, the interstate character of the commodity ceased, and the corn then became in all essential particulars incorporated in the mass of property in this state, and the new shipment, which was some five days after the delivery at Texarkana, was substantially a new one.

In the case of *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, coal was sent by the owners in Pennsylvania to their agent in New Orleans to be there sold for their account. Upon its arrival, taxes were assessed against the coal while contained in barges upon which it had been originally shipped, and before disposition, and the collection was resisted upon the ground that the coal in question had not lost its character as an interstate commerce commodity; but it was held that upon its arrival in New Orleans it became a part of the general mass

of property of the state of Louisiana, and this without reference to the fact that the coal at the time of the taxation had not been changed from the form in which it had been originally shipped, and the further fact that some of it had been sold for export. So, here, we do not think that the fact that no change was made at Texarkana of the grain in question from the cars in which it was originally shipped is decisive in favor of appellant's contention. When delivered at Texarkana the interstate commerce transit was ended, and it is immaterial, it seems to us, whether the corn was then stored in elevators, and thereafter sold in Texarkana, or, as was done, shipped to Goldthwaite to complete the contract of sale made by the Hardin Grain Company with Saylor & Burnett.

The foregoing view also harmonizes with the view of this court in the unreported case of *The Southern Kansas Railway Company of Texas v. Stump & Weaver*, appealed from Roberts county, and decided March 6, 1897. That was a case in which Stump & Weaver, at Miami, ordered of John Haggart, at Panhandle City, a certain car of coal for delivery at Miami; both these points being situated in Texas. To fill this order, Haggart purchased the coal in the state of Colorado, and caused it to be shipped to Panhandle City, where it was unloaded, reloaded by Haggart upon other cars, and reshipped to Miami. This court held that the interstate shipment ended at Panhandle City, that the shipment from that point to Miami was an intrastate shipment, and that the rates of the Texas Railroad Commission applied thereto, rather than those of the Interstate Commerce Commission. The case of *State v. Southern Kansas Railway Company of Texas* (Tex. Civ. App.) 49 S. W. 253, based upon a very similar state of facts, may seem, as is urged, to conflict therewith. The cases, however, are apparently distinguishable, at least as appears to some of us, in that in the case by the Court of Civil Appeals of the Third District, last above referred to, it was expressly found, in effect, that, at the time of the order by Stump & Weaver, they, as well as Haggart, contemplated that the coal would be purchased in Colorado, and that the shipment was made to take the form it did with a view to thereby evade the operation of the interstate commerce rate of freight from Panhandle City to Miami, which was greater than the Texas rate. No such state of facts was found in the case by this court referred to.

It is insisted, however, that the purpose or intent of the parties is irrelevant and immaterial. It may be and is doubtless so, when such purpose does not enter into the question of fact involved. But when necessary to determine the character of the shipment, or the status of the property as interstate commerce or otherwise, it may undoubtedly be considered. The purpose of the

shipper, as an element of the fact to be found, was ascertained and given effect not only in the cases of *Waggoner v. Whaley* and *State v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 44 S. W. 542, but also in *Cutting v. Florida Ry. & Nav. Co.* (C. C.) 46 Fed. 641, as may be seen from an examination of those cases. See, also, section 7, Interstate Commerce Act (page 3159, 3 U. S. Comp. St. 1901).

While perhaps at the risk of being considered prolix, we will add, in view of the importance of the question under consideration, that whether or not the transportation between the Texas points was a constituent of a continuous shipment of interstate commerce does not necessarily depend upon the fact that the corn was imported from South Dakota or Kansas City to Texarkana, Tex., immediately preceding its transportation to Goldthwaite, Tex., nor upon the fact that it was carried to the last-named place in the same cars in which it had been carried from Kansas City, but rather upon the character of the transaction between the Samuel Hardin Grain Company and Saylor & Burnett, in pursuance of which the corn was carried from Texarkana to Goldthwaite, or, in other words, whether the Samuel Hardin Grain Company, in selling and shipping the corn for delivery to Saylor & Burnett, were engaged in state or interstate commerce. That the transaction between the Samuel Hardin Grain Company and the Harroun Commission Company, in pursuance of which the corn was forwarded from Kansas City to Texarkana, and there delivered by the latter to the former, was one of interstate commerce, does not admit of controversy. But because the Samuel Hardin Grain Company were engaged in interstate commerce in buying the corn does not prove that they were also engaged in interstate commerce in selling it. Every wholesale dealer in Texas may be said to be engaged in interstate commerce when he makes purchases in pursuance of which goods are shipped to him from other states, but it would not do to hold that in selling and reshipping these goods to his Texas customers he is also engaged in interstate commerce, even though he should reship them in the same cars, and to fill orders accepted prior to the purchase of the goods. The purchase from the nonresident owner, and the through shipment in pursuance thereof, constitute interstate commerce; but when that transaction is fully accomplished, and the resident dealer becomes the owner and possessor of goods situated in Texas—goods which have thus reached the destination given them by the seller and shipper—they become a part of the general property of the state, and, if sold and reshipped to another point in the state, such sale and shipment constitute commerce within this state, and not interstate commerce. This principle was applied by this court in deciding the case of *Southern Kansas Rail-*

way Company v. Stump & Weaver, before referred to. As a purchaser and importer of Colorado coal, Haggart was engaged in interstate commerce, but in selling and reshipping it to his Texas customers he was engaged in state commerce; and we held in that case that the nature of his local business was not changed merely because when he ordered a given car of coal from Colorado he intended to reload and reship it from Panhandle to Miami to fill an order already placed with him by Stump & Weaver, who were engaged in business at the latter place. We see no reason to doubt the soundness of that decision, and the only question of difficulty is whether this case comes within the ruling there made. The Samuel Hardin Grain Company had no office or place of business in Texas, and may thus be said to be in a position different from that of Haggart; their business being, as testified by the manager, "that of soliciting orders from Kansas, Missouri, Indian Territory, Texas, and other states, and, when such orders are [were] received, to buy the commodities and fill such orders as quickly as possible," with their office in Kansas City. But it matters not what their general course of business may have been, provided in this instance they were engaged in commerce within this state; and we have finally concluded that they were, or at least that we would not be warranted in disturbing the trial court's finding to that effect. If the two cars of corn had reached Texarkana, the ultimate destination of the original shipment, and had been there delivered to the Harroun Commission Company before any negotiations took place between the two companies at Kansas City, and the grain company had then bought and reshipped the corn to Goldthwaite, the transaction would undoubtedly have been entirely local. *Brown v. Houston*, 114 U. S., 5 Sup. Ct., 29 L. Ed., supra. But under the peculiar facts of this case, should not the corn be treated as constructively in Texarkana, where it was then due, as its place of destination under the then pending shipment, with all freight charges paid, when the negotiations took place at Kansas City? We incline to think so. Certain it is that the parties did not understand or intend that the grain company should acquire any title to or have anything to do with the corn till it was delivered to them in Texas.

The court found against the contention—the most plausible urged by appellant—that the transactions took the form they did to disguise a real interstate shipment and we feel bound to respect this finding. We think, therefore, the case is not to be distinguished in principle from *Ry. Co. v. Stump & Weaver*, supra, which we think was correctly decided, and we know of no decision of our Supreme Court or of the Supreme Court of the United States in conflict with it; and the judgment will be accordingly affirmed.

ROUNTREE v. HAYNES.

(Court of Civil Appeals of Texas. March 25, 1903.)

TRESPASS TO TRY TITLE—BOUNDARY DISPUTES—VERDICT—CERTAINTY—PRESUMPTIONS—COSTS.

1. Disputes as to boundaries may be determined in trespass to try title.

2. In the absence of a statement of facts, it will be presumed, in trespass to try title, that the evidence raised no question but that of the location of a boundary line, and that the question was whether such boundary was an old fence row, or a certain other line—the court's charge so stating—and that the lines were clearly defined by the evidence.

3. In trespass to try title, the jury having returned a general verdict for defendant, and having been instructed to return such a verdict if they found that a certain line was the true boundary line, the charge could be consulted to render the verdict certain.

4. In the absence of a statement of facts, it will be presumed, in trespass to try title, that the description of the boundary line between plaintiff's and defendant's land, as given in the judgment, was sustained by the evidence.

5. Dispute as to a boundary line having been the only issue in a trespass to try title, and that issue having been found for defendant, judgment was properly rendered against plaintiff for all the costs.

Error from District Court, Franklin County; J. M. Talbot, Judge.

Trespass to try title by W. B. Rountree against H. G. Haynes. Judgment for defendant, and plaintiff brings error. Affirmed.

C. S. Tod, S. D. Goswick, and Glass, Estis & King, for plaintiff in error.

FLY, J. In his original petition, plaintiff in error's allegations were the ordinary ones in actions of trespass to try title; 170 acres of land out of the W. S. Keith survey, in Franklin county, being the land claimed. Defendant in error answered by general denial and plea of not guilty, and alleged specially that plaintiff had his fence several feet over the division line between the lands of the parties, and prayed the court to establish the line between them. In his first supplemental petition, filed before the filing of the amended answer, plaintiff pleaded as follows: "Now comes the plaintiff, and, leave of the court first had and obtained, files this, his first supplemental petition, and, in reply to defendant's answer, says that about the year 1857 one Amos Ury owned the east half of the said W. S. Keith survey, holding under conveyance to him by said Keith, and James Cowan owned the west half of said survey, holding under similar conveyance, and that during or about said year they, the said Keith, Cowan, and Ury, established, fixed, and marked the boundary line between them, which marked line is the same as the E—B line of plaintiff's land, described in his petition; that in 1858 James Cowan sold the land described in plaintiff's petition to W. C. Holbrook, and

during or about the same year W. C. Holbrook took possession and cleared and fenced part of the same, placing his fence along and upon the E—B line of the land described in plaintiff's petition, and for over 20 years he had the peaceable, continuous, and adverse possession of same, cultivating, using, and enjoying the same under said deed from James Cowan, which was duly registered; that, whilst he was in possession of and owned said land, J. D. Roach, A. M. Roach, and E. B. Roach owned the land immediately east of and adjoining the said Holbrook's land, and they and Holbrook ran the line between the lands owned by the said Roaches and Holbrook, which said line was surveyed and agreed upon between said Roaches and Holbrook as the true division line between them; that said line is the same as now claimed as the E—B line of plaintiff's land, and has ever since been recognized and acted upon by the respective owners as the true division line between the land described in plaintiff's petition and the land east of and adjoining his land; that defendant holds and claims under conveyances from said A. M., J. D., and E. B. Roach, and is estopped from disputing the boundary line so agreed upon by his vendors, and the true division line between plaintiff and defendant is along the line occupied by Holbrook's east line of fence in 1858, and for several years thereafter, and the extension of said line north." The cause was tried by jury, and resulted in a verdict for defendant.

There is no statement of facts in the record, and the errors relied upon consist of contentions that the charge is not warranted by the pleadings, and that the judgment is not sustained by the verdict.

The court gave the following charge: "The question for your determination in this case is the true location of the division line between the land owned by the plaintiff, W. B. Rountree, and the defendant, H. G. Haynes. If you believe and find from the evidence that the old fence now referred to and described by the witnesses is the true location of the division line between the plaintiff's and defendant's land, or was accepted and recognized by those under whom plaintiff and defendant claim, as such division line, or if you find from the evidence that the line run and surveyed by R. L. Mitchell is another and different line from the said old fence row, and is the true division line between plaintiff's and defendant's land, but you further find that the plaintiff, W. B. Rountree, and those under whom he claims, had and held peaceable and adverse possession of the land claimed by him in this suit, extending to said old fence row, cultivating, using, or enjoying the same, for more than ten years next before the date of the entry and trespass, if any, of the defendant on said land, then in either such case you will find for the plaintiff, although you may believe the distance from the S. W. corner of the Keith

survey, running east with its south boundary line to said old fence row, is more than 950 varas, unless you find for the defendant under the instructions hereinafter given you. If, on the other hand, you believe and find from the evidence that the said line run and surveyed by the said R. L. Mitchell is another and different line from said old fence row, and is the true location of the division line between plaintiff's and defendant's land, or if you find from the evidence that W. C. Holbrook, in his lifetime, and the defendant H. G. Haynes, agreed or accepted and recognized the said line run and surveyed by said Mitchell as such division line, and you do not find that the plaintiff and those under whom he claims had and held peaceable and adverse possession of the land in dispute, extending to said old fence row, cultivating, using, or enjoying the same, for more than ten years next before the entry and trespass, if any, of defendant on said land, then in either such case you will find for the defendant, H. G. Haynes."

In this case the pleadings of both parties have made the boundary between their lands the only matter in dispute; but if the petition had set up nothing but trespass to try title, and the answer had only pleaded "Not guilty," it is well settled that disputes as to boundaries may be determined in actions of trespass to try title. *Nye v. Hawkins*, 65 Tex. 600; *Railway v. Uribe*, 85 Tex. 386, 20 S. W. 153.

In the absence of a statement of facts, it will be presumed that the evidence raised no question but that of the location of a boundary line, and that the contention was as to whether such boundary was the old fence row, or the line run by R. L. Mitchell, as stated in the charge of the court, and that the lines were clearly defined by the evidence. *Stelle v. Shannon*, 62 Tex. 198; *Cotulla v. Goggan*, 77 Tex. 34, 13 S. W. 742.

The jury returned a general verdict for defendant, and, having been instructed to return such verdict if they found that the line run by Mitchell was the true boundary, the charge will be consulted to render the verdict certain. *Parker v. Leman*, 10 Tex. 116; *Veck v. Holt*, 71 Tex. 715, 9 S. W. 743; *Ins. Co. v. Schmitt*, 10 Civ. App. 550, 30 S. W. 833.

The jury, by the verdict in favor of defendant, fixed the Mitchell line as the one between the two tracts of land, and the court could, in framing its judgment, describe such line from the evidence in the case; and, in the absence of a statement of facts, it will be presumed that the description of the boundary line given in the judgment was fully sustained by the evidence. *Wallace v. Bogal*, 62 Tex. 636.

The pleadings, and presumably the evidence, showing that there was but one issue between the parties, and that the boundary of the two tracts of land, and the jury having found that the line contended for by defendant was the true boundary, the court prop-

erly rendered judgment against plaintiff in error for all costs.

The judgment is affirmed.

BYERS BROS. v. MAXWELL et al.

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK—FALSE REPRESENTATIONS—KNOWLEDGE OF FALSITY—PROMISE TO PURCHASE STOCK—INSTRUCTIONS—MISLEADING.

1. In a suit on a promissory note given in payment of a subscription to stock, made in order to enable the company, which was heavily involved, to pay its debts, the defense relied on was that the execution of the notes was procured by false representations of the company's manager as to the value of the company's assets in determining the amount necessary to meet its obligations. *Held*, that it was not necessary that the subscribers relied absolutely on the manager's representations, but it was sufficient if they believed them to such an extent that they were influenced thereby in subscribing for the stock.

2. An instruction that the jury should find against the makers if they knew that the company was "in a shaky and leaky financial condition" was misleading, in presenting as an issue a conceded fact.

3. Where an inducement relied upon in subscribing for stock was an agreement on the part of the president of the company to take a number of shares, and the president did not purchase such shares, and never intended to, but merely advanced money for the stock, having it issued to another, the subscribers were not bound on their stock subscriptions.

4. To entitle one to rescind a contract of subscription to stock on the ground of false representations of the manager of the company as to the value of its assets, it is not necessary that such representations were made with knowledge of their falsity and with intention to deceive, but it is sufficient that they were materially false, and were relied upon by the subscriber, he being justified in so doing.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by T. T. Maxwell, as pledgee of a note executed to the Empire Grain Company, against Byers Bros., the makers. Byers Bros. answered, making Cole, the receiver, and Paul Waples, president, parties, and praying for the cancellation of the note, or for judgment against the corporation for the amount they were required to pay. There was judgment for Maxwell for the full amount of the note, which was reversed on appeal. (See 54 S. W. 789.) Byers Bros. then paid Maxwell the amount of his claim against the Empire Grain Company. Cole, as receiver, sold the assets of the grain company in his hands, Mrs. C. B. Wandelohr purchasing the note. She became a party to the suit, and Byers Bros. amended, alleging that she was not the owner, and, if she was, she acquired with notice, etc. Again there was judgment against Byers Bros., and they appeal. Reversed.

Galloway & Templeton and Davis & Garrett, for appellants. E. C. McLean, Moseley & Smith, and Don A. Bliss, for appellees.

RAINEY, C. J. In March, 1896, the Empire Grain Company, a corporation, of which Paul Waples was president and C. B. Wandelohr was manager, was legally indebted to various parties, among whom was the City Bank of Sherman, to which it owed about \$40,000. Said bank becoming uneasy about the payment of the amount due it, a scheme was devised (through whom it originated is not definitely shown) to increase the capital stock of the Empire Grain Company \$20,000. The directors of said bank were to take \$10,000, and Paul Waples was to take the other \$10,000, of said stock. The scheme was consummated by the parties subscribing for the stock and executing their notes therefor in sums as follows: W. H. Bean, \$5,000; H. L. Hall, \$2,500; Byers Bros., \$2,500; and Paul Waples, \$10,000. Bean, Hall, and C. W. Byers, of Byers Bros., were directors of the bank. The said grain company was indebted to T. T. Maxwell, guardian, and indorsed the Byers Bros. note to said Maxwell as collateral security. On May 30, 1898, J. R. Cole was appointed receiver of the Empire Grain Company. On August 29, 1898, Maxwell brought suit on the Byers Bros. note. Byers Bros. answered, making Cole, receiver, and Paul Waples, defendants, and alleged that Maxwell held the note as collateral, that the same was obtained by false representations, and prayed for a cancellation of the note, and, in the alternative, if Maxwell recovered, that it only be for the amount said grain company might be owing him, and, further, that they have judgment for the amount they should be required to pay Maxwell. Cole, receiver, answered, and prayed for judgment for the residue, after satisfying Maxwell's claim. A trial was had, and judgment rendered against Byers Bros. for the full amount of said note. On appeal, the judgment was reversed, and the cause remanded. Byers Bros. v. Maxwell (Tex. Civ. App.) 54 S. W. 789. Byers Bros. then paid Maxwell the amount due him by the Empire Grain Company. Cole, receiver, under order of court, sold the assets in his hands of the Empire Grain Company, Mrs. C. B. Wandelohr purchasing, taking a deed in her separate right, which recited the consideration to be her separate property. Mrs. Wandelohr became a party to the suit, and Byers Bros. amended, and alleged that she was not the owner of the note, but that the same was owned by her husband, C. B. Wandelohr, but that, if she was the owner thereof, she acquired the same with notice, etc. Mrs. Wandelohr pleaded that said note was executed for 25 shares of stock, which was issued to increase the capital of the Empire Grain Company, and in consequence thereof credit had been extended to said company, and further denied notice of Byers Bros.' defense to said note. A trial was had, and judgment rendered against Byers Bros., from which this appeal is taken.

The first assignment presented complains

of the action of the court in giving a charge requested by appellees, which reads: "You are instructed that if you should believe from the evidence that C. B. Wandelohr, manager of the Empire Grain Company, represented to Byers Bros. that the stock of the Empire Grain Company was worth 85 cents on the dollar, and that said company was solvent, then, even if you should believe from the evidence that said representations, or any of them, were false when made, but further believe from the evidence that Byers Bros. did not believe the same and were not deceived thereby, but believed at the time they executed said note that the assets were not worth the amount represented by said Wandelohr, and believed that said Empire Grain Company was at the time in a 'shaky and leaky' financial condition, then you will, as to these issues, find against the said Byers Bros. in favor of the other parties herein." We are of the opinion that this charge, under the facts, is error. It calls attention to particular parts of the evidence in a manner that was calculated to mislead the jury, and places plaintiffs' right of recovery on a wrong basis. Wandelohr was manager of the Empire Grain Company, and knew, or ought to have known, the financial status of the concern. Byers Bros. did not know its condition further than that it was financially embarrassed, and that it needed money to relieve it from such embarrassment, and their contention is that they relied on the representations of Wandelohr, which they claim were false, in reaching a conclusion as to the necessary amount, and that they were induced by said representations to subscribe for part of the new issue of stock. They may not have believed at the time they executed the note that the assets were worth fully the amount represented by Wandelohr, yet they may have, after depreciating to some extent said representations, believed from the representations of Wandelohr as to the quantity and value of the assets that the same were sufficient to justify them in the taking of the additional stock, and that such would tide the concern over. In other words, Byers Bros., in order to recover, were not required to believe in the absolute correctness of the representations, but believed in them to the extent that they were influenced to subscribe for stock. Of course, if the representations were not false in a material particular, or if they did not rely on same, but relied on their own judgment, then they were not entitled to recover. Again, the charge was improper in referring in the manner it did to the "shaky and leaky" financial condition of the Empire Grain Company, for it may have improperly influenced the jury. All the parties know that the concern was in a "shaky and leaky" condition, and the object was to relieve it of that condition by subscribing for additional stock, in order that it might be able to meet its obligations to the bank. Therefore, whether or not Byers

Bros. believed the concern was in a "shaky and leaky" condition was not an issue, but, notwithstanding they knew, that the issue was whether or not Wandelohr made representations as to the quantity and value of assets that were materially false, and but for which they would not have subscribed for the stock.

Appellant complains of the action of the court in giving the following special charge asked by appellees, to wit: "In connection with the fifth paragraph of the main charge, the jury is instructed that if you believe from the evidence that Paul Waples agreed with and promised Byers and others that he would take 100 shares of the new issue of the capital stock of the Empire Grain Company at \$100 per share, aggregating \$10,000, and that he would pay in said amount for said number of shares, and that thereafter he did execute his notes therefor, in pursuance of his agreement and promise, and that said notes were afterwards paid by the Waples-Platter Grocery Company for him, then you are instructed that Byers Bros. would have no cause for action against him on his failure to have the stock issued in his own name, and selling it to C. B. Wandelohr before it was issued, and this even though you should believe from the evidence that there was an understanding between him and the said Wandelohr before then that the said Wandelohr should take the stock off his hands, and that the said Waples never intended to keep the said stock." The court, in the fifth paragraph of its charge to the jury, instructed them that if they believed from the evidence that Paul Waples stated to George Byers that he would take 100 shares of the new stock to be issued by the Empire Grain Company, and if they further believed from the evidence that Byers Bros., by said promise, were induced to subscribe for 25 shares of stock in said company, and to execute their note therefor for the sum of \$2,500, and if they further believe that said Paul Waples did not take said 100 shares in said company, and that he did not intend to take the same at the time he stated to George Byers that he would, then they should find for Byers Bros. against Paul Waples, C. B. Wandelohr, and the Empire Grain Company for the sum of \$2,617.80, with interest at the rate of 6 per cent. per annum from the 16th day of April, 1900, and in favor of Byers Bros. against Mrs. C. B. Wandelohr. It seems to us that the charges are inconsistent, in that the special charge neutralizes the force and effect of the main charge. One of the inducements alleged by Byers Bros. for taking the stock was the promise that Waples would also subscribe, and they produced testimony to this effect. Waples was president of the Empire Grain Company, and Wandelohr was its manager. If Waples promised to subscribe for stock, and Byers Bros. were influenced thereby to subscribe for stock, and Waples failed to do so, then Byers Bros., under the circumstan-

ces of this case, would not be liable on the note executed therefor, unless in the hands of innocent holders. We understand that, where a party subscribes for stock in good faith, he has a right to sell it to whom and when he pleases. If, however, officers of a corporation induce another to take additional stock on the promise that a certain one of their number will also subscribe for stock, but fails to do so, then that other is not bound. Plaintiffs' contention, in effect, is that Waples never subscribed for stock, and that he never intended to do so, but merely advanced money for his brother-in-law, Wandelohr, who was insolvent. If Waples never intended to take the stock, and had an understanding with Wandelohr that the stock should be turned over to him, and said promise of Waples was made that Byers Bros. and others might be induced to take stock, then Byers Bros. should be relieved of their obligation. If Waples executed his notes for the stock, intending, at the time, that the stock should be issued to Wandelohr, and it was done for the benefit of Wandelohr, Waples looking to Wandelohr for reimbursement, then such would not be a compliance with a promise made by him to take stock. The special charge eliminated this feature from the consideration of the jury. When viewed in connection with another paragraph of the court's charge, to the effect that the undisputed evidence shows that Waples had executed his notes and paid same, the special charge was equivalent to charging the jury that Waples had complied with his promise.

The court gave a special charge at the request of appellees, as follows: "You are instructed that an honest statement of an opinion as to the value of the notes and accounts among the assets of the Empire Grain Company made by C. B. Wandelohr in good faith, and with no intention to deceive, would not be a false representation within the meaning of the expression 'false representation' as used in the instruction given you by the court, and this even though you should believe from the evidence that such representations were afterwards found to be incorrect." We think this was error, under the circumstances of this case. Wandelohr was the manager of the concern. He was in a better position to know the value of the notes and accounts than any one else, and if he made incorrect statements in reference thereto, which were relied on by Byers Bros., and such statements were material inducements to the action of Byers Bros., then same could be considered in determining the rights of Byers Bros. to a rescission of the contract. According to the plaintiffs' theory, they were induced to act upon the representations of Wandelohr as to the value of the assets, and, in view of Wandelohr's connection with the concern, plaintiffs had a right to rely upon his opinion as to the value of its assets, and if they did so, and such values were not

substantially correct, then they would be entitled to relief. To entitle one to a rescission of a contract on the ground of false representations, it is immaterial whether made in good faith or not. The test is, were the representations material, and were they relied on by the other party, he being justified in so doing? *Watson v. Baker* (Tex. Sup.) 9 S. W. 867; *Culberson v. Blanchard*, 79 Tex. 491, 15 S. W. 700; *Loper v. Robinson*, 54 Tex. 514.

For the reasons stated, the judgment is reversed and the cause remanded.

On Rehearing.

(April 4, 1903.)

In the motion for rehearing of Mrs. Wandelohr, one of the appellees herein, complaint is made that in the opinion rendered herein we did not pass upon her cross-assignment of error presented in her brief. Only one cross-assignment was presented, which complains of the court for refusing to give the jury a special instruction which peremptorily directed the jury to find for Mrs. Wandelohr. We did not think the court erred in its action in this particular, and thought a discussion of the errors requiring a reversal of the judgment was all that was necessary, and from the failure to mention other assignments it would be understood that the court's action as to those matters was approved.

The motion for rehearing is overruled.

ST. LOUIS S. W. RY. CO. v. PARKS.*

(Court of Civil Appeals of Texas. March 4, 1903.)

CARRIERS—INJURIES TO PASSENGER—SPARKS FROM ENGINE—PRIMA FACIE CASE—PLEADING AND PROOF—VARIANCE—INSTRUCTION—EQUIPMENT OF ENGINE.

1. Proof that while plaintiff, a passenger on defendant's train, was standing near the front of the car, the door was opened, and sparks escaping from the engine struck him in the eyes and injured them, made out a prima facie case of negligence on the part of defendant.

2. Plaintiff alleged that while he was standing near the front of the car the door was opened by the conductor, and that sparks escaping from the engine struck him in the eyes. *Held*, that the allegation that the door was opened by the conductor was not one of substance, but merely a matter of inducement, and that it was not necessary to establish such fact, or submit it as an issue to the jury.

3. A charge that "if, from the evidence, you believe that sparks or cinders escaped from defendant's engine, and got into plaintiff's eyes, which caused plaintiff's injuries," etc., was not objectionable as assuming that plaintiff's eyes were injured by sparks or cinders that escaped from the locomotive.

4. A railroad must equip its engines with the most approved spark arresters in use to prevent the escape of sparks or cinders.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by S. R. Parks against the St. Louis Southwestern Railway Company. From a

*Rehearing denied April 8, 1903.

judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, Perkins & Craddock, and Dan Upthegrove, for appellant. H. D. Woods and Evans & Elder, for appellee.

NEILL, J. Appellee sued appellant for damages occasioned by an alleged injury to his eyes, caused from cinders escaping from one of its engines drawing the train upon which appellee was a passenger. The substance of the allegations in plaintiff's petition is that the engine was not equipped nor provided with suitable and sufficient appliances to prevent the escape of sparks and cinders; that it was not provided with the best approved spark arresters in use, and had not been kept in proper repair; that while he was standing by the water tank of the car, near the door fronting the engine, for the purpose of getting a drink, the conductor opened the door, and a great volume of smoke, sparks, and cinders, which, by the negligence of defendant, had been permitted to escape from the engine, came through the door, and struck him in the face and eyes, destroying his sight, and causing him great pain and mental anguish. The appellant, after answering by a general denial, specially pleaded that at the time of the alleged injury the locomotive which hauled the train was a new one, and equipped with the most approved spark arresters in use; that it had used ordinary care in keeping such appliances in repair; that the engine was in good repair, skillfully operated by competent and skillful operators; and that appellant used at the time all such precaution and care to prevent the escape of fire as the law requires. The trial of the cause resulted in a verdict and judgment for \$2,500 in favor of appellee, from which this appeal is prosecuted.

Conclusions of Fact.

On the 20th day of December, 1900, the appellee was a passenger on one of appellant's trains, and as the train was approaching Texarkana appellee was standing by the water tank of the car, near the door fronting the engine, for the purpose of getting a drink, when the door was opened, and he was struck in the face and eyes by sparks and cinders escaping from the engine drawing the train, in consequence of which he lost the sight of his right eye, and the sight of the other was materially impaired. The questions as to whether the engine was equipped with the most approved spark arrester in use, and the agents and employes of appellant in charge of it used ordinary care in operating the engine to prevent the escape of sparks and cinders, were of fact for the jury to determine from the evidence; and, as such evidence is not conclusive in favor of the appellant, we find on these issues, in deference to the verdict, that appellee's injuries were the proximate result of appel-

lant's negligence in failing to equip the engine with the most approved spark arrester, and that its agents in charge of and operating the engine failed to use ordinary care to prevent the escape of the sparks and cinders which caused the injury. The appellee, by reason of such negligence, sustained damages in the sum assessed by the jury.

Conclusions of Law.

The second paragraph of the court's charge is: "If you believe from the evidence that sparks of fire or cinders escaped from the defendant's engine and got into and injured plaintiff's eyes, as alleged, then such facts constitute a prima facie case of negligence on the part of defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injury occasioned thereby." This part of the charge is assigned as error upon the grounds (1) that it is upon the weight of evidence, in that it authorized the finding of negligence upon the mere fact that sparks or cinders escaped from the engine; (2) that it assumes the conductor opened the door, and permitted the cinders to enter the car; and (3) it submits the case upon a theory not raised by the pleadings, in that under them no recovery could be had unless the car door was opened by the conductor.

In the case of *Ry. v. O'Kelleher*, 21 Tex. Civ. App. 96, 51 S. W. 54, the evidence showed a shower of cinders escaping from an engine passing plaintiff's residence, situated just outside the company's right of way, fell upon the gallery where plaintiff was standing, and one of them struck him in the eye, and put it out. It was held that a prima facie case of negligence was shown, upon the ground that the principle which makes the fact that fire is set out from sparks shown to escape from a passing engine prima facie evidence of negligence is alike applicable when a cinder escapes, and strikes and puts out the eye of a person near the track. If this be correct, the same principle must be applied in a case where a passenger is injured in the same way while riding in a car drawn by the engine which emits the sparks and cinders.

The allegation that the conductor opened the door is not one of substance, it not being charged as negligence, but is merely a matter of inducement, and it was, therefore, not necessary to establish it, or submit it as an issue to the jury. The fact that the door was opened, without regard to who opened it, when the sparks and cinders struck and injured appellee, was alone material and necessary to prove. We do not think, therefore, that any of the objections to the paragraph of the charge quoted should be sustained.

The third paragraph of the court's charge is as follows: "If, from the evidence, you believe that sparks or cinders escaped from defendant's engine, and got into plaintiff's

eyes, which caused plaintiff's injuries, but if, from the evidence, you believe that the engine from which the sparks or cinders escaped was equipped with the most approved spark arrester, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks or cinders, then you are instructed that the prima facie case made out by proof of escape of sparks or cinders is rebutted, and, if you so believe, you will find for the defendant; but if you believe, from the evidence, that the defendant failed to equip its engine from which the sparks or cinders escaped that caused plaintiff's injuries with the most approved spark arrester in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks or cinders, then you are instructed that the prima facie case made out by proof of sparks or cinders escaping and causing plaintiff's injuries has not been rebutted."

It is objected to this part of the charge that it assumes that plaintiff's eyes were injured by sparks or cinders that escaped from the locomotive. We do not think that the charge is obnoxious to the objection when construed in the light of *Ry. v. Lehmberg*, 75 Tex. 61, 12 S. W. 838, and *Ry. v. Waldo* (Tex. Civ. App.) 32 S. W. 783. The evidence shows beyond controversy that appellee's eyes were injured in some way, and the charge simply leaves it to the jury to determine whether sparks or cinders escaped from appellant's engine, and got into his eyes and caused his injuries.

It is also urged as an objection to the part of the charge last quoted that it requires the jury, before they can find for appellant, to believe from the evidence that the engine was equipped with the most approved spark arrester in use, appellant's contention being that its duty required it "to exercise ordinary care in selecting the kind of spark arrester or netting to prevent the escape of sparks or cinders from its engines." It is said by the Supreme Court in *M., K. & T. Ry. Co. v. Carter*, 68 S. W. 164: "The decision of this court establishes that railroad companies must equip their locomotives with the best approved appliances for the prevention of the escape of fire;" citing *Ry. Co. v. Horne*, 69 Tex. 646, 9 S. W. 440, from which the part of the charge under consideration was evidently copied, for the language is identical.

Such other objections as are raised by the assignments to this part of the charge were embraced and considered in the prior assignment, and decided adversely to appellant.

So much of the special charges asked by appellant as properly announce the law applicable to this case was incorporated in the main charge of the court, and it was not error for the court to refuse to give any of them.

While the testimony of the witness Mason

may have been irrelevant to any issue made by the pleadings, no inference of negligence on the part of appellant could possibly have been drawn from it by the jury, and it could have in no way prejudiced appellant or have influenced the jury in arriving at their verdict.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

GEO. SCALFI & CO. et al. v. STATE.*

(Court of Civil Appeals of Texas. March 21, 1903.)

ACTION ON BOND — PARTNERSHIP — NONRESIDENT AND INSOLVENT PARTNER — DISMISSAL AS TO INDIVIDUAL DEFENDANT — CITATION — SUFFICIENCY.

1. In an action on a bond against a partnership, the individual members thereof, and the surety on the bond, a dismissal as to one partner not served was not prejudicial where the evidence afterwards showed that he was notoriously insolvent and a nonresident.

2. In an action on a bond, where the citation had attached thereto a copy of the petition which was made a part of the citation by reference, a want of fullness in the citation in stating the nature of the plaintiff's demand did not prejudice defendant.

3. In an action on a liquor dealer's bond for alleged illegal sales, where the evidence showed that the sales complained of were without doubt made by persons for whose acts defendants were liable, it was not necessary to give instructions defining the terms "agency" and "employee."

4. Rev. St. 1895, arts. 1204, 1224, 1256, 1257, 1259, 1347, provide that a surety may be sued without suing the principal obligor if the latter is a nonresident or insolvent, and that in suits against partners service of citation on one of the firm shall be sufficient to authorize judgment against the firm and the partner actually served. It is further provided that where there are several defendants, only part of whom are served, plaintiff may discontinue as to those not served, but that, where a suit is discontinued as to a principal obligor, no judgment can be rendered against the surety jointly sued, unless it is proven that the principal obligor is a nonresident, or insolvent; that the court may permit plaintiff to discontinue as to one or more of several defendants who have been served if such action will not prejudice the other defendants. In a suit on a bond against a firm, the individual members thereof, and the surety on the bond, one of the partners, who was insolvent and a nonresident, was not served with process because of want of knowledge of his whereabouts. *Held*, that it was not error to allow plaintiff to dismiss as to the unserved partner in his individual capacity.

5. After such dismissal the court was authorized to render judgment against the firm.

6. Rendition of judgment against the surety was also proper.

7. It was not error to refuse to continue the case in order that the nonresident partner might be served.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by the State of Texas against George Scalfi & Co. and others. From a judgment for plaintiff, defendants appeal. Affirmed.

*Rehearing denied April 11, 1903, and writ of error denied by Supreme Court.

T. L. Camp, for appellants. Lee Riddle, W. F. Martin, and W. E. McConnell, for the State.

CONNER, C. J. This suit was instituted by the state of Texas, for the use and benefit of Palo Pinto county, on the 12th day of March, 1902, against Geo. Scalfi, Geo. Scalfi & Co., a firm composed of Geo. Scalfi and M. Savant, and against the American Bonding & Trust Company, of Baltimore City, Md., to recover the sum of \$5,000 statutory penalty for breaches of the liquor dealer's bond of Geo. Scalfi and M. Savant, upon which the American Bonding & Trust Company was surety. Geo. Scalfi and M. Savant were retail liquor dealers, and were engaged in carrying on business in the firm name of Geo. Scalfi & Co. at Mingus, or Thurber Junction, in the county of Palo Pinto. They had filed with the proper officers of Palo Pinto county the statutory bond in the sum of \$5,000, the American Bonding & Trust Company being surety; and it was alleged by the appellee that Scalfi & Co. had breached this bond on many occasions during the months of August and September by selling beer to Ed., Clyde, and Charley Graves, all being under the age of 21 years. These sales occurred during the months of July, August, and September of 1901. M. Savant was never served with process, nor did he appear by answer or otherwise. Geo. Scalfi and the surety company, however, were duly cited, and they each appeared and answered by demurrer and general denial, as did also the firm of Geo. Scalfi & Co. Before the trial, appellee amended, omitting complaint of breaches of said bond by reason of sales of intoxicating liquors to Charley Graves, and dismissed its suit as to M. Savant in his individual and separate capacity on the ground that he was a nonresident of this state, and his residence unknown, and that he was actually and notoriously insolvent. The trial resulted in a judgment for appellee in accord with its prayer for the sum of \$1,500 and interest and costs against Geo. Scalfi, Geo. Scalfi & Co., and the American Bonding & Trust Company, and provided that the trust company, found to be secondarily liable, should have judgment and execution over against Geo. Scalfi and Geo. Scalfi & Co.

That the evidence sufficiently supports the material allegations of appellee's petition is undisputed, and the judgment should be affirmed unless error has been committed in the particulars hereinafter noticed. We think it quite apparent that the first, seventh, and tenth assignments should be overruled. The evidence on the trial tended to show that M. Savant was actually and notoriously insolvent, and that he was a nonresident of the state, whose residence was unknown; and it is therefore immaterial in any view that such proof was not made at the time the court heard and sustained ap-

pellee's motion to dismiss as to him. So, too, as to the objections made by the appellant trust company to the citation served upon it. The citation had attached thereto copy of appellee's petition, which, by reference, was made part of the citation, and the whole was duly served upon appellant trust company. A mere want of fullness in the citation, therefore, in stating the nature of appellee's demand, could not operate to the prejudice of the complaining appellant. Nor do we think a necessity existed for the court to give special charge No. 2, requested by appellants, defining the terms "agency" and "employé." The sales complained of were without doubt made, as alleged, by those for whose acts appellants were liable, and we hence, as before indicated, overrule the first, seventh, and tenth assignments.

The remaining assignments, however, raise more serious questions. The appellant surety company objected to the dismissal of M. Savant, and sought to continue the cause for service upon him, in all of which the court's action was adverse to said appellant, and to which error is assigned in the second, third, and fifth assignments. Objection is also made, as assigned in the fourth assignment, to the judgment against the firm of Geo. Scalfi & Co., the contention being that such judgment was unauthorized after the dismissal of M. Savant. The articles of our statute (Rev. St. 1895) deemed pertinent are as follows:

"Art. 1204. The assignor, endorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the state, or in such part of the same that he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent."

"Art. 1224. In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

"Art. 1347. Where the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served."

"Art. 1256. Where there are several defendants in a suit, and some of them are served with process in due time and others not so served, the plaintiff may either discontinue as to those not so served and proceed against those that are, or he may continue the suit until the next term of the court

and take new process against those not served; and no defendant against whom any suit may be so discontinued shall be thereby exonerated from any liability under which he was, but may at any time be proceeded against as if no such suit had been brought and no such discontinuance entered.

"Art. 1257. Where a suit is discontinued as to a principal obligor no judgment can be rendered therein against an indorser, guarantor, surety or drawer of an accepted bill who is jointly sued, unless it is alleged and proven that such principal obligor resides beyond the limits of the state, or in such part of the same that he can not be reached by the ordinary process of law, or that his residence is unknown and cannot be ascertained by the use of reasonable diligence, or that he is dead or actually or notoriously insolvent."

"Art. 1259. The court may permit the plaintiff to discontinue his suit as to one or more of several defendants who may have been served with process, or who may have answered when such discontinuances would not operate to the prejudice of the other defendants; but no such discontinuance shall in any case be allowed as to a principal obligor, except in the cases provided for in article 1257."

It seems plain to us from a consideration of the above statutes that the course pursued by the trial court was authorized, not only as to the discontinuance objected to, but also in the rendition of the judgment against Geo. Scalfi & Co. We must accept as sufficiently established the fact that M. Savant was a nonresident of the state, that his residence was unknown, and that he was actually and notoriously insolvent. It is also undisputed that the remaining member of the firm was duly served, and that he appeared and answered both for himself and in the name of the firm of Geo. Scalfi & Co. Article 1224, *supra*, expressly provides that service of citation upon one of a firm shall be sufficient to authorize a judgment against the firm and against the partner actually served; while article 1347 is of like legislative force. So that the action of the court in rendering judgment as was done in this case against Geo. Scalfi and the firm of Geo. Scalfi & Co. is expressly sanctioned by the lawmaking power, and must be sustained, unless the action of appellee and the court in dismissing M. Savant is an insurmountable obstacle, as is insisted by appellants. That such is not the case we think manifest from a consideration of articles 1256, 1257, and 1259, *supra*, it is not denied—neither can it be—that, as originally instituted, this suit was against M. Savant as well as against the appellants. Under the circumstances of this case a discontinuance as to M. Savant was expressly authorized by article 1256; but, had he in fact been served with citation, which it seems was impossible, because of a want of knowledge as to his whereabouts, article

1259 in express terms authorized the court to permit a discontinuance as to him under the circumstances mentioned in article 1257, when the discontinuance could not operate to the prejudice of other parties, as was the case in the suit before us, as will hereinafter more particularly appear. If a suit can lawfully be discontinued as against a principal obligor who has actually been served with citation when he is actually and notoriously insolvent, as M. Savant was, then it passes our comprehension why it should be otherwise when the discontinuance was before service of citation, as authorized by article 1256. In either event, under the circumstances of this case, judgment against the surety is authorized, and it is the surety company alone who can complain here. Considering the articles of the statute quoted as a whole, we think it clear, as before stated, that the court's action in the particular under consideration must be sustained. To hold otherwise is to render noneffective plain statutory provisions.

But it is insisted that such conclusion is in direct conflict with the decisions of our Supreme Court in the cases of Frank et al. v. Tatum, 87 Tex. 204, 25 S. W. 409, and Glasscock v. Price, 92 Tex. 271, 47 S. W. 965. We decline, however, to so consider them. It seems to have been held in those cases that a discontinuance of a suit as to one or more members of a partnership leaves the court without power to render judgment against the firm, and an effort to distinguish them from the case before us may not be very satisfactory. We notice, however, that in the case of Frank v. Tatum it nowhere appears in the report of the case that there was allegation or proof that the individual members of the partnership who were dismissed were nonresidents, or actually and notoriously insolvent, or that the discontinuances were in any way qualified, and no judgment seems to have been sought against the partnership as such. At least the court as to this says: "The case was tried upon the amended petition, and to that alone we can look for the allegations which govern in this investigation. The amended petition does not purport to make the partnerships defendants, but declares explicitly against the individuals as defendants." The same also appears to be substantially true, in part at least, in Glasscock v. Price, while in the case now under consideration, in addition to what we have before noticed, appellees declared against the firm of Geo. Scalfi & Co. and each member thereof, and so limited its discontinuance as to M. Savant as to restrict it to his individual and separate capacity, at the same time expressly praying for judgment against said firm and against Geo. Scalfi, the partner served, individually. And the judgment, construed as a whole, evidences that the discontinuance as to M. Savant as entered by the court was of like restricted character. We think, in effect, that

the judgment and petition relating to the discontinuance amounted to no more than a mere declaration of the existing law as applied to the facts alleged, in the absence of a dismissal of any kind. In other words, that, under the circumstances alleged, appellee by its petition but averred its purpose not to seek a judgment against M. Savant in his separate, individual capacity, but to seek judgment against him in so far as the judgment sought against the partnership of which he was a member would affect him. We surely would not be justified in reversing the judgment in appellant's favor merely because the state, by its proper officer, saw proper to distinctly avow that it did not seek an illegal judgment—a judgment against M. Savant individually, a relief to which, under the circumstances alleged and shown, the court could not award. We conclude that the judgment against the firm was authorized.

If correct in the foregoing conclusions, it of course follows that the court committed no error in refusing to continue the case for service on M. Savant. Besides, no bill of exception was taken to the action of the court in overruling the application to continue for service, and we fail to see how the appellant surety company is prejudicially affected by the action of the court here noticed. No cross-complaint of the judgment in favor of the surety company is made by Geo. Scalfi or Geo. Scalfi & Co., and the finding that M. Savant is actually and notoriously insolvent is not only supported by the evidence, but seems to be conceded by appellants. It has not been made apparent just how this could be true if there were firm assets of Geo. Scalfi & Co. in existence, and no attempt to show the existence of such firm assets appears. We conclude that the evidence tends to show that there are no such assets, and, if so, a judgment in favor of the appellant Surety Company against either M. Savant or the firm of Geo. Scalfi & Co. seems hardly worth the effort of another trial.

All assignments are overruled, and the judgment affirmed.

WIDDECOMBE v. CHILES et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

WATER COURSES—RIPARIAN RIGHTS—TITLE BY ACCRETION.

1. Defendant was the owner of the south half of a section of land between which and the river bed there was originally a strip of 8 acres, forming the fractional north half, which had not been patented. The river changed its bed until it had washed away the 8-acre strip, and flowed through defendant's land, when it began to rebuild to defendant's land all that it had washed away, and about 200 acres additional. Plaintiff then received a patent for the fractional north half of the section as described by the original survey. Held that, the accre-

tion being to defendant's land, plaintiff took no title by his patent.

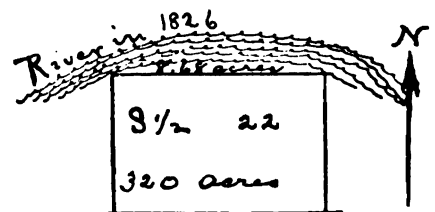
Appeal from Circuit court, Jackson County; H. L. McCune, Judge.

Action by R. H. Widdecombe against Martha S. Chiles and others. From a judgment for plaintiff, defendants appeal. Reversed.

Paxton & Rose, for appellants. J. N. Southern, for respondent.

VALLIANT, J. This is an action in ejectment for possession of N. E. $\frac{1}{4}$ and E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, section 22, township 51, range 30, in Jackson county, containing about 230 acres. The land in suit is the result of the land-building propensity of the Missouri river, and the question is whether it was an accretion to the north half of section 22, or the south half.

By the United States survey in 1826, section 22 was a fractional section, consisting of the south half, which was a full half section, and a small strip containing 8.68 acres lying along the north line of the south half and extending to the Missouri river. This strip of 8.68 acres was all there was of the north half, and it lay between the south half and the river thus:



From 1826 to 1853 the river gradually changed its bed by cutting away its south bank until it had washed away all of the 8.68 acres forming the fractional north half of the section, and a considerable part of the south half, so that not only was the south bank of the river in the south half of the section, but the whole river flowed through the south half and converted it into a fractional half section. About 1853 the river ceased encroaching, and began to gradually rebuild where it had washed away, and this process continued until 1896, when it had not only rebuilt where it had washed away, but had added more than 200 acres, which would have been in the north half of the section if it had existed when the government survey was made in 1826.

In 1896 plaintiff's grantor obtained a patent from the United States for the fractional north half of this section, containing, in the words of the patent, "eight acres and sixty-eight hundredths of an acre." The claim of the plaintiff is that the accretion was to the $8 \frac{68}{100}$ -acre strip, and, if that is true, he is entitled to recover. The defendants claim that the accretion was to the south half of the section, and, if that is true, the judgment should be for them. It was agreed that, if plaintiff was entitled to recover, his

damages should be assessed at \$1, and the rents and profits at \$4 a month. The court gave peremptory instructions for the plaintiff, which resulted in a verdict and judgment in his favor, from which the defendants appeal.

The principles upon which the decision of this case must be founded have already been established by previous decisions in this court, although, perhaps, the identical question, at least the question in identical form now before us, has not been answered.

In *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589, the facts were that in 1817, when the government survey was made, there was an island in the river which afterwards became the property of the plaintiff. The land of the defendant in that suit was shown by that survey to be on the north bank of the river, the main channel of which ran between the island and defendant's land. The river made encroachments on defendant's land, thereby pushing its north bank farther north, and taking into its bed a portion of what has been defendant's land. After a while it changed its course, the main channel got around on the south side of the island, and accretions began to form against the north side thereof, and in the course of time these accretions extended across what had formerly been the bed of the river, and covered that space where defendant's land had been before it was washed away. The defendant in that case insisted that when the accretions reached the place where, according to the old survey, his land had been, they became his property, being in fact his land restored. But this court, per Gantt, P. J., said: "On the contrary, if, after the original survey in 1817, a part of said fractional section 4 was washed away by the river, and the main channel of the river covered the place where it originally stood, for any considerable length of time, and afterwards accretions to the island began, and gradually grew, and extended north towards the north bank until they went beyond what was originally the southern or river boundary of said section 4, said accretions thus formed to the island belonged to the owner of the island, and not to the owner of the original fractional section 4." In support of that doctrine the court cites the following cases: *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565, 3 Am. St. Rep. 43; *Buse v. Russell*, 86 Mo. 209; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186.

The principles there laid down are that the accretions belong to the man who owns the land against which the deposits were made, and that they do not belong to the man who owns land against which such deposits were not made, although they cover a space where his land was before the river washed it away. The only difference between that case and this is that there the original lands of both parties were riparian, and neither at any time ceased to have a

visible body above water and a river front, while here the original land which the plaintiff's patent calls for had been washed away entirely, and the land of the defendant did not have a river front until the 8-acre strip had been cut away by the river. Yet the principles deduced from that case are applicable here. If there had been an island in front of this 8-acre strip in 1826, when the survey was made, and if, after the strip had been cut away and the river had encroached far into the south half of the section, accretions had formed against the island and extended over the 8-acre strip and over the washed away part of the south half, the law as declared in *Naylor v. Cox*, would have given the title to the owner of the island, although the accretions filled the space that had once been filled by the 8-acre strip and the washed away part of the south half of the section.

The land in dispute in *Naylor v. Cox* became the subject of another suit between the same parties, and reached this court under the style of *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450. In the latter case the evidence seemed to show that the made land in dispute was the result of a tow-head which had arisen out of what had been the bed of the river, and that accretions were made to the tow-head until it reached the mainland. The plaintiff in that case, who was the defendant in the *Naylor* suit, and was the owner of the mainland, contended that, as the new land had come up out of the bed of the river in the space where his land had been before it was washed away, it belonged to him, and not to the owner of the island. But the court held that, as he was the plaintiff in the case, it was not sufficient for him to show that the land was not an accretion to the island, or that it was an accretion to the tow-head where his land had once been, but that, before he could make his title good, he must show that it was an accretion to his mainland, and that the fact that the tow-head came up out of the bed of the river at a point where his land was, before it was washed away, did not constitute it his land restored.

The facts in the case at bar do not make it necessary for us to decide to whom the accretion would have belonged if it had grown from a tow-head that had come up out of the bed of the river in the place where the 8-acre strip had once been, for there is no evidence tending to show such a condition.

This court, in every case that has come before it involving the subject of accretions to riparian lands, has held that, in order to show title to the accretions, one must show that they were formed by deposits against visible land which he or his grantors owned. *Buse v. Russell*, 86 Mo. 209; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Price v. Hallett*, 138 Mo. 561, 38 S. W. 451.

The question, in the very form we now

have it, has been decided by the Supreme Court of Connecticut in a case referred to in *Naylor v. Cox*, supra. The Connecticut court said: "They say, in the first place, that the law of accretion applies only to the case of riparian land, and that, as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries, at least upon the sides affected by the present questions, it cannot become, by any changes of the river, riparian land. We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist. The river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relation of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remote lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that had been taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text-writers, and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of the bed. The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of the stream, or, in case of a navigable river to high-water mark, yet that being the limit of his original title, and, in the case of a non-navigable river, the line of the adjoining owner, he cannot take such accretion beyond that line. This claim is utterly without support."

That case is referred to with approval in *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617, and *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, in both of which also our cases of *Naylor v. Cox* and *Cox v. Arnold* are quoted with approval.

We are cited by respondent to *Crandall v. Allen*, 118 Mo. 403, 24 S. W. 172, 22 L. R. A. 591, as holding contrary to the doctrine above mentioned, but we do not so understand that case. There the plaintiff's land was bordered by the river. It lay north of the land of defendant, and between it and the river. But, in the course of time, so much of the plaintiff's land was washed away as that it brought the river to defend-

ant's land and gave him a river front, but it did not wash away all of the plaintiff's land. Then, when the river changed, it began building land against the defendant's front, and continued the process until the new-made land came in front of plaintiff's land, and there were accretions to the plaintiff's land also. The contention of the defendant was that he was entitled not only to the accretions to his own front, which were conceded to him, but also to that in front of the plaintiff, because the land-building had its beginning on his land; but it was held that he was entitled only to that formed on his own front. The court said: "We find nothing in the record that questions that this accretion in front of plaintiff's land formed to his shore." The court by no means qualifies what it said in *Naylor v. Cox*, but reaffirms it. *Crandall v. Allen* is itself authority for the proposition that land, though it did not reach the river when it was originally surveyed, or when the party bought it, yet became riparian land when the intervening land is cut away by the river, and that the owner has title to accretions formed against it. In support of the contention that the south half of section 22 could not be considered riparian land because its description on the survey does not call for the river as its boundary, we are referred to *Smith v. St. L. Public Schools*, 30 Mo. 290; *Benson v. Morrow*, 61 Mo. 345; *Buse v. Russell*, 86 Mo. 209; *Ellinger v. R. R.*, 112 Mo. 525, 20 S. W. 800; *Swearingen v. St. Louis*, 151 Mo. 348, 52 S. W. 346. But in none of those cases had the river cut away the intervening land and given the land in question a river boundary in fact. Those decisions go no farther than to hold that if the call in the deed is for a boundary short of the river, for example, to a street or to a wharf line, the grant is not to the river, and the land granted is not riparian.

This court has not said in either of those cases, and we doubt if any court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river—which in fact did not reach the river when the deed was made—does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary.

It is said, as in support of the plaintiff's claim, that the United States never parted with the title to the fractional north half of section 22 until 1896, when the patent under which plaintiff claims issued. But that fact does not alter the law of the case. If the government parted with the title to the south half, but held title to the fractional north half until the latter was entirely washed away and accretions formed against the south half, they became the property of the owner of the south half. The owner of the south half holds his title as much from the government as does the owner of the north half; a patent to the south half would carry to the

grantee not only the then present title, but also all the incidents of ownership, of which is the ownership of accretions. The learned counsel for respondent in their brief say: "In the absence of express legislation by Congress, the rules of the common law applied to its (the government's) ownership of this land, and, as plaintiff's grantor obtained the patent for it in 1896, this action should be reviewed as if the government itself at the time of the grant had found the defendants on the survey of this land and had brought an action to evict them." That is true. The common law does apply to the title held by the government (except in certain particulars, as, for example, that it is not affected by prescription or the statute of limitations) in the same manner that it applies to the title held by an individual, and it is by virtue of the rules of the common law, as declared by the courts of this country, that the accretions in question in this suit, if they formed against the south half, after the fractional north half had entirely disappeared in the bed of the river, belonged to the owner of the south half. When this fractional north half was surveyed and offered for sale by the government, it was visible land, capable of being held in possession; it was not in the bed of the river. The government never undertook to sell land the metes and bounds of which were at the bottom of the river, and, if it should sell land bounded by a river, that boundary is subject to shifting the same as if an individual was the seller. The Supreme Court of the United States, speaking of land belonging to the government, has said: "Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed line." *Jefferies v. East Omaha, etc.*, 134 U. S. 178, 196, 10 Sup. Ct. 518, 33 L. Ed. 872.

And, as bearing on this point, we quote again from that court: "The United States have not repealed the common law as to the interpretation of its own grants, nor explained what interpretation should be given to or imposed upon the terms of the ordinary conveyance which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government where the lands may lie. In our judgment, the grants of the government for land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie." *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428.

The learned counsel for appellant in their brief illustrate the proposition under consideration by such an apt hypothetical case that we quote it: "Suppose A. owns a tract of land which does not touch the river, but in front of it are lots 1 and 2, which belong to

the United States. B. buys lot 1, and then the river entirely cuts away both lot 1, belonging to B., and lot 2, belonging to the government, encroaching on A. Then accretions form on A.'s land, and extend over the places formerly occupied by lots 1 and 2. C. now gets a patent to lot 2. Is C., who bought a spectral title, any better off than B., who bought a real title?"

This case ought to have been submitted to the jury on the theory that if the fractional north half of section 22 was entirely washed away, making the south half the river front, and the accretions formed against the south half, they become the property of the owner of the south half, even though they extended over and beyond the space where the fractional north half had been when the survey was made.

The judgment is reversed, and the cause remanded to be retried according to the law as herein declared. All concur.

WARREN et al. v. MANWARING.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

TAXATION—JUDGMENT—COLLATERAL ATTACK —EVIDENCE—ORDER OF PUBLICATION— AFFIDAVIT—JUDGMENT—VALIDITY.

1. A tax judgment cannot be collaterally attacked by showing that the assessment was erroneous.

2. Failure to enter a tax judgment in the precise method pointed out by the statute is an irregularity, not available on collateral attack.

3. *Sess. Acts 1877, p. 386, § 6*, relative to tax proceedings, provides that in suits against nonresidents the proceedings shall be the same as in actions affecting real property, and the statute relative to such subject (*Rev. St. 1890, § 575*) enacts that, if plaintiff allege in his petition "or at any time thereafter by affidavit," that the defendant is a nonresident, an order of publication shall be made, etc. *Held* that, where a petition in a tax suit alleged that defendant was a nonresident, and the order for publication recited the making of an affidavit, the order was valid, though no affidavit was in fact made.

4. The fact that the affidavit was not in fact made was at most an irregularity not available in a collateral attack on the tax judgment.

5. *Laws 1877, p. 387, § 10*, relative to taxation, provides that all suits shall be tried at the return term of the writ. In a tax suit a judgment was rendered at the return term of the writ, and thereafter, at another term, a judgment similar in all respects was rendered in the same proceeding, except that it recited the entering of "an interlocutory judgment" at the return term. Execution was issued on the last judgment, and a sale and tax deed followed. *Held* that, the first judgment having been a final one, and the second one wholly unauthorized, the tax deed was invalid.

Appeal from Circuit Court, Ozark County;
W. N. Evans, Judge.

Suit by Louis R. Warren and another against Joshua Manwaring. From a decree for defendant, complainants appeal. Reversed.

This suit was instituted in Ozark county, Mo., on the 20th day of December, 1897.

The nature of the action was to have the court ascertain and declare the title to the lands in dispute. That we may fully understand the issues in this cause, we have inserted the petition and answer.

Petition, omitting caption: "Plaintiffs state that they are the owners in fee simple of the following described real estate, situate in Ozark county, Missouri, to wit, all of section fourteen (14) and the northeast quarter and the east half of northwest quarter of section twenty-four (24), township twenty-four (24) north, of range thirteen (13) west; that defendant claims title to said above-described real estate through a tax deed executed by M. P. Tate, sheriff of Ozark county, Missouri, on the 19th day of October, 1882; that said deed was executed by M. P. Tate, sheriff, aforesaid, by virtue of a sale made under an execution issued from the circuit clerk's office of Ozark county, Missouri, on a transcript judgment from a justice of the peace and a judgment of the circuit court; that said judgments were wholly void, and passed no title. Wherefore the plaintiffs pray the court to ascertain and determine the estate, title, and interest of plaintiffs and defendant, respectively, in said real estate above described, and to define and adjudge by its judgment or decree the title, estate, and interest of the parties severally in and to such real estate."

Answer, omitting caption: "Defendant, for answer, says that he denies each and every allegation therein contained, and not herein admitted. Defendant says he is the absolute owner in fee of all the land described in plaintiffs' petition, and prays judgment for the same."

When the cause was called for trial, respondent, by his attorney, admitted that respondent had no right or title to the N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 14, and the N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 24, township 24, range 13, same being part of said lands, and that appellants were entitled to judgment for the recovery of the same.

During the progress of the trial, the following agreement as to this cause was made: "It is agreed by and between the attorneys for plaintiffs and defendant that the common source of title is John Whitcomb, by deed to him dated August 20, 1870, by James Watson, patentee, to the S. $\frac{1}{2}$ and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 14, township 24, range 13, and that appellants are entitled to recovery, unless respondent has title by reason of sheriff's deed." Appellants introduced in evidence their claim of title from Whitcomb to the plaintiffs in this action. Defendant offered in evidence sheriff's deed, based on a judgment rendered by the circuit court of Ozark county on the 28th of October, 1878, conveying the land in dispute to one J. S. Plattenburg; also deed from Plattenburg to the defendant in this suit. Plaintiffs then offered in evidence the petition in a suit for back

taxes, filed in the circuit court of Ozark county to the April term, 1878, wherein the state of Missouri, at the relation and to the use of R. Q. Gilliland, was plaintiff, and John Whitcomb defendant, to enforce the state's lien for taxes on the lands involved in this controversy. Order of publication issued upon the filing of said petition to recover the back taxes, and plaintiffs offered in evidence such publication, which is as follows:

"Order of Publication.

"The State of Missouri, at the Relation and to the Use of R. Q. Gilliland, Collector of Ozark County, vs. John Whitcomb.

"Now comes the plaintiff herein before the undersigned clerk of the circuit court of Ozark county, in vacation, and files his petition and affidavit, stating, among other things, that the defendant is a non-resident of this state, whereupon it is ordered by the clerk that said defendant be notified by publication that plaintiff has commenced a suit against him in this court, the object and nature of which is to enforce the lien of the state of Missouri, for back taxes for the years 1865, '66, '67, '68, '69, '70, '71, '72, '73, '74, '75 and '76, amounting to the sum of \$248.02, on the following described real estate, situated in the county of Ozark, to wit, section 14, township 24, range 13, and that unless the said defendant be and appear at the next term of this court, to be held on the third Monday in April next, at the courthouse in the town of Gainesville, county of Ozark, state of Missouri, and on or before the third day thereof plead, answer or demur to the petition in said cause, the same will be taken as confessed and judgment rendered accordingly.

"And it is further ordered that a copy hereof be published, according to law, in the Ozark County News, a newspaper published in the county and state aforesaid.

"Attest: John W. Harlin, Clerk."
(Record, pages 35 and 36).

"Proof of Publication.

"Gainesville, Mo., April 18, 1878.

"I, W. A. Love, editor of the Ozark County News, a newspaper published in the county of Ozark, state of Missouri, certify that the order of publication, a copy of which is hereto annexed, was published in the Ozark County News for four successive weeks, the first insertion being on the 19th day of February, 1878, in numbers as follows: 19, 20, 21, 22.

W. A. Love.

"Subscribed and sworn to before me this 18th day of April, 1878.

"[Seal.] John W. Harlin, Circuit Clerk.

"Filed April 18, 1878.

"John W. Harlin, Clerk."

Appellants introduced in evidence judgment of circuit court rendered on the fifth

day of April term of court for the year 1878, the same being April 19, 1878, which is as follows:

"State of Missouri, at the Relation and to the Use of R. Q. Gilliland, Collector, Plaintiff, vs. John Whitcomb, Defendant.

"Suit on Delinquent Lands.

"Now at this day, this cause being called for trial, the plaintiff appears by attorneys, but the defendant comes not, but makes default, and it appearing that this suit was brought to the court by the above-named collector in and for Ozark county, Missouri, for the purpose of enforcing the lien of the state of Missouri, under the act of the General Assembly approved April 12, 1877 [Laws 1877, p. 384], upon the following described real estate, to wit, section 14, township 24, range 13 west, for the taxes, interest, and costs due thereon for the years 1865, '66, '67, '68, '69, '70, '71, '72, '73, '74, '75, and '76, and for a decree of this court to sell said real estate, or so much thereof as shall be sufficient to pay and satisfy said taxes, interests, and costs, the sum of two hundred and eighty-seven dollars and eleven cents (\$287.11), which said sum is ascertained by a tax bill filed here in court by said collector, and by him duly certified as the law directs, and the court finds that said interest, taxes, and cost had been duly assessed and charged against said real estate at the several times aforesaid by the proper officers, agents of said state of Missouri, under the then existing laws of said state, and that the defendant had wholly failed and neglected to pay the same or any part thereof, although often requested to do so by plaintiff's agents, and that defendant had been notified of the commencement of this action by publication in the Ozark County News, a weekly newspaper printed and published in Ozark county, Missouri, for four weeks successively, the last insertion being at least four weeks before the commencement of this term of this court, and that the aforesaid sum of taxes, interest, and costs is still due and unpaid: It is therefore considered and decreed by the court that the lien of the state of Missouri be enforced upon the above-described real estate, and that the same, or so much thereof as shall be sufficient to pay and satisfy said taxes, interest, and costs, be sold according to law for that purpose, and that plaintiff have and recover of and from the defendant her costs and charges in this behalf laid out and expended, and it is ordered by the court that a special execution issue against said lands."

Appellants also introduced judgment of the Ozark county circuit court rendered on the 28th day of October, in a suit to enforce the state's lien for taxes against said section 14, in which said state of Missouri, at the relation and to the use of R. Q. Gilliland, was

plaintiff, and John Whitcomb was defendant, which judgment is as follows:

"State of Missouri, at the Relation and to the Use of R. Q. Gilliland, Collector, vs. John Whitcomb.

"Suit on Delinquent Lands.

"Now, at this day, this cause being called for trial, the plaintiff appears by his attorney, but the defendant comes not, but makes default, and, it appearing to the court that this suit was brought by the above-named collector in and for Ozark county, Missouri, under act of the General Assembly of the state of Missouri approved April 12th, 1877 [Laws 1877, p. 384], for the purpose of enforcing the lien of the state and county aforesaid upon the following described lands, to wit, all of section 14, of township 24, range 13, for the taxes, interest, and costs due thereon for the years 1865, '66, '67, '68, '69, '70, '71, '72, '73, '74, '75, '76, and for the purpose of obtaining a decree of this court for the sale of said land, or so much thereof as shall be sufficient to pay and satisfy said taxes, interest, and costs, and it appearing to the satisfaction of the court that at the last term of this court an interlocutory judgment was rendered against the defendant, and it appearing to the court that the whole of said taxes, interest, and costs are still due and unpaid the plaintiff, and that the same had been assessed and duly charged against said land at the several times, as before stated, by the proper officers, agents of the state and county aforesaid, and that the defendant had wholly neglected to pay the same or any part thereof, although often required to do so by the different collectors of said state and county, and the court further finds that said taxes, interest and costs charged against said land amounts to the sum of two hundred and ninety-three dollars and fifty-three cents (\$293.53) taxes and interest, and the sum of thirty-five dollars and twelve cents (\$35.12) for his cost in this behalf laid out and expended:

"It is therefore considered and ordered by the court that the plaintiff have and recover of and from the defendant the amount of taxes and interest, together with his cost of this suit, and that the above-described land, or so much thereof as shall be sufficient to satisfy said taxes, interest, and costs due thereon, be sold according to law, for which a special execution may issue against said land."

Upon this last-mentioned judgment, the special execution was issued, the land levied upon by virtue of it, and sold, and in pursuance of such sale the deed in dispute (which is as follows) was executed:

"To all to whom these presents shall come, I, Robert P. Ellison, Sheriff of the County of Ozark, State of Missouri, send greeting: Whereas, on the 28th day of October, A. D. 1878, judgment was rendered in the Circuit Court, in the County of Ozark, State of Mis-

souri, in favor of the State of Missouri, at the relation and to the use of Robert Q. Gilliland, Collector of the Revenue of Ozark County, in the State of Missouri, and against John Whitcomb for the sum of two hundred ninety-three and $\frac{53}{100}$ dollars (\$293.53) for certain delinquent State, County and Special Taxes and interest hereinafter set forth, assessed and found by said Court to be due and unpaid upon the following described real estate, viz:

Tract No.	Parts of Sections, Lot or Block, Addition or Town.	Sect'n.	Twp.	Range.
1	All of	14	24	18

"And that the taxes and interest found due upon said real estate and the years for which the same were assessed are upon each of the above described tracts, as follows, viz.:

Tract No. 1—Years for which taxes were found due.				
1865, \$11.38;	1866, \$17.04;	1867, \$13.49,	total.....	\$41.91
1868, \$ 9.47;	1869, \$17.04;	1870, \$42.28,	total.....	\$68.79
1871, \$20.18;	1872, \$28.08;	1873, \$25.75,	total.....	\$73.96
1874, \$26.50;	1875, \$40.23;	1876, \$32.17,	total.....	\$98.90
Total				\$293.53

"And also certain costs which have been taxed the sum of \$35.12, which said several sums of taxes, interests and costs were declared by said Court to be a lien in favor of the State of Missouri upon the above described tracts of real estate.

"And, whereas, it was decreed by said Court that the lien of the State of Missouri upon said real estate for taxes, interests and costs be enforced, and that said real estate, or so much thereof as may be necessary to satisfy such judgment, interests and cost, be sold according to law; upon which judgment a special execution and order of sale was issued from the clerk's office of said court, in favor of the State of Missouri, to the use of said collector and against the said John Whitcomb, dated the 28th day of February, A. D. 1879, and directed to the sheriff of the County of Ozark, and directing said sheriff to sell said real estate to satisfy such judgment, interest and costs, and the same was to be delivered on the 4th day of March, A. D. 1879, by virtue of which said execution, I, the said sheriff, did, on the 4th day of March, A. D. 1879, levy upon and seize the above described real estate, situated in my said county; and having, previously to the day of the sale hereinafter mentioned, given at least twenty days' notice of the time and place of the sale, and of the real estate to be sold, and where situated, as the law directs, by advertisement in the Weekly Ozark County News, a newspaper published in my said county, by virtue of which said execution and notice, I did, on the 22nd day of April, A. D. 1879, between the hours of 9 in the forenoon and 5 in the afternoon of that day, agreeably to said notice, at the court house door, in my said County of Ozark, and during the session of

the Circuit Court, at the April term thereof, A. D. 1879, expose to sale at public auction, for ready money, the above described real estate, and J. S. Plattenburg being the highest bidder for the following described real estate, viz: N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, for the sum of one dollar, and the S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, for the sum of one dollar; the N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, for the sum of one dollar; the S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, for the sum of one dollar; the N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, for the sum of one dollar; the S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, for the sum of one dollar; the N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, for the sum of one dollar; the S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, for the sum of one dollar; the N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, for the sum of one dollar; the S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, for the sum of one dollar; the N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, for the sum of one dollar; the S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, for the sum of one dollar; the N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, for the sum of one dollar; the S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, for the sum of one dollar; the N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, for the sum of one dollar; the S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, for the sum of one dollar. All in Section fourteen (14), Township twenty-four (24) Range thirteen (18) west, lying and being situate in the County of Ozark, State of Missouri, the said last above described tracts were stricken off and sold to the said J. S. Plattenburg for the sum bid therefor by him, as above set forth. Now, therefore, in consideration of the premises and of the sum of sixteen (\$16) dollars to me, the said sheriff, in hand paid me by the said John S. Plattenburg, the receipt whereof I do hereby acknowledge, and by virtue of the authority in me vested by law, I, Robert P. Ellison, Sheriff, as aforesaid, do hereby assign, transfer and convey unto the said J. S. Plattenburg all the above described real estate so stricken off and sold to him that I might sell as sheriff, as aforesaid, by virtue of the aforesaid judgment, execution and notice.

"To have and to hold, the right, title, interest and estate hereby conveyed unto the said J. S. Plattenburg, heirs and assigns, forever, with all the rights and appurtenances thereto belonging.

"In witness whereof, I, Robert P. Ellison, Sheriff of the County of Ozark and State of Missouri, have hereto set my hand and affixed my seal this 25th day of April, A. D. 1879.

Robert P. Ellison."

This deed was duly acknowledged in open court, and properly filed for record and recorded in the recorder's office of Ozark county. The record discloses that appellants, at the time said deed was offered in evidence, objected to its introduction, and excepted to the action of the court in overruling the objection.

Upon a submission of this cause to the court, it ascertained and declared the title as to the land to which respondent entered a disclaimer to be in appellants; as to the remainder of the land involved in this suit

it declared the title vested in the respondent, as is fully indicated by the decree rendered in this cause. To the action of the court in rendering such decree appellants objected and duly excepted at the time. Appellants' motion for new trial being by the court overruled, they, in proper form, have prosecuted their appeal to this court.

Larz A. Whitcomb, Y. E. McClendon, and Guy T. Harrison, for appellants. A. H. Livingston, for respondent.

FOX, J. (after stating the facts). It is very earnestly urged by appellants' counsel that the judgment in the tax proceeding was void, because based upon an erroneous assessment. It is also contended that the order of publication was improvidently granted. In fact, it is contended that it was void, because the affidavit was not, in fact, made as recited by the clerk in the order of publication. Appellants also insist that the judgment, upon its face, does not conform to the requirements of the statute. The last contention, and the one that is most vital, is that the judgment of October 28, 1878, upon which the execution issued, and which forms the basis of the tax deed, is void.

The judgment in this case, if otherwise valid, is not rendered void by reason of the erroneous assessment complained of by the appellant. In the case of *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713, the court, through Black, J., says, "It was assumed that the circuit court derives its jurisdiction to render a judgment from the existence of a valid assessment. This is most clearly not the law of this state. The court derived its jurisdiction to hear and determine the cause in which the state, to the use of the collector, sued Eli Bower for the taxes therein claimed, from the Constitution and laws of this state. It was a court of general jurisdiction, proceeding according to the course of the common law. Its jurisdiction once obtained, as it was in that cause, upon a petition stating a cause of action, after due notification of the defendant by an order of publication regularly ordered and published, cannot be questioned in a collateral suit by the proof that some of its findings were erroneous. Its judgments are no less conclusive in tax suits than in any other causes over which it has jurisdiction by virtue of the Constitution and laws of the state. *Jones v. Driskill*, 94 Mo. 190, 7 S. W. 111; *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175; *Allen v. McCabe*, 93 Mo. 138, 5 S. W. 62; 1 *Black on Judgments*, § 247. The court committed no error in refusing to admit the assessment books to show the lands were not assessed. The proof of that fact, if true, would not have invalidated the judgment on which the tax deed was bottomed." This erroneous assessment at most was an irregularity, of which the appellants could not avail themselves in a collateral proceeding. In the case of *Allen v. McCabe*, 93

Mo. 138, 5 S. W. 62, the court very clearly announces the doctrine "that the same presumptions are to be indulged in favor of its judgments and the proceedings under it in tax cases as would be indulged in favor of any judgment of a court of general jurisdiction in an action between individuals." To the same effect is the case of *Wellshear v. Kelley*, 69 Mo. 343. The doctrine, as contended for by appellants, and which is supported by certain adjudications, might be applicable in cases where the sale of the land for taxes was authorized to be made in a summary manner without the judgment of any court, or where the sales were in pursuance of judgments rendered by courts exercising special or limited jurisdiction; but not so under the law in force governing the tax proceedings in this case, where the judgments are rendered by a court of general jurisdiction. Where the court has jurisdiction of the subject-matter, and acquires jurisdiction of the person by due process of law, its judgments are entitled to all the favorable presumptions, and cannot be attacked in a collateral proceeding for a mere irregularity.

As to errors complained of that the judgment does not conform to the requirements of the statute, will say that what has been said upon the point as to errors in the assessment is equally as applicable to this contention. The failure of the court to enter the judgment in the precise method pointed out by the statute was at most an irregularity, but did not render the judgment void, and it is unavailing to the appellants in this action.

The next contention to which our attention is very earnestly directed by learned counsel for appellants is the charge that the order of publication was void because the affidavit was not in fact made. We have examined the petition filed in the back-tax suit from which the sale in dispute resulted, and find that it is alleged in the petition, independent of the affidavit, that "the defendant is a non-resident of the state, so that the ordinary process of law cannot be had upon him; therefore prays the court in vacation to make an order of publication notifying the defendant of the commencement of this suit." Section 6, Sess. Acts 1877, p. 386, under which the proceeding was instituted, provides: "In case of suits against non-residents, on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property." Hence we are led to the provisions of the general law in respect to orders of publication to see the requisite steps to be taken in order to procure an order of publication. Section 575, Rev. St. 1899, which is the same as the statute on this subject in force in 1877, provides that, "If the plaintiff shall allege in his petition or at the time of filing the same or at any time thereafter shall file an affidavit, stating that part or all of the defendants are nonresi-

dents, so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or, in vacation, the clerk thereof," shall make the order of publication. It will be readily observed that, if the petition makes the proper averments as to non-residence, no affidavit is required. In fact, the statute simply points out two methods of securing the order desired. This order can be issued by the court or the clerk. The order of publication challenged in this case was issued by the clerk. The clerk was authorized to make this order, upon the allegations in the petition, without any affidavit. It is true he recites in the order the making of the affidavit. This recital, even if not true, would not make the order void, for he had the authority, under the plain terms of the petition, to issue the order. There is no merit in this contention, and at most it stands on the same footing of the other contentions discussed—a mere irregularity. That cannot be invoked by the defendant in this proceeding.

This brings us to the last question involved in this case: Was the sale in the tax proceeding, which resulted in the execution of the tax deed by the sheriff, based upon a void judgment? The answer to this question settles this controversy. Section 10, Laws 1877, p. 387, in force at the time this tax suit was brought, provides, "All suits instituted under the provisions of this act shall be tried at the return term of the writ, unless continued for good cause shown." It will not be disputed that this suit, which resulted in the sale of the land in suit, was, under the provisions of the statute, triable at the April term, 1878, to which that suit had been brought. At the April term the judgment, as heretofore indicated, was rendered. This judgment, in our opinion, was a final judgment. The statute authorized its trial, the court had jurisdiction of the subject-matter and of the person of the defendant, and each and every fact necessary to be found is recited in that judgment. The lien of the state is declared; the amount is ascertained; it is ordered that the land, or so much thereof as shall be sufficient to satisfy the taxes, interest, and cost, be sold, and that special execution issue against said land. At the October term, 1878, a judgment similar in all respects was rendered in the same proceeding. In fact, it is substantially the same in form, except it recites the entering of an interlocutory judgment at the April term. The execution was issued upon this last-mentioned judgment, rendered at the October term, 1878, and the sale and deed followed as a result of that judgment and execution.

It is elementary that there cannot be two final judgments in the same action, with but one defendant. This court, in the case of *Wellshear v. Kelley*, supra, said in respect to the time when these tax suits were to be tried: "The court did not err in rendering a judgment at the first term. The statute

expressly provides that the first shall be the trial term." Black, in his work on Judgments, § 24, 1st vol., says, "There cannot be two final judgments in the same action." And again, in section 304, vol. 1: "It has been held that the entry of a second judgment in the same action is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly canceled or set aside. 'When a judgment is once entered on record, it must stand as the judgment unless it is vacated, modified, or disposed of by some means provided by law. Entering additional judgments is not one of them.'" The judgment at the April term, 1878, was complete in itself. There was no further action of the court necessary to give it force and power. It was the term at which the final judgment should be entered, and the mere fact that the judgment at the October term, 1878, refers to it as an interlocutory judgment does not make it so. Judgments are determined as to their finality by their force and effect, and not by a mere name. The entire powers of the court in that tax proceeding were exhausted at the April term, 1878. Having entered a full and complete judgment for the recovery of the back taxes sued for, and ordered the issuance of process to enforce such recovery, the defendant, in contemplation of law, was not before the court at its October term, 1878, and, the court having exhausted its full power in that proceeding at the April term, its judgment rendered at the October term was void. It had neither jurisdiction of the subject-matter or of the person of the defendant. In the case of *Danforth v. Lowe*, 53 Mo. 217, it was very appropriately said that: "After the term had elapsed, at which final judgment was taken, the court possessed no further control or jurisdiction over the case. It then had no power to reinstate the cause on the docket, or to take any further proceedings." In the case of *Coe v. Ritter*, 86 Mo. 277, there were two judgments entered. One was an original judgment, and, following that, there was a judgment *nunc pro tunc*. Execution was attempted to be issued on the original judgment, but it conformed to the *nunc pro tunc* judgment, and a sale was made upon that execution. The court said: "And the sale under the execution issued on the original judgment was invalid, because it did not conform to such judgment, but to the one entered now for then in 1878. It follows, therefore, that defendant's title rests upon an execution with no judgment to support it." In the case of *Burnham's Heirs v. Hitt*, 143 Mo. 414, 45 S. W. 368, the court, speaking through Gantt, J., said, in respect to judicial sales: "A partition sale is a judicial sale, and it is an indispensable prerequisite to the validity of such a sale that it should be based upon a valid judgment, decree, or order of sale."

The judgment of the October term, 1878, was void, and, it being the basis of the exe-

cution, sale, and deed, it follows that the tax deed introduced in evidence passed no title to the lands embraced in it to the respondent. This judgment being the very foundation upon which the sale and deed must rest, and its absolute validity appearing from an inspection of the record in the tax proceeding, it was an error for the court to consider the deed in reaching its conclusion in this cause.

With these views, as herein expressed, we have reached the conclusion that the decree of the court was erroneous, and its judgment will be reversed, and remanded for a new trial, as indicated in this opinion. All concur.

SOUTHERN ILLINOIS & M. BRIDGE CO. v. STONE et al.

(Supreme Court of Missouri. March 4, 1903.)

BRIDGES—ORGANIZATION OF CORPORATIONS—
STATUTES—AMENDMENT—CONSTRUCTION—
JUDICIAL NOTICE—FOREIGN CORPORATIONS—
EMINENT DOMAIN—EXERCISE OF POWER.

1. The legislature of Missouri has power to confer on foreign corporations the right of eminent domain, to be exercised in the construction of a toll bridge for public use.

2. Gen. St. 1865, c. 69, § 16, authorizes the formation of bridge companies to construct bridges over any of the streams of water wholly or partly within the state for "public use" for the crossing of persons or property, and requires that the articles of such corporation shall recite "the purposes for which the bridge is to be used, whether for railroads or ordinary travel, or both." Rev. St. 1879, § 953, amended such section by substituting, for that part of the section which required the stating of the purposes of the bridge in the articles of incorporation, the requirement that the articles should be "according to the provisions of this article," which by section 929 thereof authorized the organization of corporations for the purpose of "constructing toll bridges." *Held*, that the amendment did not deny the right of incorporation of a company to construct a railroad toll bridge, but, instead, enlarged the power by permitting incorporation for the construction of toll bridges in general.

3. Gen. St. 1865, c. 69, § 17, authorizing bridge corporations to exercise the right of eminent domain, was amended by Laws 1871-72, p. 15, by inserting after the words "necessary to appropriate any lands of private persons or corporations," in the former act, the words "for approaches, road, foot, or wagon ways of said bridge company." *Held*, that the word "road," in such amendment, when applied to a structure designed for the passage of railroad trains, should be construed to mean "railroad," and authorized a railroad bridge company to condemn land for its approaches and necessary tracks to its bridge.

4. The courts of Missouri will not take judicial notice of the legislative acts or statutes of another state not introduced in evidence at the trial.

5. Rev. St. 1899, § 1024, authorizes a foreign corporation to transact business in Missouri on filing its articles of incorporation with the secretary of state, as required by section 1023, on obtaining a certificate from such secretary of state, and declares that such corporation shall be subject to all the liabilities, restrictions, and duties which are or may be imposed on corporations of like character, organized

under the general laws of the state, "and shall have no other or greater powers." *Held* that, domestic bridge corporations being authorized to condemn land necessary for their purposes, where a foreign corporation was chartered to build a bridge across the Mississippi river between the states of Illinois and Missouri, and was authorized by act of congress to construct such bridge, such corporation, when properly authorized to do business in Missouri, was authorized to exercise the same right by section 1024, without regard to whether it was entitled to exercise such right in the state of its residence.

Valliant and Brace, JJ., dissenting.

In Banc. Appeal from Circuit Court, Dunklin County; J. L. Fort, Judge.

Application by the Southern Illinois & Missouri Bridge Company for the condemnation of land, to which R. G. Stone and others filed objections. From a judgment sustaining the objections, plaintiff appeals. Reversed.

This is an appeal from a judgment of the circuit court of Dunklin county dismissing the petition of the plaintiff, in which it prayed for the appointment of commissioners to assess the damages which would be sustained by its appropriation of certain land lying on the west bank of the Mississippi river, in Scott county, in this state, for approaches, roadway, and terminal yards. The amount of land which it sought to condemn for its use as a bridge company was about 20 acres, a strip 200 feet wide and about 4,500 feet long, and extending west from the bank of the river. The defendants were the record owners when the petition was filed. The application in the first instance was made to Judge Riley, the regular judge of the Scott circuit. An affidavit of prejudice was filed against him, and he thereupon granted a change of venue to Judge Fort's circuit, and sent the case to Dunklin county.

The petition is as follows:

"In the Circuit Court of Scott County, Missouri, to October Term, 1902. Southern Illinois & Missouri Bridge Company, Plaintiff, v. Robert Stone, R. M. Finley, Nannie E. Finley, David Heldt, Burhardt Miller, and Perry Bates, Defendants. Plaintiff for its cause of action says: It is a corporation regularly incorporated under the laws of the state of Illinois, and has obtained from the secretary of state of the state of Missouri authority to do business in the state of Missouri. That it is incorporated for the purpose of erecting and maintaining a bridge across the Mississippi river from a point near Thebes, in Alexander county, Illinois, to a point near Manning's Landing, in Scott county, Missouri, with the necessary appurtenances thereto. That said bridge is intended as a railway bridge, and it is necessary for this plaintiff to have a right of way for its railway tracks, bridge, and terminal yards, etc. That the general direction of its yards will be westwardly from the western bank of the Mississippi river. That for the purpose of carrying out its charter privileges it

¶ 1. See Eminent Domain, vol. 18, Cent. Dig. § 88.

is necessary for it to hold and to own the following described tract of land, lying and being in the county of Scott, state of Missouri, to wit: A part of the S. E. and S. W. parts of private survey No. 794 in tp. 30, range 14 east, and in lot 2 of the N. E. qr. of sec. 2, tp. 29, range 14 east, being a tract of land 200 ft. wide, 100 ft. on each side of the center line of the approaches to the Southern Missouri & Illinois Bridge Co., as located and platted, beginning at a point on the east line of fractional sec. 24, tp. 30, R. 14 east, and 1,240 ft. from the S. E. cor. of said frac. sec.; thence run south, 70 degrees 45 minutes east, 765 feet; thence by a one degree curve to the right 980.4 ft.; thence south, 59 degrees 45 minutes east, 924.8 ft.; thence by a 2 deg. 30 min. curve to the left 1,289.3 ft.; thence N., 87 deg. 51 min. east, to the west bank of the Mississippi river. Said center line intersects the north line of tp. 29 100 $\frac{1}{4}$ ft. west of the N. W. cor. of lot 2 in the N. E. qr. of sec. 2, tp. 29, R. 14 east, and also intersects the west line of said lot 2 69.1 ft. south of the N. W. cor. of said lot 2. The tract above described contains 20.3 acres, and will appear by a blue print hereto attached and made a part of this petition. That the defendants herein, together with R. M. Finley, the husband of one of the defendants, are the owners of said real estate. That defendants Heldt, Miller, and Bates are tenants, having growing crops on different portions of said real estate. That the defendants have refused to relinquish the plaintiff the right to the occupancy and use of said real estate for the purposes designated. That your petitioner has endeavored to agree with defendants and each of them upon the price to pay for said property, but has been unable to amicably settle or to agree at all upon a proper compensation to either of the parties defendant. That said real estate is necessary for the laying of tracks and the handling of business over and across plaintiff's bridge. Wherefore your petitioner prays the court to make such order and decree that may be proper and necessary, and to appoint three freeholders of the county of Scott and state of Missouri as commissioners to assess the damages which defendants may sustain in consequence of the establishment, erection, and maintenance of said road and approaches over and through the said premises, and for all proper orders."

Summons regularly issued and was served on defendants. When the cause reached Dunklin county, the defendants filed the following pleading which they denominate an "answer" in the caption, and a "motion" in the body:

"In the Circuit Court of Dunklin County, Missouri. Southern Illinois & Missouri Bridge Company, Plaintiff, v. R. G. Stone, R. M. Finley et al., Defendants. Answer. Defendants in the above-entitled cause, Robert G. Stone, R. M. Finley, and Nannie Fin-

ley, limit their appearance herein for the sole and only purpose of this motion, and make the following suggestions and objections against the appointment of commissioners as prayed for in plaintiff's pretended petition:

"First. No summons or notice has ever been issued and served upon these defendants in the manner required by law. The pretended summons or notice purports to have been issued by the clerk of the court, and it does not appear that prior thereto the said court or the judge thereof had ordered plaintiff's petition to be filed, nor that the court or the judge thereof ordered any summons or notice issued upon said pretended petition. It appears upon the face of said pretended petition and of said pretended notice or summons that said petition was never ordered filed and said pretended notice or summons never ordered issued by the court or judge, and that said pretended petition was received and said pretended notice made out without authority from the court and contrary to law.

"Second. It appears from the face of the plaintiff's pretended petition that the plaintiff is a corporation incorporated under the laws of the state of Illinois for the purpose of constructing and maintaining and operating a bridge across the Mississippi river, and these defendants say such a corporation, incorporated under the laws of another state, for such a purpose, has no right, power, or authority, under the Constitution and laws of Missouri, to condemn property of any kind situated in the state of Missouri, for any use, public or private.

"Third. It does not appear by said pretended petition that plaintiff has received any authority from the Congress of the United States to erect a bridge across the Mississippi river.

"Fourth. It does not appear by said pretended petition that plaintiff has any right or authority to do business in the state of Missouri, there being no allegations anywhere in said pretended petition showing compliance by it with sections 1014, 1015, 1016, 1017, 1024-1025, 1026, and 1027, article 1, chapter 12, of the Revised Statutes of Missouri, 1899.

"Fifth. It does not appear by said pretended petition that plaintiff has surveyed or located the ground over and upon which it pretends to have the right to build railway tracks, bridge, and terminal yards, nor does it appear by said pretended petition that it has filed in the office of the clerk of the county court of Scott county any profile or map of any such survey or location.

"Sixth. The plaintiff has no right, power, or authority under the law to condemn a strip of land 200 feet wide for a right of way for railroad purposes, or for any other purpose.

"Seventh. These defendants further state that prior to the time of the issuance of the pretended notice or summons herein, and that

prior to the delivery of the said pretended petition to the clerk of the circuit court of Scott county, Missouri, they had sold, conveyed, and transferred the land described in said pretended petition in good faith and for a valuable consideration to J. H. Crowder, L. B. Houck, and Giboney Houck, by deed duly signed, executed, acknowledged, and delivered, and recorded in the office of the recorder of deeds of said Scott county. Defendants further state that, prior to the beginning and prior to the pretended institution of this suit in the circuit court of said Scott county, the aforesaid deed had been duly filed for record in the office of the recorder of deeds of said Scott county. Defendants further state that long prior to the execution of the aforesaid deed they had entered into a contract with the said grantees in said deed for the sale and conveyance of said real estate to said grantees, and that said deed was executed and delivered in pursuance of said contract for the sale of said land, and that the plaintiff herein had notice and knowledge, long prior to the execution of said deed, and long prior to the pretended beginning of this suit, of the existence of said contract of sale, and of the fact that these defendants had sold said property to the said grantees in said deed. So the defendants say that at the time of the pretended beginning of this suit they were not the owners of said property and had no title thereto, and did not appear upon the record in the recorder's office of said county as owners thereof, or as having title thereto; but, on the contrary, the plaintiff herein had constructive notice of said sale and conveyance by the record thereof in said recorder's office, as well as actual notice and knowledge of said sale and conveyance.

"Eighth. Defendants further state that prior to the beginning of this pretended suit, and prior to the delivery of the plaintiff's pretended petition to the clerk of said Scott county circuit court, and prior to the issuance of the pretended notice or summons herein, and prior to the pretended service of the said pretended notice or summons on these defendants, the Cape Girardeau & Thebes Bridge Terminal Railroad Company, a corporation organized under the laws of the state of Missouri, for the purpose of constructing and maintaining a railroad in Scott county, Missouri, from Frensdorf Station, on Houcks, Missouri & Arkansas Railroad, to the Mississippi river, had bought and had acquired and had appropriated to the public use and for the purpose for which it was incorporated the property described in the said pretended petition.

"Ninth. Defendants further state that the plaintiff, which is a corporation under the laws of the state of Illinois, had no right to construct and operate a railroad, nor to engage in the railroad business, in the state of Missouri, because such business is not expressly authorized in its charter or by any

law of this state under which said corporation may come; and this proceeding by it to condemn property for the building of a railroad and its engaging in the railroad business in this state violates the plain provisions of section 1024 of the Revised Statutes of Missouri, 1899, and section 7 of article 12 of the Constitution of Missouri.

"Tenth. These defendants further state that the appropriation by the plaintiff of any part of the real estate mentioned in plaintiff's pretended petition by the plaintiff herein, to any extent whatever, would not only interfere with the use of the same by the Cape Girardeau & Thebes Bridge Terminal Railroad Company for the purpose for which it has acquired and appropriated the same, but would utterly ruin and confiscate the same as the property of said Cape Girardeau & Thebes Bridge Terminal Railroad Company; and, even if the plaintiff has a right to condemn, which these defendants deny, the condemnation attempted by the plaintiff in this proceeding would and does violate the fifth subdivision of section 1075 and section 1272 of the Revised Statutes of Missouri, 1899.

"Eleventh. Defendants further show and state to the court that there is now, and has been since May 2, 1902, pending in the said circuit court of Scott county, Missouri, a suit wherein the Cape Girardeau & Thebes Bridge Terminal Railroad Company is plaintiff and the Southern Illinois & Missouri Bridge Company is defendant, the object of which suit is to permanently restrain and enjoin the plaintiffs herein from in any way interfering with said property, and from doing anything in or about said property tending to disturb the said Cape Girardeau & Thebes Bridge Terminal Railroad in its sole and exclusive possession and use of said property; and that a temporary injunction of the said Scott county circuit court issued in said cause is now, and has been since May 3, 1902, in full force and effect, and by said temporary injunction plaintiff herein, its agents and employes, and all who may act in aid of them or either of them, were and are now enjoined and restrained from interfering in any way with said Cape Girardeau & Thebes Bridge Terminal Railroad Company in its exclusive use, occupancy, and possession of said property, and particularly enjoined and restrained from prosecuting the very suit in which this motion is filed, and from taking any possession, and from doing anything under or by virtue of any order or proceeding in this suit to disturb said Cape Girardeau & Thebes Bridge Terminal Railroad Company in its said exclusive use, occupancy and possession of said property; and that permitting plaintiff to further prosecute this suit, or making any further order or judgment for them or in their behalf in this cause, would be contrary to the terms of said injunction, contrary to the law, and would be giving sanction to violations of writs lawfully issued by the courts

off the state, and countenancing acts in violation of law and in contempt of the lawful writs and orders of the courts.

"Wherefore defendants pray that plaintiff's petition be dismissed, and that all orders, steps, and proceedings heretofore had or done in this cause be quashed and for naught held, and for all other proper relief."

The cause came on for hearing, and the learned circuit court, as above stated, dismissed the case, for the reason that the plaintiff bridge company did not have the right to condemn land in this state for its approaches and necessary terminal facilities to accommodate the railroad for which it proposed to furnish a bridge over the Mississippi river from Gray's Point to Thebes, Illinois. This judgment we are asked to reverse.

On the hearing the plaintiff introduced and read in evidence an act of Congress, approved January 25, 1901, entitled "An act to authorize the construction of a bridge across the Mississippi river at or near Gray's Point, Missouri." 31 Stat. 741, c. 181. The first section thereof is as follows: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Illinois and Missouri Bridge Company, a corporation created and organized under and by virtue of the laws of the state of Illinois, its successors and assigns, be, and the same are hereby, authorized and empowered to erect, construct, maintain, and operate a bridge and approaches thereto over the Mississippi river from a point on the Mississippi river in Alexander county, in the state of Illinois, opposite the terminus of the St. Louis Southwestern Railway, at or near Gray's Point, in Scott county, in the state of Missouri, or from some other convenient point on said river in said Alexander county, Illinois, to some opposite point on said river in the state of Missouri, within the distance of three miles above or below the terminus of said railway. Said bridge shall be constructed to provide for the passage of railway trains, and, at the option of said corporation, its successors or assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals, and for foot passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War."

Plaintiff also introduced in evidence its charter, of date December 28th, 1900, certified by the Secretary of State of Illinois, whereby it appears that said plaintiff is a legally authorized corporation under the laws of Illinois, under and in pursuance of an act of the Legislature of that state, entitled "An act concerning corporations," approved April 18, 1872 (Laws 1871-72, p 296), and all acts amendatory thereof. Section 2 of its articles of incorporation is in these words: "The object for which said corporation is formed is to erect, construct, maintain, and operate a bridge and approaches thereto over the Mis-

issippi river, from a point on the east bank of the Mississippi river, in the county of Alexander, in the state of Illinois, to a point opposite thereto in the state of Missouri, which said bridge and approaches thereto shall provide for the passage of railway trains, and, at the option of said corporation, its successors and assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals, and for foot passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War."

The plaintiff also read in evidence the following certificate by the Secretary of State of Missouri: "Whereas, the Southern Illinois and Missouri Bridge Company, incorporated under the laws of the state of Illinois, has filed in the office of the Secretary of State duly authenticated evidence of its incorporation, as provided by law, and has in all respects complied with the requirements of law governing foreign private corporations: Now, therefore, I, Samuel B. Cook, Secretary of State of the state of Missouri, in virtue and by authority of law, do hereby certify that said Southern Illinois and Missouri Bridge Company is from the date hereof duly authorized and licensed to do business in the state of Missouri for a term ending December 28th, 1950, and is entitled to all the rights and privileges granted to foreign corporations under the laws of this state, and that the amount of the capital stock of said corporation is fifty thousand dollars, and the amount of said capital stock represented in the state of Missouri is twenty-five thousand dollars. In testimony whereof, I hereunto set my hand and affix the great seal of the state of Missouri. Done at the city of Jefferson, this 25th day of March, A. D. nineteen hundred and two. Sam. B. Cook, Secretary of State, by J. H. Edwards, Chief Clerk. [Seal.]"

The foregoing certificates and their legal effect must furnish the basis of our opinion.

Martin L. Clardy, S. H. West, Wilson Cramer, and W. H. Miller, for appellant. Giboney Houck, Jno. A. Hope, and M. R. Smith, for respondents.

GANTT, J. (after stating the facts). 1. The right of eminent domain appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The provision found in the Constitutions of our various states, providing for just compensation for private property taken or damaged for public use, is a limitation only upon the exercise of the right. When the use is determined to be a public one, the necessity or expediency of appropriating any particular property is not a subject of judicial inquiry. The property may be appropriated by the Legislature, or, as in Missouri, the power of appropriating it

may be conferred upon private corporations, to be exercised by them in the execution of works in which the public is interested. Property taken for toll bridges and ferries is for a public use. They are public highways. *Arnold v. Bridge Co.*, 1 Duv. 372; *Young v. Buckingham*, 5 Ohio, 485; *Plecker v. Rhodes*, 30 Grat. 795; *State v. Maine*, 27 Conn. 641, 646, 71 Am. Dec. 89.

These general principles are not questioned; but the insistence is that the plaintiff bridge company, being a foreign corporation, has no power to condemn lands in this state for its approaches and terminal grounds to accommodate the several railroads converging at Gray's Point. It is unquestionably true that when a private corporation, whether foreign or domestic, asserts the right to exercise the power of eminent domain, it must show that the right has been given it in express terms or by necessary implication. The articles of incorporation and the certificate of the corporate existence of the plaintiff disclose that the object for which it was created a body corporate was to construct, maintain, and operate a bridge and approaches thereto over the Mississippi river, from a point in Alexander county, Ill., to a point opposite thereto in this state, which bridge and its approaches shall provide for the passage of railway trains, and, at its option, for the passage of wagons and vehicles of all kinds, and for the transit of animals and foot passengers. That the Legislature may lawfully create the franchise of erecting a toll bridge we have no doubt whatever. It is as much an object of public concern as a turnpike road, or a railroad, or other public highway; and a necessary incident to such a structure is the right to provide proper and suitable approaches, and to lay rails thereon to adapt it to the purpose for which it is to be built.

But at the threshold of this discussion we are met with the assertion that this is a foreign corporation, and that for two reasons it cannot exercise the high prerogative power of eminent domain. Now, it is abundantly established in this court that there is nothing in our Constitution which prohibits the Legislature of this state from conferring upon a foreign corporation the right to condemn private property for a public use. *Gray v. R. R.*, 81 Mo. 126; *Railroad Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *State ex rel. Ry. Co. v. Cook* (not yet officially reported) 71 S. W. 829. And such is the rule of decisions elsewhere. In *re Townsend*, 39 N. Y. 171. In *Lewright's Case*, supra, it was said that it was evidently the intention of our Legislature to encourage foreign railroad corporations to extend their roads into and through this state, and to place them upon an equal footing and confer on them the same rights that are conferred on domestic corporations of like character; and to the same effect is *Ry. Co. v. Cook*, supra.

This fundamental proposition we do not

understand to be denied by defendants. Their contention is that the plaintiff bridge company, being a foreign corporation, can have—First, no greater or other powers than are conferred upon it by the laws of Illinois, the state of its creation; secondly, that whether it has the power to condemn approaches and terminal facilities by the laws of Illinois or not, it cannot exercise this power in this state unless our own laws permit it. That this second proposition is true we have no doubt whatever. The proposition, then, which first forces itself upon our attention is, conceding that the state of Missouri may constitutionally confer the power upon the plaintiff the right to condemn and appropriate lands for its approaches and roadways, has it done so?

Without extending our inquiries to an earlier period, we find that in the General Statutes of Missouri of 1865 (sections 16-18, c. 69, pp. 370 and 371) authority was given for the formation of bridge companies for the purpose of constructing and maintaining bridges over any of the streams of water, or any part of such streams which may be within this state, for public use, for the crossing of persons or property, and among the objects required to be stated in the articles of incorporation was "the purposes for which such bridge was to be used, whether for railroads or ordinary travel, or both." By section 17 express power was given to appropriate lands belonging to private purposes upon proper compensation, to be paid and ascertained as provided in chapter 73 of that Revision. By section 18 power was given such bridge company to consolidate its franchises and property with that of any bridge company within this state or any other to be connected by said bridge. At that date it will be noted the act required the articles of incorporation to specify the kind of bridge, and bridge companies were authorized to build railroad bridges. In 1872 (*Laws 1871-72*, p. 15) section 17 of said chapter was amended, by inserting after the words "necessary to appropriate any lands of private persons or corporations" the words "for approaches, road, foot or wagon ways of said bridge company," and provided that the condemnation proceedings should be conducted as provided in chapter 66 of General Statutes of 1865, instead of chapter 73, as provided in the original section. Thus the statute remained until the Revision of 1879, when sections 16, 17, and 18 were amended, and appear in that Revision as sections 953, 954, and 955. As amended section 953 authorized the formation of bridge companies for the purposes of constructing and maintaining bridges over any of the streams of water, or any part of such streams, which may be within this state, for public use, for the crossing of persons or property, and then, instead of specifying what the articles of incorporation should contain, it adds the comprehensive words, "according to the provisions of this article."

Those provisions were found in sections 926-930. In the third subsection of section 929 corporations were authorized to be formed (in addition to the special provisions of section 953) for the purpose of "constructing toll bridges." These sections remained unchanged in the Revision of 1889, save that they were numbered 2803, 2804, and 2805, and are found in the same terms in the Revision of 1899, but numbered 1351, 1352, and 1353. So that for 50 years at least our laws have invited and encouraged the incorporation of bridge companies to construct bridges over the streams of water in this state, or partly therein, and under their authority bridges have been constructed over the Mississippi river. *Bridge Co. v. Ring*, 58 Mo. 491; *Bridge Co. v. Schaubacker*, 49 Mo. 555.

In the construction of these statutes and the various revisions it is insisted that the change made in 1879 by omitting from section 16 as it appeared in 1865 the provisions as to what the articles should contain, and particularly the words "whether for railroad, or ordinary travel, or both," indicated a purpose on the part of the General Assembly to deny the right of incorporation of a company to construct and maintain a railroad bridge. In a word, the argument is that because the Legislature, in revising chapter 69 of General Statutes of 1865, saw fit to prescribe certain general provisions as to the form of the articles of incorporation, and remitted the incorporators to the general provisions of the article in which they are found, in framing their articles of incorporation, instead of repeating them again in section 16 as originally enacted, it is contended that the general power to form companies to build "toll bridges * * * for public use" over any of the streams of this state, excludes "railroad toll bridges." We are compelled to reject this interpretation of our statutes as too narrow and unwarranted by the history of this statute. It will be observed that the power given in section 16 in the General Statutes of 1865 was to construct and maintain a bridge for public use. The grant is general. There was no purpose or intention of enumerating the particular kinds of bridges that might be built, further than it should be for public use. The only reference to railroad bridges is found in the direction as to the form of the articles, and there the incorporators are required to designate the kind of toll bridge they propose to build. If "a railroad bridge," it must have been so designated in the articles; if for "ordinary travel, * * * so specify"; if for both, it must be stated in the articles. But nowhere in the statute is there to be found any restrictive words, further than the structure must be for public use. Now, when amended in 1879, the same unlimited power of selection of the kind of the bridge to be constructed was left to the incorporators, and they are referred for the form of their articles to the general pro-

visions of the chapter. But if we could bring ourselves to the view that the general statute of 1865 undertook to name the kind of bridge companies that might be incorporated, and that the subsequent revision of 1879, instead of enumerating, used the generic term "bridge," we would unhesitatingly say that, instead of restricting the power, the legislature had evidently intended to enlarge it. The power is given to incorporate, and to construct and maintain "toll bridges." The argument that, by omitting the words "whether for railroads" in the articles of incorporation, the legislature intended to repeal the power to incorporate a company to construct a railroad toll bridge, would apply with equal force to the associated words "ordinary travel," and thus the statute would prove itself a "felo de se" and utterly nugatory—a construction repugnant to all correct and accepted rules of construction. Our conclusion is that a railroad bridge is a bridge for public use, within the meaning of section 1351, Rev. St. 1899.

But it is further contended that, by changing the words in section 17 of the General Statutes of 1865, "to the uses of said company," to a power of condemnation of private property "for approaches, road, foot or wagon ways of such bridge corporation," had the effect of depriving said companies, after the said amendment, of acquiring grounds for the railroads it was designed to accommodate over its bridge; and because railroad companies are by the act authorized to build their own bridges (section 1035, Rev. St. 1899), it is assumed that the right of bridge companies to build one bridge which may accommodate a large number of railroads converging at the point of its construction, and to condemn land for its approaches and for the necessary switch yards and terminal facilities to enable it to serve all of its patrons, is taken away. We are not inclined to give a statute designed, as we think this was, to facilitate the commerce of Missouri with her sister states, any such restricted construction. The building of the Eads Bridge at St. Louis, and the Hannibal & St. Joseph Bridge at Kansas City, and other like structures, have contributed in a marvelous degree to the upbuilding of our great metropolitan cities, and have proven of inestimable value to our own citizens. Each of these bridges have afforded accommodations and a means of entrance and exit for a large number of railroads. The legislature deemed the acquisition of approaches, roads, and wagon ways necessary incidents of such structures. "Roads," as used in this statute, when the structure is designed for the passage of railroad trains, means "railroads," because, if only an ordinary toll-bridge for wagons and foot passengers was intended, then the words "foot or wagon ways" would have fully expressed the purpose. The use of "road," in addition to "foot and wagon ways," was evidently designed

to cover the requirements if a railroad bridge should be built, and the roads necessary to accommodate that character of transportation were railroads. As said in *Linton v. Sharpsburg Bridge Co.*, 1 Grant, Cas. 414, the necessary incidents of an authority expressly granted need not themselves be expressed, "and, when an act authorizes the erection of a bridge, it authorizes the taking of land for abutments, when compensation is also provided for, even though it be contained in no express terms," which is but the statement of an old and long-established rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's power extends, an authority to do all that is necessary to accomplish the principal object. *Babcock v. Railroad*, 50 Mass. 555, 43 Am. Dec. 411. So that we are brought to the conclusion that, when this bridge company made this application for commissioners to assess the compensation and damages to defendants for these approaches and the necessary tracks to its bridge, the laws of this state expressly conferred upon bridge companies formed under our statutes the right to condemn private property upon paying the just compensation therefor.

We next inquire, can the plaintiff company avail itself of those laws? By the act of 1891 (Laws 1891, p. 75, Rev. St. 1899, § 1024) it is provided that "every corporation for pecuniary profit formed in any other state, territory or county, before it shall be authorized or permitted to transact business in this state or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation. And such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers," etc. Section 1023 requires such foreign corporation to file in the office of the Secretary of State its charter or articles of incorporation duly certified, etc. It is further provided that, "upon compliance with the above provisions by said corporation the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this state and is authorized to do business therein, stating the amount of its entire capital and the proportion thereof which is represented in Missouri, and such certificate shall be taken by all courts in this state as evidence that the said corporation is entitled to all the benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter unless this shall

be for a greater length of time than is contemplated by the laws of this state," etc. We have seen that the plaintiff company had filed its articles of incorporation in the office of the Secretary of State and had received its certificate of authority to do business in this state. To the extent that its charter required it to do a business in this state expressly authorized by its charter, to wit, the construction and maintenance of a bridge over the Mississippi river, this act domesticating it in this state expressly authorized and empowered it to exercise the rights and powers of like corporations, to wit, bridge companies, in this state; and among these powers, we have already shown, was that of appropriating lands of private persons or corporations for its road and terminal yards, approaches, and abutments.

The language of section 1024, Rev. St. 1899, is explicit that it "shall be subjected to all the liabilities and restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this state," and "shall have no other or greater powers"; i. e., it shall have those of corporations of like character in this state. This statute was first enacted in this state April 21, 1891. The quoted words, the interpretation of which we are now considering, are found in section 26 of the corporation act found in the Revised Statutes of Illinois of 1874, c. 32, and the clause "and shall have no other or greater powers" had been construed by the Supreme Court of Illinois on two occasions prior to the enactment of our statute. In *Barnes v. Suddard*, 117 Ill., loc. cit. 241, 7 N. E. 477, it was said: "What was intended by the Legislature in the enactment of this provision of the statute? The answer to the inquiry may be found in what was said in *Stevens v. Pratt*, 101 Ill. 217: 'The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law.' From this it would seem that a foreign corporation doing business in this state possesses the same but no greater powers than a corporation organized under our statute. Indeed, the language of the last sentence of section 26, that foreign corporations shall have no greater powers than our domestic corporations, can imply nothing less than they are to have the same powers." *Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; *Trust Co. v. R. R.*, 173 Ill. 439, 51 N. E. 55. In our opinion the statute is susceptible of no other construction, and, having adopted the Illinois statute, we presumably intended to adopt the construction placed upon it when we appropriated it. In so far, then, as our own laws govern, the plaintiff finds ample authority in an express statute for its condemnation of the lands described for its abutments, approaches, and road and terminal facilities.

It is axiomatic that, even if the state of Illinois had conferred upon it express authority to condemn lands for such purposes in this state, that statute would carry no sanction or authority in this state, and without our consent it could not exercise that right within our borders. It is conceded that, notwithstanding the state of its creation and corporate abode did not grant it the power of appropriation, still it was entirely competent for this state to grant it that power within her jurisdiction; and, if we are right in our conclusion that such power has been expressly given it by this state, this would seem to be the end of the matter. No doubt whatever exists that as a general rule a foreign corporation has no extraterritorial existence as such, and can exercise none of the rights conferred by its charter outside of the state creating it, except by the comity of the state in which it essays to act or do business. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *R. R. v. Koontz*, 104 U. S. 12, 26 L. Ed. 643. It follows, of course, that foreign corporations are not entitled by their charters to exercise the right of eminent domain; but in the absence of constitutional prohibitions it is competent for the legislatures of states in which they seek to do business by enabling acts to vest them with this right. *State ex rel. v. Cook* (Mo.; not yet officially reported) 71 S. W. 829; *R. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *Ry. Co. v. Telegraph Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Dodge v. Council Bluffs*, 57 Iowa, 560, 10 N. W. 886; *Gray v. St. Louis*, 81 Mo. 126; *Abbott v. Ry. Co.*, 145 Mass. 450, 15 N. E. 91; *State v. C. B. & Q. R. R.*, 25 Neb. 162, 163, 41 N. E. 125, 2 L. R. A. 564.

But it is asserted that a corporation cannot do in this state that which its charter does not authorize it to do in its home, because our own constitution forbids it, and section 7 of article 12 is cited. That section provides that no corporation shall engage in business other than that expressly authorized by its charter or the law under which it may have been or may hereafter be organized. Certainly it is not to be gainsaid that, if the plaintiff company should attempt to run a mercantile business or a banking business in this state, it could be ousted by quo warranto; but it is doing neither. Its certificate shows it was organized as a bridge company to build a bridge across the Mississippi river; and all that it seeks to do in this state is to procure abutments, approaches, and roadways as terminals for its business as such bridge company, and it cannot be said that it is endeavoring to do a business not authorized by its charter.

Our Brethren have considered at great length certain laws of the state of Illinois, which were not offered or read in evidence on the trial of this case in the circuit court, which they concede cannot be considered by this court. The courts of this state will not take judicial cognizance of the legislative acts

or statutes of our sister states, or of foreign laws. Where they are relied on as affecting the rights of individuals or property, they must be introduced in evidence at the trial. This has been the rule of decision since the first volume of our reported decisions. *Ober v. Pratte* (1836) 1 Mo. 80; *Mooney v. Kenney*, 19 Mo. 551, 61 Am. Dec. 576; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521; *Flato v. Mulhall*, 72 Mo. 522. We must decline, therefore, to consider and construe the various statutes of Illinois which our Brethren have referred to as showing a want of corporate power in the plaintiff to appropriate lands for its abutments and approaches.

In what condition does this leave the plaintiff? The general rule that a corporation cannot exercise any powers in a state other than that of its creation is subject to limitations. Thus in *Hitchcock's Heirs v. U. S. Bank of Pennsylvania*, 7 Ala. 386, the facts were that the bank was chartered under the laws of Pennsylvania, and there was a prohibition in its charter against its taking more than 6 per cent. interest on its loans or discounts. *Hitchcock* resided in Mobile, Ala., and in that received the money and made his note to the bank, agreeing to pay 8 per cent. interest. In a suit to foreclose the mortgage given to secure this note, defendants asserted the mortgage was void because the laws of Pennsylvania gave the bank no power to loan money at 8 per cent., and that the law of the state of its incorporation must govern as to its charter powers. But the Supreme Court of Alabama held that a foreign corporation, doing business in that state and exercising its corporate powers by the comity of that state, must conform to its laws, and the prohibition in its charter did not follow it into Alabama, and, as the rate was not usurious in the latter state, the mortgage and loan were valid. The same doctrine was reiterated in *Frazier et al. v. Wilcox et al.*, 4 Rob. (La.) 517, in which the Supreme Court of that state quoted the language of *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274, that "a corporation must dwell in the place of its creation and cannot migrate to another sovereignty." * * * But, although it must live and have its being in that state only, yet it does not by any means follow that it will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. * * * Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied." The same ruling was made in *Knox v. Bank of U. S.*, 26 Miss. 655; the court, through Judge Handy, saying the prohibition against interest exceeding 6 per cent. related to Pennsylvania only. The bank had general power to make loans, and, if she makes

contracts in other states not forbidden by their laws, they are valid.

So in this case the plaintiff produced a charter to build a bridge over the Mississippi river, one end of which was to be in this state. Here is the general authority to build a bridge. It is at once obvious that under this Illinois charter, as such, no power was conferred to either purchase or condemn or hold real estate in this state, unless our laws should permit it to do so; but, having the right to construct the bridge so far as Illinois could give it, it must depend upon our laws to acquire its abutment, approaches, and roadways in this state, and we have given it exactly the same powers to acquire the necessary land for that purpose which our bridge companies have. The manner of acquiring it is governed by Missouri laws, and to them it is responsible. Armed, as it is, with a charter from the state of Illinois to build the specific bridge in question, and having the consent of the United States government in the form of an act of Congress, it must and will be presumed that it has the authority to build a bridge in Illinois, and the maxim "*omnia rite esse præsumuntur*" applies, particularly as the contrary was not attempted to be shown by the defendants, upon whom the burden rested. 7 Am. & Eng. Enc. Law, 703. It follows that in our opinion the plaintiff was entitled to condemn the lands described in its petition for its approaches and necessary roadway, and that the circuit court erred in dismissing its petition.

The evidence leaves no doubt whatever that at the time of the filing of the petition the defendants were the record owners of the property sought to be condemned, and the subsequent alienation of the land sought to be condemned to other parties by the defendants did not render it incumbent on plaintiff to amend its petition, and bring in such subsequent purchasers; but, if they desired to do so, they should have moved the court for permission to plead, which they did not do. *Phipps v. R. R. Co.*, 58 Kan. 142, 48 Pac. 573. Whatever rights the grantees acquired by such deeds were taken subject to the proceedings to condemn. *Plumer v. Boom Co.*, 49 Wis. 449, 5 N. W. 232; *Drinkhouse v. Waterworks*, 87 Cal. 253, 25 Pac. 420.

The plaintiff having the right to condemn, and as the highly important nature of the work is such that it should not be unnecessarily delayed, the judgment of the circuit court is reversed, and the cause remanded, with directions to the circuit court of Dunklin county to proceed at once to appoint three disinterested commissioners, who shall be freeholders, residents of Scott county, Mo., to assess the damages which the defendants may severally sustain by reason of such appropriation, and to require said commissioners to forthwith return under oath their assessment of such damages to the clerk of

the circuit court of Dunklin county, as required by section 1266, Rev. St. Mo. 1899, and to take such other and further steps as is required by the statutes in such cases made and provided for the resting of such abutments, approaches, roadways, and yards in the plaintiff company.

ROBINSON, O. J., and MARSHALL and BURGESS, JJ., concur. FOX, J., not having heard the argument, expresses no opinion.

VALLIANT, J. (dissenting). Plaintiff is a foreign corporation seeking to exercise the right of eminent domain in this state. The petition states that the plaintiff is incorporated under the laws of Illinois "for the purpose of erecting and maintaining a bridge across the Mississippi river from a point near Thebes, in Alexander county, Ill., to a point near Manning's Landing, in Scott county, Mo., with the necessary appurtenances thereto; that said bridge is intended as a railway bridge, and it is necessary for this plaintiff to have a right of way for its railway tracks, bridge and terminal yards," etc.; "that for the purpose of carrying out its charter privileges it is necessary for it to hold and own the following described tract of land." Then follows a particular description of the land desired, containing 20.3 acres. It is about 200 yards wide, and extends west from the river bank about $2\frac{1}{2}$ miles to the eastern terminus of the St. Louis & Southwestern Railroad. The petition states that the land belongs to defendants, who refuse to relinquish it, and the plaintiff has made unsuccessful endeavor to agree with them as to compensation, etc.; "that said real estate is necessary for the laying of tracks and the handling of business over and across plaintiff's bridge." The prayer is for the appointment of commissioners to assess defendants' damages and for general relief. The case was sent to the Dunklin circuit court by change of venue from Scott county. Defendants filed what they called a "motion" in the Dunklin circuit court, which seems to have been treated as an answer, setting up eleven grounds of defense, the chief of which is that the plaintiff is not entitled to the right of eminent domain. It contains, also, a plea to the effect that prior to the filing of the suit these defendants had sold the land in question, and that it had passed into the possession of another railroad company, who had surveyed and laid out its road and was ready to begin the work of construction.

Upon the trial the plaintiff introduced in evidence an act of Congress, entitled "An act to authorize the construction of a bridge across the Mississippi river at or near Gray's Point, Missouri," approved January 26, 1901. 31 Stat. 741, c. 181. The first section of this act is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Southern Illinois and Missouri Bridge Company, a corporation created

and organized under and by virtue of the laws of the state of Illinois, its successors and assigns, be, and the same are hereby authorized and empowered to erect, construct, maintain and operate a bridge and approaches thereto over the Mississippi river from a point on the Mississippi river in Alexander county, in the state of Illinois, opposite the terminus of the St. Louis Southwestern Railway, at or near Gray's Point, in Scott county, in the state of Missouri, or from some other convenient point on said river in said Alexander county, Illinois, to some opposite point on said river in the state of Missouri within the distance of three miles above or below the terminus of said railway. Said bridge shall be constructed to provide for the passage of railway trains, and, at the option of said corporation, its successors or assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals, and for foot passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War." Plaintiff also introduced in evidence its charter under date December 28, 1900, certified by the Secretary of State of Illinois, whereby it appeared that plaintiff was incorporated under a statute of that state entitled "An act concerning corporations," approved April 18, 1872. Laws 1871-72, p. 296. The charter declares: "The object for which said corporation is formed is to erect, construct, maintain and operate a bridge and approaches thereto, over the Mississippi river from a point on the east bank of the Mississippi river in the county of Alexander in the state of Illinois to a point opposite thereto in the state of Missouri, which said bridge and approaches thereto shall provide for the passage of railway trains and at the option of said corporation, its successors and assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals and for foot passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War." Then plaintiff produced a certificate from the Secretary of State of Missouri, showing that it had complied with the requirements of our law in regard to foreign private corporations (sections 1024-1026, Rev. St. 1899), and that it was duly licensed to do business in this state for a term ending December 28, 1950, with all the rights and privileges granted to foreign corporations by our statutes. A good deal of the testimony related to the plea in regard to the transfer of the land by defendants before the filing of the suit and the rights of the grantees under that transfer; but the case turned on the first point advanced by defendants, viz., that plaintiff had no right of eminent domain in this state. The trial court decided that point in defendants' favor, and rendered judgment accordingly, from which judgment the plaintiff appeals.

The chief question in this case relates to the validity of the claim of a foreign corporation to exercise the right of eminent domain in this state. Eminent domain is the sovereign power over private property. It is in the United States for all necessary purposes of the federal government. It is in the state for all other public uses. It can be exercised by no one except by express authority from the sovereign, and then only for a public use. Therefore, when a corporation, whether domestic or foreign, comes claiming the right to take private property for its corporate use, it must show, not only that that is a public use, but also that the lawmaking power of the state has conferred that right on the corporation. Nor does the mere fact that a corporation finds it impossible to carry out the purposes for which it was chartered give it the right to take private property without the owner's consent. It is unlikely that a railroad could be built through the state if the right of way could be obtained only by consent of the landowners, yet that fact would not give the railroad company, though a domestic concern, the right to condemn land. That right in railroad companies exists only in express grant by the Legislature. If the plaintiff has the right to condemn the land it seeks to acquire in this suit, it can point to the statute that confers that right, and this it has undertaken to do. We are first referred to the Illinois statute under which plaintiff is incorporated, then to our statute authorizing the incorporation of bridge companies, and lastly to our statute admitting foreign corporations to do business in this state. If the plaintiff has the right claimed, it is to be found in the concurrence of those statutes. The act of Congress in evidence does not purport to confer on the plaintiff this right. It is a grant only of permission to build the bridge over the river.

Defendants make the point that plaintiff did not introduce the Illinois statutes in evidence, and that therefore this court cannot take cognizance of them. That seems to be the fact, and the point is probably well made. Without the Illinois statutes we have in evidence only the charter creating the plaintiff a bridge company, and we are asked to say that a bridge company in Illinois, when it has conformed to our statute in relation to foreign corporations, is entitled to exercise in this state the same powers that are given to a bridge company chartered under our law, without regard to what powers it has under the laws of its own home. If that is a correct proposition, then, even though the plaintiff has no right under the laws of Illinois to do what it seeks to do here, yet it can do so in this state, if our statute gives such right to a domestic bridge company. That cannot be correct. If it be conceded that our statute confers on a foreign corporation admitted to do business in this state all the powers that a domestic

corporation of like character has, still that concession must not be understood to mean that the foreign corporation can do in this state that which its charter did not authorize it to do in its home. Our constitution forbids that. "No corporation shall engage in business other than that expressly authorized by its charter or the law under which it may have been or may hereafter be organized." Article 11, § 7. A corporation cannot go out of its state to do business unless its charter, by implication at least, permits it, nor, even if so permitted, can it go into another state unless by leave and license of that state. The Supreme Court of the United States has said: "A corporation must dwell in the place of its creation and cannot migrate to another sovereignty (*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274), though it may do business in all places when its charter allows and the local laws do not forbid (*Railroad v. Koontz*, 104 U. S. 12, 26 L. Ed. 643). But wherever it goes for business it carries its charter, the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere." *Canada Southern Ry. v. Gebhard*, 109 U. S. 537, 3 Sup. Ct. 363, 27 L. Ed. 1020. It would doubtless be within the power of a state to say through its legislature that a foreign corporation coming into its territory may have greater powers than those given by its charter at home; but that has not yet been done in this state. At home or abroad a corporation is bounded in its powers by its charter; and a mere similarity in character of business does not authorize a corporation to do what its charter does not so authorize. For example, a corporation organized under section 1351, Rev. St. 1899, for the express purpose of building a bridge over the Gasconade river, in Gasconade county, would not be authorized to build a bridge over the same river in Maries county, or over the Illinois river in Jersey county, even if Illinois has a law like ours, inviting foreign corporations to come into that state and transact the business for which they are incorporated. A corporation chartered under a special act of the Legislature has its powers defined in the act; but when it is chartered under a general law we must look to that law for the extent and limitation of its rights. Neither its articles of association nor the certificate of the Secretary of State can confer a franchise not contained in the legislative act. In this condition we do not see how we can get along with the plaintiff's case unless we look into the Illinois statutes to see what authority they confer; and although the plaintiff did not introduce those statutes in evidence, and therefore perhaps we have no right to pursue the subject further, yet they are referred to in the briefs of counsel, and it

would doubtless be more satisfactory to both parties if we should go to the bottom of the matter.

The only statutes of Illinois to which we are referred are the act of April 10, 1872, entitled "An act for the incorporation of bridge companies" (Laws 1871-72, p. 205), and Rev. St. Ill. 1899, p. 1693, § 16. The first section of the act of 1872 referred to is: "That any number of persons, not less than ten, may form a company for the purpose of constructing and maintaining a bridge over any of the streams of water (or any part of such streams) situated within the state of Illinois, or upon the boundary thereof, for public use, for the crossing of persons or property, and for that purpose may sign * * * articles of association, in which shall be stated the name of the company, * * * the purposes for which it is to be used, whether for railroads or ordinary travel or both," etc. Section 2 of the act provides that, when it becomes necessary to appropriate lands belonging to private persons or corporations "to the uses of said company," the same may be condemned "in such manner as may be provided by the laws of the state of Illinois for taking private property for public or corporate purposes." Section 3 authorizes the corporation so created to issue bonds, etc., and to consolidate with any bridge company in that state or "any bridge company organized under the laws of an adjoining state." The three sections quoted of this act are so nearly identical with sections 16, 17, and 18, pp. 370, 371, of our General Statutes of 1865, as to indicate that the one is copied from the other. Since that date, however, our statutes on this subject have undergone material changes, and so, perhaps, have the Illinois statutes; but our inquiry into the latter has gone no further than we have been led by the briefs of counsel.

Section 1, c. 32, Hurd's Rev. St. Ill. 1899, provides for the formation of corporations for any lawful purpose, except for certain purposes mentioned, among which the business of railroad companies is, but that of bridge companies is not, included, and declares that corporations formed for the purpose of constructing railroad bridges are not to be held to be railroad corporations. The plaintiff corporation was organized in December, 1900. Therefore it derives its charter powers either from the act of 1872 or the Revised Statutes of 1899. The charter refers to the act of 1872 and its amendments as its authority, without specifying what the amendments are, and we are not otherwise referred to them. The act of 1872 does not authorize, either expressly or by implication, the formation of a corporation to transact the business of building and maintaining bridges in general, at home and abroad; but it limits the purpose to building and maintaining "a bridge over any of the streams of water (or any part of such streams) situated within the

state of Illinois or upon the boundary thereof." That is, if the stream is within the state, the corporation is chartered to build and maintain a bridge over it; if it is upon the boundary of the state, the charter is to build and maintain the bridge over that part of such stream which is within the state, and for the rest it may consolidate with a corporation organized under the laws of the adjoining state. If it be said that it is unreasonable to suppose that men would build a bridge to the middle of the river, if they could go no further, the answer is that the language of the statute, "or any part of such streams situated within the state," etc., is meaningless unless it means to so limit the power, and is not unreasonable when taken in connection with the subsequent provision looking to a consolidation of the franchise with that of a corporation of the adjoining state. It must be remembered, also, that that statute was enacted in 1872, and the Supreme Court of the United States had not then decided, as it has since, that Congress, under its power to regulate interstate commerce, could charter a corporation to build and maintain a bridge over a navigable river dividing two states, and confer upon it all powers necessary to its purpose, including the right to condemn land. *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808. And the changes in our statutes since that date also indicate that the law on this subject has developed and is better understood. If the plaintiff finds its charter powers in the act of 1872, those powers *ex vi termini* are confined to the state of Illinois, and therefore our statute dictating the terms upon which foreign corporations may come into the state has no application to the plaintiff.

What is just said of that act is not altogether free from the criticism that it is a narrow construction. But the plaintiff is not in a position to demand a very liberal construction. It is in the act of invading the defendants' inclosure, and, if it would justify its course, it must point to a charter of no doubtful meaning. The learned counsel for plaintiff do not in their briefs say that they stand on the Act of 1872; neither do they say that they derive their charter powers from the Revised Statutes of Illinois of 1899, though they do refer to section 14, p. 1693, Rev. St. 1899, as the source of their right of eminent domain. The claim is presented in general terms that plaintiff is incorporated as a bridge company under the laws of Illinois, that it has complied with our statute in regard to foreign corporations, and is therefore entitled to all the powers to which a bridge company organized under the laws of this state is entitled. That position assumes that a similarity in names implies a similarity in character, which is not always true. Similarity in character of charter powers in such case is essential. For example, a corporation chartered under the laws of Illi-

nois to establish and maintain a ferry would not, on complying with our law in regard to foreign corporations, be entitled to build and maintain a bridge in this state; and so a corporation chartered in Illinois to build and maintain a bridge of a particular character, different from that contemplated by our bridge statute, would not, by complying with our law in reference to the admission of foreign corporations, be entitled to exercise the corporate rights of a Missouri bridge company. Therefore, if a bridge company chartered under the laws of this state can condemn land for the purposes stated in the plaintiff's petition (as to which we will presently inquire), the plaintiff must show that it has like powers in the state of its creation before it can be admitted to exercise such powers in this state. The articles of association and certificate of the Secretary of State are all that we have in evidence to show what charter powers the plaintiff has, and we are left to grope through unfamiliar statutes to see what rights are conferred.

The provision of the Illinois Revised Statutes of 1899 (section 1, c. 32) above referred to is broad enough in its terms to include a corporation created for the purpose specified in the plaintiff's charter—that is, building a railroad bridge; and, if that chapter is to be construed as superseding the act of 1872, then we are to look to that chapter of the Revised Statutes of Illinois for the specification of the plaintiff's charter rights. In that chapter mention is made by name of railroad bridge companies; but it is there declared that they are not to be held to be railroad companies. Therefore they cannot claim the right of eminent domain which is given to railroad companies, and there is no authority conferred on them in that chapter to condemn private property for their use. The learned counsel in their briefs refer to section 14, c. 137, p. 1693, Rev. St. Ill. 1899, as the clause which confers that authority. That section is part of an act entitled "An act to revise the law in relation to toll bridges," approved March 23, 1874, and forms chapter 137, Rev. St. Ill. 1899, and must be construed as relating to the bridges called for by that act. In fact, the language of the section relied on expressly limits the right to toll bridges "erected pursuant to this act." The section is: "When it shall be necessary, for the establishment, erection, repair, extension or reconstruction of any toll bridge of public utility (including all necessary approaches thereto) that may be authorized to be established or erected pursuant to this act, or which may have been heretofore erected, to take or damage private property therefor, the same may be done, and the compensation therefor ascertained, in the manner then provided by law for the exercise of the right of eminent domain." Reading the chapter of which that section is a part, we see that it relates only to toll bridges to be used for ordinary travel through the county roads. The authority to

erect the bridge is to be granted only by the county board, it may be granted to individuals as well as to corporations; but the owners of the land to be occupied are to be given the preference, if they desire the franchise. The county board is to fix the rate of toll (not the Secretary of War, as in the plaintiff's charter), and may condemn it and make it a free bridge for public use. There is not anything in the whole chapter to indicate that an interstate railroad bridge, or a railroad bridge of any kind, is contemplated, and the only authority to condemn land given in that chapter is to do so for the purposes of such a bridge and its approaches as contemplated by that statute. The plaintiff derives no right of eminent domain from that source.

The learned counsel in their brief quote Rev. St. Mo. 1899, § 1315: "No corporation organized or incorporated under the laws of any other state shall do business in this state, if such corporation if organized in this state, would organize under article 9 of chapter 12 of the Revised Statutes, or acts amendatory thereof without first procuring a license therefor which license shall be granted by the Secretary of State." Then they say that, if the plaintiff had organized in this state, it would have organized under article 9 of chapter 12. If the plaintiff derives its corporate powers from the Illinois act of 1872, and if our interpretation of that act is correct, then the plaintiff is limited to do a particular act in a particular place, and has no roving charter; and, if it should have been chartered under the terms of article 9 of chapter 12 of our Revised Statutes to do what the plaintiff seeks in this suit to do, it would have been chartered to do what the Illinois act of 1872 did not authorize it to do.

The plaintiff's articles of association in evidence declare that the object of the corporation is to erect and maintain a bridge and its approaches over the Mississippi from a certain point in Illinois to a certain point in Missouri, "which said bridge and approaches thereto shall provide for the passage of railway trains, and, at the option of said corporation, its successors and assigns, may be so constructed as to provide for and be used also for the passage of wagons and vehicles of all kinds, for the transit of animals and foot passengers, for such reasonable tolls as may be approved from time to time by the Secretary of War." When a charter is granted to a corporation to erect and maintain a work of public utility, and the extraordinary power of eminent domain is conferred to be used in that connection, the franchise carries with itself the corresponding obligation to perform the work of public utility contemplated in the grant, and a failure to do so would sustain a move on the corporation to oust it of its franchise. By the terms of its charter above quoted the only bridge the plaintiff is required to erect and maintain is one for the passage of railroad trains. It may, at its option, provide also a passage

for ordinary travel, but is under no obligation to do so, and its corporate rights could not be annulled by its absolute refusal to do so. The power to regulate tolls is vested only in the Secretary of War. The state has no control over it. Is that the kind of corporation that is contemplated in article 9, c. 12, of our Revised Statutes? It has been decided by the Supreme Court of the United States that Congress, in the name of interstate commerce, has power to incorporate a company to build such a bridge as the plaintiff purposes, and to clothe the corporation with the necessary right of eminent domain. *Luxton v. North River Bridge Co.*, *supra*. But plaintiff is not incorporated under an act of Congress, and does not claim charter powers from that source. It claims that it is chartered by the laws of Illinois, that it is a bridge company, and that as such it is entitled to all the rights, including that of eminent domain, that a bridge company chartered under section 1351 of our Revised Statutes of 1899 has; and this it claims under the provisions of sections 1315 and 1316.

Private foreign corporations organized for business purposes are by comity admitted into our state, and allowed to transact here the business for which they were incorporated. The statute just referred to imposes certain conditions upon such corporations as precedent to their admission, and when those conditions are complied with they are allowed to come as before. Perhaps it would not be too much to say they have then a right to come. But if the permission to come is converted into a right to come, it is only a right to do what was before permitted; that is, to transact the business for which the corporations were chartered. If the right of eminent domain was permitted by comity before, it may be exercised to the same extent since the enactment; but, if it was not permitted before, it is not granted by the statute. The exercise of the right of eminent domain is not a part of the business of the corporation. It is often essential in the equipping of a corporation to enable it to do business; but it relates to its organization, and not to its operation. The right of eminent domain is not conferred by comity, and has never been exercised, except by express legislative grant in this state.

The following from Thompson on Corporations is a correct statement of the law, and is well supported by authority: "The power of a private corporation to acquire private property for public purposes, for which it may have been chartered, is a power which comes to it alone through the delegation of the state of its sovereign right of eminent domain. The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed, in the business of affirmative legislation, that the state delegates any part of its sovereignty to a foreign corporation. It may be stated with confidence in every case that this power cannot be exercised by a

corporation created under the laws of one state or country without the consent of the Legislature of that other state or country, affirmatively expressed. Nor will the power to take land by the right of eminent domain, which has been granted by the Legislature of a state to a domestic corporation, pass to a foreign corporation, which succeeds by deed to the rights and powers of the domestic corporation without the assent of the Legislature of the domestic state." 6 Thompson on Corp. p. 6310; *State v. Boston, C. & M. Ry. Co.*, 25 Vt. 442.

A railroad company, owning in an adjoining state a railroad projected into Missouri, may exercise the right of eminent domain here, the same as a domestic railroad company, because our statute affirmatively grants that power. Section 1060, Rev. St. 1899; *Gray v. Railroad*, 81 Mo. 126; *St. L. & C. Ry. v. Lewright*, 113 Mo. 680, 21 S. W. 210. But without that grant even a railroad company would have no such power, notwithstanding the general policy of comity, which we have always extended to foreign corporations, and notwithstanding the fact that the exercise of the right of eminent domain might be absolutely necessary to enable it to do business. Therefore, even if a bridge company, chartered under section 1351 of our Revised Statutes, had the right of eminent domain for such purposes as the plaintiff seeks, the plaintiff has not such right, for the reason that there has been no legislative grant of such power to a foreign corporation of that kind. The Illinois cases referred to in the briefs for plaintiff, construing a statute of that state like ours in regard to the admission of foreign corporations to do business, only relate to the right of such corporations to transact the business for which they were chartered. They have no reference to the right of eminent domain. *Stevens v. Pratt*, 101 Ill. 217; *Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477; *Farmers & C. v. Lake Street R. R. Co.*, 173 Ill. 439, 51 N. E. 35.

But a domestic corporation, chartered under section 1351, has not the right of eminent domain for such purposes as and to the extent to which the plaintiff seeks to use it. We have seen that sections 16, 17, and 18, pp. 370, 371, Gen. St. 1865, are almost identical with the three sections of the Illinois act of 1872. Those sections were added to our statutes authorizing the organization of corporations for manufacturing and business purposes in the Revision of 1865. And although they are added to and made a part of the chapter entitled "Of manufacturing and business companies," the second section of which prescribes the form of the articles of association, yet, when these three sections are added, the first of them (section 16) prescribes another form of articles of association, in which it is required to be stated, *inter alia*, the purposes for which it (the bridge) is to be

used, "whether for railroads or ordinary travel or both." The next section confers the power on such corporation to condemn land "to the uses of said company." Those sections included in their contemplation the building and maintaining of a railroad bridge and the condemning of land for such purpose, and railroad bridge companies have been formed and are now lawfully exercising charter powers under that statute. *Bridge Co. v. Schaubacker*, 49 Mo. 555; *Bridge Co. v. Ring*, 58 Mo. 494. But the law has since been changed, and all that remains of section 18 now is section 1351: "Any number of persons, not less than ten, may form a company for the purpose of constructing and maintaining a bridge over any of the streams of water or any part of such streams which may be within this state, for public use, for the crossing of persons or property, according to the provisions of this article." All reference to a railroad bridge is cut out, and the only bridge authorized is one "for public use, for the crossing of persons or property." A railroad bridge is, *sub modo*, a bridge "for public use, for the crossing of persons or property"; but it is not such a bridge in the unlimited meaning of the term. The intention to eliminate bridges for railroad purposes is indicated, also, in the change of the provision for condemning land. Section 1352 takes the place of section 17 of the statute of 1865, which authorized the corporation to condemn land for "the uses of said company"; whereas section 1353 specifies that the land shall be taken only "for approaches, road, foot or wagon ways of such bridge corporation."

Contrast the purposes there specified with those for which the plaintiff in its petition demands the right to condemn the land of those defendants, *viz.*, "for its railway tracks, bridge and terminal yards," etc. Again: "That said real estate is necessary for the laying of tracks and the handling of business over and across plaintiff's bridge." The demand is for land 200 feet wide and extending $2\frac{1}{2}$ miles westward from the bank of the river. Is that the purpose for which our statute authorizes a bridge company to condemn land? If the bridge contemplated is merely an appurtenance to a railroad, then it may be built by the railroad company, which has the right to condemn land "for its railway tracks, bridge and terminal yards," etc. But, if the bridge for the passage of railway trains is the main purpose, then the corporation's function is performed when it provides means for the passing of trains that come to it. It has no authority to project its lines of railway through the country to touch railroads at the distance to which this company seeks to go.

When the provisions of the General Statutes of 1865 were in force the Constitution forbade the incorporation of a bridge company by special charter. Section 27, art. 4, Const. 1865. But the Constitution of 1875

authorized the incorporation of companies by special act to construct bridges over rivers forming the state boundary. Section 53, art. 4, Const. 1875. We are not aware of any such special act of the General Assembly, but the removal of the previous constitutional limitation on the legislative power rendered the provision by general statute for the formation of interstate bridge companies unnecessary, and it may have influenced the alteration in the statute in question. The change in the law of 1865 was made in the Revision of 1879, which left it as it now is in section 1351, Rev. St. 1899. Railroad companies, under the law of 1865, had the same right that they now have to build railroad bridges over rivers in this state; and by the Act of 1895 (Laws 1895, p. 121) they now have the right to build toll bridges for ordinary travel in connection with their railroad bridges. Section 1035, Rev. St. 1899. So that we are not without statutory provisions to enable us to build all the railroad bridges and bridges for ordinary travel in connection therewith that may be desired, even if we should hold that section 1351 calls only for bridges for ordinary travel. With the powers given the railroad companies under the sections above referred to, and those given bridge companies under sections 1351 and 1352, there is no deficiency in legislative enactments for the building and maintaining of all kinds of bridges that the convenience of the public require.

It is not necessary in this case to say whether or not a bridge company organized under section 1351 could build and maintain a bridge for the passage of railway trains in addition to its roadway for ordinary travel. But we do say that the section contemplates a bridge "for public use for the crossing of persons or property," in the unrestricted sense of that term; that that is the purpose for which the right to condemn private property is given, and that a bridge designed for railroad traffic only falls short of the call of that statute; and that the power to condemn land, conferred in section 1352, "for approaches, road, foot or wagon ways," does not authorize the company to condemn land 200 feet in width, extending $2\frac{1}{2}$ miles beyond the bank of the river, for "its railway tracks, bridge and terminal yards," etc.

This is the view the learned trial court took of this case, and its judgment ought to be affirmed.

BRACE, J., concurs in this opinion.

HOWARD v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 2,
March 31, 1903.)

MASTER AND SERVANT—INJURIES TO SERV-
ANT—DEFECTIVE APPLIANCES—NEG-
LIGENCE—EVIDENCE.

1. Plaintiff, a railroad trackman, was injured by the breaking of a handle bar on a hand

car. The handle was made of hickory, and broke at a point where it was covered with iron, and, after being broken, appeared to be slightly unsound. The hand car was used every day by plaintiff and his foreman, who was a careful man, and, though the bar was under constant observation and inspection, no defect was discovered therein, and a careful examination thereof would not necessarily have revealed the defect, which could have been determined only by cutting into the wood or breaking it. *Held*, that such facts were insufficient to establish defendant's negligence in failing to provide plaintiff with a safe bar.

Appeal from Circuit Court, Saline County; Saml. Davis, Judge.

Action by Louis T. Howard against the Missouri Pacific Railway Company. From an order granting plaintiff a new trial, defendant appeals. Reversed.

M. L. Clardy and Wm. S. Shirk, for appellant. Robt. B. Ruff, for respondent.

FOX, J. This suit was instituted in the circuit court of Saline county on the 6th day of May, 1899. The petition is in due form, and the injury complained of is based upon the alleged negligence of defendant in respect to the failure of the defendant to furnish plaintiff with a reasonably safe hand car and appliances for operating the same. The allegations in the petition which are important in the determination of the questions involved in this case are as follows: "That said hand car and handle bar was composed of old, defective, and rotten material, and wholly unfit for the use for which said car and handle bar were used by said defendant. That said defendant had actual knowledge of the defective condition of said handle bar and hand car. Such defect in said handle bar and hand car was such that said defendant, by the use of ordinary care and diligence, could have known of the same." It is not necessary to burden this opinion by inserting the other formal parts of the petition, as the only controversy in this suit is as to the sufficiency of the testimony upon the specific acts of negligence herein quoted. The answer of defendant was a general denial of the allegations in the petition, and a plea of contributory negligence. The replication was a denial of the allegations in the answer as to contributory negligence. This cause was tried by a jury, and at the close of the evidence on the part of the plaintiff the court gave a peremptory instruction directing the jury to find the issues for the defendant. In obedience to such direction, the jury returned a verdict for the defendant. Plaintiff filed his motion for new trial, which was by the court sustained, and this appeal is prosecuted to this court from the action of the trial court in sustaining the motion for new trial.

The record does not disclose any reason assigned by the court for its action in respect to the motion for new trial; hence the duty is devolved upon this court to examine the entire record to ascertain the legal reasons,

if any, for this court's action upon this motion. An abstract of the record and proceedings in this cause is filed by appellant, and also a brief discussing fully the errors complained of by the appellant. The respondent does not dispute the correctness of the abstract, or, at least, there is no additional abstract filed, suggesting any imperfections in the one filed by appellant, nor are we favored with any brief or argument by respondent in support of the action of the trial court. Nothing to the contrary appearing before us, we shall assume that the abstract of the record as filed by appellant is correct, and our conclusions must be reached from that source.

There is but one question presented in this cause for our determination, and that is, "Did the testimony, as introduced by plaintiff, warrant the court in submitting the cause to the jury?" This leads us to an examination of the testimony as offered by plaintiff. Plaintiff resided at Grand Pass on the 15th day of March, 1899, and was working for the defendant. At the time he was injured he was on the hand car of defendant. In company with the section foreman and other section men, he started out in the morning on the hand car to do some work on defendant's road, and in operating the hand car one of the handle bars broke. Plaintiff was thrown off the car and injured. It will be observed that it was the defect in the handle bar of this hand car of which plaintiff complains, and claims that defendant was negligent in furnishing him a rotten and defective handle bar with which to operate the hand car. As to the nature and character of this appliance that broke, the testimony fails to disclose. No witness undertakes to describe it, but we infer from what the witnesses do say in respect to it that it is rather a simple appliance, or, in other words, it is not a complicated piece of machinery, which would require some regular method or system of inspection. Plaintiff, in testifying in respect to this handle bar, says, first: "When they took the car off of me, I am not certain whether I had this handle bar in my hand or picked it up. I had it when I got on my feet. I looked at it, and said it was rotten." His testimony following this statement indicates clearly that the handle bar was not rotten, and that plaintiff did not believe it was rotten, for he says subsequently, in answer to a question, that the whole bar that was visible to him looked sound, and at the time looked as sound as a dollar. The testimony of plaintiff further shows that the break in the bar was at a point on it covered with iron. Even the wood under the iron, so plaintiff says, was sound, except it looked a little brash. Plaintiff had been working on that section about three years. He says in his testimony that Helleker was a very careful foreman. Plaintiff further says that "the handle bar was in a condition of what we call 'dry rot'";

but he does not state as to what are the indications of dry rot, and what appearance the wood presented. He does, however, say that one could have examined the handle bar as it was, and told that it was a defective piece of wood. How would you examine it? You would not break it; you would not cut into it. Plaintiff had been working with it for a long time, and he discovered no defects; and if, as he says, you could examine it as it was, and tell it was defective, it was as open to him as it was to the foreman. If that be true, the defect was patent, and he would not be entitled to recover. We have read very carefully in detail the testimony of the plaintiff, and the only conclusion we can reach by a fair consideration of all his statements is that this handle bar was a simple appliance for operating this car; that there was nothing to indicate or to call the attention of the foreman to any defects in it; that it was sound, apparently; that it was only when it broke that it was discovered that where the iron covered it the wood was a little brash. It was not worm-eaten, and the only examination to be made of it was by looking at it and using it, and that its soundness had to be determined from its appearance. As to it being brash, the only way that could be determined would be by cutting into the wood or breaking it, and this certainly would not be required of the foreman. It is very clear that plaintiff only discovered the brashness and the crack after it broke, notwithstanding his long connection with that section. Witness John De Moss testified that the handle bar taken from the hand car had the appearance of being brash. He said that he did not know that you could determine, by a careful examination of this bar, at the time it was on the hand car, that the wood was brash. Looking at the bar after it was broken, witness Wells said it looked aged, and had a crack in it; that he could tell the defects from looking at it. He further says the condition of this bar could have been seen by looking at it. Defendant had in charge of this hand car, as testified by plaintiff, a good, careful foreman. It was day after day under his supervision. He saw this handle bar every day; used it. There was nothing to indicate it was out of repair. The plaintiff worked on this car. Wells had worked on it. Neither of them discovered any defects. The handle bar was made out of the toughest wood known—hickory. Even conceding that it became brash, it is just as De Moss says—a careful examination of it would not necessarily reveal the defect. This handle bar was simply an appliance to operate the hand car. You could only discover the defects that were visible by looking at it and using it. It was not such a piece of machinery that you had to make tests of its strength and power. If you could see the defects by looking at it, as testified to by Wells, then the plaintiff could see them as well as the fore-

man, and even upon that theory of the case the plaintiff was not entitled to recover.

We are familiar with the well-settled doctrine, and we fully approve of it, that the master must furnish the servant with reasonably safe machinery in the course of his employment, and that if the machinery is defective and unsafe, and the master has knowledge of it, or by the exercise of ordinary care could ascertain such defects, then, and in that case, he must respond in damages for such injuries to the servant as results from such unsafe machinery. But, on the other hand, it is equally well settled that the master is not an insurer of the absolute safety of the machinery furnished his servant. He is only bound to use ordinary care in furnishing reasonably safe appliances in pursuit of the work in which the servant is engaged. *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Covey v. Ry. Co.*, 86 Mo. 635, and numerous cases. In this case the fact that the handle bar broke does not necessarily make defendant liable for the injury resulting from such broken bar; but it is incumbent upon plaintiff, before he is entitled to recover, to show that the appliance was unsafe and defective, and that defendant had knowledge of it, or by the exercise of ordinary care could have discovered the defect. *Bohn v. Ry. Co.*, 106 Mo. 429, 17 S. W. 580; *Yarnell v. Ry. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599. It does not appear from the evidence, that defendant's foreman gave the handle bar which broke any particular or special inspection, nor does it appear that the character of the appliance required such special inspection; but it is clearly disclosed by the evidence in the record that the foreman was a very good, careful man in the discharge of his duties; that he saw this handle bar every day; that the hand car was in use by his men; and from these facts "it necessarily follows that the handle was under his constant observation and inspection, and that he discovered nothing defective about it, or (being a careful foreman) he would not have continued its use."

We have carefully considered all the evidence introduced on the part of the plaintiff, and find that it clearly discloses (as is verified by the plaintiff) that defendant placed this hand car under the direct supervision of a good, careful foreman, who observed this handle bar complained of every day, witnessed the use of it by his men; that there was absolutely no indication of any defects in it; that plaintiff also used it, and nothing in its appearance indicated any unsafety in its condition to him. Hence we are of the opinion that the first impressions reached by the learned trial judge in this case were the best and correct impressions, and this cause will be reversed and remanded, with directions to the trial court to enter a judgment upon the verdict as returned by the jury. All concur.

CITY OF ST. CHARLES ex rel. BUDD v.
DEEMAR et al.

(Supreme Court of Missouri, Division No. 1.
April 1, 1903.)

PUBLIC IMPROVEMENTS—APPORTIONMENT OF
EXPENSES—FRONT-FOOT RULE—CON-
STITUTIONALITY—APPEAL.

1. Sess. Acts 1893, § 108, p. 90, and Id. p. 92, § 110, which provide for the apportionment of the cost of a street improvement by the front-foot rule, are constitutional.

2. Where a case is brought before the Supreme Court by transcript of judgment and order of appeal, and the abstract filed therein contains a petition, answer, and reply, followed by a bill of exceptions signed by the judge, but outside the bill not a single record entry appears, nor any showing that the bill was ever filed, only the record proper is before the court for review.

3. The recitals of the bill of exceptions cannot supply the other necessary record entries.

Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by the city of St. Charles, on the relation of C. D. Judd, against Henry V. Deemar and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Theo. Bruere & Son, for appellants. T. F. McDearmon, C. W. Wilson, and Bryan & Christie, for respondent.

BRACE, J. The plaintiff is a city of the third class. This is an action to enforce a special tax bill for repairs to a street in front of defendants' lot. The judgment was for \$65.30, and the defendants appeal.

One of the defenses set up in the answer is that said tax bill is null and void, because the statute governing cities of the third class, section 108, p. 90, and section 110, p. 92, Sess. Acts 1893, by authority of which the tax bill was issued, and which provides for the apportionment of the cost of such improvement by "the front foot rule," is unconstitutional. That this defense is untenable is now finally and conclusively settled, and no more cases ought to be brought here questioning the constitutionality of this method of assessing the cost of such improvements. *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, affirmed *French v. Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Heman v. Gilliam* (Mo. Sup.) 71 S. W. 163.

The answer sets up other defenses to the action, but this seems to be the only one presented by the record for our decision. The case is brought here by transcript of judgment and order of appeal. The abstract filed herein contains a petition, answer, and reply, followed by a voluminous bill of exceptions, signed by the judge; but, outside the bill, not a single record entry appears, nor anything showing that the bill was ever filed. In such case, there is nothing before us for review except the record proper.

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1113.

Even if it appeared that the bill had been filed, its recitals could not supply the other necessary record entries. *Butler Co. v. Graddy*, 152 Mo. 441, 54 S. W. 219; *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 878; *West Storage & Warehouse Co. v. Glassner*, 150 Mo. 426, 52 S. W. 237; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 37; *Dinwiddie v. Jacobs*, 82 Mo. 195; *Ferguson v. Thacher*, 79 Mo. 511; *Pope v. Thomson*, 66 Mo. 661; *McGrew v. Foster*, 66 Mo. 30; *Hughes v. Henderson* (Mo. App.) 68 S. W. 1069.

It follows that the judgment of the circuit court should be affirmed, and it is accordingly so ordered. All concur.

L. M. RUMSEY MFG. CO. et al. v. KALME.
(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

EQUITY — APPEAL — REVIEW OF EVIDENCE — CORPORATIONS — PAYMENT OF STOCK IN MERCHANDISE — OVERVALUATION — LIABILITY OF STOCKHOLDERS.

1. In equity, where oral evidence is taken below, the Supreme Court, in reviewing its sufficiency to sustain findings, will defer somewhat to the judgment of the chancellor.

2. Where merchandise is transferred to a newly organized corporation in payment of stock, it must be put in at its fair market value; and any overvaluation is pro tanto a fraud on creditors, though no intent to defraud existed.

Appeal from Circuit Court, St. Louis County; R. Hirzel, Judge.

Suit by the L. M. Rumsey Manufacturing Company and others against David F. Kalme and others. From a decree for plaintiffs, defendant Kalme appeals. Affirmed.

Clinton Rowell and Jos. H. Zumbalen, for appellant. Albert N. Edwards and W. Palmer Clarkson, for respondents.

BURGESS, J. This is a suit in equity by the L. M. Rumsey Manufacturing Company, a corporation, and other judgment creditors of the Detrick Supply Company, against David F. Kalme and others, as stockholders of said supply company. The bill was dismissed as to all the defendant stockholders except Kalme. The suit was instituted for the benefit of plaintiffs and all other creditors of the Detrick Supply Company who wished to join therein and to become parties plaintiffs therein.

The petition alleges that the Ripley-Detrick Supply Company was duly incorporated on January 10, 1894; that on April 8, 1895, the name of the Ripley-Detrick Supply Company was legally changed to the Detrick Supply Company, and that on the 25th of February, 1896, the Detrick Supply Company became wholly insolvent, and made a voluntary assignment to Albert Webb for the benefit of its creditors, in pursuance of the statute in such case made and provided; that the Rip-

ley-Detrick Supply Company, afterwards called the Detrick Supply Company, was incorporated with an authorized capital stock of \$75,000, divided into 750 shares, of the face or par value of \$100 each, and that said shares in the Detrick Supply Company were subscribed as follows: David F. Kalme, 505 shares; Geo. F. Detrick, 254 shares; Wm. H. Barere, 9 shares; Lyman B. Ripley, 2 shares; that Geo. F. Detrick subscribed such shares, and received the same as trustee for others, and not for himself; that the shares were issued as fully paid and nonassessable, when in fact 46% were and remain unpaid on each share; that prior to and on the 25th day of February, 1896, the defendant Kalme acquired and became the holder and owner of all the shares of stock not previously subscribed; that the creditors of said concern have proved up claims in the sum of \$55,832.17 before the assignee, and had the same duly allowed by the assignee; that the said assignee has declared and paid a dividend of 20 per cent. on said claims, and that 80 per cent. is wholly unpaid; that the assigned estate is wholly insolvent, and no further dividends can or will be declared by the assignee; that there is now due by the stockholders the sum of 46% on each share of stock, which constitutes a trust fund in favor of the creditors, and especially the plaintiffs herein. The bill then sets forth the allowance of each plaintiff herein separately, and prays that an account may be taken between the company and its stockholders, and the amount actually paid in by the stockholders may be ascertained and fixed by the court, and that the action of the company in issuing said shares of stock as fully paid and nonassessable may be declared fraudulent and void as to these creditors to the extent of which the same remains unpaid, etc. Defendant Kalme's answer is, first, a general denial; second, an averment that the plaintiffs contracted the alleged debts with the Detrick Supply Company with full knowledge of all the facts relating to the formation of said corporation and the payment of stock subscribed for the corporation; third, a statement that there was another action pending between the same parties and for the same cause of action in the city of St. Louis—all of which was not proven.

That defendant Kalme owned 525 shares of stock in the Detrick Supply Company is not denied. Therefore his liability, if any, must be reckoned from that standpoint. Nor is there any dispute in regard to the incorporation of the Ripley-Detrick Supply Company as alleged, its absorption by the Detrick Supply Company, and the final insolvency of that company. Nor is there any question but that the capital stock was placed at \$75,000, and that the total amount paid in was \$40,000 in cash, with which a certain stock of goods was bought and placed in the corporation at an alleged sufficient profit to enable it to issue fully paid

up stock for \$75,000; and this transaction, plaintiffs allege, was fraudulent. The vital question, therefore, is as to the actual, fair market value of the stock of merchandise purchased by the original stockholders of the Ripley-Detrick Supply Company from Messrs. Kaime, Ripley, and Detrick.

The court found and observed as follows: "The firm of Bronson & Ripley failed during the financial panic in July, 1893, and their affairs were put into the hands of Mr. W. B. Homer as receiver. He caused their whole stock of goods to be carefully appraised, and this appraisal showed the total value of the goods to be \$102,000. This was the total appraised value, but Mr. Homer's appraisers testified that the fair market appraised value of those goods was probably \$125,000. Of these goods, he sold \$45,000 in cash, leaving the property worth, at the outside, from \$75,000 to \$80,000, on his hands. This he advertised for sale, under order of court; and Messrs. Kaime, Ripley, and Detrick became the purchasers thereof at the price and sum of \$60,187.35. Before they made this offer or bid, which was accepted, they caused the goods to be duly appraised; and, strange to say, their appraisers also appraised those goods at about \$102,000, although Mr. Homer had sold \$45,000 of the same. Upon this last appraisalment, these gentlemen say, they put these goods into the corporation at a value of \$95,187.35 (or \$7,000 below the last appraisalment); making a profit on their purchase of \$35,000, which profit covered exactly the difference between the \$40,000 in cash and the \$75,000 stock. After the failure of the firm of Ripley & Bronson in July, 1893, Mr. Ripley approached Mr. Kaime, with the idea of buying the Ripley & Bronson stock of goods, to start a new supply company. Mr. Kaime was willing to invest in it, to secure a good position for his prospective son-in-law, Mr. Geo. F. Detrick, whom he desired to put in charge of some business. They agreed to raise one-half thereof. Mr. Ripley had some difficulty to raise this amount, as he was financially embarrassed, but finally did raise \$14,000, and Mr. Kaime agreed to put in \$26,000. This agreement was made in contemplation of the formation of a corporation supply company, which was to be formed by and between Kaime, Ripley, and Detrick. They then undertook to buy the stock from Mr. Homer. Mr. Kaime emphatically declared that the bid for his stock should not exceed \$60,000. After the purchase the corporation was formed, and the stock of goods bought from Mr. Homer was purchased by the corporation from Kaime, Ripley, and Detrick at the price of \$95,000. Before and during these transactions, Messrs. Kaime and Ripley took legal advice concerning their rights, etc.; and they were duly advised by eminent counsel that they could put the stock which they might or would purchase from Mr. Homer, as receiver of the Ripley &

Bronson Company, into the supply company, which they then expected to incorporate, at its full market value, regardless of the cost price, and could thus secure a handsome profit if they could purchase said stock cheap, or much below the market value. Did they buy the stock much below the fair market value when they paid \$60,000 for it? Was that stock worth \$95,000, at a fair and full market value, or was it worth less? If these incorporators overvalued their stock of goods, then their full-paid, nonassessable stock of the corporation is illegal and fraudulent, in law, to the extent of this overvaluation. Mr. Kaime is the only defendant now who is a stockholder, and he has already lost over \$40,000 in the deal, as his counsel aver. That, of course, does not shield him from liability, but he should be treated in this proceeding—the same being in equity—with the utmost fairness. I cannot find from the evidence that the stock purchased from Mr. Homer as the Ripley & Bronson stock was worth \$95,000 or \$100,000. Mr. Homer and several others state that the stock purchased by Kaime, Ripley, and Detrick from him was probably and about of the market value of \$77,000–\$78,000. I have carefully gone over the evidence, and calculated and recalculated the items given; and I think that the very best valuation to which the defendants, or, rather, the original incorporators, are entitled, is the sum of \$77,000, or, as I put it, a profit of \$17,000, which would make the actual amount paid on stock \$57,000, instead of \$40,000, as claimed on the one hand, and \$75,000, as claimed on the other. This leaves \$24 due and unpaid on each share of stock, or the amount of \$12,600 due and unpaid on the defendant Kaime's 525 shares of stock, to which the plaintiffs are entitled."

The logical result of this finding is that the stock held by defendant was fraudulently issued as fully paid, when really it was unpaid to the amount of \$24 per share, and that the merchandise claimed by defendant Kaime to be worth \$95,000 was overvalued to the extent of \$18,000. This finding defendant earnestly insists is contrary to the evidence and the weight of the evidence, and that this court should review the finding of facts. The rule upon this question as established by this court in equity cases is that, where the witnesses testify orally, we will defer somewhat to the finding of the chancellor (*Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82, authorities cited, and subsequent cases), but will consider the case, "for the most part, as if it originated here, and was to be heard for the first time." *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025; *Robertson v. Shepherd*, 165 Mo. 360, 65 S. W. 573. The record discloses that the firm of Ripley & Bronson, wholesale jobbers of plumbers' supplies, failed in 1893, and made an assignment for the benefit of their creditors to W. B. Homer, assignee. The assigned stock of merchant-

dise was duly appraised at \$102,000. The assignee employed salesmen and carried on the business under orders of the court from June to December of that year, during which time he purchased about \$3,300 worth of goods, so as to be able to fill orders, and sold during that period at private sale \$45,000 worth of goods. After selling this amount of goods in the ordinary way out of the stock in his hands, the assignee sold the residue for \$60,187.35. This sale was to George F. Detrick, and was approved by the court. These goods, while bought in the name of Detrick, were in fact bought for all the promoters and original stockholders of the corporation, who thereafter sold the goods to the corporation for \$95,000 upon its organization, which was the court found \$18,000 more than their value. There was much conflict in the testimony of the witnesses with respect to the value of the stock of goods at the time the promoters purchased it, and the sale of the goods to the corporation. Therefore we must, under the circumstances, defer to the finding of the trial court, who saw the witnesses upon the stand, and heard them testify, and was therefore much better prepared to judge of their credibility, and the weight to which their testimony is entitled, than we are.

It is conceded by counsel for defendant that property taken by a corporation in payment of its capital stock must be a fair and just equivalent in value to the corporation to the par value of the stock issued therefor. *Liebke v. Knapp*, 79 Mo. 24, 49 Am. Rep. 212; *Garrett v. Mining Co.*, 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593. This being conceded to be the law, it follows that, as the stock of goods was sold to the corporation by said promoters for seventeen or eighteen thousand dollars more than its fair and full market value, their full-paid, nonassessable stock of the corporation is illegal and fraudulent, in law, to the extent of its overvaluation. While property may be taken in payment of the capital stock of a corporation, it must be taken at a fair, just, lawful, bona fide valuation. The owners of such property or subscribers to such stock cannot put in their property at any valuation they may put upon it, but the corporation must receive, if in property, what it is reasonably worth in money. Nor does it make any difference that the corporators did not intend any fraud on the creditors of the corporation. *Van Cleve v. Berkey*, supra.

While the answer alleges that plaintiffs contracted the alleged debts with the Detrick Supply Company after they, and each of them, had been fully informed of all the facts relating to the forming of said corporation, and relating to the payment of the stock subscribed for said corporation, and that the said plaintiffs are thereby estopped from making any claim against this defendant,

this defense does not seem to be relied upon by defendant.

Our conclusion is that the judgment should be affirmed. It is so ordered. All of this division concur.

LAYSON v. COOPER.

(Supreme Court of Missouri, Division No. 1.
April 1, 1903.)

CHATTEL MORTGAGES—EXECUTION—FRAUD—OWNERSHIP OF PROPERTY—DENIAL—ESTOPPEL—EVIDENCE—WITNESSES—COMPETENCY OF WIFE.

1. In an action to recover corn alleged to have been mortgaged to plaintiff, a plea by defendant that he was illiterate, and unable to read the mortgage, and that plaintiff misread the same to him, and concealed the fact that it covered the corn in question, and induced defendant to believe that it related only to other property, presented a valid legal defense.

2. Where, in an action to recover corn under a chattel mortgage, defendant alleged that he had been deceived by plaintiff in signing the mortgage under the belief that it did not cover the corn, and also that the property mortgaged did not belong to him, a requested instruction that the defendant was estopped to deny that the corn belonged to him, which ignored the question as to whether defendant was deceived, was properly refused.

3. In an action to recover property under a chattel mortgage, the mortgagor is estopped to plead that the property mortgaged did not belong to him.

4. Where, in an action to recover corn under a chattel mortgage, defendant pleaded that he was illiterate, and that the mortgage, as read to him by plaintiff, did not cover the corn which belonged to defendant's wife, who was not a party to the suit, defendant was entitled to show that the corn did not belong to him as a circumstance bearing on the issue that the mortgage had been obtained from him by fraud.

5. Rev. St. 1899, § 4652, authorizes a wife to testify in actions to which she is a party, and section 4656 prescribes the conditions under which she may testify in a suit in which her husband is a party, whether she is joined as a party or not, not including, however, the fact of her interest in the property in controversy, where such interest is collateral only. *Held*, that where a wife was not a party to a suit against her husband, and her interest in the subject of the action was merely collateral, she was not a competent witness in her husband's behalf.

Appeal from Circuit Court, Harrison County; P. C. Stepp, Judge.

Action by John C. Layson against Isaac E. Cooper. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is an action of replevin for 178 bushels of corn. The corn was taken under the writ and delivered to plaintiff. The suit was begun in a justice's court, carried by appeal to the circuit court, where there was a judgment for defendant, from which the plaintiff appealed to the Kansas City Court of Appeals, where the judgment of the circuit court was affirmed, but, one of the judges of the Kansas City Court of Appeals being of the opinion that that decision was in con-

sist with the decision of the St. Louis Court of Appeals in *Brinsmade v. Groll*, 14 Mo. App. 444, the cause was certified to this court. The plaintiff's evidence tended to prove the following: Plaintiff was the owner of a farm, which he rented for the year 1897 to one Oliver, reserving a rent of \$25 to be paid him for the use of the pasture, and two-fifths of the crops. The lease recited that Oliver owed the plaintiff \$65 on a note, and that Oliver's three-fifths of the crops to be raised were to stand good for the payment to plaintiff of the \$25 rent for pasture and the \$65 note. It also recited the plaintiff sold to Oliver two mares on the farm, but the title was to remain in plaintiff until he was paid for the same. In June of that year plaintiff sold the farm, including his two-fifths interest in the growing crop, to Eliza K. Cooper, wife of the defendant. Soon after the purchase, Cooper and wife bought out the tenant's interest, and moved on the farm. Plaintiff's evidence is not clear as to whether it was Cooper or his wife that bought the tenant's interest, but he testified that both of them knew what his contract with Oliver was. His testimony was that Mrs. Cooper told him that "they" (meaning herself and husband) had bought the growing crop and the mares of Oliver. Shortly after defendant, Cooper, and his wife moved on the farm, he executed the paper writing under which the plaintiff claims, by which the three-fifths of the crop bought from Oliver and one of the mares (the other having died), and a horse of Cooper's are, in effect, mortgaged to plaintiff to secure a note of Cooper's for \$102.32, which sum is made up of the \$25 rent, the \$65 note of Oliver to plaintiff, and another small item of debt of Oliver to plaintiff assumed by Cooper. The \$102.32 note was not paid at maturity, and this suit is to gain possession of the mortgaged property.

On the part of the defendant the testimony tended to show that he did not purchase the corn from Oliver, but that it was purchased by his wife, and paid for with her money, and that he never made any claim to it; that he purchased the horses from Oliver, and assumed to pay Oliver's debt to the plaintiff; that he signed the paper under which the plaintiff claims, but did not know at the time he signed it that it contained anything in relation to corn. He understood that it covered only the horses. He testified that he could read very little, and that the mortgage was written by the plaintiff, who pretended to read it to him, but in doing so omitted all that there is in it in reference to the corn. He trusted to the plaintiff's reading it correctly, and signed it without reading it himself. (Plaintiff testified that he did not read the contract to defendant at all; that defendant read it himself, and then signed it.) Oliver, as a witness for defendant, testified that he sold his share of the crop to Mrs. Cooper. The agreement

was she was to pay his debt to the plaintiff and give him \$100. Her husband handed him the money. He did not know where he got it. The horses were also included in the sale. He told Mrs. Cooper what his obligation to the plaintiff was, and she agreed to step into his shoes. "Then I turned the crop over to her subject to the mortgage I had given on the three-fifths interest and on the horses to Mr. Layson. This was all in one contract, I didn't have two separate contracts with them. I declined to sell the corn unless they would take it subject to the lien on the crop and horses—unless they would take it all, and take it subject to that lien. I made that trade with Mrs. Cooper." Mrs. Cooper, wife of defendant, was called as a witness in his behalf. Plaintiff objected to her as a witness on the ground that she was the wife of the defendant, and therefore incompetent. The objection was overruled, and plaintiff saved an exception. She testified that when she bought the farm from the plaintiff and his two-fifths of the growing crop he told her that she could buy from Oliver, the tenant, his three-fifths, and that she did so; that she paid Oliver with money that she borrowed on a mortgage of other property belonging to her; that she did not know, when she bought from Oliver, that the plaintiff had a written contract with him; that the mortgage executed by her husband, under which plaintiff claims, was executed without her knowledge or consent.

The plaintiff asked instructions to the effect that the paper contract between defendant and plaintiff, together with the written contract of lease between plaintiff and Oliver constituted a mortgage, and, if the note secured by the mortgage was not paid, plaintiff was entitled to recover, that defendant was estopped to deny his title to the property covered by the mortgage, and that, though the jury should find that defendant's wife bought the corn of Oliver, yet, if she bought it with the knowledge that plaintiff had a lien on it under his contract with Oliver, still the plaintiff was entitled to recover. The court refused those instructions, but gave the case to the jury under instructions of its own, which were to the effect that, if the defendant's wife bought the corn from Oliver under agreement with him that she was to pay his debt to plaintiff as part of the consideration and that the document in evidence executed by defendant to plaintiff was executed with her knowledge and consent, and the note therein mentioned was unpaid, the plaintiff was entitled to recover; that under those circumstances defendant and his wife were estopped to deny his title to the property mentioned in the mortgage. And at the request of the defendant the court gave instructions to the effect that the burden was on the plaintiff to show that he was the owner and entitled to the possession of the property in controversy,

and, unless he did so, the verdict should be for defendant. Also that, if plaintiff told defendant's wife, when he sold her the land, that she could buy Oliver's interest in the crop, and she did so, and paid for it with her own means, and informed the plaintiff of what she had done before he took the note and mortgage from defendant, then the verdict should be for the defendant, unless the jury should find that the defendant executed the note and mortgage with the knowledge and consent of his wife. Also that, if defendant was, by lack of education, unable to read the contract, and requested plaintiff to read it to him, and plaintiff, pretending to do so, failed to read what was in the document in regard to the corn, or to inform the defendant that the corn was included in it, and defendant signed it in ignorance that it purported to cover the corn, it was a fraud on the part of the plaintiff, and rendered the contract void, and the verdict should be for defendant. Also that, if the corn belonged to defendant's wife, and she bought it with the knowledge and direction or consent of plaintiff, and paid for it with her own means, the verdict should be for defendant, unless the jury should find that the mortgage given by her husband was given with her knowledge and consent. The verdict was in this form: "We, the jury, find for the defendants." The judgment was: "It is therefore considered, ordered, and adjudged by the court that plaintiff take nothing by his writ; that the defendants go hence without day; and that the costs of this suit, taxed at 80 ⁶⁵/₁₀₀ dollars, be adjudged against plaintiff, and hereof let execution issue."

Sallee & Crossan and Wanamaker & Barlow, for appellant. J. C. Wilson and Peery & Lyons, for respondent.

VALLIANT, J. (after stating the facts). The suit having originated in a court of a justice of the peace, no written plea was required of defendant, and he filed none, but at the trial he made defense on two grounds: First, that his signature to the mortgage was obtained by fraud; second, that the property mortgaged did not belong to him. The first was a legitimate defense; the second was not. If he was really illiterate, or could not read the document, and was dependent on the plaintiff for a knowledge of its contents, and plaintiff pretended to read it to him, but concealed the fact that it covered the corn, and induced him to believe that it related only to the horses, then there was no legal execution of the document. In such case the defense may be made in an action at law, *Girard v. St. Louis Car Co.*, 123 Mo. 368, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556. There was some evidence on the part of defendant tending to prove that defense, and therefore the court was justified in submitting it to the jury. And because the in-

structions asked by the plaintiff to the effect that defendant was estopped by his deed to deny that the corn belonged to him ignored the question of whether he had been so deceived into signing the paper, they were properly refused. But the court should have instructed the jury that the defendant was estopped to deny that he owned the corn unless they found from the evidence that he was so deceived, the burden of proving which was on him, and, unless sustained, the verdict should be for the plaintiff. If the defendant executed the paper knowing its contents, or if he was not deceived or misled into signing it by the fraudulent conduct of the plaintiff, he is bound by it, and the court will not listen to him saying that the property did not belong to him.

By giving the mortgage on the corn, the defendant declared in the most solemn manner that it was his property, and, unless he was deceived, as he says he was, into signing it, he deceived the plaintiff by that act, and the law will not allow him to profit by it. It is no new doctrine that a man is estopped to deny the truth of his own assertion when another has accepted it as true and acted upon it. As above said, that was the only legitimate defense offered in the case, but it was not the one on which the defendant chiefly relied. The case seemed to turn chiefly on the question of whether or not the mortgaged property belonged to the defendant. The fact—if it was the fact—that the corn really belonged to defendant's wife was no defense in this case. She was not a party to the suit. Her title was not in question, and the judgment, whatever it might be, would not be binding on her. If the mortgage was the free act and deed of the defendant, then, as against him, the plaintiff was entitled to the possession of the corn, even though it did not belong to him. Of course, he could not mortgage his wife's property, nor could her rights be impaired by a judgment in a suit against him alone. She is not a party to this suit, and was free to assert her rights in whatever form she might have been advised was best, against both plaintiff and defendant. Whilst the plaintiff, by his writ, could take the property out of the possession of the defendant, yet, if it really belonged to the defendant's wife, she, by her writ, could have taken it from the plaintiff, or have otherwise had redress for the injury. But the defendant was not entitled to defend this suit against his own deed on the ground that the property did not belong to him. The rule that a defendant in a replevin suit may show title in a third person, if it goes to disprove the plaintiff's claim, does not apply when the plaintiff claims under a deed from defendant himself.

The instructions, therefore, that were given, embodying the theory that, if the corn belonged to the defendant's wife, the plaintiff could not recover unless the mortgage was executed with her knowledge and con-

sent, were erroneous. The defendant on the trial made no demand for the return of the property, and, although the verdict and judgment were in his favor, yet there was no award of the value of the property, nor of damages for its detention, nor was there any order for its return to him. It was only a general verdict in his favor, and a judgment that he go without day, and recover his costs, leaving the property in the possession of the plaintiff. At least that is the aspect of the case as shown by the abstract before us. The defendant seems to have successfully defended the suit against his own deed on the theory that the property he had mortgaged did not belong to him. He had no right to a judgment in his favor on that theory.

Although the wife's title was not directly involved in the suit, and defendant could not avoid his own deed by showing that he mortgaged property that did not belong to him, yet when he tendered the issue that the deed was obtained from him by fraudulent concealment of the fact that it purported to cover the corn, and that he was ignorant of the fact when he signed the document, he was entitled to show, if he could, as a circumstance bearing on that issue, that the property did not belong to him. That was a collateral fact, if it was a fact, that was proper for the jury to consider along with the other conflicting evidence bearing on the issue relating to the due execution of the mortgage. Therefore evidence on that point was relevant.

This brings us to a consideration of the question, was the wife of defendant a competent witness in his behalf? It was because of that question that this cause was certified to this court by the Kansas City Court of Appeals; that court holding in this case and in a former decision in a like case (*Toovey v. Baxter*, 59 Mo. App. 470), that she was a competent witness, while the St. Louis Court of Appeals, in *Brinsmade v. Groll*, 14 Mo. App. 444, held the contrary. It is not contended that in such case at common law the wife would be a competent witness. Our statute on the subject is an enabling act, making persons competent under certain conditions who at common law, under like conditions, were incompetent witnesses. Section 4656, Rev. St. 1899, prescribes the conditions under which a married woman may testify in a suit in which her husband is a party whether she be joined therein as a party or not. Among the conditions there prescribed is not included the fact of her interest in the property when her interest is not the subject of adjudication in the case, but only a collateral circumstance. If the wife is a party to the suit, and has a real interest in the subject which would be affected by the judgment, then she is a competent witness, by the terms of section 4652, Rev. St. 1899, whether her husband is joined as a party with her or not. But, although she may be

the real owner of the property in controversy, if she be not a party to the suit, and is not bound by the judgment, she is not a competent witness in behalf of her husband. The decision of the St. Louis Court of Appeals in *Brinsmade v. Groll*, 14 Mo. App. 444, lays down the correct rule on that subject. This court has in a number of cases said that, where the wife was the real party in interest, she is a competent witness notwithstanding her husband is a party to the suit, and that, where the husband is the real party in interest, he may testify, although his wife is also a party. *Scrutchfield v. Sauter*, 119 Mo. 624, 24 S. W. 137; *McKee v. Spiro*, 107 Mo. 452, 17 S. W. 1013; *Brownlee v. Fenwick*, 103 Mo. 420, 15 S. W. 611; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225; *Steffen v. Bauer*, 70 Mo. 399; *Wilcox v. Todd*, 64 Mo. 388; *Quade v. Fisher*, 63 Mo. 325; *Hariman v. Stowe*, 57 Mo. 93; *Owen v. Brockschmidt*, 54 Mo. 285; *Buck v. Ashbrook*, 51 Mo. 539; *Fugate v. Pierce*, 49 Mo. 441; *Tingley v. Cowgill*, 48 Mo. 291; *Hardy v. Matthews*, 42 Mo. 406. But in all of those cases the husband or the wife whose competency as a witness was in question was a party to the suit, and had a material interest in the judgment to be rendered. It was held that in such case the wife was a competent witness under section 4652, which removes the common-law disability of interest. This court has never held that a wife was a competent witness for her husband in a suit by or against him in which she was not also a party and interested in the subject of the suit. Something is said about the wife in this case being the agent of the husband in the matter about which she testified, and therefore competent. But she was not offered as a witness on any such theory, and in fact both her testimony and that of her husband shows that she was acting in her own right, and not as agent for her husband. We hold that the wife of the defendant was not competent as a witness for him in this case.

The judgment is reversed, and the cause remanded to be retried according to the law as herein declared.

ROBINSON, J., concurs. MARSHALL, J., concurs in the result. BRACE, P. J., absent.

WOODY v. ST. LOUIS & S. F. RY. CO. et al.
(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

APPEAL—COSTS—JURISDICTION—DUE PROCESS OF LAW—CONSTRUCTION OF CONSTITUTION.

1. The mere finding of an issue as to which party should pay the costs, for or against either party, or adopting the finding of a jury on the issue, does not invoke a construction of the Constitution or deny a party due process of law, so as to give the Supreme Court jurisdiction of an appeal under the constitutional amendment of 1884, giving the court exclusive jurisdiction to hear and determine appeals in

all cases involving the construction of the Constitution of the state, though there may have been an error of procedure.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by Julia Ann Woody against the St. Louis & San Francisco Railway Company and others. Judgment for plaintiff, and defendants appeal. Appeal ordered certified to the Kansas City Court of Appeals.

This action originated in Polk county, Mo., out of the killing of the infant son of the plaintiff by one of the trains on the St. Louis & San Francisco Railway. Damages were laid at \$5,000. After two mistrials an effort was made to compromise the case. On the 5th day of October, 1897, the claim agent of defendant went to the home of Mrs. Woody, and an agreement was reached whereby she, as the sole surviving parent of Troy Woody, agreed to and did accept \$510 in payment and satisfaction of her claim growing out of his death. Up to this point there is no conflict between the parties, but, when the compromise was effected, Mrs. Woody signed an agreement to dismiss the case at her costs. When the defendant presented this paper, and asked the circuit court to dismiss the case at plaintiff's costs, she objected, and insisted that she did not agree that it should be dismissed at her costs, and that the stipulation to that effect was inserted without her knowledge and consent, and the court refused to dismiss the action at plaintiff's costs. Thereupon defendant amended its answer, and pleaded the release and discharge, to which plaintiff replied, admitting that she agreed to accept the \$510, but that, as a part of said agreement, defendant agreed to pay the costs; that the agreement to dismiss at her costs was inserted in the writing without her assent; that she was illiterate and could neither read nor write, and signed the same by making her mark only, and did so with the distinct understanding that defendant was to pay the costs. Thereupon the defendant moved the court to require plaintiff to give security for the costs, and the court sustained said motion, but ruled that he would permit plaintiff to try the issue as to which party should pay the costs already accrued without giving a bond for costs; and thereupon, in order to raise said issue, plaintiff filed her motion setting up the foregoing facts, and prayed that the case should be dismissed at the costs of defendant. The defendant objected to going to trial on any issue before the jury, for the reason that there was no issue to be tried by a jury; that the pleadings showed there had been a full and complete settlement and compromise of the cause of action alleged in the petition, and that, in consideration of said compromise and settlement, defendant had paid plaintiff, and plaintiff had received from defendant, \$510, and plaintiff had not refunded or offered to refund said sum, but still retained the same, which fact was ad-

mitted in the replication; further, that the record disclosed that the suit was and is prosecuted by plaintiff as a poor person, and no judgment could be rendered against her for costs incurred in her behalf, and that the contract of settlement was in writing, and it was not sought by any equitable proceeding to charge the contract with fraud, and no evidence was admissible to modify or alter said agreement. Which objection the court overruled, and heard the evidence; and the jury, on the issue whether the defendant agreed to pay the costs, returned a verdict that defendant had agreed to pay the costs, and the court adopted this finding and entered judgment dismissing the cause at defendant's costs. Defendant in due time filed its motion for new trial, and the same was overruled, and it appealed to this court. Among other grounds, the motion assigns as a reason that "the court erred in making up an issue outside of the one raised by the pleadings, thereby depriving defendant of the rights guaranteed by section 30 of article 2 of the Constitution of Missouri, 'that no person shall be deprived of property without due process of law.'"

L. F. Parker and J. T. Woodruff, for appellants. Rechow & Pufahl, for respondent.

GANTT, P. J. (after stating the facts). The question which forces itself upon us is, has this court jurisdiction of this appeal? By the amendment to the Constitution of this state adopted at the November election in 1884, this court is given exclusive jurisdiction to hear and determine appeals "in all cases * * * involving the construction of the Constitution of the United States and of this state." It is obvious, we think, that under the allegations of the answer and the reply the original claim of \$5,000 for damages is no longer an issue in this case, but the sole and only question is, who shall pay the costs upon the dismissal of the action? Plaintiff admits she agreed to receive and did receive the \$510 in satisfaction of her damages, and is not claiming any further damages, nor asking to have the dismissal set aside; and defendant pleads that settlement, and only asks that the cause be dismissed at plaintiff's costs, and plaintiff repudiates the agreement to the extent of being charged with the costs. The amount, then, does not confer jurisdiction. Does the constitutional question raised in the motion for a new trial, to wit, that if the judgment stands, adjudging costs against defendant, it will be deprived of its property without due process of law, require this court to determine the case? If it does, then, every time a judgment is rendered against any party, all that he or she will be required to do, to insure a hearing of his or her appeal in this court, is to allege in a motion for new trial that, if the judgment stands, it will deprive him or her of his or her property without due process of law. In the case at bar the defendant was

brought before the court by summons duly served. Its pleas were filed, and issue joined thereon. Its evidence was heard. The court had jurisdiction of the subject-matter and the parties. That it may have erred in a matter of practice did not raise a question involving the construction of the Constitution of this state. This was the exact point settled in *Hulett v. Railway Co.*, 145 Mo. 35, 46 S. W. 951. This court in banc, in *Hilgert v. Barber Asphalt Paving Company* (not yet officially reported) 72 S. W. 1070, reasserted the same doctrine. The Kansas City Court of Appeals has the same jurisdiction to decide the regularity or irregularity of the action of the circuit court in adjudging the costs against defendant as this court would have if the case otherwise came within our jurisdiction. We are clear that the mere deciding an issue for or against a party, or adopting, as the circuit court did in this case, the finding of a jury upon an issue of fact, pure and simple, does not involve a construction of the Constitution, or deny to a party due process of law. At most, it can be no more than an error of procedure.

This appeal should have been certified to the Kansas City Court of Appeals, and it is accordingly so ordered. All concur.

GANSEY v. ORR et al.

(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

STATUTE OF FRAUDS—AGREEMENT TO INDEMNIFY.

1. A promise made to induce a purchase of stock in a corporation, whereby the promisors agree, in case the corporation fails and is unable to return to its stockholders the money invested by them, that they will repay to the purchaser the amount paid out by him, is within Rev. St. 1899, § 3418, which provides that no action shall be brought to charge any person upon any special promise to answer for the debt or default of another unless the agreement shall be in writing.

Appeal from Circuit Court, St. Louis County; R. Hitzel, Judge.

Action by Frances Gansey against William A. Orr and Isaac H. Orr. Judgment for plaintiff, and from an order granting a new trial she appeals. Affirmed.

This is an action upon an express contract claimed to have been entered into between plaintiff and defendants in the fall of 1890, in respect to which the petition alleges that defendants were at that time organizing a corporation known as the Wm. A. Orr Shoe Company, and that they requested plaintiff to buy shares of the capital stock of said company, and, as an inducement for her to do so, promised and agreed that if said company should fail, and not be able to return to its stockholders the moneys they invested

in its capital stock, then defendants individually would pay her the amount of money she should pay out in the purchase price of said stock, and that, relying on this promise of defendants, plaintiff promised to buy and did buy the capital stock of said company to the amount of \$7,000, and paid therefor \$7,000 in cash; that said company thereafter failed and was placed in the hands of a receiver, and its assets were not sufficient to pay its creditors in full, leaving nothing to return to or distribute among its stockholders; that plaintiff then demanded of defendants that they pay her the \$7,000 she had paid for said capital stock of said company, which defendants refused to do. The answer was a general denial, and also that the promise of defendants was a promise to answer for the debt, default, or miscarriage of the Wm. A. Orr Shoe Company, and was not in writing. The reply denied the new matter in the answer. There was a verdict for plaintiff against both defendants for \$7,953. On motion of defendants the court granted them a new trial upon the grounds that it erred "in refusing to give a peremptory instruction to find for each defendant as requested at the close of the case, in refusing instructions asked by each defendant at the close of the case, and in giving the instructions asked by plaintiff." From the order granting defendants a new trial, plaintiff appeals.

In the summer of 1890 the Orr & Lindsay Shoe Company of St. Louis announced its intention of retiring from business at the end of that year. A plan was set on foot for the organization of a new concern to purchase its stock in trade and to succeed to its business. In their plans the defendant William A. Orr, a son of the Orr who was a member of the firm of the Orr & Lindsay Company, upon the incorporation of the concern, the William A. Orr Shoe Company, became its president. In the organization of this company the promoters were advised and assisted in all matters requiring the services of a lawyer by the defendant Isaac H. Orr, a member of the St. Louis bar. Plaintiff is the wife of John Gansey, a teamster, who for many years during the life of William Orr's father had done the hauling for Orr & Lindsay. William Orr had placed on the Gansey farm a driving mare, and on a Sunday in September, 1890, as was his custom, he drove out to the Gansey farm to see the mare, and took with him his codefendant, Isaac H. Orr. Plaintiff testified as follows: "I had several conversations with William A. Orr about the formation of the William A. Orr Shoe Company. He first told me he was going to organize a company, and spoke to me a good deal before he organized it. We had our first conversation on this subject about 1890, the year they organized. The conversations were all held at my house on the Hanley road. He had several conversations with me of that nature. William A. Orr told me that it would be a good thing

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. §§ 32, 33.

to take stock in it. He told me it would be a good investment; that they would buy and sell for cash, and it would be safe. I first saw Isaac H. Orr just before I went into the concern. He came out to my house one Sunday with William A. Orr. I had never seen Isaac H. Orr before that. I was away from home when he and William A. Orr came out. They waited till I came back. I had gone up to another farm, near Creve Cœur Lake, to see about it. I left to go to the farm before dinner, and did not get back until about four o'clock that same afternoon. When I got back home, Mrs. Conroy and William A. Orr and Isaac H. Orr and some others were there. The Orrs were down in the orchard, northeast of the house. I met them after I got home. The time before this Sunday that William Orr was out to see me, I told him I would consider the taking of the stock or going into the concern. He brought Isaac H. Orr out, and Isaac and he talked to me about it. They told me it would be a good thing; that Isaac was to be the attorney for it. I had great confidence in the Orr people. They said it would be a good thing; they would buy and sell for cash. I said, 'I don't know anything about your business. In case they would fail, what would I do?' They said they would pay my money back. This conversation took place in my house, in the back parlor. They had come up out of the orchard and gone in the house. There were others present at the time, but we three were talking together. The Orrs stayed at my house until after we had some lunch. In that conversation they asked me to take stock in the new concern they were organizing, and I told them in case it was a failure what would I do? and they told me they would pay me my money back. Mr. Isaac Orr and Mr. Will said that—Mr. Isaac particularly, because he said he would be attorney, and he would be a stockholder, and he would pay me the money back. I did agree at that time to take the stock. I told him I would go down, and I did. I gave my check first for four thousand, and then for three thousand—seven thousand. It was about the same time—not so far apart—not so very long, I don't think. I gave a check to A. C. Stewart, and he paid it to Mr. Orr; and then Mr. Scott—I gave him a check, and he gave it to Mr. Orr. I never got any certificates for my stock. They never issued them until after the concern was broke up. That is what I heard. I never got any money back. They declared one dividend. It was four hundred and eighty dollars. There was only one dividend declared. That was the first year. I was away from home at the time, and when I got back I had a letter from them. I had several conversations with Mr. Will Orr, who was president of the company, about the company, after I had gone into it. At first he said they were getting along fine. Then he said it was pretty hard times—dif-

ferent things about it. I never had any other conversation with Mr. Isaac Orr after that Sunday. I never saw him, except to see him go in and out. Before I had the conversation with William and Isaac Orr, William would come out to my place on Sunday afternoons and talk the matter over with me. The conversation I had with Mr. Isaac Orr and William occurred towards the fall of the year. It was warm weather. It was pretty late in the afternoon when they left my house that Sunday." She was corroborated to some extent by one Mrs. Conroy, who testified she was present and heard the conversations. Defendants testified that nothing was said at the time of their visit to the Gansey farm to Mrs. Gansey about the William A. Orr Shoe Company, and that neither of them made any such promise or had any such conversation as Mrs. Gansey claims about stock in the company, and that Mrs. Conroy was not present at that time. In the latter part of December, 1890, Mrs. Gansey purchased from defendant William A. Orr 70 shares of stock in the new company, standing in the name of William A. Orr, but of which he was trustee for the company. She received one dividend in 1891. After that dividends ceased, but the business continued until 1896; and Mrs. Gansey visited the store during all those years, meeting William A. Orr frequently, knowing that the stock was depreciating in value, but never until a few days before the bringing of this suit did she intimate to either defendant that she claimed to have a contract with them to indemnify her. There was irreconcilable conflict between the evidence of Mrs. Gansey and Mrs. Conroy, on the one part, and of the Orrs, Chas. S. Broadhead, Esq., and other witnesses for the defense, on the other part. Upon the first trial, in the circuit court, city of St. Louis, plaintiff testified: "Q. When did Isaac Orr promise? A. He did—both together—at my house. Q. That was the time you said you would see about it. You said when they made that promise you would see about it? A. Yes. Q. When you went down to the place of business you only saw Will? A. I don't remember seeing Isaac. I am not sure. By the Court: I understand, when they made the promise out there, you said you would see about it—you didn't accept, but you would see about it? A. That was Mr. Will Orr. Q. They were both at your house. I understood you to state on direct examination that one of them stated in the presence of the other, if anything went wrong in the business, or if the business failed, they would pay you back the money. You said, 'Well, I will see about it.' Then you went down to the store and saw Will Orr, yet didn't see Isaac Orr? A. I don't remember. Q. And subsequently the same statement was made by Mr. Will Orr—that if the business was not successful, or if anything happened, then he would pay back your money. Thereupon you subscribed for the stock. Is that correct?

A. Yes; but on condition of what Isaac Orr told me—both—before I paid the money. One was attorney and one was president. Certainly I took their word. I thought they were gentlemen and honest. Q. When did Isaac Orr promise? A. He did—both together—at my house. Q. That was the time you said you would see about it? You said, when they made that promise, you would see about it? A. Yes."

Defendant William A. Orr asked the court to instruct the jury as follows, which the court refused:

"(1) The court instructs the jury that, under the pleadings and all the evidence, your finding must be for the defendant William A. Orr.

"(2) The court instructs the jury that even though you may believe from the evidence that defendant William A. Orr orally promised plaintiff that if the William A. Orr Shoe Company should fail, or if anything should happen in its business, he would pay her all the money paid by her for stock in said company, nevertheless your verdict should be for defendant William A. Orr."

Defendant Isaac H. Orr asked the court to give the two following instructions, which the court refused:

"(1) The court instructs the jury that, under the pleadings and evidence, their verdict should be for defendant Isaac H. Orr.

"(2) The court instructs the jury that even though you may believe from the evidence that defendant Isaac H. Orr orally promised plaintiff that if the William A. Orr Shoe Company should fail, or if anything should happen in its business, he would pay her all the money paid by her for stock in said company, nevertheless your verdict should be for defendant Isaac H. Orr."

At request of plaintiff the court gave the two following instructions over the objection and exceptions of defendants:

"(1) If the jury believe from the evidence that at or about September, 1890, defendants solicited or asked plaintiff to buy capital stock of the William A. Orr Shoe Company, a corporation, and, as an inducement to plaintiff to buy said stock, promised and agreed with plaintiff that if she would buy said stock she would not lose any of the money she should pay for said stock, and that if said company should fail or become insolvent, or unable to return or pay back to its stockholders what they paid for their stock, then defendants would pay to plaintiff the amount of money she should pay for the capital stock of said company; and if the jury further believe from the evidence that plaintiff, influenced by said promise and agreement, and by reason and in consequence thereof, then and there agreed to buy, and thereafter did buy, 70 shares of the capital stock of said company, of the par value of \$100 each, and did pay \$7,000 therefor; and if the jury further believe from the evidence that said shoe company thereafter, and be-

fore the commencement of this suit, did fail and become insolvent, and unable to return or pay back to its stockholders what they paid for their stock—then the jury will find in favor of plaintiff.

"(2) If the jury find in favor of plaintiff, they will assess her damages in the sum of \$7,000, and interest on the same at the rate of six per cent. per annum from the commencement of this suit, viz., December 21, 1897."

At request of defendants the court gave the seven following instructions:

"(1) Unless the jury are reasonably satisfied by a preponderance of the evidence (which means the greater weight of the evidence) that the defendants on or about the — day of September, 1890, were at the dwelling house of the plaintiff, and then and there solicited and asked the plaintiff to buy some capital stock of the Wm. A. Orr Shoe Company, and then and there, to induce plaintiff to buy such stock, the defendants both promised and agreed with plaintiff to repay her any amount she would invest in capital stock of said company, and keep her harmless from all losses by reason of such investment, should the said Wm. A. Orr Shoe Company fail in its business and become insolvent, and unless you further believe and find from the evidence that defendants by such alleged representations did then and there induce the plaintiff to buy such stock, the plaintiff cannot recover, and your verdict should be for the defendants.

"(2) The court instructs the jury that even though you may believe from the evidence that, prior to the investment by plaintiff in stock in the Wm. A. Orr Shoe Company, the defendant Wm. A. Orr represented to plaintiff that a purchase of stock in said company would be a safe investment, and even though you may believe that plaintiff relied upon such representations in buying stock in said company, nevertheless he is not liable to plaintiff unless he further promised that if she bought stock he would see that she did not lose, and if the company failed to pay back her investment he would individually pay it to her. So that, if you believe from the evidence that William A. Orr did not make any promises or agreements of that nature, then your verdict must be for the defendant William A. Orr.

"(3) The court instructs the jury that if you believe from the evidence that William A. Orr did not, on the Sunday in 1890 when he visited plaintiff with Isaac Orr, make to plaintiff the promises or agreements alleged in her petition, then your verdict must be for the defendant William A. Orr.

"(4) On behalf of defendant Isaac H. Orr the court instructs the jury that the burden of proof is upon plaintiff to establish by a preponderance of the evidence all the facts necessary to a recovery, as explained in other instructions; and by the term 'preponderance of the evidence' is meant that the pro-

bative force of the evidence in favor of plaintiff must, in your estimation, exceed that in favor of defendant Isaac H. Orr. So that, if you find that the evidence in favor of said defendant Isaac H. Orr is as great or greater in weight than in favor of plaintiff, your verdict should be for defendant Isaac H. Orr.

"(5) The court instructs the jury that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all the facts necessary to a recovery, as explained in other instructions; and by the term 'preponderance of evidence' is meant that the probative force of the evidence in favor of plaintiff must, in your estimation, exceed that in favor of the defendant, William A. Orr. So that, if you find that the evidence in favor of the defendant William A. Orr is as great or greater in weight than that in favor of plaintiff, then your finding should be for the defendant William A. Orr.

"(6) The court instructs the jury that if you believe from the evidence that defendants, William A. Orr and Isaac H. Orr, did not promise the plaintiff that if the company should fail they would pay to her the amount paid by plaintiff for stock in said company, then your verdict should be for the defendants, William A. Orr and Isaac H. Orr, even though you may also find from the evidence that said defendants represented it to be a good and safe investment.

"(7) If you believe and find from the evidence that the defendants were together at the house of the plaintiff only once during the fall of 1890, and while they were so together with the plaintiff neither of them conversed with plaintiff about the purchase of stock in the Wm. A. Orr Shoe Company, then your verdict must be for both of the defendants."

Of its own motion the court gave the following instruction:

"(3) You are the sole judges of the weight of the evidence and the credibility of the witnesses, and in determining the same you should consider the manner of each witness on the stand, his or her interest in the result of the case, and the probability or improbability of his or her statements, viewed in the light of all the other testimony in the case; and, if you believe that any witness has willfully sworn falsely to any material fact in the case, then you may disregard any part or all of such witness' testimony."

Daniel Dillon, for appellant. Chas. W. Bates and Finkelnburg, Nagel & Kirby, for respondents.

BURGESS, J. (after stating the facts). Plaintiff contends that the trial court erred in holding that the promise of defendants was within the statute of frauds, and in granting defendant a new trial for that reason. Upon the other hand, defendants insist that the alleged contract is within the purpose, intent, and language of the statute of

frauds; being a contract of indemnity against loss which might result from the "miscarriage of another."

By section 3418, Rev. St. 1899, it is provided that "no action shall be brought to * * * charge any person upon any special promise to answer for the debt, default or miscarriage of another person * * * unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." There is great conflict in the authorities as to whether a parol promise to indemnify one who becomes surety for another at the request of the promisor is within the provisions of a statute of frauds like ours; some holding that, unless some liability or duty of a third person already exists or is to be created, there cannot be an agreement to answer for the debt, default, or miscarriage of another. *Browne*, on Statute of Frauds (5th Ed.) § 157; 1 *Brant* on Suretyship & Guaranty (2d Ed.) §§ 55-57. But other authorities hold (and such seems to be the rule in this state) that where one person invests money at the solicitation of another, and upon the promise of the latter to indemnify him against the consequences, no action will lie upon such promise, unless it be in writing, under the statute of frauds, *supra*; and this, too, even though there be no legal liability on the part of the corporation in whose capital stock the money is invested to refund the same upon its insolvency. *Green v. Crosswell*, 10 Ad. & El. 453, is regarded as the leading case upon this question; and it was there held that if a person become bail for a stranger, in consideration of the request of another, and of such person promising him to indemnify him against the consequences, no action will lie upon such promise unless it be in writing, because the promise is in the fourth section of the Statute of Frauds (St. 29 Car. 2, c. 3). Section 3418, Rev. St. 1899, *supra*, is substantially the same as the English statute quoted, and there is no difference in principle in that case and the one at bar. And while that case is not in line with *Thomas v. Cook*, 8 B. & C. 728, which is followed in a majority of the states, it is followed in Alabama (*Brown v. Adams*, 1 Stew. 51, 18 Am. Dec. 36; *Godden v. Pierson*, 42 Ala. 370); in Illinois (*Brand v. Whelan*, 18 Ill. App. 186); in Ohio (*Easter v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 Ohio St. 340; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393); in Mississippi (*May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80); in Missouri (*Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379); in North Carolina (*Draughan v. Bunting*, 31 N. C. 10); in South Carolina (*Simpon v. Nance*, 1 Speer, 4); in Tennessee (*Macey v. Childress*, 2 Tenn. Ch. 438); and in Pennsylvania (*Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291). In *Baker v. Morris*, 33 Kan. 580, 7

Pac. 267, it is held, where the father, after his minor son had negligently and carelessly killed a mare belonging to another, for which the father was not liable, that a promise by him, not in writing, to pay the value of the mare, did not render him liable, because within the statute of frauds.

In passing upon the meaning of the words "debt, default, and miscarriage," in Wood on Frauds, § 114, it is said "that they apply (1) to guaranties for an existing debt; (2) guaranties for future debts or future losses which may be incurred by the acts of a third party; (3) to some past or future default in duty by a third party." It is not contended by defendants that a stockholder, as such, is a creditor of the corporation, and there was therefore no debt; nor is it contended that the corporation owed or would owe to plaintiff, as a stockholder, any duty, except the duty to use reasonable judgment, care, and diligence in the conduct of the business, and to refund her share of any surplus remaining upon liquidation after the payment of debts. For want of care, etc., in the conduct of the business, the corporation would not be liable, nor was there any surplus upon liquidation; hence there was no default for which Mrs. Gansey could have held the corporation in a civil action. The word "miscarriage" was clearly intended to have a broader meaning than either "debt" or "default," and should be so construed as to include the failure by a third party (in this case the William A. Orr Shoe Company) to succeed in the proposed business, regardless of the fact whether its failure to do so would entitle the plaintiff to an action at law against the company or not. The requirement that an actionable duty shall exist was made first by the court in cases of debt, because, unless there was a debt owing by the third party, that part of the statute clearly did not apply. The same requirement was later extended to "default," meaning "default in any duty," and for the same reason. But the reason does not exist in the case of miscarriage (i. e., the act of a third party, whether actionable or not), and the requirement should not be made. In other words, if any meaning or force at all is to be given to the word "miscarriage," it must mean something different from or broader than debt or default, and this is the only distinction that can be made. For a time it was contended that the statute did not apply to promise to indemnify against "future losses which might be incurred by the acts of a third party." The courts are still divided upon this point; some following *Thomas v. Cook*, supra, holding that a promise to indemnify a surety is not within the statute; others following *Green v. Cresswell*, supra, to the contrary. The latter rule was adopted by the courts of this state, and has been consistently adhered to. Thus in *Bissig v. Britton*, 59 Mo. 213, 21 Am. Rep. 379, it is said: "In whatever aspect the case is presented, we can construe it in no other light

than that the obligation of suretyship entered into by the plaintiff was to be a responsibility for the default of other persons, to wit, Wisner and others, and that therefore the promise of indemnity made by the defendant was within the statute of frauds, and, being verbal, must be held incapable of enforcement." In *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823, that case was followed, in which it was held that an oral promise to take up a certain note when it became due, and save the defendants harmless, was within the statute of frauds. The promise by defendants to plaintiff was simply an agreement to indemnify her against the miscarriage of the business enterprise thereafter to be entered into by the William A. Orr Shoe Company, and was clearly within the letter, spirit, and purpose of the statute.

The case of *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564, relied upon by plaintiff, is not in harmony with the views herein expressed; but we must decline to follow it, because of this fact, and especially because not in line with the trend of the decisions of this court.

Notwithstanding the promise sued upon is alleged to have been made by the defendants to plaintiff, and she was thereby induced to invest \$7,000 in the shoe company after it had been incorporated, in our opinion it is clearly a collateral undertaking to answer for the miscarriage of another, and clearly within the statute of frauds. Our conclusion is that the court did not err in setting aside the verdict of the jury and granting a new trial upon the ground herein indicated.

The judgment is affirmed. All of this Division concur.

KERSEY v. O'DAY.

(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

ATTORNEY—LIEN FOR SERVICES—EMPLOYMENT BY OTHER ATTORNEY—LIABILITY OF FUND RECOVERED—WITNESSES—COMPETENCY—TRANSACTIONS CONCERNING DECEDENT'S ESTATE.

1. An attorney rendering professional services in the collection of an inheritance for a minor has no lien on the claim for such services.

2. Where K. entered into a contract with the guardian of a minor to recover an inheritance due the minor from the estate of a grandparent in France, and agreed to pay all attorneys employed by him from his share of the proceeds of the fund to be recovered, the claim of an attorney so employed, for services rendered, was not enforceable against the fund or against the minor's estate, but was a personal claim against K.

3. Rev. St. 1899, § 4652, provides that, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living, except as to acts since the probate of the will or the appointment of the administrator. Held, that where conversations testified to, between certain witnesses and a claimant against de-

cedent's estate, with reference to such claim, occurred prior to the probate of decedent's will, claimant was not a competent witness with reference thereto.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Benjamin Kersey, as executor of the estate of T. W. Kersey, deceased, against John O'Day, Jr., guardian and curator of Marie Bunel, in which John W. Jump filed an interplea. From a judgment dismissing the interplea, interpleader appeals. Affirmed.

On August 18, 1896, Benj. Kersey, as executor of Thomas W. Kersey, deceased, and R. M. Roper instituted suit in the circuit court of Greene county, Mo., against John O'Day, as guardian and curator of Marie Bunel, a minor, Marie Bunel, S. H. Horine, and E. Y. McClendon, to recover attorney's fees claimed to be due them in recovering an estate for the minors. At the May term, 1898, of said court, John W. Jump, appellant herein, by leave, filed an interplea in said cause. The interplea, in brief, averred that plaintiff Kersey was executor of Thos. W. Kersey, and in charge of his estate; that John O'Day was guardian and curator of Marie Bunel, and in charge of her estate; that one Dames Napoleon Bunel, the grandfather of the minor, died intestate in France in 1887, leaving a large estate, valued at about \$500,000, of which the minor inherited about \$130,000; that the minor lived with her mother, in Arkansas, in ignorance of or indifference to the estate, until in 1889 the plaintiff Roper advised her of the matter, when the mother employed Thos. W. Kersey to recover the estate of the minor, and Kersey and Roper agreed between themselves that they would procure the requisite testimony and take the necessary steps to recover for the minor her estate; that they caused the probate court of Greene county, Mo., to appoint S. H. Horine guardian and curator for the minor, and he qualified as such; that in January, 1890, the New York Life Insurance & Trust Company instituted suit in the Supreme Court of New York against all persons interested in the Bunel estate to have determined the question of the legitimacy of the minor Marie Bunel, and her right to share in the trust estate held by the plaintiff in said suit under a declaration of trust executed by said Dames Napoleon Bunel, and which trust estate amounted to about \$200,000; that said suit was pending about four years, during all of which time said Kersey and Roper devoted to it all their time and attention in working up said case, taking depositions and preparing the same for trial, and in so doing they expended a large sum of money; that in said suit there was a decree, on November 23, 1893, from which no appeal was prosecuted, finding that said minor was the granddaughter of said Dames Napoleon Bunel, and entitled to a one-fourth interest in his estate; that the

services of said Roper and Kersey were rendered pursuant to a contract made with said S. H. Horine, guardian and curator of the said minor. This contract was verbal in the first place, but afterward was reduced to writing, and was sanctioned and authorized by an order of the probate court of Greene county, Mo. The contract and order of the probate court are set out in full in the interpleading petition, and from the contract it appears that, in addition to the trust estate of said Dames Napoleon Bunel in the hands of the New York Life Insurance & Trust Company, there was an estate in France; that said Kersey was to receive one-half of all sums recovered by him for the minor, and was to pay all attorneys employed by him out of his share. After making these statements, the interpleader recites that said Thomas W. Kersey was insolvent, and unable to pay the expense of taking depositions, traveling, or the employment of counsel to further prosecute the collection of money due the minor in France, and about to give up the further prosecution of that claim, when he entered into a verbal contract with the interpleader "that he and said Jump should enter into a law partnership, and move from Springfield, Mo., to Louisiana, Mo., the former home of said Jump, that he might give bond as curator and guardian of said Marie Bunel." "By the terms of said verbal contract, about June 15, 1894, the said John W. Jump was to have an interest in the money the said Kersey collected for Marie Bunel in France; that is to say, the said Jump was to have \$10,000 in the following way: \$2,500 cash, and the use of \$7,500 for ten years without interest." It is unnecessary to set out in detail all the testimony introduced in the trial upon appellant's interplea. It is sufficient to determine the disputed questions to simply say that there was testimony tending to establish the contract alleged in the interplea between the interpleader and Thomas W. Kersey, now deceased, and also testimony tending to show that there was no such contract. The cause was submitted to the court upon the evidence introduced, and its findings are fully indicated by the decree rendered, which is as follows: "Now at this day comes on to be heard the above-entitled cause, and, all the parties announcing 'Ready for trial,' the court, sitting as a chancellor, heard all the evidence offered by the respective parties, plaintiffs and defendants, and at the close of the main suit, and before he made his findings, he heard all the testimony offered by the interpleader, John W. Jump, as well as the testimony offered by Benj. Kersey, executor of the last will of Thomas W. Kersey, deceased, in defense of the claim of said interpleader of an interest in the fund collected by the defendant John O'Day, guardian and curator of Marie Bunel in the French estate in France, whereon the said John W. Jump.

the interpleader, claimed the sum of ten thousand dollars due him as attorney's fees, and for money paid out and expended by said Jump in securing said fund by judgment and decree in France for said Marie Bunel, defendant. After hearing all the testimony in the case, the court found, in addition to the former advances made to the plaintiffs, R. M. Roper is entitled to fourteen thousand two hundred and fifty dollars; Benjamin Kersey, executor of the last will of Thomas W. Kersey, deceased, the sum of twelve thousand dollars; and the defendant E. Y. McClendon, the sum of seven hundred and fifty dollars—twenty-four thousand dollars of which is to be drawn from the New York part of the estate of said Marie Bunel, and three thousand dollars from the French estate. John O'Day having paid the said Thomas W. Kersey, now deceased, the sum of five hundred and seventy dollars on his services rendered in prosecuting the claim to judgment in France, the further sum of three thousand dollars is herein allowed him; making, in all, three thousand seven hundred and seventy dollars allowed said Thomas W. Kersey as an attorney for prosecuting said French claim, which amount is hereby charged against the fund. And the court so decreed. The court further finds that John W. Jump has no interest or claim in the French fund allowed to Benjamin Kersey, as claimed in said interplea filed herein. Wherefore the court dismisses said interplea filed herein by said John W. Jump, and that he is herein adjudged to pay the cost of same." To the rendering of said decree the interpleader at the time duly excepted.

Heffernan & Heffernan, for appellant. E. W. Banister, for respondents.

FOX, J. (after stating the facts). It will be observed that the interpleader in this cause bases his cause of action upon an alleged verbal contract with Thos. W. Kersey for services performed and money expended in the prosecution of a certain claim in France of Marie Bunel, a minor; and this interplea was filed, doubtless, upon the theory that this claim was a lien upon the fund so recovered by said Kersey for said minor. It will be further noted that this proceeding in behalf of the interpleader is an effort to have the court, in an action by the executor of Thos. W. Kersey to charge the minor's estate with compensation for his legal services, adjust a claim that the appellant avers exists in his favor against the estate of Thos. W. Kersey. In effect, it is claimed by this interplea that the circuit court has the right and power to charge a fund, the administration of which is in the probate court, with the payment of the interpleader's claim, not against the minor's estate, but against the estate of Thomas W. Kersey. It must be remembered that this claim is not enforceable

against the estate of the minor, but is based upon a contract with Thomas W. Kersey in his lifetime. The contract of Kersey, spread upon the record of the probate court, clearly expresses that he was to pay any additional counsel employed to aid in the prosecution of the minor's claim in France, and of this contract appellant had due notice. Counsel for appellant, in their brief, do not discuss this phase of the case. They make no reference to the proposition as to the power or right of the court to entertain this interplea in this proceeding. Doubtless the theory upon which the interplea is predicated is that the claim of appellant, as an attorney in securing this fund for the minor, is a lien upon such fund. If we are correct in assuming that this interplea is based upon the contention that the appellant has a lien upon the fund he aided in securing, we will say that this, in our opinion, is a mistaken conception of the law upon that subject in this state. Judge Scott many years ago settled this question. In the case of *Frissell v. Halle*, 18 Mo. 18, he says: "Attorneys and counselors at law in Missouri are not to be confounded with the mere attorney and solicitor in England. These last are recognized officers of the court, and are entitled to fees for the services performed by them, in the same manner as the clerks of our courts of record. Their fees are ascertained and fixed by rules of court, and are recognized in the taxation of the costs of a suit. Such being their foundation, the law confers a lien on papers and on judgments to secure their payment, and will not suffer collusive compromises between the parties to a suit, made with a view to prevent their recovery. Attorneys at law in our courts are allowed no fees which are taxed as costs. They look to contracts made with their clients for remuneration for their services. If they receive the money of those who employ them, they may retain their fees, just as any other bailee may retain for services rendered in the care of the subject of the bailment. Hence the learning in the English books in relation to the liens of attorneys has no application, or an extremely limited one, under our system of laws." To the same effect is the case of *Alexander v. Grand Ave. Ry. Co.*, 54 Mo. App. 73. The learned judge very appropriately says: "That an attorney has no lien for his services on a judgment obtained by him was long since determined in this state. *Frissell v. Halle*, 18 Mo. 18; *Roberts v. Nelson*, 22 Mo. App. 28. And it could scarcely be pretended that an attorney, merely as such, would have a lien on the claim before it became a judgment, in the absence of a statute conferring such a lien, as the attorney can have no lien on the suit." The claim of interpleader is simply one against the estate of Thos. W. Kersey, based upon a contract. His action upon this claim is purely an action at law, and it cannot, by filing this interplea, asking the court to distribute

a fund, be converted into an equitable action. His claim for legal services is of no higher order than that of any other creditor against the estate of Kersey. His remedy is not against the estate of the minor. His claim, according to the allegations in the interplea, is not based upon any contract with the minor, or the guardian of the minor; hence he must seek his remedy in the usual way pursued by creditors against the person or estate with whom he contracted. There was no error in the action of the trial court in dismissing the interplea filed in this cause.

The conclusion reached upon the main question, as herein expressed, renders it unnecessary to discuss the contention as to the exclusion of testimony by the court upon the trial of this cause. However, as counsel for appellant has relied exclusively in his brief upon this contention, will briefly consider the questions involved in it. It is disclosed by the record that during the progress of the trial, upon the question as to the existence of the contract alleged in the interplea, certain witnesses testified as to conversations had with appellant which tended to prove that he had no claim against T. W. Kersey. In rebuttal of this testimony, counsel for appellant introduced the interpleader, for the purpose of testifying as to the conversations mentioned by the other witnesses. Upon the objection of plaintiff, the court excluded his testimony. Doubtless this objection was sustained by reason of the provisions of section 4652, Rev. St. 1899, which is identical with section 8918, Rev. St. 1889, which provides: "Where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless, the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator." The conversations testified to by the witnesses for plaintiff were had prior to the probate of the will and the grant of letters testamentary, except as to a conversation with Powell which occurred after the estate of Kersey went into the hands of the executor. The evident purpose of section 4652, supra, was to place the parties to the action on equal footing in the trial of causes. If either of the parties were dead, then the living party to the action was incompetent to testify. This statute has been very strictly construed by this court, and, while there is a very strong line of reasoning opposed to this construction, it still remains the settled law of this state. The statute which excludes the living party, "except as to acts done or contracts made since the probate of the will or the grant of letters," has been applied to conversations, as in this case, had by witnesses with the living party prior to the probate of the will. Speaking for myself, it is difficult to see the reason of this strict rule. What difference does

it make whether the conversation was before or after the grant of letters of administration? The dead man is no party to the conversations. All the persons engaged in the conversations are living. Some of them are permitted to testify to the conversations, but the living party to the suit is excluded because the opposing party to the suit is dead. If he had been living, and was not present at the conversation, he would not be able to say anything about it. It strikes me, as to these conversations, separate and independent from any transaction with the deceased, to permit the living witnesses to give their version of the conversation, and then exclude the living party from giving his, is directly in conflict with the spirit of the statute, of placing all parties on an equal footing. The party to the suit must remain silent, and living witnesses can testify that he made certain statements, and he is not permitted even to deny their statements. If the deceased was present at the time of these conversations, I could see the reason of the rule. However, this court has settled that question. In the case of *Leeper v. Taylor*, 111 Mo., loc. cit. 323, 19 S. W. 956, after quoting the statute referred to, the court, speaking through Black, J., says: "But it seems he and his sister Mrs. Patterson and some of his brothers had a meeting on the 22d day of March, 1888, for the purpose of settling their mother's estate. * * * This meeting was held a month, or thereabouts, before the plaintiff took charge of the estate. At that meeting Mr. Patterson and some of the other persons present insisted that defendant should account for the rental value of the land, and they testified on the trial of this case as to what defendant then said concerning the declaration of trust. The claim now is that defendant should have been allowed to give his version of what he said on that occasion. The case of *Wade v. Hardy*, 75 Mo. 394, holds that a defendant, when sued by an administrator, may testify as to conversations attributed to him by the administrator or by third persons after the grant of letters of administration. That case is not in point. The statute excludes the living party, except as to acts done or contracts made since the probate of the will or grant of the letters of administration. Here the conversations were had before letters were granted. The statute is plain enough, and should be followed." In *Curd v. Brown*, 148 Mo., loc. cit. 95, 49 S. W. 993, the court says: "The plaintiff was not a competent witness in this case for any purpose. The circuit court permitted him to testify on the theory that he was competent to deny the statements attributed to him by the living witnesses in Virginia. In this respect the court committed error. Section 8918, Rev. St. 1889, leaves him where he would have been at common law—incompetent for any purpose, because the other party to the contract was dead." Citing cases. To the same effect is the case of *Teats v.*

Flanders, 118 Mo. 680, 24 S. W. 126; Ring v. Jamison, 66 Mo. 424; Wood v. Matthews, 73 Mo., loc. cit. 482. If the rule announced in these cases are to control, then there was no error committed by the court in the exclusion of the interpleader as a witness in reference to the conversations with those witnesses prior to the probate of the will.

Entertaining the views as herein expressed, the judgment of the trial court will be affirmed. All concur.

STATE ex rel. MISSISSIPPI RIVER & B. T. RY. v. DEARING, Judge.

(Supreme Court of Missouri. March 20, 1903.)

RAILROADS—EMINENT DOMAIN—CROSSINGS—COMMISSIONERS—DETERMINATION—MANNER AND POINT OF CROSSING—CONCLUSIVENESS—JURISDICTION OF COURT—MANDAMUS.

1. Rev. St. 1899, § 1035, provides that every railroad shall have power to cross any other railroad, and that, if the roads are not able to agree on the compensation for, or point or manner of, crossing, the matter shall be determined by commissioners appointed as provided in section 1268, and the latter section provides that the report of the commissioners may be reviewed by the court on written exceptions, and that the court shall "make such an order therein as right and justice may require, and may order a new appraisal on good cause shown." *Held*, that the determination of the commissioners as to the point and manner of crossing is not conclusive, but is open to review by the court.

2. Mandamus will lie to compel the court to hear evidence on exceptions to the commissioners' report as to the manner and point of crossing.

In Banc.

Mandamus by the state, on the relation of the Mississippi River & Bonne Terre Railway, to compel Frank R. Dearing, as judge of the circuit court of Jefferson county and of the Twenty-First Judicial Circuit, to hear evidence on exceptions by relator to the report of commissioners appointed in proceedings by the Southern Missouri Railway Company wherein it sought to condemn a right of way over relator's railroad. Peremptory writ granted.

This is an original proceeding in this court to obtain a peremptory writ of mandamus directing Judge Dearing, the judge of the Twenty-First Judicial Circuit of this state, to set aside an order made by him, as judge of the circuit court of Jefferson county, at the May term of said court for the year 1902, and on the 16th day of June, 1902, striking out the exceptions of the relator, the Mississippi River & Bonne Terre Railway Company, filed in certain condemnation proceedings by the Southern Missouri Railway Company, wherein said last-mentioned company sought and seeks to condemn a right of way and crossing over what is known as the "Crawley Line" or spur of the Bonne Terre Railway, and also a crossing over its main line; also to condemn $1\frac{1}{10}$ acres of ground on the west side of and adjoining the right

of way of the Bonne Terre Railway, which it is alleged it purchased for the purpose of enabling it to replace a temporary bridge at Flat river.

These condemnation suits were commenced in the circuit court of St. Francois county at its May term, 1901. An answer was filed putting in issue the allegations of the petitions, and averring that the proposed crossings on the Crawley line and main line were near the foot of steep grades, which were approached by abrupt curvatures, and that, if these crossings were permitted to be made at grade, it would subject the employes of both roads and their passengers to constant risk of injury.

The answer also alleged that the bridge of the Bonne Terre Road over Flat river on its main line, near the south end of which the Southern Missouri Road proposes to cross, is a temporary structure which it is its purpose to replace with a permanent bridge constructed at a different grade, which purpose will be defeated by the construction of the crossing as contemplated by the Southern Missouri, and that the $1\frac{1}{10}$ acres of land, all of which the Southern Missouri seeks to condemn and occupy, was purchased solely for the purpose of enabling the Bonne Terre Road to reconstruct its bridge over Flat river, and without such strip it will be unable to carry out such purpose.

When the cause came on for hearing for the appointment of commissioners, the circuit court, it would seem, declined to hear any evidence at that time, except that which tended to prove that said plaintiff had made an effort to agree with said defendant therein as to the point and manner of crossing, and as to the connections to be made and compensation to be paid, holding that the other questions should be determined when the report of the commissioners had been filed. Three commissioners were appointed to ascertain and determine in the two crossing cases "the amount of compensation to be paid the defendant railway company to cross its said railroad herein before described, and also to ascertain the points and manner of such crossing and connections with defendant's railroad in the petition therein prayed to be appropriated and used as crossings as aforesaid," and, in respect to the $1\frac{1}{10}$ acres of ground, "to assess the damages which the owner may sustain by reason of the appropriation of the property sought in the petition [therein] to be appropriated and condemned." The commissioners filed three reports, one in each of the original cases, in which two of the commissioners joined, and the third commissioner filed a separate and dissenting report.

As to the crossing on the Crawley line, the majority of the commissioners fixed the point of crossing on the line of the survey located and fixed by the Missouri Southern by its profile map of its route, and adopted by it over the said Crawley line, at the grade fixed

by said Missouri Southern, and assessed the damages at \$500. As to the crossing of the main line, the majority also fixed the point of crossing of the Bonne Terre Road on the line of survey located and fixed by the profile map of its route filed by the Missouri Southern, and adopted and filed by it in the clerk's office, and on the grade fixed by its said survey and location as evidenced by its profile map, and on the then grade of the Bonne Terre's main line, and assessed the damages at \$2,500.

As to the $1\frac{1}{10}$ acres, the majority of the commissioners also condemned said parcel, being a strip 50 feet wide, by specific metes and bounds, and containing $1\frac{1}{10}$ acres, and assessed the damages at \$100, the said strip including also switches and side tracks thereon, unless removed by defendant.

The third commissioner reported that the commissioners heard a number of witnesses as to the point of crossing, among others, all the railroad commissioners of the state, and two former commissioners, and other railroad men of experience, and locomotive engineers, who testified that to establish the said crossings at grade would be to hazard the lives of the passengers and employes traveling on both of said lines of railway; that, in his opinion, the great weight of evidence was in favor of an overhead crossing, and he therefore found in favor of such crossings, and that to make the crossings at the places designated in the survey of the Missouri Southern would materially interfere with the uses to which the Bonne Terre Road was authorized to put its road. He further reported that one of the commissioners, who was a practicing lawyer, maintained that neither under the laws of the state nor the instructions of the court were the commissioners authorized to make other than a grade crossing, and had no authority to change the location fixed by the profile map in any respect whatever.

Within the time allowed by law, the Bonne Terre Company filed its exceptions to the said several reports. The venue of the cause was changed in November, 1901, to the circuit court of Jefferson county. On January 18, 1902, the Missouri Southern filed its motion to strike out these exceptions, and on June 16, 1902, the circuit court of Jefferson county sustained the motion to strike out the exceptions, save and except as to the inadequacy of the damages assessed, and, upon the suggestion of the Bonne Terre Road that it would make application for a writ of mandamus to require said court to hear said exceptions, postponed the hearing of the question of damages until this court had passed upon such application. Thereupon an application for this writ was made at the June term, 1902, and just prior to the adjournment of this court, and an alternative writ was awarded, to which Judge Dearing filed his return. The questions presented arise on the pleadings thus filed.

Without reproducing the exceptions in full, it is sufficient to state that the issue raised by them was tersely stated by Judge Dearing when he sustained the motion to strike them out. He says: "The defendant company filed its exceptions to the report of the commissioners. It filed its exceptions to the amount of damages awarded by the commissioners as well as to the point selected and the manner of crossing." "The plaintiff company then filed its motion to strike out all that portion of the exceptions filed by the defendant company which referred to the point and manner of crossing. It is contended by plaintiff that there is no appeal allowed the defendant company from the finding or order of the commissioners in regard to the point and the manner in which the plaintiff company shall cross the defendant company's right of way and its tracks. It is insisted by the defendant company that the right of appeal does lie to the point and manner of crossing, as well as the amount of damages awarded," and he reached the conclusion, after a consideration of the statute law on this subject in this state, that, even if he had heard evidence and reached the conclusion that the commissioners had decided different from what he would, there was no express or implied statute in Missouri authorizing him to substitute his opinion in place of theirs, whereby he might have fixed the point and manner of crossing; in a word, that he was not authorized to hear evidence tending to show that the commissioners had acted unwisely in fixing the point and manner of crossing, but that the commissioners' report was final, and not subject to review by the circuit court.

Huff & Sleeth, R. A. Anthony, J. F. Green, and Martin L. Clardy, for relator. F. M. Trissal, Smith & Anthony, and Byrnes & Bean, for respondent.

GANTT, J. (after stating the facts). The very able and learned counsel for the respondent have discussed many questions, which are involved in the decision of this case in the circuit, which are not now before us. The sole contention of the relator in this proceeding is that it was the duty of the circuit court to hear evidence on the issue as to the dangerous character of the crossing selected and the manner of crossing. Whether desired by counsel or not, it is not our purpose to pass upon the merits of any one of the numerous exceptions, nor to direct the circuit court how it shall decide any or all of them. The question is, was the circuit court right in holding it had no power to consider such exceptions, and that the report of the commissioners was conclusive alike on him and the defendant railroad?

The statutes apposite to this discussion are sections 1035 and 1268, Rev. St. 1899.

Section 1035, Rev. St. 1899, provides: "Every corporation formed under this act

shall in addition to the powers hereinbefore conferred, have the power * * * to cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route and upon the grounds of such other railroad company, with the necessary turn-outs, sidings and switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid and if the two corporations can not agree upon the compensation to be made thereby or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in this chapter for the condemnation of lands for railroad purposes."

Section 1268, which is applicable to the condemnation of lands for railroad and other purposes, and which is also a part of said chapter 12, Rev. St. 1890, provides: "Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof and the report of said commissioners may be reviewed by the court in which the proceedings are had on written exceptions filed by either party in the clerk's office within ten days after the service of notice aforesaid, and the court shall make such order therein as right and justice may require, and may order a new appraisal upon good cause shown." These two sections are in *pari materia*, and must be construed together, especially so as section 1035 requires the commissioners to be appointed as provided by the article in which both are found.

Such, we think, moreover, has been the construction placed upon section 1035, and this court, in *Kansas City Sub. Belt Ry. Co. v. R. R. Co.*, 118 Mo. 599, 24 S. W. 478, tacitly, at least, approved such a construction. In the absence of a provision making the ascertainment of the point and manner of crossing by the commissioners absolutely conclusive, we think that sound reason is against such a construction. As said by Judge Bliss, in *Hannibal Bridge Co. v. Schaubacker*, 49 Mo. 558: "To treat the opinion of commissioners sent out to view and assess the value of property as conclusive is to place their finding higher even than a verdict of a jury, who, with their attention confined to a single case, have patiently listened to all the evidence and allegations of the parties. If obviously mistaken, their verdict may and should be set aside by the trial court, although the law gives no such general supervising power as is given by this statute over the action of the commissioners."

In *Kansas City Sub. Belt Ry. Co. v. R. R. Co.*, 118 Mo., loc. cit. 614, 24 S. W. 482,

Burgess, J., discussing the contention of the defendant in that case that the court erred in failing to give the jury specific instructions that a material interference, by the new road in crossing the elder road, with the use of its road was not authorized, and that they should provide for a crossing that would not work such a result, said: "This question has already been virtually disposed of, but, even if it had not been, we are of the opinion that the commissioners were the sole judges of this matter, and, as the order appointing them recites that they 'are appointed commissioners to fix and determine the points and manner of crossing and connections sought to be made by the petitioner with and over defendant's tracks and right of way, to hear evidence,' etc., no further instructions were necessary." Standing alone, this announcement sustains the position of the learned circuit court that he was not authorized to interfere with the determination of the commission in fixing the point and manner of crossing, and that no amount of evidence would avail to change their findings. But this court did not stop with the above statement, but Judge Burgess, continuing, says: "Moreover, the record discloses the fact that defendants were heard on this matter both by the commissioners and by the court, on their motion to set aside the report of the commissioners, which was subject to review and approval or to be set aside by the court as it felt authorized to do." Similar expressions are found throughout the opinion, clearly indicating that the report as to the point and manner of crossing was subject to the approval or disapproval of the court, and that only as to damages by way of compensation was the defendant entitled to a jury as a matter of course. The case of *Ry. Co. v. Ry. Co.*, 110 Mo. 510, 19 S. W. 826, in no manner militates against the proposition that the court has the power, on written exceptions, to review the report of the commissioners. Judge Black expressly gives, as one reason why the award of the commissioners in that case should be enforced by a bill in equity, that the defendant company "got an award to which it made no objection whatever, and then took possession under the terms thereof." Why allude to its failure to object, if the report of the commission was absolutely conclusive; and its objections would not have been considered?

The question is, at last, does the circuit court in a condemnation proceeding under our statutes act in its judicial capacity, or is he a mere commissioner to appoint commissioners, and limited in his power merely to the specific act of making the appointment, with no revisory power whatever? We answer in the language of Judge Napton, in *Railroad v. Lackland*, 25 Mo., loc. cit. 527: "In the main, the general scope of the section [act] looks to the action of the court in its judicial capacity, and gives the court authority not only to pronounce a judgment

which will pass a title to the land to the company and a right to the damages to the landowner, but 'to make all orders and take any steps' which in the opinion of the court will best promote the ends of justice." While the language of the statute is somewhat different now, the words "as right and justice may require" are synonymous with those found in the statute when the Lackland Case was decided. And in that case, as in the subsequent cases, it was ruled that, although no provision was made in express words for an appeal, an appeal was within the intention of the Legislature, "because it may be safely said that it is at least doubtful whether that jurisdiction could be entirely cut off if the Legislature had so intended." And he significantly inquires: "Could the Legislature provide an illusory compensation for private property taken for public use, totally at variance with the true spirit of the Constitution, and, by placing its enforcement under the control of a selected tribunal and declaring the decisions of that tribunal final, thus place the subject beyond the reach of the courts?"

Unless section 1268 is to be disregarded in a crossing case, then the relator was and is entitled to be heard on its exceptions, and, while the return asserts that there was a hearing and a decision adverse to relator, we cannot shut our eyes to the statement in the return reiterating the ruling made when the exceptions were overruled, in substance, that the finding or order of the commissioners fixing the point and manner of crossing could not be reviewed by the court, and any subsequent proceedings with regard to the commission would not refer to the point and manner of crossing, for the reason that, if another jury should determine otherwise, there would be interminable litigation. We think it is obvious the court did not decide this point in any technical view of the form of the exceptions, but on the substantial ground that it had no authority to review the finding of the commissioners.

While our law gives one railroad the right to cross and intersect another, it is apparent that it did not give it an arbitrary power to do so. That right is to be exercised in subordination to the judgment of commissioners appointed by the court to fix the point and manner of crossing. That commission, however, is itself subject to the supervising control of the court which appointed it. It would be contrary to the spirit and the whole trend of our statutory and common law to hold that vested property rights of any citizen or corporation could be transferred or extinguished by the decision of an extrajudicial body, and no opportunity afforded him or it to be heard in a court of justice. So far, no such construction has been given to our condemnation laws, and it will not do to say that the defendant in this case has no property right which permits it to appeal to the courts to protect. The

Legislature has not so regarded its rights. The law requires, as a precedent for maintaining the proceedings to obtain such crossing, that the new road shall first endeavor to agree with the old road as to the point and manner of crossing, and it has been held that such a commission may impose on the new road the duty and cost of the support of such a crossing. But the defendant is not alone concerned in such crossings. The state has a vital interest in the safety of the employes of both roads and the traveling public, and it is not the purpose of this statute to permit the new road to so cross the old one as to destroy the uses to which the old road has already been devoted.

Judge Elliott, in his excellent work on Railroads, vol. 3, §§ 1122 and 1125, wisely says: "The tendency of modern legislation and judicial authority is to discourage the construction of grade crossings of railways whenever it is possible to avoid same. Crossings at grade are not only a source of inconvenience and delay to companies operating trains over the crossings, but also a source of danger on account of collision between trains and consequent injuries to employes and passengers. Whenever it is practicable to avoid a crossing at grade, equity may interfere to prevent such crossing." Elliott on Railroads, vol. 3, § 1122. "Where one railroad company seeks to condemn, and construct a crossing over, the right of way and tracks of another, at a place and in a manner not authorized by law, resort may be had to equity for relief. If a company seeks a crossing at an improper place, or seeks an unnecessary crossing, or attempts to erect one in such manner as to materially interfere with the franchises of the company whose line is crossed, or in excess of lawful authority, a remedy by injunction is appropriate." 3 Elliott on Railroads, § 1125.

The statute intends the crossing shall be made with the minimum risk of hazard to life and property, and the smallest injury to the railroad which has already acquired its right of way.

The Supreme Court of Washington, in the case of *R. v. State et al.*, 34 Pac. 558, says: "We cannot see how it is possible, looking solely to the words of the statute, to hold that all it refers to is the matter of compensation. It is very evident that the Legislature did not mean to invest the younger company with the power to cross at any point and in any mode it might elect, but, on the contrary, to prevent the arbitrary exercise of the right to cross the older line. If the three things, compensation, points and manner of crossing, cannot be settled by negotiations, they must be brought before the proper tribunal for adjudication." The court cites many cases in support of its views. In *St. Louis & Florissant R. R. Co. v. Almeroth*, 62 Mo. 343, the circuit court declined to hear evidence on exceptions as to values and damages, and this court held

then, as it has in numerous cases held, it was the duty of the circuit court to review the commissioners' report as to all questions upon which defendant is entitled to a hearing. *Transfer Co. v. Ry. Co.*, 100 Mo. 419, 13 S. W. 710; *Hannibal Bridge Co. v. Schaubacker*, 49 Mo. 555; *St. Louis v. Buss*, 159 Mo. 9, 59 S. W. 969; *St. Louis v. Lanigan*, 97 Mo. 175, 10 S. W. 475.

As said in *St. Louis & Florissant R. R. Co. v. Almeroth*, it is sufficient at this time to hold, as we do, that the circuit court erred in declining to consider the exceptions and evidence in support thereof. If the court considered the evidence offered before the commission inadmissible, it could have afforded defendant a reasonable time to offer its witnesses in person. If the defendant cannot be heard on its exceptions, it is denied any hearing at all.

2. That mandamus is the proper proceeding in the circumstances of this case we have no doubt whatever. This court, by express constitutional provision, is granted superintending control over all inferior courts, with power to issue writs of mandamus and other remedial writs. In this case we are not asked to direct the circuit judge to sustain these exceptions, or any one of them, but to require him to hear evidence on the exceptions of relator, and to set aside his order overruling them; in a word, to exercise a jurisdiction which the statutes have imposed upon him, and which he has, as we think, erroneously declined to exercise. In so doing, we think it will be competent for him to approve the finding of the commissioners, or set aside their report if he finds they have misapprehended their duty as interpreted by us, or he may modify and change their report by directing such crossing to be overhead or underneath the defendant's road, if upon the proofs before him, or that may be presented to him, he shall find that the proposed grade crossing will be more hazardous to the lives of the employees and passengers on said roads, or, if deemed more satisfactory to him, he may appoint a new commission and fully instruct them as to their duties and powers as to fixing the point and manner of crossing, whether on grade, overhead, or underneath defendant's tracks, or at a different point, if thereby the extra hazards are diminished or avoided. The principles upon which mandamus lies at this stage of the proceedings have been so recently reviewed by this court in *State ex rel. Chicago, Rock Island & Pacific Railroad v. Smith*, 72 S. W. 692, and the *State ex rel. City of Stanberry v. Same*, 73 S. W. 134, that we deem it unnecessary to dwell further on that point than to cite the additional cases of *State ex rel. Adamson v. Lafayette Co. Ct.*, 41 Mo. 225; *Dunklin Co. v. District Ct.*, 23 Mo. 454; *State ex rel. v. Klein*, 140 Mo. 502, 41 S. W. 895; *State ex rel. v. Smith*, 152 Mo. 444, 54 S. W. 218; *State ex rel. Bayha v. Phillips*, 97 Mo. 335,

10 S. W. 855, 8 L. R. A. 476; *State ex rel. v. Cape Girardeau Ct. of Com. Pleas*, 73 Mo. 560; *Spelling on Extraordinary Remedies*, § 1369; *High on Extraordinary Remedies* (3d Ed.) § 151.

It follows that a peremptory writ will be directed to Judge Dearing to proceed in accordance with the views herein indicated. All concur, except FOX, J., who, having presided on circuit, takes no part in the decision.

**STATE ex rel. JONES et al. v. COOK,
Secretary of State.**

(Supreme Court of Missouri. March 20, 1903.)

PRIVATE BANKS—STATUTORY REQUIREMENTS.—PAID-UP CAPITAL—AMOUNT—CITY BANKS—SECRETARY OF STATE'S CERTIFICATE—MINISTERIAL DUTY—MANDAMUS.

1. Rev. St. 1899, § 1299, provides that no persons shall engage in the business of private bankers "without a paid-up capital of not less than \$5000." Section 1278 provides that incorporated companies shall not engage in the business of banking in cities with a population of 150,000 or more with a less paid-up capital than \$100,000, and section 1801 provides that all provisions of the article, so far as the same are applicable, apply to private bankers. *Held*, that individuals desiring to engage in the business of private banking in a city of over 150,000 inhabitants are not required to have a paid-up capital of over \$5,000.

2. Rev. St. 1899, § 1299, declares that no person shall engage in the business of private banking without a paid-up capital of a certain sum, and section 1277 enacts that the Secretary of the State shall, before the banker does business, make an examination to ascertain whether the capital has been paid, and, if he shall find that the law has been complied with, he shall grant a certificate to him showing that the banker is authorized to transact business. *Held*, that where the proper amount of capital stock has been paid up, it is the duty of the Secretary of State to grant a certificate, notwithstanding the fact that the business is to be conducted in a department store conducted by the banker.

3. The duty of the Secretary of State in the premises being purely ministerial, mandamus lies to compel the Secretary to issue the certificate.

In Banc. Mandamus by the state, on the relation of Lawrence M. Jones and another, to compel Sam B. Cook, as Secretary of State, to grant to relators authority to carry on the business of private banking in Kansas City. Alternative writ made peremptory.

Proceeding by mandamus, on the relation of Lawrence M. and J. Logan Jones, to compel the Secretary of State to grant to them the state's authorization to carry on, as partners, the business of private banking in Kansas City.

The petition of relators, on which the alternative writ herein was issued, states a compliance on their part with all the requirements provided in section 1299, Rev. St. 1899; its request upon the Secretary of State that

he make or cause to be made an examination to ascertain if said provision of the law had been complied with on the part of relators, and, if complied with, that he issue to them the state's authorization to engage in said business of private banking; and the refusal of the Secretary so to do.

To the alternative writ issued in obedience to the prayer of relators' petition, respondent filed the following return:

"Now comes the respondent, Sam B. Cook, and, for a return to the alternative writ of mandamus herein, admits that he is the Secretary of State of the state of Missouri, and that he was Secretary at and during all the time mentioned in complainants' petition; admits that as such Secretary it is his duty, when an individual banker has filed in his office the requisite certificate to commence business under the laws of this state as a private banker, to examine, or cause an examination to be made, as to the amount of capital actually paid up, the manner of transacting business, and to ascertain whether or not all the laws of the state have been complied with in reference to the organization of private banks, and, when it is found upon such examination that the provisions of the law have been complied with by the individual or individuals desiring to be authorized to transact private banking business, to grant them a certificate to that effect.

"Respondent further says that the certificate filed by complainants in his office, and referred to in the petition herein, provides that the business to be conducted by said complainants as private bankers shall be at Kansas City; that said Kansas City is a municipal corporation containing more than one hundred and fifty thousand inhabitants, and that under the laws of this state no person or persons can be authorized to transact business as private bankers unless capital be first paid in to the amount of one hundred thousand dollars; that complainants in their said certificate certify and acknowledge to the payment of only ten thousand dollars, and that by reason of said fact said certificate as filed in the office of this respondent is insufficient to warrant said respondent in issuing a certificate to said complainants to do the business of private bankers in said city.

"Respondent denies that complainants have complied with all the provisions of the laws of the state of Missouri required for the purpose of organizing a private bank; denies that, as Secretary of State for the state of Missouri, he refuses to grant to relators a certificate setting forth the fact that they have complied with the law in the case of individual bankers made and provided, but avers that he is now, and has been at all times, willing to issue said certificate, when a proper statement as to the capital invested and evidence of character of busi-

ness and place of business has been properly acknowledged and filed in his office by complainants.

"Respondent further avers that, until said complainants have certified to him that they have paid up one hundred thousand dollars of capital to be invested and used in the transaction of the sole business of private bankers, he is not and cannot be required to examine into the condition of such payment, the manner of transacting business, or to issue a certificate to said complainants authorizing them to transact the business of private bankers at Kansas City, said city having a population of more than one hundred and fifty thousand.

"Respondent further states that it is the object and purpose of the complainants to locate and conduct their business as private bankers in the same building, and on the third floor thereof, occupied by them now as a department store in said Kansas City, Missouri, and that said bank, when so organized and run, is to be conducted in conjunction with their said department store, said complainants being engaged in owning and conducting a general department store business at said city, and respondent says that said complainants have no right or leave under the laws of this state to operate or transact the business of private bankers in connection and conjunction with the business and affairs of their department store at said city, and that they have no statutory or other legal right to transact the business of private bankers in the building and on the same floor of the building occupied in part by them in their department store business. Respondent avers that the laws of the state of Missouri require banking business to be conducted in its own banking house, separate and apart from any other business.

"Respondent, further answering, says that heretofore, to wit, on the — day of —, 1902, after full presentation of the matter and all facts in connection therewith, together with the certificate showing that ten thousand dollars of capital has been paid in, filed in his office, he, upon due consideration of the same, found and determined that said complainants had not properly qualified themselves under the laws of the state of Missouri to engage in the business of private bankers, and having not so properly qualified, and not having filed a proper certificate showing that one hundred thousand dollars had been paid up, to be used in the transaction of the business of themselves as private bankers, he, the respondent, refused to issue a certificate, under the seal of his office, granting to said complainants authority to transact the business of private bankers at Kansas City, Missouri.

"Wherefore respondent says that he has fully, fairly, and officially passed upon and exercised his judgment as to the right of

complainants to engage in said business in said city upon the certificate filed by them in the office of this respondent as mentioned in complainants' petition; wherefore, and upon consideration of the foregoing, this respondent asks to go hence with his costs."

To this return relators replied:

"Now come the relators, and, for their reply to the return filed by the respondent to the alternative writ of mandamus herein, admit that the certified copy of the relators' statement set forth that the place at which relators' business as private bankers is to be carried on is Kansas City, Missouri, and admit that said Kansas City is a municipal corporation containing more than one hundred and fifty thousand inhabitants.

"Said relators, for their further reply, state that Jones Dry Goods Company is a business corporation duly organized under and by virtue of the laws of the state of Missouri, and that as such it is conducting a general merchandise business, or what is generally known as a 'department store,' in said Kansas City, Missouri; that the relators are large stockholders and officers of said corporation, and said relators admit that they have rented a room on the third floor of one of the buildings occupied by said Jones Dry Goods Company as a department store; that said relators propose to do a private banking business in the room so rented, and that one of the entrances to said banking room will be opened into one of the store rooms of said Jones Dry Goods Company, but relators deny that said banking business is to be conducted in conjunction with said department store, but say that said banking business is to be conducted separate and distinct in every particular from the business of said Jones Dry Goods Company; that said relators will own their own banking house, the fixtures therein, and it is not the object or purpose of said relators to receive deposits or pay checks except over their own counter and in their own banking house.

"Said relators further deny the statement in respondent's return that he is now, and has been at all times, willing to issue said certificate when a proper statement as to the capital invested has been properly made, filed, and acknowledged as provided by law, but said relators say that the respondent has arbitrarily and oppressively, and without any investigation as to the amount of capital actually invested by these relators except as shown by said statement, refused to issue the certificate provided for by section 1277 of the Revised Statutes of Missouri of 1899, solely for the reason that the amount of capital invested by said relators is set out as ten thousand and no/100 (\$10,000.00) dollars, and has wrongfully, arbitrarily, and oppressively assumed to exercise his judgment as to the right of relators to engage in the banking business, and denied the right of these relators to do a private banking business, al-

though said relators have fully complied with all of the provisions of the statute in such cases made and provided.

"Wherefore said relators pray the court to award its peremptory writ of mandamus as prayed in the petition."

Merservey, Pierce & German, for relators.
The Attorney General and Sam B. Jeffries, for respondent.

ROBINSON, J. (after stating the facts). Ignoring the issues of facts raised by the pleadings of no consequence in the determination of the right of relators and the duty of the respondent in the premises (each and every one of which issues of fact, it may be said, however, in passing, was found in favor of the contention of relators by the commissioner appointed to take testimony and report to the court his findings thereon), the first point of difference between relators and respondent that we are called upon to consider is as to the amount of capital necessary to be subscribed and paid in by an individual or individuals desiring to do business as private bankers in cities of 150,000 inhabitants or more in this state before a certificate of authority should issue therefor by the Secretary of State to the individual or individuals subscribing the funds. The relators assert that any one or more persons in this state who subscribe and swear to the statement as provided in section 1299, Rev. St. 1899, and pay up a cash capital of \$5,000 or more, to be used in the business of private banking, is entitled to a certificate of authority from the Secretary of State to that effect, whether the business to be carried on is in a city of 150,000 inhabitants or more, or in the smaller cities or towns of the state; while, upon the other hand, respondent contends that no one or more parties can be authorized to do business as private bankers in an incorporated city in this state with a population of 150,000 or more inhabitants, unless he or they have paid up not less than \$100,000, and subscribed and sworn to the statement provided for in said section 1299.

By section 1298, art. 8, c. 12, Rev. St. 1899, private bankers are declared to be "those who carry on the business of banking by receiving money on deposit with or without interest by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, money, bonds or stock or other securities and of loaning money without being incorporated."

Section 1299 of said article gives the requirements of those who may engage in such business, and reads as follows: "No person or company of persons shall engage in the business of banking as private bankers, without a paid-up capital of not less than five thousand dollars, nor until he or they shall have made a statement, subscribed and sworn to as correct and true before a notary public

by each person connected with such business, as owner or partner, setting forth: First, the names of all persons interested in the business and the amount of capital invested; and second, the name in which the business is to be conducted, and the place at which it is to be carried on; which statement shall be acknowledged, recorded and filed in the same manner as provided in this article for the articles of agreement." Which means nothing more or less than that if any person, or company of persons, shall pay up a cash capital of not less than \$5,000, to be used in the business of banking, and shall make and subscribe to the statement provided for therein, he or they shall be entitled to the privilege of doing a banking business anywhere he or they may desire in this state. The reading of this clear and explicit provision of the statute, it would seem, of itself should put at rest all possible controversy upon the first proposition presented by respondent's return. The minimum amount of cash capital required of the individual banker or company is explicit, and the location in the state, where the individual banker or company is entitled to do business with that designated capital, is wholly unrestricted, and must of necessity include the city of 150,000 inhabitants or more, as it does the smaller cities and towns of the state.

But, says the respondent, since the Legislature, by the adoption of section 1278 of said article 8 of chapter 12, has declared against the policy of permitting incorporated companies to engage in the business of banking in cities with a population of 150,000 or more inhabitants, with a less paid-up cash capital than \$100,000, it must equally be as improper, unwise, and unbusinesslike to suffer a private individual or company of individuals to engage in the same business with a less capital under like circumstances, and, from this self-evolved necessity of equality in rights between all character of bankers in this state, he contends that the effect of the provisions of section 1301 of said article 8 aforesaid is to amend to that extent or to make nugatory the provisions of section 1299 of said article, and to render all parties wishing to engage in private banking in this state, in cities with 150,000 inhabitants or more, subject to the provision of section 1278, supra.

The language of section 1301 is: "All the provisions of this article shall, so far as the same are applicable, apply to all private bankers doing business in this state, and any private banker, who shall fail to make and file the statements required by this article of banks incorporated under the provisions of this article * * * shall be deemed guilty of a misdemeanor," etc.; while that of section 1278 is: "The cash capital of such corporation shall in no case be less than ten thousand dollars nor more than five thousand dollars; provided, that when such corporation is situated in a city having a population of

150,000 inhabitants or more, the cash capital of such corporation shall not be less than \$100,000."

One section declares the amount of cash capital the individual or copartnership must subscribe and pay up for use in private banking in order to procure the state's certificate of authority to prosecute the business of banking in the state; the other, with no more or no less distinctness, the amount of cash capital the incorporated banking company must pay up before it will be entitled to the state certificate of authority to engage in the same business. All that we need do, so far as concerns the present inquiry, is to say, "Thus the statute has been written, and thus it must be obeyed." With the question of the policy of the statute, as with the question of the propriety or impropriety of the distinction made therein in favor of the individual against the incorporated banking company, neither the court nor the Secretary of State has any concern.

The expression "so far as the same is applicable," contained in said section 1301, seems to have been inserted for the very purpose of making it clear that certain provisions of said article 8, and particularly the provisions of section 1278, should not apply to private bankers, where other express provisions have been made in the same article which do apply directly to them. As said, when by section 1299, supra, it was provided that no person or company of persons shall engage in the business of private banking without a paid-up capital of not less than \$5,000, it meant that, when that amount of capital was paid up by the individual or individuals, and was ready for use in such business, he or they subscribing the fund should be entitled to pursue that calling, and to that end were entitled to the state's certificate of authority, regardless of the judgment of the Secretary of State, or any one else, that a larger sum was contemplated when the business was to be carried on in a city with a population of 150,000 inhabitants or more, and regardless of his judgment as to the propriety or impropriety of the proposed location of the business on the third floor of a business house in which relators are conducting a department store, or of respondent's opinion as to the ultimate purpose and object of the parties in organizing said banking company. Relators' right to engage in the business of private banking in this state depends upon what the statute exacts of them to procure the state certificate of authority, and not upon respondent's interpretation of the law's meaning, or of what he might think would be a consistent requirement for private bankers in cities with 150,000 inhabitants or more. Relators' rights are to be determined by the law, and not by respondent's construction of it. Facts, and not respondent's deductions from them, fix relators' status.

This brings us to the further contention

made by respondent that, even though this court should be of the opinion that the construction placed by him upon the statute in question, as to the amount of cash capital necessary to be paid in by individuals or companies wishing to engage in the business of private banking in cities of 150,000 inhabitants or more in this state, is incorrect, still the court has no right by mandamus to review or correct that error, or to control the judgment and discretion vested by statute in respondent, as Secretary of State, in the matter of granting certificates to applicants wishing to engage in the business of private banking in this state. The correctness or incorrectness of respondent's position in this regard must depend for its solution upon our determination of this further proposition, whether the duty respondent is called upon to exercise in the matter of application for license to do the business of banking is ministerial or judicial; and to that end resort must again be made to the statute defining respondent's authority and relators' rights in the premises.

That mandamus will not lie to correct or control the judgment or discretion of an executive officer of the state in matters committed to his care in the ordinary discharge of his official duties, whether those duties require the interpretation of law or the determination of facts, is a question too well settled in this state to call for discussion at this time; as is also the rule that mandamus will lie, and judicial power may be invoked, to compel mere ministerial duties imposed by law upon any or all officers of the state to do a particular act or thing upon the existence of certain facts or conditions shown, even though in a limited sense the officer is required to exercise judgment before acting. A ministerial act, as applied to a public officer, is defined to be an act or thing which he is required to perform by direction of legal authority upon a given state of facts, independent of what he may think of the propriety or impropriety of doing the act in the particular case. With this definition in mind, what appears the character of the act which respondent was requested by relators to do, and, the doing of which respondent having refused, relators seek to compel by mandamus? Referring again to the provisions of the statute above mentioned, we find that by section 1298 it is declared who are private bankers, and what they may do without being incorporated under the law of this state.

By section 1299 is provided the requirement of parties or companies who desire to engage in the business of private banking, as follows: "No person or company of persons shall engage in the business of banking as private bankers, without a paid-up capital of not less than five thousand dollars, nor until he or they shall have made a statement, subscribed and sworn to as correct and true before a notary public by each person connected with such business, as owner or part-

ner, setting forth: First, the names of all persons interested in the business and the amount of capital invested; and second, the name in which the business is to be conducted, and the place at which it is to be carried on; which statement shall be acknowledged, recorded and filed in the same manner as provided in this article for the articles of agreement."

By section 1277 of same article and chapter, supra, it is provided: "When any banking corporation, individual or trust company shall have filed with the Secretary of State the requisite certificate prior to commencing business under the laws of this state, and shall have provided the cash required by law, the Secretary of State shall, before such corporation, individual banker or trust company shall be authorized to commence business, examine or cause an examination to be made in order to ascertain whether the requisite capital of such bank, banker or trust company has been paid in cash. The Secretary of State shall not permit such bank, individual banker or trust company to complete the filing of papers or to begin business until it appears to his satisfaction from such examination or other evidence satisfactory to him that the requisite capital has been in good faith subscribed and paid in in actual cash and is ready for use in the transaction of the business of the proposed institution. In case the Secretary of State shall find that all the provisions of the law have been complied with by the institutions herein named which desire to be authorized to do business, he shall grant them a certificate to that effect."

As seen, in section 1277 is set out and contained all the authority, duties, and requirements of respondent in the matter of applications by persons or corporations wishing to engage in the business of banking in this state and seeking the state's authorization to prosecute said business, and that authority is nothing more or less than to refuse such person or corporation the right to complete the filing of papers in his office, if, in the exercise of the duty imposed upon him by said section, he finds that the requisite cash capital has not been subscribed and paid in by the individual or individuals or corporations, and held ready for use in the transaction of the business proposed, or that the other preliminary steps required of the applicant under section 1299, supra, have not been properly pursued. By the closing language of section 1277, the duty of respondent in the premises is expressed in mandatory terms, and he is left with no discretion or judgment whatever. "In case the Secretary of State shall find all the provisions of law have been complied with by the institutions herein named, which desire to be authorized to do business, he shall grant them a certificate to that effect." His authority in the premises is to make or cause to be made an examination to ascertain if the requirements of the statute on part

of the applicant have been met and performed. His duty, if he finds the applicant or applicants have complied with the law's requirements in these particulars, is imperative to issue the state's certificate of authority required. His duty is purely ministerial under every definition of that term made by text-writers or announced by the courts. The Secretary of State cannot say, to defeat the right of the individual wishing to engage in the business of private banking in a city of this state with a population of 150,000 inhabitants or more: "I interpret the statute to mean that you are required to pay up in cash, for use in such business, the sum of one hundred thousand dollars." His erroneous interpretation of the statute does not determine the individual's right in the premises. That the court must determine. Nor can he say, in order to withhold the certificate enjoined on him to issue where a given state of facts exists, "I do not so find the facts as the applicant has stated," and have that finding go as a final judgment, and as a bar to the applicant's right to pursue a lawful calling, when in truth and in fact a full compliance with all the statutory requirement had been met and performed. The facts, and not respondent's arbitrary finding thereon, must ultimately determine both his duty and relators' right in the premises. The respondent is to look to the evidence presented, and to act on the facts shown, but with no uncontrollable power of judgment as to the facts or the law. On his finding the existence of the statutory facts required of the applicant, the statute is peremptory in its requirement of respondent that he issue the state certificate of authority, and that, too, as above said, without regard to what he might think of the propriety or the impropriety of permitting relators to conduct a banking business in the place designated in their statement, or the motive that prompted its selection, or the ultimate purposes the relators may have in view in so conducting said business. By section 1277, respondent is clothed with no judicial power; by it he is invested with no discretion as to the course he shall pursue upon the facts presented, other than the discretion necessarily involved in determining by count the amount of cash capital paid up by the applicant or applicants, and that he or they have properly made, subscribed, and sworn to the statement required in said section.

Since by the finding of the commissioners appointed by the court at the request of respondent to take testimony in the case, it is made to appear that relators have provided and paid up in actual cash \$10,000 for use in their proposed business as private bankers in Kansas City, and have in all things complied with the provision of section 1299, Rev. St. 1899, to authorize them to engage in such business, the alternative writ heretofore issued is made peremptory. All concur.

RYAN et al. v. RYAN.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

DEED—UNDUE INFLUENCE—FIDUCIARY RELATION OF PARTIES—SUFFICIENCY OF EVIDENCE.

1. Evidence, in an action by the children and heirs of a grantor, to set aside a deed to the latter's niece, with whom he had made his home, on the ground of undue influence in view of the grantor's habitual drunkenness, considered, and held insufficient to sustain a finding for the defendant.

Appeal from St. Louis Circuit Court; Wm. Zachritz, Judge.

Suit by Margaret Ryan and others against Mary E. Ryan. Judgment for defendant, and plaintiffs appeal. Reversed.

Plaintiffs are the children and heirs of Timothy Ryan, deceased, and defendant is a niece of plaintiffs' father. The object of this suit is to set aside a deed made by Timothy Ryan, a short while before his death, to the defendant.

The statements of the petition, as grounds for the relief sought, are that the deed was made while the plaintiffs' father was in a weak and sickly condition and of unsound mind, resulting from habitual intoxication, and while he was residing with and under the influence of the defendant, and that it was obtained by her through her undue influence over him.

The testimony for the plaintiffs was to the effect that their father for more than 25 years had been addicted to the intemperate use of intoxicating liquor, and that the habit grew worse as the years went on, so that in the last few years of his life it was beyond his control, and he was a habitual drunkard. He had a little property from which he collected rents—about \$30 a month—but he consumed it all in dissipation, and gave his family no assistance from it. When on a spree he would sell or pledge his working tools, and even his clothes, for money with which to purchase liquor.

The only conflict in the evidence between the plaintiffs and defendant on this point, if it amounted to a conflict, was as to the extent to which the deceased indulged the habit of drink or was controlled by it. That he was a man very much addicted to the habit, the testimony of defendant also showed. It was an undisputed fact that within the last few years of his life he had been four or five times placed in the inebriate department of St. John's Hospital, and in St. Mary's Asylum once, and, when it was endeavored to place him in the latter institution again, the sisters in charge refused to receive him, on the ground that he was crazy and they were afraid to stay in the hospital with him. He was then taken to the Alexian Brothers' Hospital and confined in the inebriate ward, and there treated for some time, and discharged as cured. That occurred in April.

1898. After leaving the hospital at that time he went to live with his niece, the defendant, who kept a boarding house in the city.

There is some conflict in the evidence as to the cause of his leaving his own home and going to live with his niece. The evidence on the part of defendant on that point was to the effect that he said his wife and children beat him and drove him away, but their testimony was that they never treated him unkindly and did not drive him away. The plaintiffs' testimony also tended to show that they were not welcome to visit their father at the defendant's house, and that once one of them was refused admittance.

In September, 1898, the unfortunate man again fell into such a condition that his niece, the defendant, with whom he was then living, took him to the Alexian Brothers' Hospital, and he was again placed in the ward for inebriates, and remained there under treatment two weeks. It was on the last day of his confinement there, and while he was yet in the hospital, that he executed the deed in question. He was discharged, after executing the deed, either that day or the next.

It was agreed between the parties at the trial, and so stated in open court, that the value of the property in question was \$1,000, and that it was mortgaged for \$600. The only consideration expressed on the face of the deed is \$5. This was not the only property Ryan owned. There were three other lots, also incumbered, and of about the same net value, which his wife and children have received.

The testimony as to what occurred at the execution of the deed was that the defendant, in company with one of her witnesses, Mrs. Dohoney, went to the hospital, and, when they arrived, the notary who took the acknowledgment was already there, the blank deed was filled out by the notary, and it was signed and acknowledged by Timothy Ryan within five minutes after they arrived, Mrs. Dohoney signing it as a witness. There were present Mr. Dunn, one of the Alexian Brothers, the notary, Miss Ryan, the defendant, and Mrs. Dohoney.

Mr. Dunn testified that Timothy Ryan was "perfectly cognizant of what he was doing," and that he was discharged as cured the next day. Mrs. Dohoney also testified that at that time "he had his perfect sense; * * * there was nothing in his manner or conversation that was peculiar." There was also testimony for defendant to the effect that Ryan had said that his niece had done a great deal for him by boarding and lodging after he had been put out of his own home, and he intended this deed to pay her for what she had done for him. The testimony also tended to show that his niece treated him kindly and took care of him. After Ryan executed the deed and came out of the hospital, he continued to collect the rents and appropriated the same to his own use, and

there was evidence tending to show that he warned the tenant, in Miss Ryan's presence, not to pay her the rent.

In April, 1898, while he was in his niece's house, Ryan executed a paper that purported to be his will, in which, after a legacy of \$1 to each of his children, he willed all of his estate to his niece. The witness who drew this document was a boarder at the time in Miss Ryan's house. This witness could not remember whether it was Mr. Ryan or Miss Ryan that first requested her to write it, but thought it was Miss Ryan. When this paper was offered for probate, however, after Ryan's death, it was rejected, because both of the subscribing witnesses testified that at the time Ryan signed it he was so drunk he did not know what he was doing.

The circuit court found the issues for the defendant, and rendered judgment accordingly, from which the plaintiffs appeal.

A. J. B. Garesche, for appellants. Eugene McQuillin, for respondent.

VALLIANT, J. (after stating the facts). It is not essential to the establishment of the plaintiffs' case that they should prove that their father was actually bereft of his reason when he executed the deed. As long as a man has mental capacity enough to escape being placed under guardianship, after due inquiry, a court will not set aside his deed merely because he is mentally inferior to his adversary in the transaction and had been beaten in the bargain. The law expects men, not fit to be placed under guardianship, to take care of themselves. But this cold rule of law applies only where the relation between the parties to the transaction is not impressed with the character of trust and confidence reposed by the weaker in the stronger. By this is not meant a case in which the weaker may have trusted and confided when he had no right to trust and confide—when the parties were in fact dealing with each other at arm's length—but is meant a case in which the relation between the parties is such that the law gives to it a fiduciary character, one in which the weaker party not only may have in fact placed trust and confidence in the other, but in which that other owed a duty to the confiding weaker one. Learned writers on this subject, while frequently specifying the relations of physician and patient, priest and communicant, lawyer and client, as examples of what the law deems a fiduciary relation, have been careful not to narrow the class so as to exclude other relations that ought to be embraced in it. *Cadwallader v. West*, 48 Mo. 483. The text-writer in 13 *Am. & Eng. Ency. Law* (2d Ed.) 11, says: "A person is said to stand in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other person."

The main question, therefore, in this case

is, did the defendant at the time this deed was executed stand in a relation towards the grantor that the law will denominate fiduciary? If she did, the burden is on her to show that the transaction was entirely fair and not constrained by her power over him. That Ryan was in a most deplorable condition is shown by the evidence on both sides. That all of his misfortunes, so far as the record shows, were brought about by his habit of intoxication, is very certain. Whether he was badly treated and driven from home by his wife and children, as the defendant's witnesses say he said he was, or whether he left there because he found he could indulge his habit with less reproach and mortification when out of sight of his wife and children, is immaterial. It was his evil habit that brought about that condition. Whether he was driven out or went of his own accord, the fact is he left his house and took refuge in the house of his niece. This niece was kind to him, and no one has a right to say, from anything that appears in this record, that she would not have been just as kind to him as she was if he had been entirely without means. And it may be said, further, that, if this deed had been executed under circumstances which showed not only that the grantor knew what he was doing, but also that he was a free man, acting by impulse of his own mind, and that it was made in consideration of the care she had taken of him, it could not be successfully impeached on the ground of inadequacy of the consideration. But the circumstances show that Ryan was not entirely free when he made this deed, and that he was under the influence, and, within a measure, in the power, of his niece. Whether he was driven from home, as defendant contends, or whether he left there for his own reasons, the fact is his niece's door was the only one that from his point of view was open to him, and, if she should close it on him, he would become an outcast indeed.

One of defendant's witnesses, a colored woman, testified that after he came out of the hospital he applied to rent a room in her house, but she refused, because she considered it improper for a white man to live in a house with colored people.

Defendant had exercised sufficient authority over him to put him in the custody of the hospital people for treatment, and before he was discharged from the custody he signed the deed. There is no evidence that either entreaties or threats were used, but his condition and the surroundings were such as could not fail to have had their influence. If it was a free act on his part, why was it planned to be performed before he was discharged? Why was it not postponed until he should have returned to the defendant's house? We say "planned to be performed," because, although there was no direct evidence of a prearrangement, yet the circum-

stances point to such. The defendant went there, taking a witness who also became a witness to the deed, there they met the notary, who had been summoned—the evidence does not show by whom—there was no parley, but the deed was drawn and signed within five minutes after their arrival. But after he left the hospital he took care that the grantee in the deed should not collect the rent. He warned the tenant to pay the same to no one but himself. The defendant, so far as shown, never attempted during the life of her uncle to resist his collecting the rent, except that she demanded it of the tenant, but the tenant refused to pay it to her.

There is another fact that shows that the defendant was disposed to use the condition of affairs to her own advantage. She was instrumental in the making of the attempted will, whereby she would have received all her uncle's property. She allowed that document to be signed by her uncle, requested the subscribing witnesses to attest it, and they did so, when she knew, and they all knew, that he was so drunk he did not know what he was doing. That occurred four or five months before the deed was executed, but it goes to show her influence and her disposition to use it. The man may have been in his right mind when he signed the deed, but the circumstances under which it was executed fall far short of showing that it was his free act and deed.

The judgment is reversed, and the cause remanded, with directions to render a decree for the plaintiffs as prayed in their petition. All concur.

SOUTHWEST MISSOURI LIGHT CO. v. SCHEURICH et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

EMINENT DOMAIN—PUBLIC MILLS—ELECTRIC AND WATER WORKS.

1. The right of eminent domain conferred in Rev. St. 1899, c. 131, for the construction and maintenance of mills and milldams, relates only to public mills, as defined in section 8756 to be "all grist mills which grind for toll, and all water grist mills, built on any water course by authority of any statute or order of any court," and does not confer the right to condemn land for a dam, on a corporation organized for the purpose of owning and operating gas, electric, and water works, to furnish light, power, and water for hire.

Appeal from Circuit Court, Newton County; Henry C. Pepper, Judge.

Action by the Southwest Missouri Light Company to condemn lands of A. J. Scheurich and others for the purpose of a dam and water power to operate an electrical plant. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

Plaintiff is a private corporation organized under article 8, c. 42, Rev. St. 1899, for the purpose of owning and operating gasworks,

electricity works, and waterworks, to furnish light, power, and water to Joplin, Webb City, and neighboring towns, and their inhabitants, for "hire and compensation." By this suit the plaintiff seeks to exercise the right of eminent domain as it is conferred in chapter 113, Rev. St. 1889 (now chapter 131, Rev. St. 1899), entitled "Mills and Milldams." Upon the filing of the petition a writ of ad quod damnum issued, and proceedings were had as in conformity to the requirements of that chapter. Upon the final hearing the court quashed the proceedings and dismissed the suit upon the ground, as recited in the judgment, "that the court finds that the petitioner is not entitled, under the pleadings and evidence, under the Constitution and laws of this state, to exercise the powers of eminent domain, and erect and maintain the dam in question for the purpose of furnishing electric light to the city of Joplin, or other municipalities, or their inhabitants." The plaintiff appeals from that judgment.

John A. Eaton, W. R. Thurmond, and John T. Sturgis, for appellant. O. H. Montgomery, for respondents.

VALLIANT, J. (after stating the facts). There were some disputed questions of fact as to the damage that would be done the owners of land, and the effect on the health of the people in the vicinity, caused by maintaining the dam; also concerning plaintiff's alleged contractual duty to the city of Joplin to furnish light and water. But in the view we take of the main question in the case, it is unnecessary to go into those questions.

Plaintiff's purpose is to maintain a dam across Shoal creek, in Newton county, on land owned by it on both sides of the creek, to gain a water power to run its works to manufacture gas and electricity to be transmitted to Joplin, Webb City, and other cities in the vicinity, and their inhabitants, the consequence of which will be to obstruct the flow of the creek, flood adjacent lands, and inflict damage on the property owners in the vicinity, compensation for which the plaintiff offers to pay when the amount is duly ascertained as in the statute above mentioned is prescribed.

The vital question in the case is, does our statute which authorizes a person to exercise the right of eminent domain to condemn private property for the purpose of building and maintaining a milldam embrace in its purpose a private business corporation, organized to furnish light and water, for pay, to neighboring cities and their inhabitants? In going straight to this question, we may, for the purpose of this case, concede, without so deciding, that the use of property in furnishing light and water to a city is a public use. But it is not every corporation whose occupation is that of serving the public that is entitled to condemn and take or damage private property for its use. Many corpora-

tions whose whole revenues are derived in serving the public have no right of eminent domain. Street railroad companies serve the public, and their machinery and appliances are public utilities. If the plaintiff in this case may exercise the right of eminent domain to enable it to generate electricity for the purposes it has in view, a street railroad company may condemn, take, and damage private property, under the terms of the statute in question, to enable it to utilize a water power anywhere in the state to transmit the power by wire to the city to run its street cars; and in such case the railroad company's dam would be as appropriately called a "milldam" as the dam that the plaintiff in this case would erect. The right of eminent domain does not come merely from the character of the business, but arises only in legislative grant, and is to be exercised only in the manner prescribed by law. Section 21, art. 2, Const. It is a sovereign power, to be used only by the sovereign, or by one on whom the sovereign has conferred it for a particular use; and when conferred it is to be treated as an invasion of the rights of the individual whose property is to be taken, and therefore to be strictly construed. The Legislature has authorized the taking of private property without the consent of the owner for some public uses, but not for all.

The statute we now have to construe authorizes the taking and damaging private property for the purpose of building and maintaining a milldam to gather water power to run a public mill. Are the plaintiff's works of the character that constitute them a public mill, within the meaning of that act? A learned text-writer, laying down the rule that contemporary history is to be consulted in construing a statute, quotes from the Supreme Court of the United States in *U. S. v. Union P. Ry.*, 91 U. S. 72, 23 L. Ed. 224: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." Black on Interp. L. p. 212. The statute in reference to mills and milldams first appears in our books in the form of an act approved December 3, 1822 (1 Terr. Laws, p. 948, c. 392). The provisions of that act have been brought forward with little change, and have appeared in every revision from and including that of 1825 down to that of 1899. If we go back to 1825, and think about mills and milldams as applicable to the necessities of the country then, we can have no doubt as to the kind of mills the Legislature had in mind when it enacted this law. Grist-mills were the only kind the people of this state in those early days had any practical familiarity with. When they used the word "mill," it was in that sense. And that is the original and only natural meaning of the word. The signification that is derived from its modern application to various manufac-

turing machines is artificial. It is like the appropriation of the word "industrial" in an exclusive sense to manufacturing occupations, as if it distinguished them from agricultural or other pursuits. It is an artificial and arbitrary use of the word. Webster thus defines the word "mill": "An engine or machine for grinding or comminuting any substance, as grain by rubbing or crushing it between two hard, indented surfaces, generally of stone or metal. * * * In modern usage, the term 'mill' includes various other machines and combinations of machinery, which resemble the flouring mill, to which the term was first applied, not in its circular or grinding action, but in the more general one of transforming some raw material by mechanical processes into a state or condition for use." That is substantially the definition given also in 20 Am. & Eng. Ency. L. 674. But even in the modern application of the word it is not used to include all kinds of machinery. We hear the term "sawmill," "cotton mill," "woolen mill," "silkmill," but we never hear "gasmill," "electricity mill," and we never hear gasworks or electricity works or waterworks called "mills." The statute, however, uses the term "mill and other machinery," but that term in that connection does not include all manufacturing machinery. "Mill and other machinery," as there used, means mill and other machinery ejusdem generis. The same learned text-writer from whom we have above quoted says: "The words of a statute are to be construed with reference to its subject-matter. If they are susceptible of several meanings, that one will be adopted which best accords with the subject to which the statute relates." Black on Interpretation of L. p. 125. By "other machinery," therefore, the statute means machinery that is appurtenant to the mill proper, as bolting machinery, grain elevators, etc. There are no express words in that chapter requiring the mill that the dam to be erected is to run shall be a public mill, yet that is taken for granted, as though the Legislature deemed it unnecessary to say that the power given to one man to take or damage the property of another was not given him for his private use. That chapter concerns only the exercise of the power of eminent domain to enable one to build and maintain a dam to run a public mill. It confers the right on conditions, and prescribes the terms on which it may be acquired and used, and the conditions on which the dam may be maintained; but the Legislature reserved to the next succeeding chapter, which was of twin origin and is of equal age with the preceding one, the function of defining what the term "public mill" means and how it should be operated. 2 Rev. Laws 1825, p. 591: "All mills now in operation or which may hereafter be put in operation, within this state, for grinding wheat, rye, corn, or other grain and which shall grind for toll, shall be deemed public mills." Rev.

St. 1835, p. 404: "All grist mills which grind for toll are hereby declared public mills. Every water grist mill that has heretofore or shall hereafter be built and established on any water course, by authority of any statute or lawful order of any court, is hereby declared to be a public mill and shall grind for customers at least four days in each week." Substantially the same definition is contained in each revision down to that of 1889, when it is in these words: "Sec. 7024. Public Mills. All grist mills which grind for toll, and all water grist mills, built on any water course by authority of any statute or order of any court, are hereby declared to be public mills, and shall grind for customers at least four days in each week." Same section 8756, Rev. St. 1899. Then follow in each volume regulations of tolls, and the manner of conducting the operation of the mill. That is the definition of a public mill, in reference to the subject of obstructing a water course, as approved by this court in *McIntosh v. Rankin*, 134 Mo. 340, 35 S. W. 965. The statute just quoted is of contemporaneous legislation relating to the same subject as that contained in the chapter conferring the right to condemn property for the purpose of building and maintaining a dam, and the mills there referred to and defined are the only mills for the building of which the right or eminent domain is conferred. Not only is the machinery of plaintiff not a mill, but the manner of conducting its business, its compensation for its service, and its dealing with the public are all matters which, if under any statutory regulation at all, are not regulated by the terms of the statute now under discussion.

There are other subjects discussed in the briefs, but as we are satisfied that plaintiff's works do not come within the meaning of the term "mill and other machinery," as contemplated in the statute under which the plaintiff seeks to exercise the right of eminent domain, there is no necessity for further discussion.

The judgment of the circuit court is affirmed. All concur.

HEYWORTH et al. v. MILLER GRAIN & ELEVATOR CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

SALES—CONSTRUCTION—TECHNICAL WORDS—EVIDENCE—DEPOSITIONS—USE IN SUBSEQUENT SUIT—CUSTOMS—KNOWLEDGE.

1. Where pleadings in another suit, in which depositions were taken, were not preserved in an appeal record, and the depositions appeared to be taken in a suit between the same parties, and to relate to the same subject-matter, the overruling of an objection to the admission of such depositions in the suit at bar on the ground that the previous action involved different issues will not be reversed.

2. Where words used in correspondence relating to the exportation of grain were unusual technical trade terms, parol expert evidence as to the meaning of such terms was admissible.

3. Where, in an action on a contract for the exportation and sale of corn, a custom of the trade, which limited the cargo to 10 per cent. under or over the amount stipulated for, and entitled the consignee to reject the cargo if such percentage was exceeded either way, was shown to have been as extensive and general as the trade itself, and defendant was familiar with the customs of the business, he was bound by such custom.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by Thomas B. Heyworth and others against the Miller Grain & Elevator Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Plaintiffs are partners composing a firm of merchants in Liverpool, engaged in the grain trade. Defendant is a corporation in St. Louis, engaged in like business. In 1892 the two concerns had transactions together involving shipments of corn by defendant at St. Louis to plaintiffs in Liverpool. Out of these transactions disagreements have arisen between the parties, which have led to this suit. The plaintiffs' petition is in three counts, each relating to a separate transaction. The cause was by consent referred to Fred. A. Wislizenus, Esq., to try all the issues. The findings of the referee were for the plaintiffs on the three counts. Exceptions to his report were overruled, and judgment for plaintiffs was rendered in accordance with his findings for the sum of \$5,947.17, from which judgment the defendant has appealed.

Rassieur & Rassieur, for appellant. Lee W. Grant, for respondents.

VALLIANT, J. (after stating the facts). No assignment of error is made to the rulings and judgment of the trial court in so far as they relate to the first and third counts of the plaintiffs' petition, but the rulings and judgment as they relate to the cause of action stated in the second count are complained of. The essential difference between the plaintiffs and the defendant lies in the construction that each party places on the contract under which the grain mentioned in the second count was shipped. The plaintiffs maintain that it was a contract for a cargo shipment, while defendant holds that it was for a parcel shipment. The decision of that question is the decision of the case. The terms "cargo" and "parcel," as relating to the trade in which these parties were engaged, are technical, and expert testimony from both sides was heard by the referee to explain their meanings. We think the testimony sustains the referee in his understanding of the meaning of these terms, and, as his definition is so clearly expressed in his report, we quote it:

"The most important matter in this inter-oceanic trade bearing on this case is the distinction between 'parcels' and 'cargoes' with the special law as to 'cargoes' established by the customs. A 'parcel' sale is of a definite quantity of grain placed in an ocean vessel with any other freight, to be delivered at a definite port to which the vessel is bound by its charter. It is the ordinary sale transaction, the special customs of which trade between Liverpool and America do not concern us in this matter. The essential feature of a 'cargo' transaction is that the whole purchase must go in one vessel, which carries no other freight, in order that the whole purchase may be handled without any complications by the purchaser. This vessel is consigned to some convenient port, which need not be a grain market; as, for instance, Cork, 'for orders.' On arrival at this port the vessel finds orders from the purchaser to proceed to some defined port and unload. The limits as to selection of such other port are fixed in the contract. Of course, the charter party of the freighter must conform. The agreement usually covers ports in the United Kingdom, as also a portion of the European continental seaboard. This flexibility as to cargoes, this opportunity of sending them to the best market on their arrival, with information beyond possibility of knowledge when purchase was made, and even when the grain left America, renders cargoes particularly desirable at Liverpool. The cargo contracts command a premium over the market price of 'parcel' grain, and this, too, spite of the fact that freight to the point of ultimate delivery is almost sure to be somewhat higher than in case of direct shipment to that port. A contract for a cargo calls for a definite amount of grain; as, say, 12,000 quarters. The custom of the trade has fixed the limits within which the amount in the bill of lading may vary from the amount fixed by the contract at 10 per cent. of the contract amount. For instance, on a cargo contract for 12,000 quarters, any amount between 10,800 quarters and 13,200 quarters is a proper tender. If, however, the variance either way exceeds the 10 per cent. though but a trifle, the purchaser has the right to refuse to accept such a cargo as a proper tender under the contract.

"Attention must be called to the superior advantages of ocean bills of lading over inland bills of lading in this grain traffic across the Atlantic. Even as regards parcels, ocean bills of lading are much more satisfactory to the Liverpool merchant than our through inland bills issued by some railroad. Contracts pass from hand to hand in the Liverpool market. Precision is essential. Anything outside the routine form is destructive of negotiability. Technical irregularity as to a note, or cloud, however frivolous, on the title of realty collateral to the note, makes such papers troublesome to handle here. It is easy for us, who study this ques-

¶ 2. See Evidence, vol. 20, Cent. Dig. §§ 2104, 2105, 2126.

tion from the records before us, to appreciate the fact that in a world market, such as Liverpool, a railroad bill of lading from St. Louis calls up doubts and presents possibilities which seriously interfere with its market value. It seems, however, that parcels are shipped at times from St. Louis to Liverpool, but the evidence makes it clear that it is impracticable, if not impossible, to ship a cargo on an inland bill of lading."

The testimony shows that late in December, 1891, or early in January, 1892, a Mr. Gilchrist, representing the plaintiffs, was in St. Louis, and held several conversations with defendant in the person of Mr. Miller, looking to the establishment of business relations between the parties. In these conversations, according to the testimony of defendant, the subject of ocean and inland bills of lading was discussed; Mr. Gilchrist at first insisting on ocean, but finally agreeing to inland, bills of lading. On January 27, 1892, plaintiffs mailed the following letter to defendant, which it received on February 9th.

"Liverpool, January 27, 1892.

"Messrs. Miller Grain & Elevator Co., St. Louis—Dear Sirs: Our representative, Mr. Arch Gilchrist, advises us that he has had the pleasure of meeting your president, and has had some conversation with reference to export business. If, as we gather from the tenor of his advices, you are fully equipped to do this business, we have no doubt but that we could work with advantage. The drawback to grain business from interior points is the difficulty of sellers giving Ocean Bills of Lading, which are a necessity for satisfactory business. If you can arrange to give us Ocean B/L for anything you sell us, the business can be done, but if not, it would appear to be a necessity that the business should go through houses at the Seaboard. The delays and shortages, etc., which at present accompany thro' Bills of Lading business are matters over which we have no control, and they are consequently risks and liabilities, which we hardly feel ourselves called upon to accept. At present we do business with many of the Seaboard houses to whom you are sellers, and there is really no necessity for these intermediates if the business is properly looked after. We should imagine that you have competent agencies, etc., to properly care for any of your shipments.

"We await your further advices and shall be pleased to have your cable code.

"As regards parcel business, we should prefer a commission of 1% to be included, and as regards cargo business a commission of 1½%, as in the case of the latter we have to return ½% to the buyers."

"Yours truly,

"[Signed] Wm. Moore & Co."

On February 11th defendant received the following cablegram from plaintiffs: "We are offered subject to your immediate reply

by cable February and March shipments 20s. 6d. per quar. Cork orders. We charge you one per cent. commission—12,000 quarters. American Rye terms." The last words, "American Rye terms," have a technical meaning, understood by the parties, relating to a point not in dispute, and may be dropped out of consideration. On February 12th defendant answered by cable: "We accept your offer 20/6 12,000 corn." On the same day plaintiffs cabled: "We confirm same. 12,000 cargo 20/6. Orders February and March shipments. American Rye terms. We charge one per cent. commission. Say port anything less direct. Please telegraph us early." "Say port anything less direct" was shown by the evidence to mean an inquiry whether there might be a reduction in price if the corn should be ordered directly to some port, instead of going to Cork for orders. On February 13th defendant cabled plaintiffs, "Might reduce direct port 3d." Plaintiffs, on the same day, replied by cable: "Make contract 20/3 direct U. K. 20/6 orders or continue direct." On February 15th defendant cabled: "Contracted Cork orders. Please telegraph early port wanted. Will change if possible." On same day plaintiffs cabled: "We confirm your arrangement. Give date of sailing and name of vessel carrying." Nothing further passed in reference to a change to a direct port, and the contract stands as originally specified, "Cork for orders." In addition to those cablegrams, the defendant wrote to plaintiffs (received February 11th) as follows: "As result of today's cables, we beg to confirm sale to you 12,000 quarters No. 2 corn 10% more or less at 20/6, Cork for orders, your commission 1% Rye terms, February or March shipment. This corn is now at Norfolk and we will arrange for vessel by to-morrow or next day and expect to ship it all within a week." Plaintiffs wrote by mail to defendant, under date February 13th, in which was the following: "With regard to the cargo, we must point out that you have been in your messages very sparing of information as to the terms on which you sell. You have not even up to the present given us the port from which you intend to ship although we have asked for it two or three times. It is most important in the case of cargoes that we should have full particulars, as we cannot enter into contracts for these larger risks with buyers here leaving anything indefinite. These cargoes are turned over ten or twenty times and the result generally is that at least one buyer makes a stiff loss, and if there is any discrepancy in the terms of the contract or charter party or any other particular he takes the opportunity to make trouble, and if possible to get out of his bargain and loss."

The evidence on the part of the plaintiff tended to show that one of the characteristics of a cargo transaction in the export grain trade from America to England was

that a variation in quantity of grain shipped of 10 per cent., more or less, but strictly neither more nor less, was allowed the seller; that is, in a sale of a cargo of 12,000 quarters, the seller might tender, and the buyer was bound to accept, a cargo varying from 10,800 quarters to 13,200 quarters, and that such a tender was a fulfillment of the seller's contract. The allowing of this variance was accounted for as a necessity arising out of the fact that the seller had to take the weights as they came to him from the West, which were liable to vary from the correct weights when tested in the elevators. Defendant conceded that this 10 per cent. variation was an allowable feature of its transactions with the plaintiffs, but its testimony was that that was one of the terms agreed on with Mr. Gilchrist, and applied as well to parcel as to cargo sales.

As in fulfillment of the contract evidenced by the foregoing cablegrams and letters, defendant, on February 16th, shipped to plaintiffs 15,996 quarters of corn under a railroad through bill of lading from St. Louis to Liverpool, and drew on plaintiffs for £10,593, attaching draft to the bill of lading. The Bank of Commerce in St. Louis discounted the draft for defendant, and the same was presented to plaintiffs in Liverpool March 1st, with the railroad bill of lading attached; whereupon plaintiffs cabled defendant: "Shipment 16 ulto. will not fill 12,000 contract. Cannot accept draft. Documents untenderable to buyer. Telegraph quick. Waiting reply. Have you Steamer's B/L? What is steamer's name?" To which defendant replied by cable same day: "Accept draft as made. Sell surplus our account. Railroad reports expect commence loading the seventh. They will forward you separate ocean B/L 12,000." On receipt of this, plaintiffs accepted the draft. Plaintiffs answered same day: "Must on no account exceed 13,200 first cargo. Ship surplus second or ship Liverpool by steam. Pending receipt steamer's B/L we will protect your draft. Confirm." On March 2d defendant cabled: "Confirm. Send ocean B/L for 13,200." On March 3d defendant cabled: "Telegraph us fully at our expense shipping instructions. Will have ocean B/L and insurance made accordingly." After this correspondence, defendant forwarded in the steamer City of Gloucester 13,725 quarters under two bills of lading—one for 13,200 quarters, the other for 525 quarters; the balance of the 15,996 quarters was forwarded in another vessel. These ocean bills of lading were obtained from the steamer by the railroad company, who forwarded them to a bank in Liverpool to be delivered to plaintiffs in exchange for the railroad bill of lading, which was done. On March 18th defendant cabled plaintiffs how the shipments were made, and plaintiffs replied: "You have not carried out shipping instructions. Quantity shipped is not in accordance with contract." On 21st of March defendant cabled,

"Sell 400 quarters excess Gloucester our account," to which plaintiffs replied, "We cannot arrange as suggested."

When the corn arrived in Liverpool the market had declined, and the plaintiffs, treating it as a consignment, sold it at the then prevailing rate, 19s. 6d. The referee, sustaining the plaintiffs in that theory, stated the account between the parties relating to the transaction by charging the defendant with the amount of the draft that the plaintiffs paid and a few small items not disputed, and crediting it with the proceeds on the sales of the corn, which resulted in a balance in plaintiffs' favor of £805 5s. 5d. Concerning these figures, defendant, in its briefs, says, "If the theory is correct, then the amount may be taken as correct." If, therefore, the referee was correct in his interpretation of the contract, he was correct in the amount stated by him. The plaintiffs' testimony tended to show that on February 26th they sold this contract as a cargo contract at 21 shillings, but when they received the cablegram of March 18th, informing them as to how the shipment was made, seeing that they could not deliver it as sold, bought it back at the rate then prevailing, 21 shillings 7½ pence. In the profit they would have made on the sale and the loss they sustained in buying back, plaintiffs' figures show that they suffered to the amount of £675 in addition to the £805 5s. 5d. the referee found to be due them on the transaction, but the referee found against them on that contention.

There was in the defendant's answer a counterclaim, founded on the theory that the transaction in dispute was a parcel sale, and the plaintiffs were chargeable in the account with 13,200 quarters at 20s. 6d. On that issue the referee found for the plaintiffs.

A large part of the plaintiffs' testimony was in the form of depositions taken in another suit between the same parties, and, when offered, defendant objected "on the ground that they were incompetent and improper as evidence in this case." The objection was overruled, and exception taken. That ruling is now assigned as error, the specification being that the depositions were incompetent because taken in a former suit, involving different issues; citing in support of the contention *Borders v. Barber*, 81 Mo. 636, where it is said: "Whilst it cannot be maintained, in admitting depositions taken to be used in another trial, the complete mutuality is required as in case of judgments, yet the general rule so far applies that the issues in both cases must be the same." The pleadings in the case in which the depositions were taken are not in this record, and therefore we are not informed as to what issues were contained; but the trial court was in a better position than this court to pass on that question, and we must presume it did so in the light of the pleadings in the case. At all events, the burden is on the appellant

to show that the court committed the error complained of. Depositions taken in another suit between the same parties may be read in this suit if they concern the same subject-matter. *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869. Judging from the depositions themselves, they relate to exactly the same subject that is here in dispute. We see no error in the court's ruling on that point.

Objection is urged to the evidence relating to the proper meaning of the words employed in the correspondence on the ground that it is the province of the court, and not of the witnesses, to construe the contract. On this point we are referred to *Kimball v. Brawner*, 47 Mo. 398. In that case the court said: "No usage, however general and well understood, can be permitted to control the terms of a special contract, where the subject-matter of the contract and its terms are, as in this case, clear of all doubt and obscurity." But in the same connection the court adds: "Where the subject-matter of a contract is in doubt, extrinsic evidence may doubtless be employed to establish facts and circumstances showing the true subject of the contract. So, when a new and unusual word is used in a technical or peculiar sense, as applicable to any trade or calling, or to any particular class of people, evidence of usage may be employed to explain and illustrate the unusual word or technical term." The law, as there expressed, sustains the ruling of the referee in the admitting of this expert evidence. The terms used in those cablegrams were exceedingly technical, and were applicable, in the sense in which they were used, to the trade in which these parties were engaged. Without that testimony no one not schooled in the technicalities of the trade would understand the meaning of the words the parties employed in dealing with each other.

It is also contended that the expert testimony was incompetent as tending by usage to alter the rights of the parties under the contract. In *Southwestern F. & C. Press Co. v. Stannard*, 44 Mo. 71, 100 Am. Dec. 255, it was said: "A custom, to be good, must be general, uniform, certain, and notorious; and, to be binding on parties to a transaction, must be distinctly known to them, or so universal and general in its character that knowledge may well be presumed. Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all of those particulars which are not expressed in the contract. But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law." The same principle was declared in *Ober v. Carson*, 62 Mo. 209. The testimony for the plaintiffs showed that the usages in the trade

referred to were as extensive and general as the trade itself; that they were understood by and governed the conduct of the parties engaged in the business, not only at one end of the line, but at the other also—not in Liverpool alone, but in St. Louis as well. Indeed, from the very nature of the business, it could not be intelligently conducted if the party on one side acted on one theory and the party on the other side on another. It was not a custom of the Liverpool trade, governing a business with both ends in Liverpool, but a custom of merchants in Liverpool and St. Louis, trading across the ocean with each other; and it was shown to have been known as well in St. Louis among men engaged in exporting grain to Liverpool as it was in Liverpool among men engaged in receiving grain from St. Louis.

Appellant says in its brief that testimony as to the usage should not have been received, "because it was not shown that defendant had any knowledge of such foreign usage." If it was a usage of the trade, the defendant was bound to know it when it entered the trade. A merchant is chargeable with knowledge of the usages of a business in which he holds himself out to the public as competent to be dealt with. Besides, the defendant, in the person of Mr. Miller, testified that it did know the usages of the trade. "I have been in the grain export business most everywhere, exporting and shipping in this country and buying grain. In that way I have become familiar with the terms ordinarily used in the export business, and the methods and customs which pertain to that business." Then the witness proceeded to testify as an expert, defining the technical terms in question, and explaining the customs of the export trade. In doing so his testimony to some extent conflicted with that of the plaintiffs' expert witnesses, with that, even, of defendant's expert witness Culpepper, who, when the whole case was given to him in a hypothetical question, answered that the contract called for a cargo. We do not deem it necessary to discuss the evidence in detail, but it is sufficient to say that by a fair preponderance it justifies the referee in all his findings.

We see no error in the record, and the judgment is affirmed. All concur.

CHANDLER v. KANSAS CITY, MISSOURI, GAS CO.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

SERVANT—INJURIES—LIABILITY OF MASTER.

1. Cinders from defendant's factory were carried in cars along a track some 80 feet, and dumped. The track was laid on longitudinal sills elevated some 4 feet above the natural level of the ground. Defendant permitted concerns in the vicinity to take ashes from the end of the dump, to be used in filling up low ground of their own. An employé of one of these other concerns, just about dark, filled his

wagon with ashes which he dug out from the side and under the track, making a deep hole. No one saw him do it, and the evidence was practically uncontradicted that he had no authority to take ashes from that point. An employé of defendant, returning with a car from the dump later in the evening, fell into the hole, and was injured. Held insufficient to show negligence in defendant.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by Wm. F. Chandler against the Kansas City, Missouri, Gas Company. Judgment for plaintiff, and defendant appeals. Reversed.

Action for damages for personal injuries sustained by plaintiff while in the service of defendant, and which plaintiff alleges were the result of defendant's negligence. Defendant is a manufacturer of illuminating gas, having several factories in Kansas City, near the intersection of Front and Harrison streets; one of which is on the south side of Front street, and another one on the north side. There is an ash pit in the basement of the latter, into which cinders and ashes are deposited, and thence removed in a car up an incline to a point about 35 feet east of the factory, from which point the car is pushed by hand down an incline to a track along a level on which it is further pushed by hand eastward 80 or 100 feet, where the ashes and cinders are dumped, and the car is then returned to the ash pit for another load. The business was so extensive that the ash pit had to be cleaned out three times a day, and five car loads, containing a cubic yard each, were taken out at each cleaning. The cinders were being used by the defendant to raise the surface of the ground in front of the factory. The track along which the car was pushed was made of iron rails laid on longitudinal sills elevated four to six feet above the natural surface of the ground, but at the time of this accident the process of filling had progressed so far that the space under the track and on both sides to a considerable distance north and south had been filled with cinders and leveled. The process of filling was being extended eastward, and, when the ground at the end of the track was filled and leveled north and south as far as desired, the track would be extended further east to continue the process. The plan of the defendant was to use the cinders from this factory for this filling purpose. But the factory south of Front street produced cinders in considerable quantity also, which were not so convenient to dispose of, and those cinders the defendant sold to concerns in the vicinity, who hauled them away in wagons, and used them for filling up low grounds of their own. It sometimes occurred that there were not enough cinders output from this south factory to meet the demand, and when that was the case the defendant allowed the wagons to take cinders from the north side. To do this the usual course was for the wagons to go to the east

end of the track above described, and take the cinders from the dump. Among the concerns hauling cinders from these gas works was a lumber company, whose driver was named Knight. He had been hauling there a considerable time, usually getting his loads from the south factory, but also, when there were no cinders there, getting there from this dump. He was so engaged on December 27, 1899. He had hauled one load from the dump in the afternoon of that day, and returned about 5 o'clock for another. He loaded his wagon at the dump, but he experienced some difficulty in hauling it from that point, and thereupon he threw out the load he had taken, and drove his empty wagon west along the north side of the track about 60 feet from the dump, and there stopped and filled his wagon with cinders which he dug out from the side and under the track, making a hole or pit under the track about 4 feet deep and 6 feet long. It was about half past 5 o'clock when he did this, and it was just about dark. No one saw him do it. He drove away in the dark, leaving the hole as he had dug it. Plaintiff was in the service of the defendant as a common laborer. Cleaning out the ash pit and pushing and dumping that cinder car were not his regular duties, but he was frequently called on to do it, and was familiar with the work. He had made several trips with the car on the day in question, when he was ordered to another part of the works on some duty, and was to return to the cinder pit at 6 o'clock to clean it out. He did so, and, passing along the south side, pushed a car of cinders out to the end of the track, and dumped it, then returning, walking in the track, pushing the car, he fell into the hole which Knight, the driver of the lumber company, had recently made as above mentioned, and received severe injuries. Knight, as a witness for plaintiff, testified that the orders from the defendant's man to him was to haul cinders from the south side, but when there were no cinders there, for accommodation, he could go on the north side, and get them, and he did so, and also other haulers; all of them usually going to the end of the dump for their loads. The witness, in undertaking to tell what orders he had from the defendant's superintendent as to where he could take cinders from, used this expression, "We could get them where we pleased, and all we had to do was to come to the office and pay for them." But on the further examination he said that no one pointed out to him where he was to get the cinders, except that he was told he could go over to the north side and get them. "Q. But you went over there, and took them from the end of the dump, for several days? A. Yes, sir. Q. And you saw others taking them from the end of the dump? A. Yes, sir. Q. That was the place where it would do no injury to the track, was it not? A. Yes, sir. Q. On this occasion you had a

team of young mules that did not work very well, or at least got stuck with a load in the hole at the end of the dump, and you then unloaded, and drove up, and made this excavation under the track? A. Yes, sir. Q. Without any authorization from anybody connected with the gas company? A. Yes, sir." And on further examination by plaintiff's attorney: "Q. And he told you that, when the cinders gave out at the south dump, to go over to the north dump, where the cinder track was, and get them whenever you pleased? A. No, sir; he did not. Q. You disobeyed his instructions? A. He did not tell me I could get them whenever I pleased. He told me I could go around there and get my load." The evidence showed that the ground along this track which had been raised by the deposit of cinders was leveled off, and used for storing gas pipe by defendant. The evidence for the defendant was to the effect that the men hauling cinders were directed to get them from the south side, but when there were no cinders there they were told that they might go to the end of the dump on the north side and get them, and the defendant never knew that any cinders were taken from the north side except from the end of the dump. Defendant knew nothing of this hole that Knight dug in the track until after the accident, which happened about an hour after the hole was dug. It was after dark, and no one in the employ of defendant had occasion to go out there, except the man who pushed the cinder car. At the close of the plaintiff's evidence the defendant requested an instruction to the effect that the plaintiff was not entitled to recover, which the court refused, and defendant excepted. The case was given to the jury under an instruction that declared the defendant liable if the defendant authorized Knight and others to take cinders from the vicinity of the cinder track, and in doing so "the defendant knew, or as a reasonably careful and prudent person might have known, that in doing so said persons would be liable to excavate cinders near or under said cinder track," etc. And at the request of the defendant the court instructed the jury that there was no evidence that defendant, or any of its agents, "knew, or by the exercise of ordinary care might have discovered, before the plaintiff was injured," that the excavation had been made. There was a verdict and judgment for plaintiff for \$7,500, from which defendant appeals.

Gage, Ladd & Small, for appellant. Scarritt, Griffith & Jones, for respondent.

VALLIANT, J. (after stating the facts). The court should have given the instruction asked by the defendant in the nature of a demurrer to the evidence. There was no evidence tending to show any negligence on the part of defendant. The court correctly instructed the jury that there was no

evidence that defendant knew, or could have known by the exercise of ordinary care, that the hole had been dug in the track before the accident occurred; yet an instruction given at the request of plaintiff authorized the jury to convict the defendant of negligence if a reasonably careful and prudent person might have known that the persons hauling the cinders were liable to dig them out from under the track. On that theory the defendant, under the circumstances in the case, would not be a reasonably careful and prudent person, if, in granting permission to the men to haul cinders from the end of the dump, it trusted that they, in availing themselves of the permission, would act as reasonable men usually act under like conditions, or that they would at least refrain from acts of willful wrongdoing. Such a rule of law would impose on one in defendant's position the duty of exercising the utmost care which distrust could suggest, and unceasing vigilance. Ordinary business could not advance under such a rule. The learned counsel for respondent, in their brief, say, "It is a far call from the certainty that a thing is to happen to the bare possibility that the thing is to happen." All the shades of difference between the certainty and the bare possibility there referred to are covered when we say that the thing is liable to happen. It may be probable or improbable, a reasonable or an unreasonable expectation; yet, if it may possibly occur, it is liable to occur. These men, permitted to enter defendant's premises, and load their wagons with cinders, were liable to do just what this man did; more liable, perhaps, to do so when, as in this case, darkness assisted him. But the fact is that, although a number of men from different concerns—this man among them—had been hauling cinders from there for a considerable time, no one had ever done such a thing before, and there is nothing to suggest that such a thing was at all likely to occur. The utmost caution that distrust of mankind could suggest might possibly have anticipated it, and unceasing vigilance have prevented it; but the law required of defendant no such degree of caution and no such vigilance. Reasonable care is all that the law demands. In *Fuchs v. St. Louis*, 167 Mo. 620, loc. cit. 645, 57 S. W. 610, 57 L. R. A. 136, this court, per Tittman, J., quotes with approval Ray on Negligence, pp. 133, 134: "A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of the probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chance, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things."

Reference is also made in that opinion to Webb's Pollock on Torts, pp. 45-8, from which is quoted: "This being the standard, it follows that if, in a particular case (not being within certain special and more stringent rules), the harm complained of is not such as a reasonable man in defendant's place should have foreseen as likely to happen, there is no wrong, and no liability." See, also, *Beasley v. Transfer Co.*, 148 Mo. 414, 50 S. W. 87, and *Stone v. Railroad*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 704. Applying the law as above quoted (with the statement of which we are entirely satisfied) to the facts of this case, even as made out by the plaintiff's evidence alone, there is nothing to show a neglect of duty on the part of the defendant, and nothing to render it liable. True, the witness Knight said he could get cinders from where he chose, but, when questioned on that point, he said that no one had told him he could do so, and he knew that the place they were expected to get their loads from was at the end of the dump. He also said that he had before taken cinders from the side of the track; but he was very indefinite on that point, and, if he did so, there is nothing to show that defendant knew it. The formation of the raised surface of the ground and its obvious use showed to any reasonable man that defendant would not knowingly allow a pit to be dug under the track, as was done. The evidence of defendant was explicit that the men were ordered to get the cinders from the end of the dump, and that, so far as defendant knew, or could reasonably have known, that was done. The evidence of plaintiff, though not so explicit, is yet practically to the same effect.

The instruction asked by the defendant in the nature of a demurrer to the evidence should have been given.

The judgment is reversed. All concur.

STEVENS et al. v. ANNEX REALTY CO. et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

DEEDS—COVENANTS—RUNNING WITH LAND— PURCHASERS—NOTICE—PERPETUITIES.

1. The owners of land laid the same out in private streets, parks, and building lots, and conveyed the streets and parks to trustees, with authority to improve them and pay all taxes, and covenanted for themselves and those who might hold the lots through them that the lots should be forever chargeable with all assessments made by the trustees for the payment of taxes and improvements. *Held*, that the covenant ran with the land.

2. Though the covenant did not run with the land, a purchaser with notice was bound to observe it.

3. Subsequent purchasers claiming through a recorded deed with covenants are chargeable with notice of them, and occupy the same position as to them as the original grantee did.

4. The owners of a tract of land laid out the same in building lots, parks, and streets, and

conveyed the streets and parks to trustees, who were authorized to make improvements and pay all taxes, and for such purposes to make assessments against the lots. Provisions were made for filling vacancies among the trustees in case of death, etc. *Held*, that the conveyance to the trustees did not violate the rule against perpetuities, since, while the beneficial interests in the streets could never be alienated independently of the lots, there were persons in being who could by their concurrence convey an absolute fee to the streets, etc.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Suit by A. T. Stevens and others against the Annex Realty Company and others. From a decree for complainants, defendants appeal. Affirmed.

This is an equitable proceeding, the purpose of which is to enforce against defendant, the owner of a lot, an assessment made upon the lot, in pursuance to the covenant of a deed through which it claims title, and to declare the assessment a lien upon the lot.

The case was submitted to the court upon an agreed statement of facts, which shows that on April 10, 1885, Angus G. Kennedy and Annie E. Kennedy, his wife, and Willis H. Plunkett and his wife, made a conveyance to Fry, Tebbetts, Croy, Doan, and Pye, as hereinafter stated. The deed of conveyance recites that whereas, the grantors are the owners of certain tracts of land, containing 45½ acres; and whereas, in order to improve and dispose of the land, they have determined to lay out certain private streets and two parks, and dedicate said streets and parks to the use of the persons who may purchase and improve the lots in said subdivision, and have caused the remainder to be laid out into 58 building lots; and whereas, they desire to secure to persons purchasing the lots the enjoyment of the parks and private streets upon the terms and conditions as set out in the deed; now, in consideration of \$5, they convey the two parks designated as "Clifton Park" and "Frisco Park," and the private streets and avenues designated as "Simpson Avenue" and "Bowman Avenue," to the said Fry, Tebbetts, et al., in trust, to improve said avenues and parks, giving them power for that purpose to improve and ornament the parks, and to keep the roads and parks in good order and repair, empowering them to pay all taxes, public or local. The deed provides for the enjoyment of the parks by the owners of the lots, under such rules and regulations as the legal owners of a majority in number of the lots may from time to time establish. It also designates the parties of the second part, to wit, Fry, Tebbetts, et al., as trustees, and provides for the filling of vacancies in case of the death or resignation of any of the trustees, and fixes the terms for which the first trustees shall hold office; provides for the election of a president and other officers, and for the holding of an annual meeting on the first Monday in March of each year. It also provides that the trustees or

their successors shall have power to collect and recover, from any party liable to pay the same, all such annual charges and assessments as are or shall be charged, levied, or assessed on said lots, or any part thereof, by law, or pursuant to the terms of the deed, or any part, and to enforce the conditions, covenants, regulations, and restrictions created by the deed, they having for their object the protection or improvement of said lots, roadways, and parks. The deed contains further provisions, substantially as follows: That the said parties of the first part, for themselves, their heirs, executors, and administrators, and also for and on behalf of all persons who may hereafter derive title or otherwise hold through them any of the building lots aforesaid, or any part of the said lots, agree to and with the said parties of the second part, and their survivor or survivors, and their successor or successors in said trust, as follows: First, that each of said building lots in said subdivision, and also the person or persons from time to time owning the same, shall forever hereafter stand and remain bound and chargeable to said board of trustees for the time being, and to such treasurer, for the payment of all levies, charges, or assessments as shall be made by said board of trustees for the purpose of paying taxes, general, special, or local, so incurred, and for the improvement of the streets and parks; and they further agree that all said assessments shall be a first lien on said respective lots, and each of them, and every part thereof; and, in default of payment at the time specified, said board of trustees may institute suits and prosecute such proceedings in law or equity as may be necessary to enforce said lien and the payment thereof, with interest from the time it became due, with \$20 in each case as liquidated damages. It further sets forth, substantially, that those covenants, conditions, and restrictions shall attach to and run with each and every building lot, and all titles and estates in the same, and shall be binding on each and every lot, and each and every owner of the same, forever. And it covenants that neither of the parties hereto, nor their heirs or assigns, or any future owner, shall or will convey or demise any or either of said lots, or any part thereof, except and being subject to the covenants, conditions, and restrictions contained in the deed; and, whether or not it is so expressed in the deed or other conveyance of said premises, the same shall be absolutely subject to said covenants, conditions, and restrictions, which shall run with and be appurtenant to said land and every part thereof. There is a further provision that the covenants, restrictions, and so forth, shall not be enforced personally against any of the parties, their heirs or assigns, unless he or they, while owners, shall have violated or failed to perform such covenants, etc. The deed provides that the trustees shall make the assessments for the purpose of paying

the taxes upon the land held by them in trust, and for the improvement of same, and provides for the manner of making the assessments. This deed was duly recorded on April 28, 1885.

On the 11th day of April, 1885, Angus G. Kennedy and wife conveyed the lots in controversy to M. B. O'Reilly, which deed was duly recorded. This deed contains a stipulation that the lots are conveyed by the parties of the first part, and accepted by the party of the second part, and his heirs and assigns, subject to the conditions, stipulations, and agreements contained in the deed of Kennedy and Plunkett to Fry, Tebbetts, et al., being the deed first above recited. And the deed further covenants that the lots conveyed are to be held, improved, and disposed of in conformity with and subject to all the provisions of said Kennedy and Plunkett's deed as if said conditions were incorporated in and made a part of the deed.

It is admitted that, at different times and dates subsequent to the conveyance by Kennedy and wife and Plunkett and wife to the trustee, said Kennedy and Plunkett did convey to sundry parties the several lots, to wit, lots numbered 1 to 58, both inclusive, and that in every conveyance of said lots, or parcel thereof, the deed from Kennedy and Plunkett to Fry et al., as trustees, was referred to, and said conveyance bound the respective purchasers to all the restrictions, conditions, and agreements contained in the deed to the trustees aforesaid. On February 10, 1897, M. B. O'Reilly and wife conveyed the property described in the petition, by deed, which omitted reference to the deed of Kennedy and Plunkett to the trustee, to the defendant the Annex Realty Company, which is now the owner thereof. It is admitted that on the 30th day of April, 1896, the plaintiffs, as the board of trustees, levied an assessment of \$5 on parts of lot 38, and \$3 on part of lot 37, being the property in controversy, under and by virtue of the power and authority set forth in the deed from Plunkett and Kennedy to Fry et al., as trustees; and that on the 30th day of July, 1897, plaintiffs notified the defendant of said assessment and demanded payment thereof.

Jno. B. Denvir, Jr., and Carter & Sager, for appellants. Young & Althelmer, for respondents.

BURGESS, J. (after stating the facts). It is not contended by defendant that a trust estate is created in the building lots in Clifton place, and that they can never be alienated, but it is admitted that they can be alienated at the will of their respective owners. Nor is there any contention that the covenant of the grantors in the deed executed by them on the 10th day of April, 1885, to Fry, Tebbetts, et al., for themselves, their heirs, executors, and administrators, and also for and on behalf of all persons who might thereafter derive title to or otherwise hold through them

any of the lots aforesaid, is in restraint of alienation and in violation of the rule against perpetuities. On the contrary, for the purpose of the present argument, defendant admits that the covenant is in itself perfectly legal, and that, if the trust is lawful, it can be enforced. But the argument is that, as the private parks and streets were conveyed to trustees, to be held in trust forever for the benefit of the lot owners, a perpetual trust, of which the lot owners are the beneficiaries, was created in said parks and streets, and that there never will be a time when either the trustees or the beneficiaries, or both together, can convey the parks and streets from the trust estate.

The law has always been that a vendor of land may restrict its use in a particular way, provided such restrictions are not against public policy, and that a covenant of this character runs with the land, when either the liability to perform it or the right to enforce it passes to the assignee or vendor of the land, if he has notice of the covenant. *Tulk v. Moxhay*, 15 Eng. Ruling Cases, 254; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *The Howard, etc., Company v. The Water Lot Company*, 53 Ga. 689; *Byers v. Trust Company*, 175 Pa. 327, 34 Atl. 629. The covenants contained in the deed from Kennedy and Plunkett to Fry et al., as trustees, passed with the land, and that all of said covenants and agreements passed to M. B. O'Reilly, defendant's grantor, by virtue of the deed to him by Kennedy and wife, of date April 10, 1885, to one of those lots, is too clear for argument. As was said in an opinion filed by the learned circuit judge who tried this case: "In the case at bar, the deed itself expressly provides that the covenants, conditions, and restrictions shall run with the land, and be binding upon the owners thereof and upon the land itself forever. The owners of the lots, Plunkett and Kennedy, being the original owners of the 58 lots, conveyed the streets and parks to the parties of the second part as trustees, and, as owners of all the lots, covenanted for themselves and all subsequent purchasers thereof that they will pay all assessments levied, and that the land shall be subject thereto, and also that the deeds made of each piece shall contain this covenant. The fact that the assessments are to be made by trustees does not in any manner affect the nature of the covenant. It is precisely the same as if Plunkett and Kennedy had, as owners, covenanted with the trustees that, for the purpose of improving the parks and private roadways of the subdivision, they and all subsequent owners would pay annually an assessment of 10 cents per front foot upon each of the lots in the subdivision, to be paid to said trustees by such owners of lots, and such charge to be a lien upon the lots and to run with the land. Indeed, it is not essential to the enforcement of restrictions and servitudes of the character here in controversy that they

should run with the land. It is sufficient that they be reasonable and not against public policy, and that the parties against whom they are sought to be enforced have notice, actual or constructive, of the conditions or restrictions. A purchaser with notice of restrictions, servitudes, or stipulations is bound to observe them, although they do not run with the land at law. *Tulk v. Moxhay*, 15 Eng. Ruling Cases, p. 254. In this case, all the conditions, restrictions, and stipulations contained in the original deed are contained in the deed of defendant's grantor, and the deed of defendant's grantor was duly recorded. Constructive notice to an assignee is sufficient to make the covenant binding upon him. Subsequent purchasers, claiming through a deed which sets out the conditions and has been recorded, are chargeable with notice of them, and occupy the same position as the grantee of that deed did." 1 Jones, Real Property, par. 782.

From what has been said, it must necessarily follow that the action of the board of Clifton Heights in levying an assessment of \$5 on part of lot 38, and \$3 on a part of lot 37, of which defendant was at that time the owner, under and by virtue of their powers and authority contained in said deed from Kennedy and Plunkett to Fry, Tebbetts, and others, against the property of the defendant, was a legal and valid assessment, and the judgment rendered in pursuance thereof, declaring the same to be a first lien upon the property owned by defendant Annex Realty Company, is a legal and valid judgment, and should be affirmed, unless the trust created unlawfully suspends the power of alienation of the parks and streets, and is in violation of the rule against perpetuities, and hence a covenant to support it unenforceable.

While there are many definitions of a perpetuity, differing as a general thing only in the manner of expressing it, one of the most satisfactory is that given by Sanders on Uses and Trusts, side p. 203, as follows: "A perpetuity may, with greater propriety, be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." "In order to understand this definition complete, the words, 'such event or period being more remote than allowed by law' should be added." Note 8, p. 203, supra; Lewis on Perpetuity, side p. 164.

That the beneficial interest in the streets and parks can never be directly alienated, or alienated independently of the lots, is, we think, perfectly clear; but that by the conveyances of one of the lots the beneficial interest in the streets and parks passes by a conveyance of any of said lots as incident thereto is equally clear.

As sustaining the contention of defendant, among the cases relied upon is *Williams v. Herrick*, 19 R. I. 197, 32 Atl. 913, wherein "a testator gave all his property, subject to a life estate, to five trustees, in trust, to erect a brick block to be forever known as the 'A. G. & A. W. Olney Block,' the remainder to be held by them and managed in such manner as they might deem for the best interest thereof, the whole to be known as the 'A. W. Olney Trust Estate.' He directed the rents and income to be divided among his heirs in the same proportions as they would inherit his intestate estate, whenever the accumulations should reach such proportions that the trustees should deem dividends advisable, and provided, further, that vacancies in the board of trustees should be filled by the probate court having jurisdiction of the will 'ever thereafter.' There was no provision in the will for a vesting of the estate, or any part thereof, in anybody at any time, except by way of the dividends to his heirs." And it was correctly held that the trust was as a perpetuity.

To the same effect substantially are the following authorities: *Adams v. Perry*, 43 N. Y. 487; *In re Walkerly* (Cal.) 41 Pac. 772, 49 Am. St. Rep. 97; *Chaplin on Suspension of the Powers of Alienation*, §§ 2-64; *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145. But that line of authorities differ from the case at bar in that there is no restriction here upon the alienation of the lots, and, by releases, or conveyances to a common grantee by the owners of the lots, these interests can at any time be consolidated in one, the consolidation thus formed being of necessity an absolute fee in possession.

In *Chaplin on Suspension of the Powers of Alienation*, § 64, it is said: "The test of alienability in any given case lies in the question whether there are persons in being who, if they wish, can convey an absolute fee in possession. The absolute fee need not be already vested in order to obviate suspension of the power. Wherever there is in being a representative for each estate, interest, right, and possibility, present and future, vested and contingent, each capable of alienating, if he wishes, the estate or interest represented by him, there can be no suspension. For the various estates and interests constitute, amongst them, the makings of an absolute fee; and if, by releases or conveyances to a common grantee, these can be consolidated in one, the consolidated estate thus formed is of necessity an absolute fee in possession. In other words, it is sufficient if there are persons in being who, by combining the several estates, rights, interests, and possibilities that they represent or are authorized to speak for, can, if they all wish to, patch together an absolute fee. It is not necessary that all the outstanding possibilities of future defeasance should be capable of conveyance or assignment. It is enough

that they may be released, or in any way extinguished or got out of the way, so that the fee may be cleared of all features that deprive it of its absolute character, and may be delivered, absolute and indefeasible, to a grantee or releasee."

There is no suspension of the power of alienation of the lots. There are persons in being who can by their concurrence convey an absolute fee to the lots, parks, streets, and alleys. The question is not as to the probability or improbability of the owners of the lots doing so, but, rather, as to their power to do so by their concurrent action if so inclined, with respect to which we think there can be no question. With this aspect of the case, there is no future limitation restraining the owners of the lots from alienating the fee simple of the property, discharged of the covenants in the deed, *inter partes*, from *Kennedy* and *Plunkett* to *Fry*, *Tebbetts*, and others; hence the covenants in that deed are not obnoxious to the rule against perpetuities.

The judgment should be affirmed, and it is so ordered. All of this Division concur.

RECTOR, ETC., OF MT. CALVARY CHURCH v. ALBERS.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

TRUST FUND—TRUSTEES—EXPRESS TRUST— GUARANTY—CONTRACT—EVIDENCE —REVIEW—REFEREE.

1. Money contributed to plaintiff, a church, was kept separate from the ordinary revenues, and treated by the vestry as a building fund for a new church, and afterwards turned over to defendant, as treasurer of the building fund. Other donations, paid to a member of the vestry, were by him given to defendant. There was no evidence that any contributor ever gave defendant authority to hold or withhold the money as a trust fund. *Held*, that defendant was not a trustee, and he was guilty of a violation of his legal duty when he refused to turn the fund over to plaintiff.

2. Defendant claimed that money in his hands as treasurer of the building fund of a church was a trust fund, which could only be used for the purpose of constructing a new church. The evidence showed that at various times he had paid out nearly one-fourth of the fund, on orders from the vestry, for general church purposes, other than for the purpose of the alleged trust. *Held*, that defendant was estopped to claim it to be a trust fund.

3. Parol evidence is not admissible to establish an express trust, under Rev. St. 1899, § 3416, providing that "all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by his or her last will, in writing, or else they shall be void."

4. Evidence examined, and *held* not to establish defendant's claim that he was to have the use of money loaned him by plaintiff "until such time as the same might be required to be paid out for the construction of a church building" by plaintiff.

5. Conclusions of a referee on questions of fact, approved by the trial court, will not be disturbed where the evidence is conflicting.

6. The vestry of a church agreed to let defendant use money in his hands as treasurer of its building fund, in consideration of his pay-

ing interest thereon, but no agreement was made as to how long he should have the use of it. At the bottom of a report subsequently made by him as such treasurer was the following guaranty, signed by a third party: "I guaranty that [defendant] will properly account for and pay over any money he may receive or have, belonging to the Mount Calvary building fund, for bills incurred in building new church, when approved by the vestry." This guaranty was accepted by the vestry in lieu of the bond originally required of defendant. Held not to constitute, as a matter of law, a contract between the church and defendant that he should retain and use the money until such time as it might be required to be paid out for the construction of a new church building.

Appeal from St. Louis Circuit Court.

Action by the rector, etc., of Mt. Calvary Church of St. Louis against Claus H. Albers. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover \$7,772.13, with 5 per cent. interest. The answer admits that the amount claimed is correct, but sets up two specific defenses, to wit: First, that the plaintiff loaned him the money, he to pay 5 per cent. interest per annum for the use, "until such time as the same might be required to be paid out for the construction of a church building for plaintiff," and that the plaintiff is not ready or able to construct such a building, and therefore the debt is not due; and, second, that the fund was contributed by various persons for the construction of a new church, and was deposited with him, "upon the terms and conditions hereinbefore stated," by the plaintiff, "with the consent and approval of the contributors to said fund, and that defendant thereby became a trustee as to such fund for both the plaintiff and said contributors, and, as such trustee, is not authorized to pay over said sum, except in payment for the construction of a new church building," and that the plaintiff has no intention of so applying said money, but intends to misapply it to other purposes. The answer then alleges a willingness "to pay over the same whenever it is needed for the purpose for which it was subscribed," and in the meantime to give any security therefor that the court may require. The reply denies that the fund was donated to the church to be used only for the construction of a new church, but alleges that its former church was destroyed by the cyclone in May, 1896, and that it owns a lot of ground at another place, on which there is a church building, but says it is insufficient and unsuitable for its uses, and that the plaintiff is ready and able to commence the erection of a new church on said lot, but is prevented from so doing because the defendant withholds its said money, which it alleges that the defendant does because of his factious opposition to the rector, and with the intent to force the congregation to discharge the rector. The reply then denies all the allegations of the answer not specially admitted. By consent of parties the whole case was referred to a referee, who found all

the issues of fact for the plaintiff, and recommended a judgment as prayed. The trial court overruled the exceptions to the referee's report, and entered judgment for the plaintiff for \$7,969.63; being the admitted amount in suit, with 5 per cent. interest added. The defendant appealed.

Jos. S. Laurie, for appellant. T. K. Skinner, for respondent.

MARSHALL, J. (after stating the facts). The case made is this: The plaintiff is a religious corporation organized under the laws of this state. The defendant was for many years a member of the vestry. Prior to the cyclone the plaintiff had two places of worship—a church on the corner of Lafayette and Jefferson avenues, and a chapel on Grand avenue at the terminus of Lafayette avenue. The church was incumbered by a mortgage. The church was owned by a corporation known as the Mt. Calvary Building Association, which had a capital stock of 200 shares, of which the defendant owned 95 shares, Joseph Franklin and George M. Wright owned 50 shares, and the plaintiff owned the balance. The cyclone destroyed the church. Thereafter, principally through the personal efforts of the rector, various persons contributed various sums of money to the church, which was kept separate from the ordinary revenues of the church, and treated by the vestry as the building fund. On July 27, 1896, the defendant was appointed by the vestry treasurer of the building fund, and ordered to give bond in the sum of \$10,000, with a trust company as surety; the vestry to pay the expense of securing the bond. On September 7, 1896, the general treasurer of the church turned over to the defendant, the treasurer of the building fund, the contributions that had been received, amounting to \$2,761.90. On April 13, 1897, the defendant, as treasurer of the building fund, reported to the vestry that he had received \$3,769.75, and had paid out on orders of the vestry for various purposes, other than for the erection of a new church, the sum of \$1,057.60, leaving a balance in his hands of \$2,712.15. He had never given bond as such treasurer, but when he made this report there was written at the bottom of the report the following guaranty: "I guaranty that C. H. Albers will properly account for and pay over any money he may receive or have, belonging to the Mount Calvary building fund, for bills incurred in building new church, when approved by the vestry of Mount Calvary Church. [Signed] J. W. Kaufman." This guaranty was accepted by the vestry in lieu of the bond originally required. In July, 1897, the mortgage on the church was foreclosed. Messrs. Franklin and Wright donated to the plaintiff their share of the proceeds of the sale after paying the mortgage, amounting to \$1,617.77, and the share of the plaintiff in such excess amounted to \$2,794.33. These

sums, amounting to \$4,412.10, were turned over to the defendant, as treasurer of the building fund. The fund in controversy was therefore made up of contributions, the donation of Messrs. Franklin and Wright, and the share of the plaintiff in the excess aforesaid. There is absolutely no evidence in the record that any of the contributors limited the use of their contributions to the erection of a church, nor that any of them constituted the defendant their trustee to hold the contributions for any such purpose. Messrs. Franklin and Wright testified that they "donated it [their donation] into the fund for the benefit of the church—the building fund of the new church—something of that kind." But there is no evidence that they constituted the defendant a trustee of their donations, nor that they even had any dealings with the defendant in that matter in any way. On the contrary, their donations were turned over to Mr. Lipman, who was acting as the agent of, and was a member of, the vestry, in looking after the interest of the church in the sale under the mortgage; and he turned their donations, as well as the plaintiff's share of such excess, over to the defendant, as the treasurer of the building fund, and properly reported his action in this regard to the vestry on July 6, 1897.

At various times prior to April 3, 1899, the vestry ordered the defendant—once or twice on his own motion—to pay out of the building fund various sums, amounting in all to \$2,259.41, for purposes other than for building a new church, and the defendant obeyed the orders and paid the money. At some time—the date is not altogether clear, but at any rate it was before April 13, 1897, when the Kaufman guaranty was delivered to the vestry—the defendant reported to the vestry that he could not get more than 4 per cent. interest for the use of the money, but that the banks charged him 5 per cent. for money when he borrowed from them, and if they would let him use the money he would pay 5 per cent. for the use of it; and he said that in this way the vestry would get 1 per cent. more interest than if they loaned it to or placed it in a bank or trust company, and would also save the expense of having to pay for a \$10,000 bond for him as treasurer of the building fund. The vestry accepted his proposition. The defendant claimed for the first time in his answer that the contract contained the further clause that he should have the use of the money "until such time as the same might be required to be paid out for the construction of a church building." And the defendant and his witness Mr. Lipman gave testimony which gave some color to that claim, but which, at best, amounted in law to only a scintilla of evidence in support thereof, as the following excerpts will show: The defendant testified on cross-examination as follows: "Q. Will you state now what you did say at that meeting about paying interest? A. I stated

that I would pay five per cent. interest on that fund. Q. That is all you stated? A. Yes, sir. Q. Is that all you said about the terms on which you would keep that fund? A. That I could not state. The statement was embodied in that agreement there, and I do not remember what was said afterward. Q. You do not remember what was said to the vestry about it? A. I could not remember the words. Q. Then you do not pretend to swear now that you said to the vestry that you would pay five per cent. interest on condition that you were to keep that fund until it was needed in the building of the new church? A. The words used I could not swear to at this late date. Q. Will you swear you used any such language as that that I have used? A. I do not remember, sir. Q. Will you swear you used any language that means the same as the language I have just used? A. I do not, sir, remember. Q. You do not remember? A. No, sir. Q. Now, is it true that all you remember about it is what you see written in that paper? A. That is about the principal recollection I have—that I would keep that fund, and allow 5 per cent. on it until used for building the new church. Q. And you annex that qualification because you find it in that Kaufman guaranty? A. No; because that was in my mind always, for the reason that all that money had been subscribed for that purpose alone, as far as I remember it." Mr. Lipman testified for defendant as follows: "Q. I will ask you how long it was stated, if it was stated, that this fund should remain in the custody of Mr. Albers—when he should pay it out? A. Well, I do not remember at any time that there was any absolute time stated, how long he should hold it, or when it should be paid out; but I do know when this fund was placed in his hands it was with the understanding he was to take care of it until such time as we required it for the building of a new church. That was the distinct understanding, although I have no knowledge of any such thing being written." On the other hand, the plaintiff's witnesses Mr. Fauntleroy, Mr. Dempster, and Mr. Dennison testified that there was no agreement made as to how long the defendant should have the use of the money. And the minutes of the vestry and parish meetings, and the defendant's reports as such treasurer, show that, after the time the defendant says such an agreement was made, he paid \$2,259.41 out of the money he was so authorized to use, on orders of the vestry, for general purposes, and not for building a new church. The uncontradicted evidence shows that the defendant never set up any right to keep the money until it was required to be paid out for the construction of a new church until he asserted it in his answer. At all times prior thereto he had taken the position that it was a trust fund, and that the vestry wanted to divert it from the purposes of the trust, and that he felt

morally bound to protect the fund, and to see that it was properly applied to the purposes for which it was contributed. This was his position after the parish had refused to re-elect him a member of the vestry, and after the vestry had removed him from the office of treasurer of the building fund, and had abolished that office, and had ordered him to turn over the fund to the treasurer of the church, and later when he refused even to turn it over to the bishop of the church, saying it would be no safer in his hands than it was in the plaintiff's hands. He also took the same position on the day after this suit was commenced, in an interview in the public press, and also two days later in a letter to the press. He did offer to turn it over to a trust company, but when it was arranged by the treasurer of the church with the trust company, and the company prepared the form of the certificate to be given, he refused to do so upon those terms, and also refused to specify upon what terms he would do so. After or about the time this suit was begun he deposited the money with a trust company, took the certificate in his own name, and placed the certificate in the hands of Mr. Franklin.

1. Trust Fund. Three conclusive reasons are apparent why the money is not a trust fund in the hands of the defendant: First, there is absolutely no evidence to support such a claim; second, the defendant himself has not treated it as a trust fund, but has paid out nearly one-fourth of the total amount for general church purposes, other than for the purposes of the alleged trust; and, third, it is alleged to be an express, and not an implied, trust, and under the statute "all grants and assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will, in writing, or else they shall be void." Rev. St. 1899, § 3416. And construing this statute this court has held that parol evidence is not admissible to establish an express trust. *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66; *Woodford v. Stephens*, 51 Mo., loc. cit. 448. The only evidence of a trust shown by the testimony is as to the \$1,617.77 donated by Messrs. Franklin and Wright, and, if that created a trust, it was such only as between them and the plaintiff, and the plaintiff was responsible to them if it violated the trust; but, even conceding this to be true, it afforded no reason or right or excuse for the defendant, as the special agent of the plaintiff, to withhold the plaintiff's money from it, and the claim that by so doing he was subverting a moral obligation, by preventing his principal from violating the principal's trust, is no excuse, especially as by so doing he violated his legal duty to his principal to return to his principal his principal's money, whether it be trust funds or not. It was wholly beyond the power or province of the defendant to refuse to turn over the money

for any such reason. If the fact had been, as the answer alleges, that the money was placed in his hands by the plaintiff with the consent and approval of the contributors, that would have also been insufficient, under the statute, to constitute it a trust fund, or to make the defendant a trustee, because the grant or assignment was not in writing, and the money was the money of the plaintiff. There is not a word of evidence in this record tending in the slightest to show that any contributor or Messrs. Franklin and Wright ever gave the defendant any authority to hold or withhold the money as a trust fund. On the contrary, they donated the money to the church, and it passed into its custody, and the church appointed the defendant its special agent, and placed the money in his hands. The defendant was therefore never constituted a trustee by any one, and it was incompetent for him to constitute himself a trustee, and hold the plaintiff's money for any purpose except such as the plaintiff directed, and he was guilty of a violation of his clear legal duty when he refused to turn it over to his principal.

2. Loan. The defendant claims that the plaintiff loaned him this money "until such time as the same might be required to be paid out for the construction of a church building," and that it is not yet required for such purpose; he agreeing to pay 5 per cent. a year interest for the use of the money. The oral evidence does not sustain this claim. The minutes of the vestry and parish meetings, and the defendant's own reports and conduct with reference to this fund, do not sustain the claim. The referee found this issue against the defendant. The best that can be said for defendant of the case is that the evidence is conflicting. The trial court approved the finding of the referee. This court will not weigh the evidence or disturb the finding of fact in this regard. *Dempsey v. Schawacker*, 140 Mo., loc. cit. 686, 38 S. W. 954, 11 S. W. 1100; *Uteley v. Hill*, 155 Mo., loc. cit. 277, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569. The defendant, however, says that he does not expect this court to review the findings of fact by the referee, but does ask this court to review the conclusions of law of the referee, and to apply the true law to the findings of fact made by the referee. The gist of all which is that the defendant contends that the guaranty signed by Kaufman and delivered by the defendant to the vestry, and its acceptance by the vestry, constitute, as a matter of law, a contract between the defendant and the plaintiff that he should retain and use the money until such time as it might be required to be paid out for the construction of a church building. The Kaufman guaranty prescribed what the guarantor agreed to be bound for. It did not attempt in any way to recite what the defendant's contract with the plaintiff was, nor to define the rights or duties of the par-

ties inter sese. A guaranty may be broad as, or broader or narrower than, the contract between the principal debtor and his creditor. The terms of the guaranty measure the liability of the guarantor, but do not constitute the contract between the debtor and creditor. The contract of guaranty is a contract between the guarantor and the person assured. The person whose conduct or acts are assured is not a necessary party to a contract of guaranty. The contract between the person thus assured and the person whose acts are assured is a separate matter. Brandt on Suretyship and Guaranty (2d Ed.) vol. 1, §§ 145-166; Bank v. Shine, 48 Mo. 464, 8 Am. Rep. 112; Hill v. Combs, 92 Mo. App. 242; Graham v. Ringo, 67 Mo. 324. The guarantor may be discharged by the creditor giving time to the debtor, or by any change in the contract which varies the terms of the guaranty, but this will not affect the liability of the debtor to the creditor. Therefore, whilst by the terms of the guaranty the plaintiff could only hold Kaufman liable on his contract of guaranty by showing that the defendant had failed to pay over the money for bills incurred in building a new church, when approved by the vestry of Mt. Calvary Church, this in no manner proves or establishes the fact or the law to be that the plaintiff was not entitled to demand, sue for, and recover the money from the defendant at any time, whether it was required to be paid out for the construction of a church building or not. Non constat that the plaintiff would ever be able to build a new church. It might never have money enough to do so. The corporation might be dissolved by any of the methods known to the law, and thus might never build a new church. According to defendant's theory, he would then never be required to "render unto Cæsar the things that are Cæsar's." If the defendant had given the plaintiff his note for the money, and had made it payable when required to be paid out for the construction of a church building, there could be no doubt that the legal effect would be to make it a contract to pay on demand, and to rob it of its character as a note. 1 Parsons on Bills & Notes, p. 39. In case no time or an uncertain or impossible time is specified for the payment of a note, it is understood to be payable on demand. Collins v. Trotter, 81 Mo., loc. cit. 278. And when no time is specified for the performance of a contract a reasonable time is understood. Salisbury v. Renick, 44 Mo. 554; McNew v. Booth, 42 Mo. 189. So, too, where money is loaned, and no time is specified for its return, or the time specified depends upon the happening of an uncertain event, that may never occur, the loan must be regarded as a demand loan.

From these considerations it follows that the defendant has admitted that he has in his hands the fund in controversy, and that he agreed to pay 5 per cent. per annum in-

terest for its use, but that he has failed to make good his claim that it was a trust fund in his hands, that he had a right to hold and apply only to the building of a new church, and also has failed to make good his claim that he is entitled to keep the money until it is required to be paid for the construction of a church building, but that the plaintiff was entitled to a return of its money whenever it demanded it. Kaufman is not a party to this suit, nor is this a suit upon the guaranty, and therefore whether the plaintiff would have any claim against him on the guaranty is not material here. It is enough that in this case the plaintiff has a present cause of action against the defendant.

The judgment of the circuit court is affirmed. All concur.

DAVIS v. EVANS et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

SPECIAL ASSESSMENT — SALE — CERTIFICATE
—SECOND MORTGAGE—PURCHASE OF TAX
TITLE—REDEMPTION—PARTY IN POSSESSION.

1. Where on a sale of land under special execution for nonpayment of a special assessment made under the Kansas City charter of 1889, pp. 155, 156, as amended, the sheriff refused to issue to the purchaser a certificate of purchase as required by such charter, and the purchaser acquiesced in such refusal, he acquired no title.

2. Where the holder of a second mortgage purchased an outstanding tax title to the mortgaged property, from which he had the right to redeem, the title so acquired cannot be asserted to impair the rights of the holder of the first mortgage.

3. One who is in possession of real estate, enjoying the rents and profits, and whose duty it is to pay the taxes and assessments thereon, cannot impair the right of a mortgagee by neglecting to pay and then purchasing at a tax sale.

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Action by Lucy J. Davis against J. Evans and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

This is a suit in equity, the main object of which is to establish plaintiff's mortgage debt as prior in right to the claims of defendants. The property in question is real estate in Kansas City, and the rights of the parties respectively grow out of the following transactions in relation thereto:

March 7, 1892, defendant Evans was the owner of the land. On that day he borrowed \$900 from plaintiff's father, and executed his note and deed of trust on the land to secure the loan, which deed was duly recorded that day. Plaintiff is now the holder of that note. August 16, 1892, Evans and wife sold the land, subject to the above-mentioned incumbrance, to Helen Sherlock, taking from her and her husband a deed of trust to secure a note for \$350 given as part payment

¶ 2. See Mortgages, vol. 35, Cent. Dig. § 232.

of the purchase money. Those deeds were duly recorded. June 22, 1894, Sherlock sold the land to defendant J. W. Harlan for \$50, Harlan in the meantime, that is, April 1, 1894, having purchased the \$350 note secured by the second deed of trust. The deed from Sherlock to Harlan was never recorded. July 21, 1894, Harlan conveyed the property to his wife. There was no consideration for that deed. January 5, 1895, Harlan and wife conveyed the land to defendant Johnson, who on the same day executed his note for \$800 principal, and 10 interest notes, and secured the same by deed of trust on the property. That was the third deed of trust. It was duly recorded. Defendant Monks is now the holder of those notes. March 18, 1895, Johnson and wife sold the property to defendant Van Vleck for a consideration stated of \$1,500, of which the notes in the last deed of trust mentioned, amounting to \$1,040, formed a part, and were assumed by Van Vleck, who executed back a deed of trust to Harlan, trustee for Johnson, to secure notes given for the balance of the consideration, which notes were afterwards transferred by Johnson to Harlan. Harlan took possession of the property in May or June, 1894, and held it and collected the rents until Van Vleck purchased, when possession was delivered to him, and he has retained it ever since.

There would be no controversy between the parties on the foregoing facts, if it were not for the transaction now to be mentioned. May 29, 1891, an ordinance of the city, No. 3,160, was passed, the purpose of which was to grade Kansas avenue, and to that end proceedings were had in the circuit court, as prescribed by the charter of the city, for the assessment of damages and benefits. At that date defendant Evans, and one Maguire, and his trustee, Boland, were the only persons shown by the records to have any interest in the property in question, and therefore, as to it, they alone were made parties to the proceedings. The Maguire interest, whatever it was, seems to have ceased, at least it was not asserted in this case. Those court proceedings were begun August 3, 1891, and resulted in a judgment July 27, 1892, assessing against this lot, as benefits, the sum of 97 cents. A special execution issued on that judgment December 9, 1892, and the lot was sold by the sheriff thereunder January 16, 1893, to C. T. Gorman for \$61. The following provision in the charter of Kansas City in relation to such sales was in force at the time:

"Upon sales made by the sheriff under any such special execution, he shall issue to the purchaser a certificate of purchase, setting forth the substance of such special execution, the date of the sale, the purchaser, the property sold, and the amount bid. If the property so sold be redeemed within one year from the date of such sale by payment to the sheriff of the amount due on the judgment, including interest and costs up to the

date of redemption by the owner of or party interested in the said property, no deed shall be given by the sheriff. * * * If the lot or parcel of land so sold be not redeemed as herein provided, a deed shall be given at the end of one year from the date of said sale by the sheriff to the holder of said certificate. * * * Such certificate of purchase shall be delivered by the sheriff to the purchaser or his assignee, on payment of the amount bid, which certificate shall be executed and acknowledged by such sheriff before an officer authorized to take acknowledgment of instruments affecting real estate, and shall be filed for record in the office of the recorder of deeds of Jackson County at Kansas City, within six months after the date of the same." Pages 155, 156, Kansas City Charter of 1889, as amended.

The sheriff refused to give the purchaser the certificate required by that charter provision, and therefore no such certificate was recorded. June 30, 1894, Harlan obtained by purchase a quitclaim deed from Gorman to this property. Pursuant to the execution sale, the sheriff made a deed to Gorman, purporting to convey to her "all the right, title, interest and estate of the said Joe Evans, M. Boland, trustee for Christopher Maguire, of, in and to said lot three (3) block 2, Graham's Addition, an addition to the City of Kansas, now Kansas City, Missouri, that I might have as sheriff as aforesaid by virtue of the aforesaid execution, levy and notice." This deed was acknowledged March 1, 1894, but it was not delivered by the sheriff until July following. It was then delivered to Harlan, who filed it for record July 7, 1894.

While Sherlock owned the property his attention was called by a neighbor to a postal card addressed to the former owner, Evans, informing him that there was a special benefit tax of 97 cents against the lot. Thereupon Sherlock went to the circuit clerk's office, and found the records of the proceedings, and saw, marked in pencil, opposite this assessment the word "Paid." Afterwards, when he heard that the property had been sold, he went again to examine the record, but he could not find the entry; was not certain that he found the same book.

In 1897 other proceedings were had in the circuit court affecting this property, looking to the condemnation of land to establish a boulevard, in which there was a benefit assessment adjudged against the north 15 feet of this lot, under execution of which that part of the lot was sold by the sheriff to one Chase, who in turn sold it to the defendant Van Vleck. Van Vleck was in possession of the property when those proceedings were had.

The plaintiff makes some charges in her petition of unfair dealing and conspiracy to defraud in connection with the several transfers of this property between some of the defendants, and there is evidence for and

against such charges, but, in the view we take of the law bearing on the undisputed facts, we consider it unnecessary to go into those questions.

The finding and decree were for the plaintiff, establishing her deed of trust debt as the first lien on the property, and authorizing a foreclosure. Defendants appeal.

E. W. Shannon and C. E. Small, for appellants. R. B. Middlebrook, for respondent.

VALLIANT, J. (after stating the facts). 1. There is no question but that the plaintiff's deed of trust is superior to the interests of defendants, if it was not cut out by the sheriff's sale under execution on the judgment founded on the special tax bill. The regularity of the court proceedings which led up to that judgment and the issuance of the execution are not questioned.

The main question in the case grows out of the refusal of the sheriff, at the time of the sale under execution in January, 1893, to issue to the purchaser the certificate required by the city charter in such case, and the consequent failure to record such a certificate. It is argued on behalf of appellants that that requirement of the charter was merely directory, subjecting the sheriff, perhaps, to costs, but in no way affecting the title conveyed. In support of that construction of the charter provision we are cited to *Jackson v. Young*, 5 Cow. 269, 15 Am. Dec. 473, and *O'Brien v. Hashagen*, 20 Hun, 565, and text-writers who base their texts chiefly on those cases. A reference to those cases shows that they are so briefly reported that we can gather little of the reasons on which they are founded, and we are by no means satisfied that their facts render them analogous to the case at bar. But, whatever construction courts in other states may have put on somewhat similar statutes of their own, this court has long ago laid down its interpretation of such a provision in our law as the one now under discussion. In *Reeds v. Morton*, 9 Mo. 878, the court had under consideration a section of the statute relating to sales of land for taxes, which prescribed that the officer should deliver to the purchaser a certificate, which should be acknowledged and recorded like a deed, after which the owner has two years in which to redeem, and, if he did not redeem within that period, the officer was to give the purchaser a deed. The court held that the requirements as to giving a certificate and having it recorded were essential to the validity of the sale. It was said by the court that the recording of the certificate was one of the most efficient methods of bringing notice to the owner that his land had been sold, and that that was the main object of that requirement of the statute. That decision, defining the purpose and effect of such a certificate, was rendered in 1846, and its correctness has never been questioned in this court. Therefore, whenever the lawmaking power of this state has

since then inserted a similar requirement in a statute relating to the same subject, we must understand that the Legislature meant it to have the force and effect as declared in that case.

But it is argued that the court in the case just mentioned was construing a statute relating to a nonjudicial sale, whereas we are now considering a sheriff's sale under execution emanating from a court of record. In 1846, when that case was decided, sales of land for taxes in this state were not made under judgments of court, and the details then prescribed by law in such proceedings were for the guidance of the executive officers making the sales. But when the Legislature adopted a different system, and provided for the bringing into court of the delinquent landowner and the condemning of his land to sale for the payment of taxes, whatever requirements there were in the law under the old system which were brought forward and prescribed to be observed in the new procedure have just the same effect under the new as they had under the old system, and especially is that so in reference to a requirement the meaning, purpose, and effect of which had been fully explained by judicial interpretation. If the requirement of the statute construed in the case of *Reeds v. Morton* was mandatory, and the recording of the certificate essential to the validity of the sale, as the court then declared, we must assume that when the lawmaker, dealing with a similar subject, put the same requirement in the city charter, it was intended to have the effect that had before been judicially declared.

Although the condemnation and sale of land for taxes are now conducted under proceedings in court, yet it is often the case that the owner has really no notice in fact of the proceeding, and therefore there is not such a great difference between the present judicial and the former nonjudicial sale, in so far as actual notice is concerned. The case at bar illustrates this. The charter of Kansas City in such proceedings declares: "It shall be sufficient to bring in the owner of the property or those interested therein, who may be such at the time of the taking effect of the ordinance providing for the improvement, and parties claiming or holding through, or under such owners or parties interested or any of them shall be bound by the proceedings without being brought in." Article 8, § 5. Under that clause of the charter, this condemnation proceeding was conducted without the presence of any one of the parties to this suit except Evans, who, when the suit came on for hearing, had really no interest in it at all.

At the time the judgment was rendered in that proceeding, charging upon this lot the payment of 97 cents, there was no one actually a party to the suit who had an interest to the amount of 97 cents in the property. The parties really in interest were chargeable only with a constructive lis pendens

notice; there was no actual notice.* Therefore there is little, if any, room, under the facts of this case, to argue that there should be a different construction of the statute prescribing the terms of a nonjudicial sale by an executive officer and one prescribing terms of a judicial sale under such a proceeding. So far as the refusal of the sheriff to give the certificate is concerned, there is really more reason for holding the purchaser at the judicial sale to the strict consequence of that act than there would have been under a nonjudicial sale for taxes, because the sheriff, in a judicial proceeding, is subject to the order of the court in reference to the execution of its process, and, if the purchaser is not satisfied with what the sheriff does, he can go into court by motion and require the officer to do what is right. We hold that the issuance of a certificate of sale by the sheriff, and the recording of such certificate as required by the charter, are essential to the validity of such sale, and, those requirements not having been observed in this case, the sale was invalid.

2. There is another reason why the sale under execution in this case cannot avail the defendants to cut out the plaintiff's prior mortgage. The city charter, after providing that any party in interest may redeem within one year, declares: "If the lot or parcel of land so sold be not redeemed, as herein provided, a deed shall be given at the end of one year from the date of said sale to the holder of said certificate." Article 9, § 18. Before the sheriff delivered his deed in this case, the defendant Harlan had purchased a quitclaim title to the land from Gorman, the purchaser at the tax sale. At that time Harlan held the second deed of trust, above mentioned, given by Sherlock to Evans, and also a quitclaim deed from Sherlock. Not only was the plaintiff's mortgage duly recorded before the second mortgage, held by Harlan, had been given, but the deed securing that second lien expressed on its face that it was subject to the plaintiff's \$900 incumbrance. The holder of a second mortgage cannot, by buying a tax title, extinguish the lien of the first mortgage. Harlan, as second mortgagee, had the right under the law to redeem the land from the tax sale before the sheriff's deed was delivered. The purchaser at the sheriff's sale, therefore, was not free to refuse the amount of his bid and costs and keep the title, as he might have done on the demand of a stranger. Harlan's right to redeem was a valuable interest in the property, and was superior to the purchaser's right to demand a deed of the sheriff. But the second mortgagee cannot use such a right to impair the effect of the prior mortgage. In such case it makes no difference whether the second mortgagee sees fit to give his act the aspect of a redemption from the tax burden or a purchase from the purchaser at the tax sale; the effect as to a prior mortgage is redemption, with right to call the

prior mortgagee to an equitable accounting for the amount paid necessary to redeem. In *Chrisman v. Hough*, 146 Mo. 102, loc. cit. 111, 112, 47 S. W. 941, 943, the court, per *Brace, J.*, said: "All that the second mortgagee can in equity and good conscience demand of the prior mortgagee is that he be reimbursed from the general estate for the sum thus expended in procuring a title which protects the interest of each, and restores the estate to its original standing so far as their interests therein are concerned." In the same opinion it is also said: "And no distinction on principle can be made between the case where such title is procured at first hand, by purchase at the tax sale, and the case where the tax title is afterwards acquired by the second mortgagee from the purchaser." The same principle is declared also in *Frank v. Caruthers*, 108 Mo. 569, 18 S. W. 927, and *Ins. Co. v. Bulte*, 45 Mich. 113, loc. cit. 122, 7 N. W. 707. For the same reason, the title acquired by defendant Van Vleck to the north 15 feet of the lot in question under the boulevard condemnation proceedings is also of no effect as to the plaintiff's mortgage. Van Vleck being in possession at the time, and enjoying the rents and profits, it was his duty to have paid that assessment and have prevented the sale.

The circuit court took the correct view of this case. The judgment is affirmed. All concur.

BLEVINS v. TERRELL, Land Commissioner, et al.

(Supreme Court of Texas. April 16, 1903.)

SCHOOL LANDS — LEASES — CANCELLATION — POWERS OF COMMISSIONER — PURCHASE OF LEASED LANDS.

1. A land commissioner has no power to cancel an existing lease of school lands which is in good standing, and at the same time execute another lease to the holder of the lease so canceled.

2. School lands were leased on September 24, 1892, for five years, and while such lease was in force, on August 17, 1896, the land commissioner, without authority, canceled the same, and executed to an assignee thereof a new lease of the same land for ten years from the 1st day of August, 1896. On February 28, 1900, the latter lease was canceled, and a new lease made to the previous lessee for ten years from February 2, 1900. Held, that since the lease of September 24, 1892, continued until it expired by its terms on September 24, 1897, the lease of February 28, 1900, was valid, so that the land was not subject to purchase during its continuance.

Application for mandamus on relation of W. S. Blevins against J. J. Terrell, land commissioner, and others. Writ denied.

Walter Gillis, for relator. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondent Rogan. Denman, Franklin & McGown, for respondent Gage.

BROWN, J. Relator filed his petition in this court against Charles Rogan, Commis-

sioner of the General Land Office, and A. S. Gage, praying for a writ of mandamus against the Commissioner of the Land Office for the purposes as set out in the petition. Rogan's term of office having expired, Terrell was elected to succeed him, and qualified according to law, after which he was made a party defendant to the proceeding.

The petition alleges, in substance, that on the 11th day of June, 1902, he was an actual settler in good faith on section No. 2, block No. 347, certificate No. 33,650, Gulf, Colorado & Santa Fé Railway Company, original grantee, situated in Brewster county, Tex., and on the said day the said relator filed with the county clerk of the said county his application to purchase the said section for a home; complying in all respects with the requirements of the law in making the application and the affidavit, making the first payment upon the land, and executing his obligation. On the same day relator filed his applications to purchase, as additional lands to his home section, each of the following described sections of land, situated in the same county, and each being within a radius of five miles from the first described section, to wit: Section No. 2 in block No. 9, certificate No. 1/689, Galveston, Harrisburg & San Antonio Railway Company original grantee, and section No. 4 in block No. 347, certificate No. 3,366, Gulf, Colorado & Santa Fé Railway Company original grantee. In making the applications for the last-named sections the relator complied in all respects with the law, and on the 13th day of June, 1902, the said clerk of the county court of Brewster county filed the applications and the several obligations with the Commissioner of the General Land Office, and deposited with the Treasurer of the state of Texas the one-fortieth part of the price of each section paid by relator thereon, and on the same day the Commissioner of the Land Office approved each of the said applications, and awarded each of the said sections of land to the relator as purchaser thereof. Each of the said sections of land belonged to the public free school fund, and prior to the making of said applications had been classified as dry grazing land, and appraised at \$1 per acre; and, at the same time the applications were made, each of said sections was duly on the market for sale under the laws of this state. After he had accepted relator's applications and awarded the lands to him, the Commissioner of the Land Office canceled and set aside the award and contract made for the purchase of section No. 2, block No. 347, upon the ground that the land was, at the time the application was made, under a valid lease to A. S. Gage, which lease was then in full force and in good standing. On September 24, 1892, the Commissioner of the General Land Office leased section No. 2, block No. 347, and other lands, to T. F. Swann, for five years, and while the said lease was in force, to wit, August 1, 1896, Swann transferred all of his

interest in the said lands under the lease of A. S. Gage. The Commissioner of the Land Office on August 17, 1896, canceled the said lease by consent of Gage, and on the same day executed to the said Gage a new lease for section No. 2, block No. 347, for ten years from the 1st day of August, 1896, and afterwards, to wit, on February 28, 1900, Charles Rogan, then Commissioner of the General Land Office, canceled the lease made to A. S. Gage, and leased the said section of land to him for ten years from the 2d day of February, 1900. Relator charges that both of the leases made to Gage were void, and made for the purpose of giving him control of the land for a greater period of time than was permitted by law. The petition prayed that the writ of mandamus issue against the Commissioner of the Land Office, requiring him to reinstate the application, award, and the contract of the relator for the said section No. 2 in block No. 347.

Terrell, as Commissioner of the Land Office, and A. S. Gage, as co-respondent, answered by general demurrer, and also by answer admitting the facts as stated in the petition to be true, except in so far as they charged upon the respondents an intention to violate the law in making the said leases. It was alleged in the answer that the first lease was made to Gage in conformity to the previous customs and rulings of the Commissioners of the Land Office, and that the second lease was made in compliance with the decision of this court.

The lease made to Gage on the 17th day of August, 1896, was void, because the commissioner had no power to cancel the existing lease, which was in good standing, and at the same time to execute another to him. *Ketner v. Rogan*, 68 S. W. 774, 5 Tex. Ct. Rep. 118. If the lease which had been made to Swann and assigned to Gage was not canceled by the transaction between Gage and the Commissioner of the General Land Office, it expired on the 24th day of September, 1897, and the land was on the market for sale or lease from that time until it was leased to Gage, on the 28th day of February, 1900, at which time there was no obstacle to making a valid lease to Gage. By the execution of the lease of February 28, 1900, the land was withdrawn from sale during the continuance of that lease, and at the time relator made his application it was not on the market; hence he acquired no right by his application, nor by his settlement upon the land. It is unnecessary to discuss the motive which may have prompted the Commissioner of the Land Office to make the last lease to Gage, for, while there are no facts charged which show an improper motive, yet, if it were true as charged, it could not affect the relator, because he had no right in the land, and the act of leasing, being lawful and done in a lawful manner, vested the rights of a lessee in Gage during the term for which it was made.

The writ of mandamus will be refused in this case, and all costs of this proceeding will be taxed against the relator.

WAGGONER v. DODSON et al.

(Supreme Court of Texas. April 16, 1903.)

DEEDS—RECITALS—PRIOR CONVEYANCE—NOTICE—ESTOPPEL IN FAIS—STATEMENTS—RELIANCE.

1. Where a deed to defendant's grantor from the common source recited that the grantor had heretofore made and delivered his deed to the property in controversy, and that he was informed it had been lost, for which reason he executed the deed in question, but failed to recite to whom such alleged lost deed had been executed, it could not be presumed that it had been executed to the grantee in the subsequent deed, and hence the latter and persons claiming under him were charged with notice that at the time of executing it the grantor had no title to the land.

2. Plaintiff had inclosed a large pasture, containing tracts, some belonging to himself, and many belonging to others, asserting title only to those which he owned. Most of plaintiff's title papers were in the custody of his attorneys, but those to the land in question were in the possession of others; and on account of the large number of his holdings, which consisted of more than 100 tracts, he did not always remember the tracts he owned. During negotiations by defendants' grantors to purchase land included in the tract which in fact belonged to plaintiff, such grantors requested plaintiff to buy the same, but he declined, saying that he did not claim it, and that the owner could fence it out of the pasture at any time, as he did not desire to use it. *Held*, in an action by plaintiff to recover the land, that, in the absence of evidence that defendants' grantors were influenced to purchase the land by plaintiff's statements, plaintiff was not thereby estopped to claim title thereto.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by W. T. Waggoner against M. Dodson and others. From a judgment (71 S. W. 400) in favor of defendants, plaintiff brings error. Reversed.

W. W. Flood and Theodore Mack, for plaintiff in error. Montgomery & Hughes and J. H. Barwise, Jr., for defendants in error.

WILLIAMS, J. This is an action of trespass to try title, brought by plaintiff in error to recover of defendants in error a tract of 320 acres of land patented to the heirs of Reuben Hornsby. Both parties claim under M. M. Hornsby. The plaintiff's title was the elder, but was defeated in the district court upon the grounds (1) that defendants were innocent purchasers without notice of plaintiff's title, and (2) that plaintiff was estopped by his conduct from asserting his elder title against defendants. The Court of Civil Appeals affirmed the judgment of the district court upon the first proposition, premitting a decision of the second. Plaintiff showed a regular chain of title from the state to M. M. Hornsby, and in himself, under Hornsby, by deed from the

latter to S. D. De Cordova July 14, 1883, and deed from De Cordova to himself July 23, 1883. These two deeds were not recorded until November 27, 1899. The title of defendants originated in a deed from M. M. Hornsby to C. H. Shaw, May 13, 1892, as follows:

"The State of Texas, County of Travis. Know all men by these presents: That whereas, I, M. M. Hornsby of the county of Travis and State of Texas, have heretofore made, executed, and delivered my deed to the Reuben Hornsby survey of 320 acres of land lying and being situate in the county of Wichita in the state of Texas, and which said deed I am now informed has been lost. Now, therefore, I, M. M. Hornsby in consideration of the premises and of the sum of one dollar to me in hand paid by Charles H. Shaw, of the county of Travis and state of Texas, have bargained, sold and quitclaimed to the said Charles H. Shaw the said Reuben Hornsby survey of 320 acres of land situated in said county of Wichita in the state of Texas. To have and to hold unto him the said Shaw, his heirs and assigns forever. Witness my hand this the 13th day of May, 1892.

"M. M. Hornsby."

They further deraigned title to themselves through the following deeds: C. H. Shaw to W. B. Corwin, December 6, 1892, for an undivided half interest; C. H. Shaw to A. S. James, December 6, 1892; W. B. Corwin to A. S. James, December 6, 1892; A. S. James and wife to N. Henderson, December 21, 1892; N. Henderson to J. A. Kemp, dated December 21, 1892, but in fact executed later. Defendants Dodson claim under conveyance from Kemp. There is a question of fact, not determined by the Court of Civil Appeals, as to whether James purchased from Shaw and Corwin, who were partners, and paid nothing for the land, or purchased from Hornsby, through Corwin and Shaw, as his agents. He paid \$550, but whether as consideration for the land, or to Shaw and Corwin as compensation for services and expenses in procuring the deed from Hornsby, is also a controverted question not settled by the Court of Civil Appeals. The view taken of the case renders further notice of these questions unnecessary. Henderson, Kemp, and the Dodsons bought under warranty deeds, paying adequate considerations, and under circumstances which may be conceded to be sufficient to sustain the finding that they were innocent purchasers, if that defense can be based upon a deed in their chain of title such as that from Hornsby to Shaw. That deed, as will be seen, recites that Hornsby had "heretofore made, executed, and delivered his deed" to the land, not stating to whom, and that in consideration of the premises and of \$1 he bargained, sold, and quitclaimed to Shaw. What is the effect of such a deed? The recital is evidence against all parties

to the instrument as well as those claiming under it. It states a fact which shows that Hornsby had previously parted with his title, and then had none to convey. If such previous conveyance was to another person than Shaw, such other person had the title and Shaw got none. If the first conveyance was to Shaw, it, and not the last, invested him with the title. The title of Shaw and all persons claiming through him, therefore, depended upon the answer to the question, to whom was the first deed executed? This the deed does not answer, unless the presumption is to be indulged that the recited conveyance was made to the grantee named in the second. We know of no principle which authorizes such a presumption. The parties agreed to their own instrument and the recitals in it. It contains no express intimation that Shaw was the grantee in the original instrument, or had succeeded to his rights. The only proper conclusion from the omission is that the maker of the instrument did not intend to commit himself to a determination and declaration that Shaw had acquired title under the previous conveyance. In such an instrument a recital that it was made to supply the loss of a former one under which Shaw had title would naturally be expected, if such were the fact. Many instruments containing such recitals may be found, but a somewhat extended research has not brought to our attention such a one as that in question, and we cannot hold that it has the same effect as if it contained recitals which we must assume were intentionally omitted. If the recital had been of an instrument creating a prior mortgage, lease, or other estate less than the fee, it would hardly be contended that the presumption would arise that Shaw was the grantee therein. *Farrow v. Rees*, 4 Beav. 18. Such a recital would show an estate still in the grantee, subject to his power to convey, and hence there would be less apparent inconsistency between the recital and the attempt to convey than there is in this conveyance. But the recital in question does not undertake to determine the rights existing under the prior conveyance, the grantor leaving that question open to be determined by other evidence; and hence there is no real inconsistency. If the parties claiming under this deed were plaintiffs in trespass to try title, would they, under it alone, after showing title in Hornsby, establish title sufficient to enable them to recover? We think not, for the reason that their own evidence would disclose an elder title outstanding under Hornsby, with which they would not appear to be connected. We have found no authority exactly in point, but there are some which involve the same doctrine. In *Maxwell Land-Grant Company v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279, plaintiff in ejectment relied on a deed which conveyed a large tract, excepting "parts

thereof, which the grantors have heretofore sold and conveyed." The tract sued for was a part of the larger tract, but plaintiff did not show that it had not been previously sold, and it was held that it could not recover, as it had failed to show title to the land sued for. The same ruling was made in a number of other decisions. *Corinne Co. v. Johnson*, 156 U. S. 576, 15 Sup. Ct. 409, 39 L. Ed. 537; *Reusens v. Lawson*, 91 Va. 254, 21 S. E. 347; *Cox v. McClure*, 71 Conn. 733, 43 Atl. 310; *Harman v. Stearns*, 95 Va. 71, 27 S. E. 601; *Stockton v. Morris*, 39 W. Va. 442, 19 S. E. 531. In these cases the deeds passed title only to land not previously conveyed, and hence the plaintiffs in order to show that the conveyance passed the lands sued for, were required to prove that they had not been previously sold. In the present case it may be said that the deed purports to convey the whole of the tract, and that herein is the distinction. But the grantor was careful to recite that he had previously conveyed, thereby showing that he then had no title, and the result is that a party claiming under the deed does not establish title until in some way he obviates the difficulty thus presented. The recital prevents the deed from operating against the prior conveyance. The case would, doubtless, be different if the deed had recited another to Shaw or to some one else whose title Shaw had obtained. The recital would not then leave the case open to the question as to who held the title already conveyed. If the party relying on such a deed proved the former conveyance, he would take under it; if he did not prove it, he would take under the last deed, there being nothing in its recitals to destroy its effect as evidence of complete title. *Boyce v. Stambaugh*, 34 Mich. 348.

It results from what we have said that upon the face of their evidence defendants have not an apparent title, even leaving out of view the deeds from Hornsby to De Cordova and from the latter to Waggoner. Such being the case, can they be regarded as bona fide purchasers? Authorities here and elsewhere, too numerous to mention, hold that they must know everything appearing upon the face of their muniments of title. The fact here appearing is that they have no title through their deeds standing alone. Now, we understand it to be of the very essence of the claim of an innocent purchaser, protected by the registration laws, that he must have bought from one apparently invested with title, and have secured from him that which on its face is the title, without notice of a previous conveyance. The title of record appearing to be in his vendor, such a purchaser is entitled to rely on the record, and when he buys that apparent title without notice of any other he is protected. But here the very deed which he takes notifies him that the title has already passed from the vendor, and leaves the right which he

gets subject to the operation of the previous conveyance. If that conveyance was to another, he has notice of the rights of that other; if to himself, he must prove it, in order to make out his title. This, it seems to us, takes from his claim its very foundation. And every subsequent purchaser under such a deed takes it with the same notice and the same infirmity. Of course, we do not hold that parties claiming under such a deed would be estopped from showing that there had been, in fact, no previous valid conveyance, or that it was made to them or to those whose rights they hold; nor do we hold that all this might not be proved by circumstances, or even presumed after long lapse of time and other attendant facts. No such questions are here presented, a prior deed to another having been produced. The only facts which defendants adduce to sustain their claim, in addition to the proof of purchase, payment of consideration, and absence of actual knowledge of the prior unrecorded deed, are the conversations, hereafter stated, between James, Henderson, and Waggoner, and a statement made by Shaw to James, at some time not stated, that he (Shaw) had procured a deed from M. M. Hornsby, and that it was destroyed by mistake in his office, and when he went to Hornsby to get a new deed he declined, under advice of his attorneys, to make any other than that in evidence. The fact contained in this statement is not proved. The conversations with Waggoner were not had in the prosecution of any inquiry excited by the recitals in the deed, and do not affect this question; and James could not safely rely on the interested statement of Shaw to destroy the effect of the recital as notice, whether Shaw be regarded as his agent or as his vendor, without any inquiry of Hornsby, who made the deed, and who was accessible. *Patman v. Harland*, L. R. 17 Ch. Div. 353. What would have been the effect of an inquiry of Hornsby, resulting in a confirmation of Shaw's statement, we need not decide.

The evidence of estoppel was wholly insufficient. It was claimed to have arisen (1) from conversations between Waggoner and James, and (2) from conversations between Waggoner and Kemp. The evidence showed that Waggoner had the tract inclosed in a large pasture, with many other tracts, some of which belonged to him and some to others, and that by such inclosure he asserted title only to those tracts which he owned. His title papers generally were in the custody of his attorneys, but those to the land in controversy were in the possession of other persons. On account of the large number of these holdings (more than a hundred) Waggoner did not always have in mind what tracts he in fact owned, and in the conversations with James and Kemp was oblivious of the fact that he owned the land of which they were talking. While James was negotiating for the land, he proposed to sell it to

Waggoner, who declined to buy, stating that he did not claim it, and that the owner could fence it out of his pasture at any time, and he did not want to use it. There is an utter absence of evidence that James, in purchasing, acted upon or was influenced by what Waggoner said. Henderson, before he purchased, also tried several times to negotiate a sale of it to Waggoner, who, without affirmatively claiming or disclaiming title, simply replied that he did not want to buy it, saying that he had enough land in his pasture. We give, of course, the versions most favorable to the parties in whose favor the jury found.

The absence of evidence that James was influenced by Waggoner's statement deprives that transaction of a necessary element of an estoppel. Besides, the facts show that neither party was considering the matter with reference to any possible claim Waggoner might have had. James was already negotiating for the land, and merely tried to arrange a sale to Waggoner in case he succeeded in purchasing. Nothing was said to indicate to Waggoner that the land referred to was any owned or claimed by him, and the evident assumption of both parties was that it was some of that in the pasture which he did not own. A just view of it would be that his mind was led away from any thought that the land might belong to him already. This is true of the conversation with Henderson. The subject of the conversation was not such as to require any statement from Waggoner as to his own claim, or to make it necessary for him to inquire into it. He simply declined the proposal to sell to him, making no misrepresentation whatever. It is true that parties are sometimes estopped by their silence and their failure to affirmatively disclose their rights. But this kind of estoppel is founded on an obligation resting upon the party to speak. There is nothing in the circumstances disclosed to create such an obligation. Neither Waggoner nor the others had in mind his title to this property, and nothing in their attitudes suggested to him that they would act upon either his silence or statements.

The case of *Nichols-Stewart v. Crosby*, 87 Tex. 443, 29 S. W. 380; *Stewart v. Crosby* (Tex. Civ. App.) 26 S. W. 138, relied on by defendants, was very different. There one of the parties was considering a proposal to make a loan to the holder of one of the titles, and Smith, the holder of the other, of which he was probably forgetful, was appealed to for advice. He did not simply remain silent, but undertook to advise the loan, and to make the statement that he knew the other title to be good, saying nothing of his own. Undertaking to influence by his advice and statements, he was under obligation to know that his representations were true, at least so far as they affected his own title, and he could not set up his forgetfulness of his own claim in opposition to his representation that

the other was good. As was said in *Knouff v. Thompson*, 16 Pa. 364: "The law distinguishes between silence and encouragement. Whilst silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad or doubtful title would be a positive fraud that should bar and estop the party, the author of that encouragement and deception, from disturbing the title of the person whom he misled by any claim of title in himself."

We are of opinion that the evidence, taken at its strongest, was legally insufficient to establish either defense, and the judgments of the district court and the Court of Civil Appeals are reversed, and the cause remanded.

TOLLESON v. ROGAN, Commissioner of General Land Office, et al.

(Supreme Court of Texas. April 13, 1903.)

PUBLIC LANDS—SALE DURING LEASE—STATUTES.

1. Laws 1897, p. 186, c. 129, relative to public lands, providing that "lands leased * * * shall not be sold during the term of the lease, till otherwise provided by law," in view of the preceding provision that the lessee shall not be disturbed in his possession during the term of the lease in the following cases, and of the previous legislation on the subject (Laws 1887, p. 83, c. 99; Laws 1895, p. 63, c. 47), and of the long-continued practical construction by the Land Office Commissioners, will be held to be merely for the benefit of the lessee, and not to prevent a sale during such term where the lessee waives his right.

Application by W. B. Tolleson for mandamus to Charles Rogan, Commissioner of the General Land Office; B. E. Waggoner being made a party. Writ denied.

Ashby S. James and E. H. Yelser, for relator. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondent Rogan. Ed. J. Kamner, Cowan, Burney & Lee, and Browning, Madden & Truelove, for other respondent.

WILLIAMS, J. This is an original application to this court for a mandamus to compel the respondent, as Commissioner of the General Land Office, to accept and approve Tolleson's application to purchase section 72, certificate 488, block 25, Houston & Texas Central Railway Company survey, in Scurry county, which had been surveyed, classified, and appraised for the school fund. B. E. Waggoner, a claimant of the section under a prior application accepted by the Commissioner, is a party to the proceeding. The petition originally sought to enforce a like duty with reference to other sections, and other persons claiming them were made parties, but before the hearing complainant discontinued his suit as to those sections and parties, and further notice of them is unnecessary.

Section 72, along with others, was, under the act of 1895, leased by the Commissioner

to Brooks Bell for a term of five years from August 30, 1895. Tolleson made his first application to purchase January 13, 1900, which was, on January 24, 1900, rejected by the Commissioner because of the existence of the lease. On the 13th day of August, 1900, Bell executed to Waggoner an assignment or transfer of all right, title, and interest in section 72, which transfer was filed in the General Land Office August 27, 1900, and on the last-named day Waggoner made application to purchase the section, which was awarded to him. Thereafter, on August 30 and 31, 1900, respectively, Tolleson made two new applications to purchase section 72, which were afterwards rejected by the Commissioner because of the previous sale to Waggoner. It is thus seen that Waggoner's application to purchase was made before the date at which the lease to Bell would have expired according to its terms, and relator's contention is that by the lease the land had been taken off the market, and was not subject to sale; that the award to Waggoner was, therefore, unauthorized; and that his own application, made after the lease had terminated, entitled him to the land. The land in controversy is included within what is known as the "absolute lease district" created by the act of 1897 (Laws 1897, p. 186, c. 129), and relator's case is rested on the following provision of that act:

"All lands which may be leased shall be subject to sale at any time except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made, as well as those hereafter to be made. Any section or part of a section which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof during the term of his lease, in the following cases: (1) When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement. (2) When he has placed on such section or part of a section improvements of the value of two hundred dollars. (3) When the aggregate of the land owned by a settler and leased by him does not exceed one section. Any lands which may be leased south and west of the line herein designated shall not be sold during the term of the lease until otherwise provided by law: provided, the sections leased by any one party are not so selected as to detach sections which are thereby left unleased." The part especially relied on is that which says that "lands leased south and west of the line herein designated shall not be sold during the term of the lease until otherwise provided by law"; the effect sought to be given to it being that of an absolute reservation from sale, depriving the Commissioner of all power to sell lands in the defined territory which had been leased during the term named in the lease. The pro-

vision, standing alone, unaffected by its context, its history, and previous practical construction, and interpreted literally, would give strong support to relator's position. A more limited operation is ascribed to it by respondent's contention, which is that this and similar provisions in previous laws were intended merely for the benefit of lessees, to protect them in the enjoyment of their leases, and did not, when such right was waived by those for whose benefit the protection was given, affect the general power to sell conferred upon the Commissioner by other sections of the statutes. This, it is urged, especially appears from the preceding provision, "nor shall the lessee be disturbed in his possession thereof during the term of his lease in the following cases," as well as from the nature of the first, second, and third specifications of conditions under which sales are prohibited. These provisions, it is contended, show the purpose of the prohibition to have been merely to secure lessees, under the circumstances specified, against interference by sales of their leased lands. In support of this view it is made known to the court by the sworn answers that since the enactment of the law of 1887 the several Commissioners have uniformly put this construction upon this and like provisions of the statutes regulating sales and leases of the school lands, and have uniformly sold lands under lease to lessees and to others with their consent; and that under this construction many sales have been made under each of these statutes which would be upset if that construction were now overthrown. The respondent Rogan also states that before making such sales he adopted the practice of requiring lessees to file in his office their written transfers to persons applying to purchase. To see the full strength of this contention a review of the history of the legislation referred to is necessary.

In 1883, the land board was authorized to sell or lease these lands, preferring sales when they could be made. This law declared that leased lands remained "subject to sale" to persons desiring to make actual settlement, except that, where the lessee had but one watered section in the same vicinity, the law provided "such section shall not be subject to sale and settlement during the term of the lease." The act of 1887 (Laws 1887, p. 83, c. 99) transferred to the Commissioner of the General Land Office the power to sell and lease, and declared that, when the lands had been classified and appraised as required, they should be "subject to sale to actual settlers," etc. When the Commissioner became "satisfied that the lands were not in immediate demand for purposes of actual settlement, and that such lands can be leased without detriment to the public interest," he was authorized to make leases. The act declared that leased lands classified as grazing were not "subject to sale during the existence of such lease,

and the possession thereof by the lessee shall not be disturbed during the term of such lease"; and that lands classified as agricultural were to be leased "subject to sale," except in cases where the lessee had placed improvements of the value of \$100 on the section sought to be purchased. Certain sections of this act were amended by the act of 1889, in which the same language was repeated. The act of 1889 was amended by that of 1891, which authorized leases of 5 and 10 years, according to the territory in which the lands were located, and provided that lands of which 10 years' leases were authorized "shall not be subject to sale during the term of the lease contract thereof, and the possession of the lessee shall not be disturbed during the term of his lease"; and that lands of which five years' leases were authorized "shall be subject to sale," except that, where a lessee actually settled upon a section included in his lease, and erected thereon his residence and substantial improvements for permanent settlement, "such section shall not be sold, nor shall such settler be disturbed during the term of his lease." This act further provided that agricultural lands leased for 10 years "shall be subject to sale to actual settlers," except where settlement and improvements were made by the lessee as provided. It further required an actual settler desiring to purchase land leased for five years to first make substantial improvements of the value of \$100.

In 1895 a new act was passed, regulating sales and leases of school lands. Laws 1895, p. 63, c. 47. In its general structure it followed the act of 1887 and its amendments, but contained many new and different provisions. It committed the making of sales and leases to the Commissioner, as before, made all the lands when classified and appraised "subject to sale," and authorized leases when the Commissioner was satisfied that lands were "not in immediate demand for actual settlement." Agricultural and permanently watered lands were to be leased for terms not longer than 5 years, and pasture or dry grazing lands for not longer than 10 years. By section 18 the latter class of lands were declared "not to be subject to sale, nor shall the possession thereof by the lessee be disturbed during the term of the lease, except as herein provided." The act then makes some very complicated regulations defining conditions under which lands, already leased might be sold, or leased to others. Agricultural lands leased by actual settlers were declared "subject to sale and settlement," with a condition that need not be stated. We discover nothing in these lengthy and confused provisions of section 18 to materially affect the construction of the language quoted, which is the same, in substance, as that found in the previous laws. Section 23 of the act, however, expressly provided: "Lessee shall have the right to

purchase their leased lands, subject to the limitations as to quantity provided by this act, and at the price and on the conditions herein provided, without reference to any improvements made on such lands by such lessees; and all improvements made by lessees on lands leased by them are hereby declared to be personal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration to remove the same."

The act of 1897, first referred to, merely amended that of 1895 by substituting certain sections with others; section 18, in which is found the provision which we first quoted, being among the number. Another statute was passed in 1901, which does not affect this case, and the effect of which is not considered. Section 23 was not touched. The general purpose and policy pervading these laws is easily seen. The Constitution having commanded the Legislature to provide for the sale of these lands, the statutes were passed in obedience to its mandate, and the favorite policy, sedulously promoted, plainly appears to have been that of selling when sales were practicable. The impracticability of early sales of much of the land, from lack of demand, being apparent, the Legislature, in 1883, in order to derive some revenue from it until sales could be made, authorized leases, but kept the lands still subject to sale, with one narrow exception, by which tracts of a defined character were taken out of the general rule, and made not subject to sale, and secured to the use of the lessee during the term fixed by the lease. This provision was the origin of the prohibitions in the various statutes of sales of leased lands, and it would be difficult to maintain that it rose to the dignity of a reservation of the named sections from sale, or was more than a mere protection given to lessees, or that the land board had not the power to sell such sections to lessees, or to other persons, when the rights of lessees were out of the way. The subsequent legislation indicates that the Legislature found it consistent with the general policy of selling as fast as possible to enlarge the provisions for leasing and the rights of lessees; but all of the statutes show a permanent and prevailing purpose to have been that sales should be made when practicable, while leasing was to be temporary and exceptional, and resorted to only when lands were not in immediate demand for actual settlement. In order to facilitate the leasing of lands, when this condition existed, larger privileges were offered to lessees, and the Commissioner was empowered to lease lands which were deemed least likely to at once come into demand for settlement, so that they should not be subject to sale, nor the lessee be disturbed during his term. The construction that the officer clothed with the power of both selling and leasing could sell to any

qualified purchaser lands under lease, where a sale would in no way interfere with the rights of the lessee, would be not only consistent with, but promotive of, this general policy of the law, and the constitutional duty of the Legislature to effect sales. This is an important consideration in determining whether or not such construction is consistent with the language of the statutes, which remains to be seen. The language of the statutes from 1887 to 1895, inclusive, which forbids sales of leased lands, is the same as that used in the act of 1883 on the same subject, and it is certainly not unreasonable to hold that it was all along used in the same sense, and for the same purpose. Under the laws subsequent to 1883 it has a much wider operation than it had under the statute of that year, in that much more extensive classes of land were brought within its scope; but this fact does not necessitate, even if it would authorize, the conclusion that the Legislature, with no change in language, intended to change the nature of the provision from that of a mere safeguard for the benefit of the lessee to an absolute reservation of leased lands from sale, taking from the agent of the state all power to sell, even where this could be done consistently with the rights of the lessee. Besides, in each of these statutes the provision is immediately connected with other and new ones plainly intended only to secure to the lessee the benefits of the lease. Inasmuch as actual settlement and continued occupancy by purchasers were required, sales could not be indiscriminately made without interfering with the lessee's possession, and hence the Legislature could not, consistently with these requirements, leave the leased lands generally subject to sale, and at the same time secure lessees in an uninterrupted use; but a power in the Commissioner to sell when the lessee waived his rights would be wholly consistent with all of the objects of the law. The general provisions of the statutes making subject to sale all lands when classified and appraised, and empowering the Commissioner to sell, would authorize sales of any and all of the lands, whether leased or not, unless this power would be inconsistent with the provisions which made certain lands, when leased, not subject to sale; and whether there be such inconsistency or not depends upon the nature and extent of the restriction thus imposed. Section 23 of the act of 1895 permitting lessees to buy, or recognizing their right to buy, might tend to the implication that no one else should be permitted to do so. But if it be true, as had been held by the Commissioner, that leased lands could, under other provisions, be lawfully sold to, or with the consent of, the lessee, that section was not necessary to confer the right; and it is not unreasonable to assume that it was inserted not for the first time to enable lessees to buy, but merely to secure to lessees pur-

chasing the other privileges mentioned in it, and not to exclude the power to make sales otherwise authorized. The Commissioner, according to the record, had for years been making numerous sales to lessees and to others with the consent of the lessees, and we must assume that the Legislature, when it came, in 1895, to revise all of the laws regulating the subject, knew of this ruling, and that it would, if the intention had been to forbid such action in the future, have expressed that intent in clear and unequivocal language. Instead, the Legislature repeated, without modification, the provisions which had been so construed and acted upon, and in doing so it is fair to presume that it acquiesced in the construction.

Having reached the conclusion that the statutes preceding the act of 1897 were susceptible of the construction put upon them by the different commissioners, we will now inquire whether or not that act made such changes as to require a different construction. The quotation from it made at the outset contains all of the changes which, in our opinion, materially affect the case. The opening sentence declares all leased lands "subject to sale at any time, except where otherwise provided herein." The provision is then inserted that leased sections "shall not be sold, nor shall the lessee be disturbed in his possession during the term of his lease, in the following cases." Then are specified three conditions of fact the existence of which, in leased land anywhere situate, shall exempt it from sale. Then follows the provision declaring that lands leased in the defined district "shall not be sold during the term of the lease until otherwise provided by law." The only difference between these provisions giving exemption from sale and those of previous laws are in the arrangement of the different provisions, the change in the language from "shall not be subject to sale" to "shall not be sold," and the omission from the last provision of the clause "nor shall the lessee be disturbed," etc. All of the provisions giving exemptions are expressly made exceptions to the opening provision, declaring lands in general subject to sale, and are thus associated together. The last exception is the introduction to a long provision defining the absolute lease district, and this explains the change in arrangement. The language "shall not be sold," with reference to particular land, is used as the exact reverse of the words "shall be subject to sale," with reference to lands generally, and shows that the Legislature meant the same as if it had again used the words, "shall not be subject to sale." Plainly, this change is of no importance to indicate a change in the nature of the immunity from sale intended to be given. Besides, in the act of 1891 we find the same language "shall not be sold" clearly used only to give a protection to the lessee, and not to make a reservation to the

state. A repetition, in the last provision, of the clause, "nor shall the lessee be disturbed," etc., was wholly unnecessary. It had been already used to apply "in the following cases" (the exceptions made to the general rule), of which the exemption from sale of the lands leased in the district was one. Some stress is laid upon the closing phrase, "until otherwise provided by law," as indicating a purpose to reserve the land specified from sale until such other provision should be made. But the provision is that such land shall not be sold "during the term of the lease until otherwise provided." It was evidently designed to reserve the right thereafter to provide that leased lands might be sold without regard to the rights of the lessees. The appropriate language in which to express the idea contended for would be, "shall not be sold during the term of the lease, nor until otherwise provided by law." This would withhold lands once leased from the market, even after the lease had expired, until further provision was made for selling. Plainly, this was never intended. The literal construction insisted upon of the one sentence of the act of 1897 would prevent sales to lessees during the term of the lease, notwithstanding section 23 of the act of 1895, expressly recognizing the right of lessees to buy, was not amended or repealed by the last law, which is strongly persuasive that the provision is not to be taken as a reservation of the land beyond all power to sell it merely because it was held under lease. The only difficulty we see in restricting the provision in question, as has been done by the Commissioners, is that the language is broader than was necessary for that purpose. The same difficulty arises under all of the statutes. The meaning put upon them by construction would have been fully expressed had they simply provided that leased lands should not be sold during the term of the lease without the consent of the lessee. But the statutes indicate that the Legislature had in mind sales which would disturb the lessee in his possession, and the prevention of this is the only purpose which the statutes themselves disclose. This purpose there is no doubt about, and it could be fully carried out, and at the same time the general policy of selling whenever opportunity offered could be promoted, by the course pursued by the officers of the government. Whether or not any other purpose was in view can only be conjectured. If there were any, the laws do not express them. It was suggested that it was a policy of the law to have lands to be sold so put on the market that all persons might have equal opportunity to purchase, and that this would be defeated by allowing particular persons, who could obtain the consent of lessees, to purchase when others could not. No competitive bidding was required. The lands, when on the market, were sold to the first applicant at an appraised value. Leases

could be terminated, and the land again opened to purchase by any one who knew the fact, and the Commissioner was required to sell to the first applicant who complied with the law, without any notice to the public. If there was any policy of the kind contended for, there is no expression of it. It was also urged that the construction adopted by the Commissioner enabled lessees to parcel out among those whom they favored, and to speculate upon their leased lands. Could we know that the Legislature foresaw such results, we still could not say that a prevention of them was regarded as a sufficient reason for a surrender of the right to sell lands during the terms of leases, when sales could be made, for the price demanded, to persons who possessed all the prescribed qualifications, complied with all the requirements of the law, and thus aided in the disposition of the lands. Collusion in all purchases was provided against. It is certain that during the many years when its agents were so construing the law and making extensive sales under it, the Legislature has expressed no condemnation of their course, nor materially changed the provisions of law under which they so acted, from which we should conclude both that such course was in keeping with the legislative intent, and that it had resulted in no evil which the Legislature thought proper to remedy.

We have endeavored merely to point out some of the reasons which may be urged in support of the long-continued construction of these laws made by those whose duty it was, in the first instance, to construe and execute them, in order to show that such action was not so clearly wrong as to justify the courts in disregarding it. The great weight which, from necessity, courts must often give to the contemporaneous construction put upon laws by other departments and officers to whom is committed their practical administration is so well understood that it need not be dwelt upon. Sound public policy requires the solving of all mere doubts in favor of constructions so made and uniformly acted upon. Fitter occasion for the recognition of this could not well be imagined than controversies arising upon the construction of these land laws, extensive in their provisions and in the subjects upon which they operate, bristling with questions, and requiring at every step decisions which the Commissioner must make at the peril of purchasers and others dealing with him. Upon many of his rulings are based thousands of sales, on which rest the titles of purchasers which may be destroyed by decisions in the courts reversing such rulings. While, as this court has frequently held, actions of such officers in plain opposition to law cannot be upheld, it is equally true they are entitled to great weight in de-

termining the true construction of doubtful and indefinite regulations made for their guidance. The Legislature, in charging him with the duty of attending to this business, gave to the Commissioner "all the power and authority necessary to carry into effect the provisions of this act," and invested him with "full charge and discretion of all matters pertaining to the sale and lease of said lands, etc., with such exceptions and under such restrictions as may be imposed by the provisions of this act or by the Constitution." It made it his duty to "adopt such regulations, not inconsistent with the Constitution or this act, as may be deemed necessary for carrying into effect the provisions of this act," and "to call upon the Attorney General for advice whenever there is doubt as to the meaning of this act or any provision thereof." While this was followed by such minute regulations attempting to specify, in many things, exactly what he should do, and when and how he should do it, as, in many instances, to leave little room for the exercise of discretion or the making of regulations, it is nevertheless true that there must be many conjunctures in which the law is silent or is indefinite and doubtful, and in which regulations and decisions by him not inconsistent with the law are but the exercise of power expressly conferred.

In the matter under consideration, admitting that there is doubt as to what action these officers should have taken in order to "carry into effect the provisions" of the statutes, the very existence of the doubt makes it proper that their determination, so long acted upon, and involving so much, should not be reversed at this late day. The constant action of the Legislature in legislating upon the subject, without change in the regulations upon which the Commissioners were acting, or any disapproval of their course, makes their action well-nigh conclusive.

The first application of relator was made when the lease was in full force, without the consent of the lessee, and hence the Commissioner could not sell to him. Waggoner's application was accompanied by a transfer from the lessee in compliance with the regulation of the Commissioner, and entitled him to an award of the land, and relator's subsequent applications were, therefore, properly refused. We give no other effect to the transfer than to hold that, under the law as construed, it removed the obstacle to a sale interposed by the lease, and gave room for the exercise of the power of the Commissioner to sell and of the applicant to buy given by the law. We do not hold that the right to purchase was acquired from the lessee. It follows that applicant is not entitled to the writ.

Writ refused.

CITY OF AUSTIN v. AUSTIN CITY CEMETERY ASS'N.

(Supreme Court of Texas. April 13, 1903.)

CEMETERIES—REGULATION BY CITY—CONTRACTS—CONSIDERATION.

1. There being a reasonable and valid ordinance prohibiting the interment of the dead within certain limits in a city, permission by the city to a company to use land therein for a cemetery, with supervision by the city sexton, is sufficient consideration for its agreement to sell burial lots at prices not exceeding a certain sum.

Certified Question from Court of Civil Appeals of Third Supreme Judicial District.

Suit by the city of Austin against the Austin City Cemetery Association for injunction. A demurrer to the petition was sustained, and plaintiff appealed to the Court of Civil Appeals, which certifies a question to the Supreme Court. Question answered.

V. L. Brooks, City Atty., for appellant.
D. W. Doom and D. H. Doom, for appellee.

BROWN, J. Certified questions from the Court of Civil Appeals for the Third Supreme Judicial District, as follows:

"The Court of Civil Appeals of the Third Supreme Judicial District certifies that there is now pending in said court the above styled and numbered cause. The cause of action, as alleged by the pleadings of the plaintiff, is as follows:

"Appellant, the city of Austin, instituted this suit for injunction against appellee, the Austin City Cemetery Association, in the district court of Travis county, Texas, for the Fifty-Third Judicial District, by an original petition filed on March 20, 1902. The case was presented in the court below on the averments of the first amended original petition of plaintiff, which contained allegations in substance as follows, viz.:

"(1) The plaintiff is a municipal corporation of more than ten thousand inhabitants, chartered by special act of the Legislature of the state of Texas; that it is situated in Travis county, in said state; and that R. E. White, who resides in said county and state, is its mayor.

"(2) That defendant is a private corporation, chartered under and by virtue of the laws of the state of Texas, for the purpose of maintaining a cemetery corporation, and selling cemetery lots, in the city of Austin; that its principal office is located in Travis county, said state; and that Otto Bergstrom, who resided in Travis county, Texas, is the president of said defendant corporation.

"(3) That the city council of plaintiff has, and at all times herein mentioned has had, the following, among other, charter powers, viz.: "To make regulations to prevent the introduction or spreading of contagious disease within the city, and to make and enforce all other regulations necessary to secure the general health of its inhabitants; to define what shall be a nuisance within the

city, and to punish the author thereof by penalties, fines, and imprisonment; to do all acts and make all regulations necessary or expedient for the promotion of health or suppression of disease; to regulate the burial of the dead, and to purchase, establish, and regulate one or more cemeteries within or without the city limits; and to determine when it is necessary to acquire property for the use thereof by the power of eminent domain."

"(4) That on February 28, 1893, plaintiff was, and had continuously been for a period of more than thirty years prior to said date, the owner of a certain tract or parcel of land in Division B, said city, according to the original plat thereof, which tract or parcel of land was, and during all of said period had continuously been, established and used by it for the purposes of a public cemetery, under the following conditions and circumstances, viz.: Said tract was divided into burial lots, in size 25 by 30 feet, with all necessary driveways and walks between; was adorned and beautified by shade trees, shrubs, and flowers, as is usual with well-managed public cemeteries; was inclosed by a substantial and well-built fence; and was under the management of a certain city employé, known as the "city sexton," whose duties were defined and set forth by ordinances of said city, which ordinances contained substantially the following provisions, viz.: "The name of said cemetery, together with such additions thereto, as the council might subsequently authorize, was 'Austin City Cemetery.' The city assessor and collector of taxes is required to keep among the records of his office a plat of the land embraced in said cemetery, and to sell to persons desiring same, for purpose of sepulture, burial lots, half lots, quarter lots and single grave spaces for adults or children, according to a schedule of prices fixed in said ordinance." Said cemetery was to be under the charge of the city sexton, whose duty it was to act as superintendent of same, and who was made ex officio a city policeman, with the duty of enforcing city ordinances within said cemetery; and said sexton was charged with the additional duty of performing such other services in said cemetery as the council might from time to time prescribe, and was required to execute in favor of the city a good and sufficient bond for \$1,000, conditioned for the prompt and faithful performance of his duties. Said sexton was to prepare properly and promptly the ground in said cemetery for the reception of bodies, was to inter all bodies properly presented to him for burial in graves at least four feet deep, was to superintend the depositing of bodies in such graves, was to refill and properly finish off the graves after burial, and was to preserve order and quiet during burials. Said sexton was to keep a register of the dead buried in said cemetery, such register to contain a state-

ment showing the name, age, sex, color, place of birth, residence, and cause of death of all persons buried, as well as time of interment, and place where interred. Said sexton was to take care that the fences, walls, streets, and other public places in said cemetery were kept in good condition, and perfectly clean, and was to superintend all repairs done by private parties on their grounds, and was to have such repairs made upon the streets and other public places of the cemetery, from time to time, as the council might order; and for such services was to receive pay from the city treasurer. In addition to the above duties, it was the duty of said sexton to keep the gates of said cemetery open on Sundays from one o'clock p. m. to six o'clock p. m., and to be present in the cemetery at such hours to enforce rules for the preservation of order and decorum and the protection of property.

"(5) That by reason of the long-continued operation of said Austin City Cemetery under the conditions and circumstances, and in accordance with the provisions of the ordinances above alleged, said cemetery had on the 28th day of February, 1893, become and was the most generally used and valuable cemetery property within the corporate limits of said city.

"(6) That on the said last-named date defendant was, and since said date has continued to be, the owner of a certain tract or parcel of land immediately joining and contiguous to the cemetery property above mentioned, and situated within the corporate limits of the city of Austin, and particularly described as follows, viz.: [Here follows a description of the property.]

"(7) That prior to said last-mentioned date said defendant, wishing and intending to utilize the above-described property for the purpose of a cemetery, had subdivided same into several hundred cemetery lots of 25 by 30 feet each, with necessary and convenient driveways between, and had offered said lots for sale generally to the public for the purpose of burying therein dead human bodies.

"(8) That on said date there was in existence and in force a valid penal ordinance, enacted by plaintiffs, prohibiting the burial of dead human bodies within certain territory embraced in the corporate limits of the city of Austin, and that the property above described was situated wholly within said territory, where the burial of human bodies was prohibited from being made by the terms of said ordinance.

"(9) That on the 15th day of March, 1893, defendant instituted in the district court of Travis county, Texas, a suit against the city of Austin to restrain said city from enforcing against it the provisions of said penal ordinance, on the alleged ground that said ordinance was, as to it, void; and that the litigation thus begun was terminated by the judgment of the Supreme Court of Texas, which

judgment adjudicated the issues involved in said litigation in favor of the city of Austin, and sustained the validity of said ordinance, and the power of said city to prohibit said cemetery association from maintaining a cemetery on the property above described or any part thereof.

"(10) That after the final termination of said litigation said cemetery association, still wishing to utilize said above-described property for the purpose of a public cemetery, and wishing to have the privilege of so operating said property as to make it in effect an addition to the Austin City Cemetery, above mentioned, and to thereby create an additional demand and value for said property as cemetery property, and wishing also to secure for it the supervision and superintendence of the city sexton of the city of Austin, applied to the city council of the city of Austin for permission so to do, and that in response to said application the city council of the city of Austin, by ordinance enacted on the 18th day of March, 1895, authorized said cemetery association to establish a cemetery on said property as desired by it, provided said association would accept in writing and agree to the provisions of said ordinance. That said ordinance contained a statement of the mutually binding terms upon which said defendant was to establish and plaintiff was to permit the establishment of an addition to the previously existing Austin City Cemetery, which terms are substantially as follows, viz.: "Said addition was to be operated as a cemetery under the care and supervision of the city sexton, whose duties in connection with said management and supervision were to be similar to those imposed upon him by ordinance with reference to the Austin City Cemetery, as same previously existed. A certain strip of land situated in said addition was to be deeded to the plaintiff absolutely for interring its pauper dead. The driveways and streets in said addition were to be so located, arranged, and constructed as to constitute them continuations and extensions of the driveways and streets in the older portion of the cemetery, and the whole property was to be inclosed in a single general inclosure or fence. Burial lots or blocks in the addition were to be of the same dimensions as those in the older portion of the cemetery. The cost of maintenance, including cost of necessary fencing, grading, culverts, and drains, was to be borne by the defendant. A plat of the land embraced in said addition was to be filed by defendant in the office of the city assessor and collector of plaintiff. Defendant was to pay all costs incurred in the case of Austin City Cemetery Association vs. City of Austin; was also to pay all court costs in the case of Hill et al. vs. City of Austin, which was an injunction suit to restrain the said city from further extending the limits of the Austin City Cemetery; and was to enter into bond to indemnify the city against further cost of litigation arising because of the

establishment or operation of said addition to said cemetery." That, in addition to the terms imposed by and contained in said ordinance, as above alleged, it was also provided therein that the Austin City Cemetery Association should establish and maintain on its above-described property a public addition to said Austin City Cemetery, and that it should not charge more than \$25 per block 25 by 30 feet in size in said addition; that a true copy of said ordinance is hereto attached, marked "Exhibit A," and prayed to be taken as part of this petition.

"(11) That on the 18th day of April, 1895, defendant, by an instrument in writing filed with the city clerk of plaintiff, accepted the terms and conditions imposed by said ordinance; that a true copy of said acceptance is hereto annexed, marked "Exhibit B," and prayed to be taken as a part of this petition; and that on said date it did and performed all other acts prescribed by said ordinance as conditions precedent to the taking effect of said ordinance; that said ordinance thereupon and at once took effect, and became a contract between plaintiff and defendant, and that the contract evidenced by said ordinance and the acceptance thereof has ever since said 18th day of April, 1895, constituted a valid and binding obligation upon both plaintiff and defendant; that plaintiff has in each and every respect performed and caused to be performed each and every duty and obligation resting upon it by reason of said contract; and that defendant, for many years after said contract was made, observed and performed its duties thereunder; and that said addition to said Austin City Cemetery was for a period of several years immediately following the execution of said contract operated by both parties in accordance with the agreement thereby evidenced.

"(12) That immediately prior to the date when the contract above alleged was executed the supply of unused and unsold lots in the Austin City Cemetery had become almost exhausted, and it had become necessary for the plaintiff to establish or secure the establishment of additional cemetery facilities in or conveniently accessible from said city, in order to meet the imperative needs of its people; that all of the territory embraced in the corporate limits of said city, and all of the territory contiguous to and without said limits, which could be made available for cemetery purposes, was land of a porous quality, resting on a limestone foundation, close to the surface of the ground, and more or less likely to convey from any cemeteries which might be located thereon poisonous fluids to great distances; that the city council of plaintiff, believing such regulations to be expedient for the promotion of health among the inhabitants of the city, has always so exercised its charter powers as to limit and restrict by ordinance the territory which might be used within said city for cemetery purposes to the smallest extent adequate to meet

the requirements of the people of the city, and that the establishment and operation within the corporate limits of the city of more cemeteries than would be sufficient to accommodate the needs of the public would, because of the character of such territory, be attended with unnecessary danger to the health of said city; that, in order to make effectual its ordinances restricting and limiting the territory which might be used for cemetery purposes within said city, it is, and has always been, essential for plaintiff to secure to the people of the city the right to purchase burial ground in authorized cemeteries at reasonable prices; and that the contract above alleged was made by the city council in recognition of such necessity.

"(13) That on July 10, 1901, and on divers dates prior to that date, defendant willfully and wantonly broke said contract by extorting from all persons purchasing lots in said cemetery addition a price for each lot purchased exceeding the maximum price of \$25, which it is permitted to charge for a cemetery lot under the terms of its contract with this plaintiff; that the names of the persons to whom said lots were sold, and the exact dates and prices of such sales, are not at this time known to plaintiff, but are in each and every instance known to the defendant, and will be proven by plaintiff on the trial of this cause; that on the date last above mentioned the officers of plaintiff expostulated with the president of defendant corporation, and threatened him with public prosecution if he should continue to so violate said contract; that on or about the 1st day of September, 1901, defendant again placed its cemetery lots on the market, and since said date has sold divers of said lots to persons requiring same for the burial of their dead, and has in each and every instance charged the purchasers of said lots prices exceeding the maximum price of twenty-five dollars which it is permitted by its contract with defendant to charge for a cemetery lot; all of said lots in said addition being of the size mentioned in said ordinance attached as Exhibit A.

"(14.) That there are at present in said cemetery addition more than one hundred unsold lots which defendant is under the legal duty of selling to such proper persons as may apply to it for the purchase of lots at prices not to exceed \$25 per lot; that, unless restrained from further violating its said contract, defendant will in the future continue to violate said contract as same has by it been violated in the past, and will take advantage of the circumstances of such of the people of said city as require places for the burial of their dead to extort from them as the price of each lot sold sums ranging from one hundred to one hundred and fifty dollars, or will arbitrarily and without cause take all of said lots off the market, and leave the people of said city without adequate or proper place for the burial of

tueir dead; that, unless the relief herein-after prayed for be granted, the plaintiff and the people of whom said extortion will be practiced will each and all be without any remedy adequate to protect themselves from the consequences of said wrongful, unlawful, and continuous breaches of contract on part of defendant.'

"The petition prayed that the defendant, its officers, agents, and employes, be restrained from charging, demanding, or receiving, directly or indirectly, more than \$25 each for lots in the cemetery addition of defendant; and said parties, and each of them, be restrained from refusing to sell to any proper person a lot at said maximum price of \$25, when requested so to do; and for such other and further relief that it might be entitled to under the facts alleged.

"The exhibits attached to the petition were as follows, viz.:

" 'Exhibit A.

" 'An ordinance authorizing the Austin City Cemetery Association to establish a cemetery in the city of Austin.

" 'Be it ordained by the city council of the city of Austin:

" 'Section 1. That permission is hereby granted to the Austin City Cemetery Association to establish and maintain a cemetery within the city of Austin, upon the following described tract of land, viz.: [Here follows field notes of the land.]

" 'Sec. 2. That before said cemetery shall be established, said association shall convey to the city of Austin a strip of land out of said tract 25 feet in width by 1,050 feet in length for the use of the city for the burial of paupers as the city council may hereafter designate.

" 'Sec. 3. That said association shall not charge more than \$25 per block of 25 feet by 30 feet in size in said cemetery.

" 'Sec. 4. That said cemetery shall be under the care and supervision of the city sexton and all graves in said cemetery shall be dug in accordance with the directions and requirements of the city of Austin, and the directions of the city sexton.

" 'Sec. 5. That it shall be the duty of the said association to lay out and dedicate for the use of the public, streets and walks through said cemetery of the same dimensions as the streets and walks of the present cemetery, and such streets and walks shall be laid out by said association so as to form extensions of the streets and walks in the present cemetery.

" 'Sec. 6. It shall be the duty of said association to divide said tract of land into blocks of the same dimensions of the blocks in the present cemetery.

" 'Sec. 7. That the cemetery hereby provided for shall be maintained at the expense of said association and all necessary fences, gradings, culverts and drains shall be put in by said association at its own cost.

" 'Sec. 8. It shall be the duty of said association within thirty days after the passage of this ordinance to file with the assessor and collector of taxes a plat of the cemetery hereby provided for, and also to file with the city clerk a written acceptance of the provisions of this ordinance.

" 'Sec. 9. This ordinance shall not take effect until said cemetery association shall have paid all costs incurred in the case of C. F. Hill et al. against the city of Austin, pending in the district court of Travis county, Texas, and the case of Austin City Cemetery Association against the city of Austin, pending in the Court of Civil Appeals at Austin, and shall file with the city clerk an obligation to hold the city of Austin harmless against all costs that may be incurred in suits hereafter brought by reason of the establishment of said cemetery, and also an agreement to pay the expenses of removing the fence on the west side of the two and one-half acres of land now owned by the city of Austin and adjoining the land of said association at such time as the city may desire said fence removed sixty feet east of its present location.'

" 'Exhibit B.

" 'Austin, Texas, April 18th, 1895.

" 'Mr. Milton Morris, City Clerk, Austin, Texas—Dear Sir: The Austin City Cemetery Association hereby accepts the provisions of the ordinance passed by the city council on March 18th, 1895, entitled "An Ordinance authorizing the Austin City Cemetery Association to establish a cemetery in the city of Austin."

" 'This acceptance is filed in compliance with section 8 of said ordinance, by resolution of the board of directors of said Austin City Cemetery Association. Respectfully,

" 'Austin City Cemetery Association,

" 'By Otto Bergstrom, President.

" 'Attest: A. G. Covert, Secretary.'

" 'To this pleading of the plaintiff, the defendant, besides various special exceptions and answers, which it is unnecessary to notice here, filed a general demurrer. The general demurrer of defendant was sustained by the trial court, whereupon the plaintiff excepted and gave notice of appeal to this court.

" 'All the members of the Court of Civil Appeals have agreed that the trial court erred in sustaining defendant's demurrer, and that the judgment below should be reversed and the cause remanded for the following reasons:

" '(1) That the provisions of the charter of the city of Austin, as pleaded, authorized the city to pass an ordinance prohibiting the burial of the dead and the establishment of cemeteries within certain limits, provided said ordinance was reasonable. That the ordinance pleaded, as set out in subdivision 8 of the plaintiff's petition, which prohibits the burial of dead human bodies within cer-

tain territorial limits, was and is prima facie, reasonable, so far as that fact may be determined from the averments of the plaintiff's petition.

"(2) That the provisions of this ordinance did not prohibit the city from selecting places for cemeteries in which to inter the dead, nor did it prohibit the city from delegating this power to some one else, if it saw fit to do so; provided, that in neither instance would the creation of a nuisance be allowed. The averments of the petition of the exercise of the authority of the city in this respect are not to the effect that a nuisance was created by permitting the appellee corporation to use the ground described in plaintiff's petition for cemetery purposes.

"(3) In view of the provisions of the charter and the ordinance pleaded in subdivision 8 of plaintiff's petition, the appellee, the cemetery association, could not, if said ordinance was and is reasonable, establish their cemetery at the place described without first obtaining the consent of the city.

"(4) That the consent of the city to establish and maintain a cemetery for the purpose of interring the dead was such a valuable right and privilege to the cemetery association as would operate as a consideration to support all the terms of, the ordinance and contract, as shown in Exhibits A and B to the plaintiff's petition, entered into between the plaintiff and the cemetery association.

"(5) That the city had and has such an interest in the matter as would authorize it to maintain this action.

"In view of the public interest to some extent involved in a prompt and early decision of this case, we certify to the Supreme Court the following question:

"Assuming that the ordinance set out in subdivision 8, under the facts as pleaded, was reasonable, did the city have the authority to limit the purchase price of lots sold by the cemetery association to a sum not exceeding \$25 for a block of 25 feet by 30 feet, and was said stipulation and provision of the ordinance or contract entered into by the city and the association to this extent valid, and binding upon the latter?"

We concur in the conclusion of the honorable Court of Civil Appeals that the demurrer was improperly sustained. The ordinance of the city council for the city of Austin which prohibited the interment of dead bodies within certain limits in the said city being reasonable and valid, the appellee had no right to use its property for that purpose, except by the consent of the city, which might be given, as in this case, upon terms which would secure a proper regulation of the use of the property and "for the promotion of health and the suppression of disease." The permission granted to the appellee to use the property for burial purposes, and the supervision and protection afforded to it by the terms of the contract, constitute sufficient con-

sideration to support the agreement made by the appellee to sell its lots at prices not exceeding the sum named in the ordinance. It was within the power of the city and the appellee to make that contract, and it is valid and binding. *Westfield Gas & Milling Co. v. Mendenhall*, 142 Ind. 543, 41 N. E. 1033; *Cleburne W. I. & L. Co. v. City of Cleburne* (Tex. Civ. App.) 35 S. W. 733.

RAILROAD COMMISSION OF TEXAS v. WELD & NEVILLE et al.

(Supreme Court of Texas. April 13, 1903.)

RAILROAD COMMISSION—FREIGHT RATE ON COTTON—REASONABLENESS—JURISDICTION TO REVIEW.

1. Under Rev. St. 1895, arts. 4565, 4566, authorizing an action against the Railroad Commission by a party dissatisfied with a rate made by it, in which such party must show that the rate is unreasonable and unjust to him, the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.

2. Rev. St. 1895, arts. 4565, 4566, authorizing an action against the Railroad Commission to ascertain the reasonableness and justness of rates made by it, though they be not so unreasonable and unjust as to amount to the taking of property without due process, do not confer legislative power on the court, in contravention of the Constitution.

3. Plaintiff in an action against the Railroad Commission does not, as required by Rev. St. 1895, art. 4566, show that the freight rate on cotton made by it is unreasonable and unjust to him because there is no car rate, and because it is the same amount per 100 pounds whether pressed to a density of 40 pounds to the cubic foot, as shipped by him, or to a density of only 22½ pounds, as shipped by others.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Weld & Neville and others against the Railroad Commission of Texas. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (68 S. W. 1117), and defendant brings error. Reversed.

C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for plaintiff in error. Gregory & Batts, Hutcheson, Campbell & Hutcheson, and Crane, Greer & Wharton, for defendants in error.

BROWN, J. Under article 4565, Rev. St. 1895, the defendants in error instituted this suit in the district court of the Twenty-Sixth Judicial District, Travis county, against the Railroad Commission of Texas, and alleged, in substance, that the said Railroad Commission had established rules and regulations for the transportation of cotton from various points in Texas to Houston and Galveston as follows: For the territory extending not more than 100 miles from Houston the rate allowed to be charged upon cotton was based upon the length of the haul, but from all points more than 100 miles from Houston the same rate was allowed based upon 100

pounds of weight, whether in car load or less lots, with reduction of rate upon cotton compressed to a density of $22\frac{1}{2}$ pounds to the cubic foot. It is alleged that the regulations of the commission require the railroad companies to cause the cotton to be compressed either at the initial point of shipment or at the first compress in the line of transportation; charges for compressing to be paid by the railroad company, except for cotton shipped from points between 70 and 100 miles from Houston, the charges of compressing are apportioned between the shipper and the railroad company, but cotton shipped from stations less than 70 miles from Houston is not required to be compressed.

The petition alleges that the regulations of the Railroad Commission governing the shipping of cotton and fixing the rates thereon were made with reference to the old system of handling cotton, which involves its compression at the gins in bales of 54 to 58 inches long, 28 to 36 inches wide, and from 24 to 28 inches thick, which must be hauled to the railroad station, thence by the carrier to the nearest compress; 25 bales being all that a car will carry in an uncompressed condition, but, after being compressed to a density of $22\frac{1}{2}$ pounds to the cubic foot, 50 bales can be carried to the car. Plaintiffs allege that they are interested in one of a number of improved economic methods of handling cotton in successful operation in Texas and minutely describe the method by which a bale of cotton is produced by the Lowry system which weighs 250 pounds, with a density of more than 40 pounds to the cubic foot, being convenient in size and weight for handling, impervious to water, and not combustible. With bales thus compressed the carrier can load cars to the limit of their capacity and the allowed excess, and can use flat cars in the transportation of the cotton without danger of injury from water or fire.

Plaintiffs allege that the cotton crop of Texas amounts annually to 3,000,000 bales, the greater part of which is gathered and shipped during the last four months of each year, and all of it must be transported by the railroads of the state within that time, necessitating the ownership and use of a large number of cars at a heavy cost, which cars cannot be used at other seasons of the year; that the demand for cars to carry cotton is so great as to often create car famine and great delay in the transportation of the cotton, which causes the railroad companies to resort to the use of flat cars that are unfit for that use, and expose the cotton to damage by water and fire, whereby the railroad companies are subjected to heavy damages. The petitioners state minutely the supposed advantages that accrue to the railroad companies in shipping the Lowry bales of cotton over other freight or cotton otherwise compressed. Briefly stated, the allegations are that the Lowry bales are not breakable; that

they are not combustible, nor liable to injury by water; save the expenses incident to short hauls and concentrating the cotton, and the difference between the cost of carrying two packages of the same weight, one compressed to the density of $22\frac{1}{2}$ pounds to the cubic foot and one to the density of 40 pounds to the cubic foot.

The petition charges that, notwithstanding cotton properly compressed is the most desirable class of freight for railroad companies, the railroad commission has fixed upon cotton the highest charge for transportation. It is charged that in transporting the same weight of cotton as originally compressed and the Lowry bale the railroad company receives nearly twice as much freight for a car load of the Lowry bale as for a like car load of the other, and particular instances are cited to illustrate this proposition. It is averred in the petition that under the regulations complained of the railroad companies are given an extraordinary and unreasonable revenue and profit for transporting Lowry bales of cotton, that the revenue derived by railroads from handling cotton compressed under the new method is greatly in excess of that derived from cotton handled in the old way, and that the cost under the new method is so much less than that to establish the same rate for both classes of cotton is unjust and inequitable, and a discrimination against plaintiffs.

Plaintiffs allege that prior to the institution of this suit they twice called upon the Railroad Commission for proper hearing to establish reasonable rates for the transportation of cotton, which application the Railroad Commission refused, alleging as its reason that to grant the prayer of petitioners would give the owner of the improved bales practically a monopoly of the business of compressing cotton. It is alleged that the refusal to grant a hearing and the refusal to establish the regulations requested were unreasonable and unjust to plaintiffs, that the regulations requested were reasonable and just to defendants, and they prayed that the regulations be established by the court.

The Railroad Commission, by the Attorney General, filed general demurrer and special exceptions, which were by the court overruled, and upon trial before the court judgment was entered declaring the rates and regulations to be unreasonable and unjust as to the defendants in error, which judgment was affirmed by the Court of Civil Appeals. 68 S. W. 1117.

The contention of the Railroad Commission may be considered under the following propositions: (1) Articles 4565 and 4566 of the Revised Statutes of 1895 do not authorize an inquiry by the courts into the reasonableness and justness of the rates, rules, and regulations made by the commission, except to ascertain if they amount to the taking of property without due process of law; in other words, that such rates, rules, and regula-

tions are confiscatory in their effect. (2) It is contended that, if the said articles do authorize an inquiry into the reasonableness of rates, etc., except to ascertain whether or not they are in conflict with the Constitution, then such articles of the statute are in violation of the Constitution of the state, because they thereby confer legislative power upon the courts. (3) That the facts alleged in plaintiffs' petition do not constitute a cause of action under articles 4565 and 4566.

The first question stated above has been decided by this court adversely to the contention of plaintiff in error in the case of *Railroad Commission v. H. & T. C. Railway Co.*, 90 Tex. 340, 38 S. W. 750. In that case the court said: "The language of the law is so antagonistic to the rules established by the decisions, which construction is claimed to have been adopted by the Legislature, that we must conclude that the Legislature intended to change those rules in their application to the subject embraced in the articles quoted; otherwise there was no need for the articles 4565 and 4566. Indeed, the conferring of that jurisdiction upon the courts of itself imposed the duties to try the case by the ordinary rules of procedure, unless otherwise provided." Upon re-examination of the question we are constrained to adhere to our conclusions announced in that case, and to hold that the Legislature intended to confer upon the courts power to determine the question of the reasonableness of rates as they affect the rights of shippers and the railroads by the same rules that would be applied in determining a like question between other parties.

Articles 4565, 4566, do not confer legislative power upon the courts, but, by subjecting the rates to be made by the commission to examination, their reasonableness becomes a judicial question, and there is no conflict between those articles and the provision of the Constitution which provides that "no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." The making of rates by the commission is the exercise of legislative authority, which the courts cannot exercise; but whether the law under which it acts has been complied with is a question for the courts. It is unnecessary for us to inquire what the rule would be in the absence of our statutory provisions.

Articles 4564-4566, Rev. St. 1895, read as follows:

"Art. 4564.—In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found other-

wise in a direct action brought for that purpose in the manner prescribed by articles 4565 and 4566 of this chapter.

"Art. 4565.—If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court.

"Art. 4566.—In all trials under the foregoing article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

The meaning of the phrase "unreasonable and unjust to it or them" is the question to be solved. An examination of the law as it existed before the creation of the Railroad Commission will aid in the solution of the question. Prior to the enactment of the commission law, railroad companies were authorized by statute to make their rates of freight and their rules and regulations, but were limited in their charges to a reasonable sum, not to exceed 50 cents per 100 pounds per 100 miles; the charges to be uniform on each class of freight, and unjust discrimination was forbidden. The fact that the carrier charged one person a greater sum than was charged to another for "transportation in this state of any freight of the same kind and class in equal or greater quantities for the same or less distance" was made prima facie evidence of unjust discrimination, but the carrier was permitted to rebut this presumption by showing that it was not unjust discrimination. Article 4258 (Sayles' Old Ed.) Rev. St. 1888-89. It will be observed that the violation of the law did not consist alone in the discrimination in charges, but depended upon the justness of such discrimination. That statute declared in a negative form what the common law affirmed of the same subject; that is, at common law a carrier was permitted to discriminate in freight rates, provided the circumstances were not such as to make it unjust and unreasonable. *Baxendale v. E. C. Ry. Co.*, 93 Eng. Common Law Rep. p. 75; *Garton v. B. & E. Ry. Co.*, 101 Eng. Common Law Rep. p. 153; *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142; *Avinger v. South Carolina Ry. Co.*, 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; *Johnson v. Pensacola & Perdida Ry. Co.*, 16 Fla. 666, 26 Am. Rep. 731; *Scofield v. Railway Co.*,

43 Ohio St. 612, 3 N. E. 907, 54 Am. Rep. 846; Fitchburg Ry. Co. v. Gage, 12 Gray, 398. Under the statute discrimination in rates is prohibited unless it appears not to be unjust and unreasonable. At common law the party complaining was required to show that the discrimination was unjust and unreasonable, while by statute the burden of proof was upon the carrier to establish that it was reasonable and just.

The railroad commission law deprived railroad companies of the power to make rates, and conferred that authority upon the commission, which necessarily took from shippers any right of redress against carriers in case the rates were unreasonable, because they are compelled by law to carry at the rate fixed by the commission, and cannot be held responsible for excess in charges thus forced upon them. The commission was organized as arbiter between carriers and shippers, and for that purpose is invested with very large, but not absolute, powers. To secure the rights of both carrier and shipper against errors or intentional wrongs which might be committed by the railroad commission, articles 4564-4566 were adopted, which give the railroads a right of action against the commission to set aside such rates as might be prescribed for their government in case they should be unremunerative, giving to the shippers an action against the commission to secure a reduction of such rates in case they be unreasonably high. Being thus clothed with power to adjust the rights of the carrier and shipper, and being subjected to judicial control so as to secure such rights, the commission stands in this action in the attitude towards plaintiffs that the railroad company would stand if excessive charges had been collected from the plaintiffs, and this suit were for the purpose of recovering the excess of charges paid; hence the same construction should be given in this action to the phrase "unreasonable and unjust to it or them" that would have obtained in a suit to recover from the carrier excess of charges paid.

At common law, in a proceeding of this kind, the terms "unreasonable and unjust" meant that the rate charged was more than a fair compensation for the services rendered, or that the difference in rates constituted an unjust discrimination against the complainant. In *Garton v. Railway Company*, above cited, the action was to recover for excessive charges paid by the plaintiffs, based upon the proposition that the charge collected was greater than the sum demanded from another shipper for like service. In the course of the trial Justice Cockburn said: "Suppose the company choose from some motive of mere favor to convey the goods for A. B. for nothing, could every person else to whom they made a charge recover it back as money had and received unless there was proof of damage? The amount to which they favor others can make no differ-

ence." And in the same case Justice Crompton remarked, "The charging of another person too little is not charging you too much." An examination of that case will show that it fully sustains the position that the carrier had the right to discriminate between shippers as to the amount of charges, provided it did not amount to unjust discrimination, and the charge complained of was not more than a fair compensation for the services performed.

In *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, the court made the following quotation from *Directors, etc., of Great Western Railway Company v. Sutton*, 4 Eng. & Ir. App. 238: "At common law, a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable."

In *Fitchburg Ry. Co. v. Gage*, cited above, it was sought to recover from the railroad company the difference between freight charges collected from Gage and others and charges upon the same class of freight carried for others between the same points about the same time, the contention being that railroads are common carriers, and "in that relation required to carry merchandise and other goods or chattels of the same class at equal rates for the public and for each individual on whose account service in this line of business is performed." The court answered the contention as follows: "The principle derived from that source [the common law] is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for

special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could, of course, make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly, then, the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known, and cannot, therefore, be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties."

If the rates, rules, and regulations complained of in this action had been made by a railroad company before the creation of the commission, and this suit had been instituted against the railroad company to recover damages for discrimination, it could not be maintained, because the facts alleged in the petition do not show that there was any discrimination against the plaintiffs in the rates charged and collected from them. The comparison is made by plaintiffs between cotton compressed to a density of 40 pounds and more to the solid foot and cotton not so compressed, and it is claimed that, because the railroad company derives more profit from a car load of the one than the other, there is discrimination against the shipments of cotton compressed by the method represented by plaintiffs. The same rate is charged per hundredweight for all cotton, and the plaintiffs' case rests wholly upon the proposition that they have the right to compel the Railroad Commission to make a rate by the car load instead of by the 100 pounds, or to give lower rates on cotton in round bales. There is no rule of the common law nor provision of the statute which requires the carrier or the commission to make rates based upon car-load lots, nor is there any precedent or principle by which the reasonableness of a rate (as it affects individual shippers) made by carriers or by the commission can be determined by a comparison of the profits, derived from the shipment of different classes of freight.

Article 4562, Rev. St. 1895, prescribes the duty of the commission in making rates in this language:

"Art. 4562. The power and authority is

hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and to prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

"1. The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

"2. The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions."

The performance of these duties requires that classification be made so as to secure equality as near as may be in the carriage of similar articles, and each shipper is entitled to have his property carried for a reasonable compensation for the service rendered to him. In making the classification and rates of charges, the railroad companies must also be protected in their right to have a fair return from their business; but in determining this question the railroad commission must have in view the entire business operations of the railroads. A marked difference between the right of the shipper and the carrier in determining the reasonableness of rates consists in this: When considered from the shipper's standpoint, it must be reasonable as to the particular property carried; that is, the charge must not be more than a fair compensation for the services rendered to the shipper in the carriage of the particular property. When, however, the commission considers the reasonableness of rates from the standpoint of the railroads, it is not confined to the particular article, but must look to the whole business of the railroads, which are required to carry many articles at a loss as a single transaction, which must be made up by levying higher rates upon such articles as can bear it within the limit of reasonable compensation. The rate and classification must be so arranged as to give a result of just and reasonable compensation on the entire business of the railroad company; but the rate on each article need not be reasonable if considered alone, but the aggregate must, however, produce a reasonable return. The work of the commission as prescribed by the article last copied involves a comprehensive knowledge by the commission of the business transactions of railroads and of the various business

interests of the people, so that by a just exercise of their ample powers the citizen may be guarded against extortions and unjust discrimination, and the railroads be allowed a fair return for the services rendered to the public. To every one who is charged with the distribution of taxes upon property and pursues the serious question is presented: how much can be levied upon each class of property or each occupation, and which is best able to bear the burden that is necessary for the support of the government? A like, but more complicated, question presents itself to the Railroad Commission or railroad company in the fixing of rates and making classifications. Public interest must be consulted in the regulation of these matters so as to give support to weak enterprises, and not to exclude from market many things which would not bear transportation if the charges were based upon absolute equality. The superficial view of the subject which we are able to take with our limited knowledge makes it manifest that discrimination in rates is often necessary to uphold justice and to promote the public good, and such discrimination is not unjust to him who gets in service the equivalent of what he pays.

The plaintiffs do not complain that the rates charged against them are either unjust or unreasonable. They claim simply that the Railroad Commission has failed to give them an advantage over their competitors, which is unjust to them because it deprives them of a benefit that they would derive from the control of improved machinery, and because it gives to the railroad company more profit on a car load of cotton prepared by their method than upon other cotton. But a complete answer to this proposition is that in the transportation of a car load of cotton composed of round bales the shipper receives the service of carrying nearly twice as much cotton as can be carried upon a car of flat bale cotton. The profits which are made by railroad companies are greater to the car load, but the car load is of greater value and weight than the other, and the liability of the railroad company is proportionally increased. Plaintiffs can as well complain of lower rates given upon other articles; for instance, upon wheat, oats, and corn, neither of which would bear a charge equal to that placed upon cotton, either by the car load or by the 100 pounds. In truth, if such a rule was adopted as that proposed by the plaintiffs in this case, the commission's work could not possibly be sustained in any court, for it might, by comparison between rates on different articles, and by showing a difference in profits derived from the transportation of one over the other, destroy any schedule of rates that could be prepared. The process that the plaintiffs would inaugurate to test the reasonableness of a rate is such as the Railroad Commission might adopt for the purpose of making proper

distribution of rates. It is applicable strictly to rate making, and is, therefore, legislative in its character. It is not appropriate to the work of testing the reasonableness or justness of a prescribed rate, therefore is not judicial. Courts are limited in their review of the work of the commission by the terms of the statute, and cannot go into an investigation of the methods by which the commission arrived at its conclusions.

We have found no case like this because there is not within the range of our research any trace of a statute like that under which this proceeding was instituted. The cases of *Garton v. Railway Company*, 101 Com. L. R. 153, and *Fitchburg Railway Company v. Gage and others*, 12 Gray, 398, which we have cited, are analogous in some respects, and announce principles which condemn the contention of the defendants in error. We repeat the following part of the quotation before made from the latter case: "But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded, for complaint." Certainly, the commission has, under the laws of this state, no less authority than the railroad corporations had before the commission was created. According to the allegations of the petition of defendants in error, the commission has, in conformity to the principles announced in the cases cited, "confined itself to a rate not unreasonable for the services rendered" in the transportation of all classes of cotton.

The defendants in error disclose their purpose by that which they ask the court to do: that is, to fix a rate upon cotton in round bales lower than the rate which has been fixed by the commission upon cotton of all classes; in other words, they ask that the rate of charges upon the cotton in which they are interested shall be sufficiently below the general rate to enable them to avail themselves of the advantage their improved machinery would give them under such circumstances. The effect of such action would be to give them such advantage over their competitors in the purchase and sale of cotton that it would tend very decidedly to creating in their favor a monopoly of the cotton business. Their allegations are sufficient to show that the machinery they claim to be interested in is being operated in different parts of the state, and with the discrimination which they seek would enable them to cover in a large measure the cotton producing territory of Texas, and to control the bulk of the crop. To make such difference in the rates upon cotton in flat bales and that in round bales would manifestly be unjust discrimination, and it was proper for the commission, in making rates, to bear in mind that the probable effect would be the

creation of a monopoly to the detriment of the public. The owners of improved machinery have a right to all the benefits of its superiority over the old machinery for ginning and baling cotton that comes from the use of the machinery itself, but they have no right to ask the government to bend its policy to their aid in this respect to the injury of the citizenship of the state.

We are of opinion that the facts alleged in the petition do not tend to show any right of action in the defendants in error as against the Railroad Commission, and that the court below erred in not sustaining the general demurrer to the petition. The allegations of the petition and the facts proved show that no better case can be made by an amendment of the petition; hence it would be useless to send this case back to the district court for further proceedings.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that the general demurrer of the Railroad Commission to the petition of the defendants in error be, and the same is hereby, sustained, that this case be dismissed, and that the defendants in error pay all cost.

OVER et al. v. MISSOURI, K. & T. RY. CO.
(Court of Civil Appeals of Texas. April 1, 1903.)

RAILROADS — NEGLIGENCE — PERSONS NEAR TRACKS — LICENSE TO CROSS — PATHWAY — CUSTOM — NEGLIGENCE OF MINOR — CHILD SUI JURIS — QUESTION FOR JURY — FAILURE TO GIVE SIGNALS — INSTRUCTIONS.

1. Where, on the trial of an action against a railroad company for injuries to a minor, there was no evidence that his discretion was not equal to that of an adult, and the question was not raised on motion for a new trial, on appeal the case must be considered as though the minor were an adult.

2. Where one turns aside from a path which crosses a railroad, and leisters on the tracks, he is a trespasser, and the railroad owes him no duty, save to use means to prevent injury after his dangerous position has been discovered.

3. In an action against a railroad for injuries to one crossing the tracks by a path that had been used for a number of years, an instruction that, if the path had been used "for a long time," the railroad owed certain duties to those crossing the pathway, was not prejudicial to plaintiff.

4. In an action against a railroad for injuries sustained by one struck by a car while crossing a path over the tracks, the injured party and one or two of those with him testified that he was struck while bending over on the track, tying his shoe. *Held*, that the question whether the act was contributory negligence was for the jury.

5. The court charged that if the jury believed that certain cars were backed, and that there was no engine attached to them, no duty rested on the railroad company to ring a bell or blow a whistle. *Held*, that the effect of the charge was to withdraw from the jury one of the items of alleged negligence, to the effect that no bell was rung or whistle blown.

6. Where, by custom and acquiescence, the public have a pathway across railroad yards, it is a question for the jury whether it is negligence of the railroad to run cars over the path,

with locomotive detached, so that no bell is rung or whistle is sounded, and whether the fact that men are on the cars, keeping a lookout, is a sufficient precaution.

7. In an action against a railroad company for injuries sustained by one owing to his having been struck by a car while crossing a pathway over the railroad tracks, it was error to instruct that the railroad employes must have knowledge that the path was used by the public, to render the company liable, inasmuch as, if the pathway was customarily used, it was the duty of the railroad company to make its employes acquainted with the fact.

8. An appellant cannot avail himself of errors in instructions where he has asked charges containing the same erroneous matter.

9. In an action for injuries to a minor struck by a railroad car while crossing a path over the tracks, it was not error to exclude the declarations of the minor that he did not know that it was dangerous to stop where he did on the track.

10. It was not error to refuse to permit plaintiff to ask the minor's mother if she knew whether he understood the danger of going around trains, the same being a matter to be determined by the jury.

11. It was error to permit defendant to introduce certain testimony as to the minor's connection with some brass that had been stolen from a school building, such evidence having no relevancy.

12. It was proper to permit a witness who had taken measurements at the scene of the accident, and made a plat of it, but who was not present when the boy was hurt, to testify that he had been shown the place by persons who were present, and to permit the latter to testify that they had shown the place to different parties.

13. As tending to contradict the evidence of the minor, it was proper to permit a witness to testify as to what a boy had said to the minor as to how the accident occurred, and to which the minor assented.

14. It was error to admit testimony of a witness as to what the minor's parents had told him when he told them that they should keep the minor from jumping on trains.

15. In an action for injuries to a minor, the fact that the father was absent from home, and left the government of the children to the mother, was not evidence of negligence on his part.

16. Declarations of the minor's mother that she was capable of taking care of her child, and "that it was no policeman's business to be monkeying with her children," and that she did not believe her boy had been going on defendant railroad's right of way, were not admissible.

17. Where a minor is sui juris, in an action for injuries sustained by him the negligence of his mother cannot be imputed to him.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by Walter Over and another against the Missouri, Kansas & Texas Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Smith, Templeton & Tolbert and Jno. T. Suggs, for appellants. T. S. Miller and Head & Dillard, for appellee.

FLY, J. This suit was instituted by George Over, for himself and as next friend of his son Walter Over, a minor, to recover damages for injuries inflicted on the latter through the alleged negligence of ap-

¶ 17. See Negligence, vol. 27, Cent. Dig. §§ 151, 152, 156.

pellee. The trial resulted in a verdict and judgment for appellee.

The pleadings of appellants proceed upon the theory that Walter Over was injured while crossing the railroad at a point where persons were accustomed to cross, and that while so crossing he was negligently injured by the railway company, and upon that theory the cause was tried. The question of the indiscretion of the boy was not raised in the trial court, and in all the special charges requested he was treated as a person of mature age and judgment. The question was not raised in the motion for new trial, but for the first time is sprung in this court. There was no evidence that tended to establish that the boy's discretion was not equal to that of an adult. As said by the Supreme Court in *Railway v. Shiflet*, 94 Tex. 181, 58 S. W. 945: "The evidence showed that Thomas Shiflet was between 11 and 12 years old—most probably within two months of the latter age. This does not bring him within the age at which courts have held a child to be exempt, as a matter of law, from the charge of contributory negligence; neither does it place him at such an age as the court will, as a matter of law, hold that he was responsible for his acts. It was a question of fact for the jury, to be determined upon the evidence adduced before them. If there was no evidence upon the subject, the issue should not have been submitted, or, having been submitted, the jury ought to have found for the defendant, because it devolved upon the plaintiff to show, for want of discretion, the negligent act of the deceased was not imputable to him." Under the facts of this case, Walter Over must be treated as though he were an adult, with full and ripened experience and discretion; and if it can be held, as a matter of law, that it would be contributory negligence for a man to play with the coupler of a car on a siding in a railroad yard in a city, the law must be so applied to this boy.

Walter Over was only licensed to cross the tracks of appellee, and he had never received license or permission to make a playground of the track, with the appliances of the cars as his means of pastime and pleasure. When he turned aside from crossing the tracks of appellee, and loitered thereon for other purposes, he became a trespasser, subject to the same treatment and dangers as any other trespasser; and appellee owed him no duty, except to use all means to prevent his injury after he was discovered on the track. *Railway v. Cowles* (Tex. Civ. App.) 67 S. W. 1078.

Appellants alleged in their petition that the public had been using the pathway near the place of accident for many years in crossing the railroad tracks, and the court did not err in telling the jury that, if the pathway had been used by the public "for a long time," the railroad owed certain duties to those crossing in the pathway. It takes time

to establish a custom, and without such element there was nothing to bring knowledge of such use home to the railroad company, so as to infer acquiescence. The proof indicated that the pathway had been used for a number of years, and the instruction could not possibly have injured the cause of appellants.

Walter Over and one or two of his companions swore that he was struck by the car while he was bending over on the track, tying his shoe; and the court did not err in instructing the jury that, if they found that act was contributory negligence on the part of the boy, they should find for appellee. The issue was directly raised by the evidence, and the evidence failed to show that the boy did not have sufficient discretion to be guilty of contributory negligence.

The court, at the request of appellee, instructed the jury: "If you believe from the evidence that certain cars were backed and struck cars which were standing, and that there was no engine attached to these cars which were backed, then you are instructed that no duty rested upon the railway company to ring a bell or blow a whistle." The effect of this charge was to withdraw one of the items of negligence alleged in the petition, and which was supported by evidence tending to show that no bell was rung or whistle blown when the cars were started on a down grade on a siding over which custom had established a pathway. By the charge, one of the grounds of negligence alleged was held to be no ground of negligence. To justify the charge, the proposition is advanced that the law does not require the ringing of a bell or blowing of a whistle when the cars are detached from the engine in railroad yards. If that be correct as an abstract proposition, it must be modified in cases where the evidence shows that by custom and acquiescence the public have made a pathway across the yards. The evidence in this case tends to establish that fact, and, if the injured boy did not by his acts make himself a trespasser, it was the duty of the railroad company to use care and prudence to prevent injuring him; and if by giving the signals at the time the cars were started, and afterwards, the boy might have been warned of the approach of the car, then it was the duty of the railroad company to give such signals. The boys swore they heard neither bell nor whistle; the employees of appellee did not swear that signals were given; and a question of fact as to whether such failure was negligence was raised, and should have been submitted to the jury. If it be the law, as declared by the charge, that a railroad company can drive cars without signal over a crossing created by custom, and not be liable for damages, it would be authorized to do the same thing across a public road or street. If the engine should have given signals had it been attached to the cars moving on the siding, it should have

given them when it threw the cars on the siding, and went off and left them to pursue a journey that might end in destruction of human life. It is true that the evidence established that two men were on the moving cars, who were keeping a lookout; but it was the province of the jury, and not that of the court, to say whether keeping a lookout was a sufficient precaution under the facts of the case. If there had been proof that the signals were given, or circumstances proven that would indicate that the signals would not have been heard or heeded, the charge might be excused; but no such facts appear, and we are confronted with the naked declaration that the law does not require a bell to be rung or whistle blown when cars are shunted down sidings over which pathways have been made and permitted. There is no authority in law for such a proposition, but as to whether it was negligence is a matter of fact to be determined by the jury.

If the pathway across the railroad track had been customarily used by the public for a long time, with the knowledge of the railroad company, certain duties would devolve upon the company in connection therewith, whether the employes in charge of the locomotive and cars knew of such custom or not. It was the duty of the railroad company to make its employes acquainted with such facts as were necessary for legally running its trains and performing its service, and it could not relieve itself of its responsibility by putting employes in charge of its trains who were ignorant of such facts. It was therefore error to instruct the jury that the employes in charge of the engine and cars that inflicted the injury should have knowledge that the path was used by the public, in order to make the railroad company liable. This error is referred to in view of a reversal, for it could not avail appellants on this appeal, because they clearly invited the error by asking charges containing the same proposition.

The court did not err in excluding the declaration of Walter Over that he did not know that it was dangerous to stop where he did on the track, or in refusing to permit appellants to ask his mother if she knew whether he understood the danger of going around trains. Such declaration of the boy was self-serving, and the issue was a matter to be determined by the jury from the facts in regard to the boy's intelligence, opportunities of learning about such matters, and his experience around railroads, and not to be arrived at by the conclusions of witnesses.

The court permitted appellee to introduce testimony as to Walter Over's connection with some brass that was stolen from a school building, and it would seem clear that such evidence could have no relation to any issue in the case, and should have been excluded.

A witness, who had measured the yard and made a plat of it, was not present when

the boy was hurt, and did not know where it occurred, was permitted to testify that he had been shown the place by persons who were present, and the latter were permitted to say they had shown the place to different parties. We think the evidence was clearly admissible.

The testimony of Dr. Booth as to what a boy had said to Walter Over as to how the accident occurred, and to which the latter assented, was admissible, as tending to contradict the evidence of the latter.

The testimony of the witness Finley as to what Mr. and Mrs. Over told him when he told them they should keep Walter from jumping on trains had no bearing on any issue in the case, and should not have been admitted. The fact that the father was absent from his home, and left the government of his children to the mother, was not evidence of negligence on his part, and could not have affected his right to recover for the services of his son; and the declaration of the mother that she was fully capable of taking care of her child, and "that it was no policeman's business to be monkeying with her children," and that she did not believe that her boy had been going on the right of way, was not admissible for any purpose. It did not show negligence on her part, and, if it did, it could not be imputed to the boy.

It is unnecessary to consider the other assignments of error.

For the errors indicated herein, the judgment is reversed, and the cause remanded.

CENTRAL TEXAS & N. W. RY. CO. v. SMITH.

(Court of Civil Appeals of Texas. April 1, 1903.)

CARRIERS — INJURY TO PASSENGER — NEGLIGENCE — IMMATERIAL ERROR — POSTPONEMENT FOR ABSENT WITNESSES — EVIDENCE.

1. Action of a railroad engineer or fireman in leaving a switch engine standing on the track over which a passenger train was expected, while he consorted with prostitutes, was such gross negligence as to make almost any kind of error in the charge on negligence immaterial.

2. An application for a postponement on account of absent witnesses is addressed to the court's discretion, and its decision will not be reviewed unless an abuse of discretion appears.

3. In an action against a railroad for injuries to a passenger, where there was no evidence of the amount of money paid by plaintiff for medical attention, or as to the amount he was obligated to pay, it was error to submit the matter to the jury.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by Richard Smith against the Central Texas & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Frost, Neblett & Blanding, for appellant. Geo. A. Bell and A. A. & Y. D. Kemble, for appellee.

NEILL, J. This suit was brought by Richard Smith against appellant to recover damages for personal injuries inflicted upon him while a passenger upon one of the appellant's trains, caused by the collision of the train with a switch engine. The appellant, after interposing a general demurrer to appellee's petition, pleaded "Not guilty." A trial of the case, which was before a jury, resulted in a judgment for appellee of \$1,000.

Conclusions of Fact.

On the 7th of November, 1900, a switch engine was left standing on appellant's railroad track near Waxahachie, from which either the engineer or fireman got off, and went under a pecan tree and engaged in a conversation with two women of a bawdy-house. While so engaged, one of appellant's regular passenger trains, upon which appellee was a passenger, coming into Waxahachie, collided with the switch engine, whereby appellee was thrown from his seat across the aisle against another seat, and seriously and permanently injured. The act of appellant's servants in leaving the switch engine upon the track was, under the circumstances, negligence of the most flagrant character, and was the proximate cause of appellee's injury.

Conclusions of Law.

It is complained by appellant that the court erred in this paragraph of its charge:

"The word or term 'negligence,' as applied to a person or corporation engaged in the transportation of passengers for hire, is the failure to do anything which a person of the highest degree of care and prudence, engaged in the same kind of employment, would have done or performed under like circumstances, or the doing of anything which a person possessed of the highest degree of care and prudence, engaged in the same kind of business, would have refrained from doing under like or similar circumstances."

The paragraph of the charge immediately preceding this is:

"The term 'a very high degree of care' means that degree of care which a person possessed of the highest degree of care and prudence, engaged in the same kind of employment, would have exercised under like circumstances."

It seems to us that the paragraph complained of, when the definition of the term "a very high degree of care" is read into it, instead of being at variance with the principle announced by the Supreme Court in *I. & G. N. Ry. v. Welch*, 86 Tex. 204, 24 S. W. 390, 40 Am. St. Rep. 829, as is urged by appellant, is in perfect harmony with it. Were it not, in view of the evidence in this case, we would not be inclined to disturb the judgment on that account. When the servant of a railroad company leaves his engine standing on the track, over which a passenger train is expected, to consort with

prostitutes, such gross negligence is shown as would make almost any kind of an error in the charge on the question of negligence immaterial.

The appellant had used no statutory diligence to procure and enforce the attendance of the witness for whose testimony a postponement of the trial was asked, and, as the matter was addressed to the sound discretion of the court, it is not our province to review its action, in the absence of an apparent abuse of such discretion.

There was no evidence of the amount of money paid by appellee for medical attention, or of the amount he was obligated to pay for such attention. Therefore the court erred in submitting it to the jury, to be considered in estimating the damages. *Railway v. Tierney*, 72 Tex. 312, 12 S. W. 586; *Railway v. Click* (Tex. Civ. App.) 23 S. W. 833; *Railway v. Moore*, 72 S. W. 226, 6 Tex. Ct. Rep. 700. The appellee alleged in his petition "that he had incurred for necessary medical attention, expenses, and medicine the sum of \$138." As this limits the amount he could have recovered for such attention and expenses, and as appellee has, in the event we should deem the charge erroneous on this point, tendered in his brief a remittitur of that sum, such remittitur will be entered of record, and the judgment affirmed.

EASTERN MFG. CO. v. BRENK.

(Court of Civil Appeals of Texas. April 1, 1903.)

SALES—WRITTEN ORDER FOR GOODS—CONTEMPORANEOUS WRITTEN MODIFICATION—AUTHORITY OF AGENT—NOTICE TO SELLER.

1. A writing contemporaneous with an order for goods, authorizing their return in case they are not satisfactory, and showing on its face that it is executed by the seller's agent on the seller's behalf, is admissible, though it conflict in some respects with printed terms embodied in the order.

2. It is within the apparent scope of an agency for the sale of goods to stipulate that, if the property sold is unsatisfactory to the purchaser, it may be returned for credit.

3. An agent for the sale of goods having apparent authority to agree that they may be returned if unsatisfactory, it is immaterial that the seller is not apprised of such agreement.

4. An agent for the sale of goods having apparent authority to agree that they may be returned if unsatisfactory, and the buyer having no notice that the agent was disregarding instructions in doing so, the fact that he may have acted contrary to instructions is immaterial.

Appeal from Robertson County Court; Tom M. Taylor, Judge.

Action by M. C. Brenk against the Eastern Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Simmons & Crawford, for appellant. J. Felton Lane and J. E. Bishop, for appellee.

KEY, J. This is the second appeal in this case. 61 S. W. 329. The former judgment

was reversed because the trial court excluded the written contract pleaded by the defendant, which, by its terms, authorized him to return the jewelry for which the notes sued on were given, if the jewelry was not satisfactory. At the second trial the contract referred to was admitted in evidence, which is assigned as error.

We see no reason to change the ruling made on the former appeal. The instrument referred to was executed at the same time that the defendant signed the printed order for the goods. It is true that it was signed by J. W. Calloway, the plaintiff's traveling salesman; but it shows on its face, in connection with the testimony bearing on that subject, that it was executed for and on behalf of the plaintiff, and not as the individual obligation of Calloway.

We must rule against appellant on the contention that Calloway was without authority to make the contract referred to. Having authority to make a contract of sale, it was within the apparent scope of his agency to stipulate in the contract that, if the property sold was unsatisfactory to the purchaser, it could be returned for credit.

As to the question of agency, and the authority of Calloway to make a contract varying the printed terms embodied in the order, we feel constrained to follow the case of *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63, and other cases to the same effect by our Supreme Court. The case of *Aultman & Co. v. York*, 1 Tex. Civ. App. 485, 20 S. W. 851, decided by this court, is not entirely analogous. The agreement relied on in that case to change the terms of the written contract was verbal, while the one relied on in this case was a contemporaneous written agreement. It is true that in some respects it conflicted with the printed terms embodied in the order given by Brenk for the jewelry, but it is a familiar rule in the construction of contracts that written terms will prevail over those that are printed.

If we are correct in the foregoing views, it is unimportant whether or not the plaintiff had notice of the existence of the written contract set up by the defendant. If the agent had the power to make the contract, it is binding upon the plaintiff, although the agent may have neglected to apprise the plaintiff of the existence of the contract, and may have acted contrary to instructions given him by the plaintiff, it not being shown that the defendant had notice of the fact that the agent was acting in disregard of instructions given by his principal. *Merriman v. Fulton*, 29 Tex. 97; *Ry. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Clarkson v. Reinhartz* (Tex. Civ. App.) 70 S. W. 111.

All the questions presented in appellant's brief have been considered, and no reversible error being shown, the judgment is affirmed. Affirmed.

AVINDINO'S HEIRS v. FR. BECK & CO. (Court of Civil Appeals of Texas. March 28, 1903.)

WRONGFUL EXECUTION—MEASURE OF DAMAGES—VALUE OF GOODS—FINDINGS—EVIDENCE.

1. In an action to recover for an alleged wrongful levy of an execution on the ground that the defendant in execution was denied the right to point out the property to be levied on, the measure of damages is the value of the goods seized at the time of the levy, less the amount of the judgment.

2. In an action for wrongful levy on a stock of goods under a judgment for \$665.51, there was evidence that the goods were worth from \$2,500 to \$3,000. The sheriff testified that, in fixing the value at \$1,978.35, he based his estimate on the cost price of the goods in the wholesale markets, with 10 per cent. added to cover freight. Other witnesses testified that the goods were worth from 40 to 50 cents on the dollar. The goods were sold under the execution for \$530, and the purchaser immediately resold them for the same amount. *Held*, that a finding in favor of plaintiff for \$250 was not erroneous, as inadequate.

Appeal from District Court, Bowie County; J. M. Talbot, Judge.

Action by E. S. Avindino against Fr. Beck & Co. From a judgment in favor of plaintiff's heirs, substituted after his death, for less than the relief demanded, they appeal. Affirmed.

Henry & Henry, for appellants. Glass, Estes & King, for appellees.

TEMPLETON, J. This suit was brought by E. S. Avindino against Fr. Beck & Co. to recover the value of a stock of millinery which was levied on and sold under an execution in favor of Beck & Co. against Avindino. It was claimed that the levy was wrongful, because the defendant in execution was denied the right to point out property to be levied on. Avindino died pending the suit, and his heirs made themselves parties, and, on a jury trial, obtained judgment for \$250, with legal interest from the date of the levy. They were not satisfied with the amount of their recovery, and have appealed.

The only question presented is the contention of appellants that they were entitled, under the evidence, to a larger sum than the amount awarded to them by the verdict of the jury. The measure of the damages of appellants is the value of the stock of goods, less the amount of the judgment of Beck & Co. against Avindino. At the time of the levy there was owing on the said judgment the sum of \$665.51, with some interest. By adding this sum to the sum recovered by appellants, we are enabled to arrive at the value of the goods as found by the jury. Avindino and his wife, both of whom are now dead, testified on the first trial that the goods were worth \$3,000, and their testimony was reproduced. Mrs. Russell, clerk of the Avindinos, testified that the goods were worth \$2,500. The value of the goods, as

fixed by the officer who levied the execution, was \$1,978.35. This estimate of the sheriff was based on the cost price of the goods in the wholesale markets, with 10 per cent. added to cover freight charges. B. Applebaum testified that the goods were worth about 50 cents on the dollar. S. Heilbron, who is now dead, testified on the first trial that the goods were worth about 40 cents on the dollar; that he was a bidder at the execution sale, his bid being \$525, which he considered the value of the entire stock. His testimony was reproduced.

The goods were bought at the execution sale by Beck & Co. for the sum of \$530, and were immediately resold by them for the same amount. The stock of goods was composed, in part, of odds and ends that had accumulated in the course of the business, which had been carried on for six years.

A consideration of this evidence will show that it is sufficient to warrant the finding of the jury that the goods were worth between \$900 and \$1,000, and it follows that the judgment should be affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. IRVINE & WOODS.

(Court of Civil Appeals of Texas. April 1, 1903.)

RAILROADS—SHIPPING CATTLE—NEGLIGENCE—DEVIATION FROM ROUTE SELECTED—AUTHORITY OF STATION AGENT—DAMAGES—EVIDENCE—EXPERT EVIDENCE—INSTRUCTIONS.

1. A shipper usually has the right to select the route over which his goods are to be shipped, and the carrier is liable for all damages resulting from deviation therefrom.

2. In the absence of a selection of a route by a shipper, the initial carrier may choose the same, having due regard for the shipper's rights.

3. Where a railroad shipped cattle over a route longer than that selected by the shipper, and there was no testimony to show increased damages by reason of the greater distance, it was error to submit the issue to the jury.

4. A station agent of a railroad company can bind it by a verbal contract to furnish cars at a given time for the shipment of freight, unless want of authority in the agent is known to the shipper.

5. In an action against a railroad for negligently transporting cattle, defendant was not injured by a refusal to charge that no damages could be assessed on account of an allegation, unsupported by the evidence, as to the cars being old and out of repair, where the court fully instructed the jury on what issues to consider damages, and did not include the item of old and defective cars therein.

6. It was not error to refuse special charges on an issue covered by the general charge.

7. Where shippers held their cattle at a certain point on account of a railroad's failure to furnish cars at an agreed time, they could recover on account of defects in the cars finally furnished them, whether they demanded other cars in writing or not.

8. In an action against a railroad for negligently transporting cattle, it appearing that it had shipped the cattle over a route different

from that selected by the shipper, evidence as to the customary running time of cattle trains over the route selected was admissible.

9. Evidence as to the speed of one freight train at a certain time was inadmissible.

10. In an action against a railroad for negligently transporting cattle, testimony as to the death of cattle several days after leaving the cars was competent.

11. In an action against a railroad for negligently transporting cattle, declarations of the vendor, made before he delivered the cattle to the shippers, as to his reasons for not penning the cattle, were inadmissible, where such vendor was not shown to be the shippers' agent.

12. An expert in shipping cattle was properly allowed to state whether it would have been necessary to feed the cattle at a certain point if they had been promptly shipped and expeditiously transported.

Error from Grayson County Court; J. D. Woods, Judge.

Action by Irvine & Woods against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. Terry and Ohas. K. Lee, for plaintiff in error. Wolfe, Hare & Semple, for defendants in error.

FIY, J. This is a suit for damages in the sum of \$640.32 alleged to have accrued to a shipment of cattle from San Angelo, Tex., to Checotah, Ind. T. The trial resulted in a verdict and judgment for defendants in error in the sum of \$331.

Defendants in error alleged that plaintiff in error, through its local agent at San Angelo, agreed to furnish proper and suitable cars for the transportation of the cattle on the morning of April 24, 1901, but failed to have any cars ready until on the night of April 25, 1901; that the cars furnished were old, worn, and out of repair, and unsuitable for the shipment of cattle; that defendants in error had requested that the shipment be made by way of Brownwood, over the Ft. Worth & Rio Grande Railroad, but they were not so shipped, but were sent by Temple and Cleburne, increasing the distance 120 miles, by which the cattle were damaged; that the cattle were delayed and injured by rough handling, and eight cows and two calves were killed.

The facts in this case show that appellees demanded that their cattle be shipped over appellant's line from San Angelo, Tex., to Brownwood, Tex., and thence over the line of the Ft. Worth & Rio Grande Railway. This the appellant refused to do, and routed the cattle over its line by way of Temple and Cleburne, a distance of 115 miles further than by the route desired by appellees.

The shipper usually has the right to select the route over which his goods are to be shipped, and the carrier will be held liable for all damages resulting from a deviation from the route selected by a shipper. U. S. Express Co. v. Kountze, 8 Wall. 342, 19 L. Ed. 457.

It is the rule that, in the absence of the

¶ 1. See Carriers, vol. 9, Cent. Dig. §§ 488, 787.

selection of a route by the shipper, the initial carrier may choose the route over which property is shipped; but the selection must be made with due regard for the rights of the shipper; and, if the carrier selects a longer and less expeditious route than the one desired by the shipper, it will be held responsible for all damages resulting from its action. *Wells-Fargo Ex. Co. v. Fuller*, 5 Tex. Civ. App. 213. In the case of *Express Co. v. Kountze*, above cited, the shippers had ordered their gold dust shipped by a certain route, which was not done, and the property was lost by robbery, and the court said: "If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in defiance of the owner of the property, reject the safe and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instruction given by the owner of property concerning its transportation, whenever practicable." There was no evidence, however, that established that the damages were increased by sending them by Temple and Cleburne, unless it could be inferred from the fact that the distance was greater than by the Ft. Worth & Rio Grande Railway. If such inference be permissible, then there is no testimony by which to fix the increased damages. Not only does the evidence fail to show increased damages, but, on the other hand, there was testimony as to the delays that would have been required by transfers of the cattle at Brownwood and Ft. Worth, that would tend to show that no time was lost and no damage resulted by taking the cattle by Temple and Cleburne. There being no testimony warranting the submission of the issue, the court erred in submitting it. It is true that the charge allowed the jury to offset any damages arising from the longer route by the increased freight rate over the Ft. Worth & Rio Grande Railway, and, if it had been shown that the damages so inflicted were less or only equal to the increased freight rate, no injury could have resulted to plaintiff in error; but it is impossible to ascertain what may have been allowed as damages by the jury for the deviation from the route designated by defendants in error.

The third assignment of error complains of a refusal to charge the jury that the local agent had no authority to agree to furnish cars of a certain size at specified time, and that such agreement should not be considered by the jury. The instruction was properly refused. "It is well settled in this state that a station agent of a railroad company can bind it by a verbal contract to furnish cars at a given time for the shipment of freight, unless the shipper knows the agent has no such authority." *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583; *McCarty v. Rail-*

way, 79 Tex. 37, 15 S. W. 164; *Railway v. Hume*, 87 Tex. 211, 27 S. W. 110; *Railway v. True* (Tex. Civ. App.) 57 S. W. 977; *Railway v. Gallagher* (Tex. Civ. App.) 70 S. W. 97. What has been said in this connection disposes of the fourth and fifth assignments of error, also. Shippers are not called upon to investigate the authority of a railroad agent to make contracts, but may act on his apparent authority within the scope of his employment. *Railway v. Williams* (Tex. Civ. App.) 57 S. W. 883.

There was evidence tending to show unnecessary delay in the transportation of the cattle, and it was not error to present that issue to the jury.

The court's charge did not authorize the finding of double damages for delay, and there is therefore no merit in the seventh assignment of error.

The charge as to the measure of damages, when read, as it should be, in connection with the rest of the charge, could not have been construed by the jury to authorize the assessment of damages that occurred on the line of a connecting carrier against plaintiff in error.

No damage could have resulted to plaintiff in error by the refusal of the court to charge that no damages could be assessed on account of the allegation as to cars being old and out of repair, there being no evidence to support the allegation, for the reason that the court fully instructed the jury on what issues to consider damages for defendants in error, and did not include the item of old and defective cars therein.

The court instructed the jury that damages could not be recovered that could have been avoided by feeding the cattle, or that may have resulted from improper bedding, and it was not error to refuse special charges on the same subject.

Defendants in error had held their cattle at San Angelo on account of failure to furnish cars at the time agreed on, and they could recover on account of defects in the cars furnished them, whether they demanded other cars, in writing, or not. Such a stipulation was unreasonable under the circumstances of this case, at least.

We think evidence as to the customary running time of cattle trains between Brownwood and Ft. Worth over the Ft. Worth & Rio Grande Railway was admissible on the issue of deviation from the route selected by the shippers, but the evidence as to the rate of speed of one freight train at a certain time, it would seem, was inadmissible.

The objection to the testimony of Irvine as to the death of cattle several days after leaving the cars at Checotah was an attack on the weight, rather than on the admissibility, of the evidence. The evidence may have been weak, but it was properly admitted to be weighed by the jury.

The declarations of Henderson, who sold

the cattle to defendants in error, made before he delivered the cattle to them, as to his reasons for not penning the cattle, were properly excluded. He was not shown to be the agent of the shippers, and they could not be affected by his admissions.

The witness Chisholm was shown to be an expert in shipping cattle, and it was not error to allow him to express an opinion as to whether it would have been necessary to feed the cattle at Ft. Worth if they had been promptly shipped and expeditiously transported; but, as the shippers were responsible for the proper bedding of the cars, that matter should not have entered into the question, or answer of the witness.

The other assignments of error are unimportant, and need not be considered.

For the errors indicated, the judgment is reversed and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. FREEMAN et al.*

(Court of Civil Appeals of Texas. March 21, 1903.)

RAILROADS—HOSPITALS FOR EMPLOYEES—NEGLECT—CONTAGIOUS DISEASE—PERMITTING NURSE TO GO AT LARGE—LIABILITY TO PERSON INFECTED—DEATH—PERSONS ENTITLED TO RECOVER—PECUNIARY INJURY—CONTRIBUTORY NEGLIGENCE—ACTIONS—PETITION—INSTRUCTIONS.

1. Rev. St. 1895, art. 3017, provides that an action for death may be brought where the death is caused by the negligence or carelessness of the proprietor or owner of any railroad, or by the unfitness, negligence, or carelessness of his servants or agents. *Held*, that an action for death against a railway company under such section was not limited to a death resulting from the railroad's operation of its road in its capacity as a carrier only, but extended to a death resulting from the negligence of a servant of the railroad company employed to nurse a smallpox camp, in connection with the hospital maintained by the railroad as a part of the legal department.

2. A complaint alleged that a servant of a railroad company was infected with smallpox in the company's hospital, and, on developing the disease after his discharge, the company's surgeon ordered the local surgeon to isolate and care for such employé; that such local surgeon isolated the employé, and employed an incompetent, untrustworthy, and unfit Mexican to nurse such employé; and that the nurse was permitted to leave the pest camp, and, by reason of his incompetency, came in contact with plaintiff's intestate on the public street, by reason of which intestate became inoculated with the disease, from which he died. *Held*, that such petition was not objectionable for failure to allege that such nurse, while going on the street as alleged, was defendant's servant, or was acting within the scope of his employment.

3. Where a surgeon employed by a railroad company to care for an employé afflicted with smallpox employed a nurse who was incompetent and had the reputation of being an habitual drunkard, and, by reason of the nurse's negligence in going on the public streets of the city without disinfecting himself, he communicated the disease to plaintiff's intestate, from which intestate died, the railroad company was liable for intestate's death.

4. Where, at the time plaintiff's intestate came in contact with a nurse employed by defendant to nurse a smallpox patient, he knew that the nurse was employed to care for such patient, but there was no evidence that he knew at that time that such nurse had not changed his clothes or disinfected his person, an instruction that if intestate knew that the nurse was so employed, and voluntarily came in contact with him, he was guilty of contributory negligence, was properly refused.

5. Where, in an action for death, there was no evidence that decedent's father was receiving any pecuniary benefits from decedent's earnings at the time of his death, or that he had any reasonable expectation of doing so in the future, a finding in favor of the father was erroneous.

Appeal from District Court, Hunt County; H. O. Connor, Judge.

Action by Annie Freeman and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiffs for \$7,000, defendant appeals. Modified.

T. S. Miller and Perkins & Craddock, for appellant. Evans & Elder, for appellees.

Conclusions of Fact.

BOOKHOUT, J. The appellant, the Missouri, Kansas & Texas Railway Company of Texas, enters into agreements with its employes whereby, in consideration of deducting a stipulated sum from their wages each month, in case any one of them should become sick or injured while in its service it will furnish them surgical and medical attention. Appellant entered into a contract with Alonzo Dickson, an employé, whereby it was agreed that, in consideration of deducting 25 cents from his wages each month, if he should become injured or sick it would take charge of him and treat him for such injury or sickness. On August 1, 1899, and for many years prior thereto, the appellant was operating and controlling a hospital department for the purpose of treating its sick and injured employes. The Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company constitute what is known as the Missouri, Kansas & Texas Railway System. Said companies operate, in connection with and as a part of their legal and claim departments, their hospital department, under one general management, for the mutual benefit and interest of the companies and their respective employes. The Kansas Company owns a hospital at Sedalia, Mo., that is used by the two companies, where some of the employes of appellant are sent for treatment when sick or injured. During the latter part of July, 1899, Alonzo Dickson, who was then in the employment of appellant as a section hand, and had been in such employment for four years in Hunt county, received a slight injury in such service, and was sent to the Sedalia Hospital; arriving there on August 1, 1899. At the time he was placed in the hospital he was placed in a ward with some colored patients who were broken out with

*Rehearing denied April 11, 1903.

the smallpox, smallpox having existed in the hospital from the 10th day of July previous. He complained to the surgeon in charge, and told him that those negroes had smallpox, and that he desired to leave the hospital. He was told by the surgeon that it was only chickenpox, but to come around the next morning, and he would give him a pass back to Greenville. On the next morning, August 2, 1899, he was discharged from the hospital, sent back to Hunt county, and placed at work for appellant under James Ewing, section foreman. George McNeil was the house surgeon of said hospital. It was his duty to examine, admit, treat, and discharge patients sent to the hospital, and to keep a register showing the names and addresses, and the dates of admission and discharge, of all patients sent to the hospital for treatment. This surgeon was inexperienced in the treatment of smallpox; never having treated a case prior to this time; there never having been a case of smallpox in the hospital since he had been in charge; he being put in charge in 1890, the same year he graduated from college. It was not determined that there was smallpox in the hospital until August 2, 1899, the day Dickson was discharged from, and after he left, the hospital. On that day the city of Sedalia quarantined the hospital on account of the prevalence of smallpox in the hospital, and it remained under quarantine until September 11, 1899. Prior to the 2d day of August, appellant did not know that smallpox existed in the hospital, but learned it on that day, and that Dickson had been exposed thereto, and was liable to break out with the disease in about 15 days. No precautions were taken to protect him, or the public against him, until the 19th day of August, when he broke out with the disease. On August 8, 1899, the division superintendent of appellant, A. D. Bethard, at Denison, Tex., sent to A. W. Baxley, at Greenville, Tex., the road master of the Mineola Division of appellant's lines, the following telegram: "During quarantine at Sedalia hospital, local surgeons will look after sick or injured employes except those who desire to go to hospital, who may be sent to Dallas, Ft. Worth or Houston infirmary." When Dickson broke out with smallpox, and this fact was made known to the company's local surgeon, Dr. Garnett, he wired Dr. Yancey, the chief surgeon, to know what to do with him, and the chief surgeon wired him: "Isolate and quarantine him, secure a nurse at reasonable wages, and give him such attention there as he will need. Write me particulars and daily expenses. Attend to vaccination and watch any one who may have been exposed by him."

When R. M. Chapman, who was then the mayor of Greenville, learned that Dickson had smallpox, and before he learned that he was an employe of appellant and had been exposed to the disease at its hospital, he purchased a tent, and arranged with the owner

of some lands, preparatory to taking charge of Dickson. This was Sunday afternoon, August 20, 1899. But before taking charge of Dickson, Dr. Garnett showed Chapman his instructions from Dr. Yancey, at which time Dr. Garnett, acting under said instructions from Dr. Yancey, took charge of Dickson, and undertook to isolate and quarantine him. He placed him in the tent and on the land that had already been secured and designated by Chapman as a quarantine camp, and Chapman took no further steps until after Dickson had escaped, which was on Tuesday morning, August 22d. On that afternoon the mayor, acting on the understanding that the railway company would defray the expenses, hired one additional guard for the pest camp, and confined in it all who had been exposed to Dickson. Dr. Garnett, having taken charge of Dickson, undertook to isolate and quarantine him on behalf of the railway company, and neglected to employ a sufficient number of attendants or guards to restrain him, but negligently employed an incompetent Mexican, and placed him in charge of Dickson to guard and nurse him for the first two days. The railway company knew, or in the exercise of ordinary care could have known, of the incompetency of said Ablo. Frank Ablo was put in charge of two patients afflicted with smallpox, to nurse and guard them. The said Ablo, while so employed, and within the scope of his duties, left the camp or pesthouse, and went upon one of the public streets of the city of Greenville, without having disinfected himself, and while on a public street came in contact with W. A. Freeman, and caused him to contract said disease, from which said Freeman died. The said Ablo, in leaving said camp and going upon the public streets of the city of Greenville, where he was liable to come in contact with persons who had not had smallpox, was negligent, and was also negligent in not disinfecting himself; and the railway company was also guilty of negligence in so permitting said Ablo to leave said pest camp and go upon the public streets of Greenville. W. A. Freeman was not guilty of contributory negligence in coming in contact with said Ablo and in contracting said disease, nor in failing to have himself vaccinated. By reason of the death of said Freeman, plaintiffs, except C. J. Freeman, sustained damage in the amount found by the jury.

Conclusions of Law.

1. The first contention of appellant is that under the statute a railway company is not liable for injuries resulting in death, caused by the negligence of its agents or servants, unless the injuries so resulting were brought about in some way in the operation of the railway company in its capacity as a carrier of goods and passengers. There is no assignment of error under which this contention specifically arises, but it is presented by appellant as fundamental error; and, if sound,

we are of opinion that it should be so considered. This contention was raised by appellant in the case of *Railway Co. v. Wood*, under a state of facts in all respects the same, so far as this question is concerned, as is presented by this record, and this court overruled the contention without discussion (68 S. W. 802), and a writ of error was refused by the Supreme Court. The fact that the hospital department was operated in connection with the claim and legal department, for the benefit and profit of the railway company, and as an essential department of its service as a common carrier, brings this case within the terms of the statute (Rev. St. 1895, art. 3017). *Railway Co. v. Wood* (Tex. Civ. App.) 68 S. W. 802; *Railway Co. v. Wood* (Tex. Sup.) 66 S. W. 449, 56 L. R. A. 592.

2. It is contended that the trial court erred in overruling and not sustaining the ninth and tenth special exceptions of appellant to the petition, to the effect that the petition does not show that the nurses or guards, in communicating smallpox to Freeman, or in going upon the premises where Freeman was at work, or in the streets or elsewhere, were the agents or servants of defendant, or acting within the scope of their employment. It was alleged, substantially, that the local surgeon, in taking charge of Dickson and undertaking to care for him, acted as the agent of appellant, and within the scope of his authority. The petition alleged the contract between appellant and Dickson, the acts of the railway company in sending him to the hospital at Sedalia, his infection with smallpox on the 2d day of August, 1899, at Sedalia, and the order of the division superintendent on the 3d day of August directing the local surgeons to treat its sick and injured employes along its lines and outside of the hospital during quarantine; that the defendant undertook to isolate, detain, nurse, and treat its employes afflicted with smallpox in the city of Greenville; that, for the protection of the public, it was required that the servant in charge of said smallpox patients would remain at the camp, and refrain from communicating or coming in contact with the public while nursing and guarding such patients, to the end that such disease might not be communicated to the public; that it was the duty of the defendant to have employed nurses and guards who would not leave the camp and come in contact with the public; that the defendant employed only one servant to act as both nurse and guard, and placed him in charge of the patients, which servant was "ignorant, incompetent, untrustworthy, and wholly unfit and unsuitable to assume the responsibility and discharge the duties of such position, which was known to the defendant; that during the latter part of August, 1899, W. A. Freeman was engaged as a carpenter at work on a house within a short distance of the pest camp, • • • and while going on a public street to,

or returning from, such house where he was at work, the defendant negligently and carelessly communicated the disease to him, by negligently permitting its said nurse and guard to leave said pest camp and detention camp, and that by reason of the negligence and carelessness of the defendant in employing an incompetent and untrustworthy nurse and guard, who, by reason of his incompetency and want of sense of his responsibility, left the camp, and did go into and upon a public street and come in contact with W. A. Freeman, and caused him to contract the disease, from which he died; and that, by reason of such negligence and carelessness, plaintiffs were damaged." When the defendant company took charge of Dickson for the purpose of isolating, nursing, and treating him for smallpox—a dangerous and infectious disease—it assumed and owed a duty to the public to employ competent and experienced persons and agents to perform that duty. It took the risk of all consequences of a wrongful execution of that duty, resulting from the incompetency of a nurse or guard so employed by it. It was the duty of the company's surgeon to employ a person as nurse or guard who had sufficient intelligence and discretion to remain isolated, and not leave the camp and go upon the public streets, where he would likely come in contact with persons who had not had the disease, without first disinfecting his person and changing his clothes. It was the negligence of the company's surgeon in employing the incompetent guard, Ablo, that placed said Ablo in a position where he could, by reason of his negligence and incompetency, communicate the disease to others. 1 *Thomp. on Neg.* § 529; *Wood, Mas. & Serv.* §§ 282, 283; *Railway Co. v. Shields* (Ohio) 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840; *Railway Co. v. Mallon*, 65 Tex. 115; *Postal Tel. & Cable Co. v. Coote* (Tex. Civ. App.) 57 S. W. 912. It was held in the case of *Railway Co. v. Wood* (Tex. Sup.) 66 S. W. 449—a case arising out of the same state of facts as this—that the company was liable for the negligence of the guard, Ablo, in permitting one of the patients, while in a delirious condition, to escape and communicate smallpox to another. We think the company is liable where, as in this case, it employs an incompetent servant, and puts him in charge of a pest camp containing persons afflicted with smallpox, to isolate, nurse, and guard such persons, and the servant, by reason of his want of discretion and incompetency, negligently leaves the camp and goes upon the public streets of the city, and communicates the disease to another. The allegations in the petition are sufficient to show liability on the part of the defendant company, and the evidence fairly sustains the allegations. It is shown that when the Mexican, Ablo, was employed, no inquiry was made as to his habits or fitness, other than that it was known that he was im-

mune by reason of having had smallpox. The evidence shows that he had the reputation of being a habitual drunkard, and is amply sufficient to show his utter incompetency. On the 21st of August, 1899, there were two negroes at the pest camp, afflicted with smallpox. Ablo was the nurse or guard in charge of them. He left the camp, and went to town, he says, to get something for the negroes and himself to eat. On his return he stopped on Lee street, in front of the Diamond Saloon, where he came in contact with W. A. Freeman.

3. It is insisted that the court erred in instructing the jury as follows: "If you believe the deceased, Will Freeman, did not contract the disease from Frank Ablo, or if you believe that Will Freeman knowingly went into or near the pest camp, and voluntarily came in contact with one or more of the nurses or guards employed in or about the pest camp, knowing they were so employed, or voluntarily came in contact elsewhere with one or more of the nurses or guards employed in or about said pest camp, knowing that he or they were so employed, and in either of said ways contracted the smallpox, and died therefrom, and if you further believe that the said Will Freeman was guilty of negligence in exposing himself, if he did, then and in that event you will find for defendant." The contention is that, if a person knowingly and voluntarily exposes himself to danger, he assumes the risk thereof, and is negligent, as a matter of law, and that it is error to submit the question of negligence to the jury. There was evidence tending to show that W. A. Freeman knew at the time he came in contact with Frank Ablo, on Lee street, in front of the Diamond Saloon, that said Ablo was employed as a guard at the pesthouse. There is no evidence that he knew that Frank Ablo at the time had not changed his clothes and disinfected his person. Under the evidence and circumstances shown by the record, Freeman may have believed at the time of such exposure that Ablo had changed his clothes and disinfected himself before leaving the pest camp, and that one would not contract the disease of smallpox by coming in contact with him. If Freeman knew that Ablo was a guard or nurse at the pest camp, but at the time he met him in front of the Diamond Saloon, in Lee street, was under the impression that said Ablo had disinfected his person and changed his clothes, and would not communicate the disease, then it was for the jury to determine whether Freeman was guilty of negligence in so coming in contact with Ablo. The charge of the court expressly restricted the right of recovery by plaintiffs to the exposure on Lee street in front of the Diamond Saloon, and told the jury to find for defendant if Freeman did not contract the disease from such exposure. The court did not err in its charge in leaving it for the jury to determine whether Free-

man was guilty of negligence in exposing himself, under the circumstances. There was evidence that Freeman was taken with smallpox within the usual time for its development after such exposure. For the reasons above given, there was no error in the action of the court in refusing the special charge, the refusal of which is made the ground of appellant's seventh assignment of error, and wherein the appellant sought to have the jury instructed that it was negligence, as a matter of law, if Freeman knowingly and voluntarily came in contact with one or more of the nurses or guards employed in the pest camp, and plaintiffs could not recover. So far as said charge is correct, it was embraced in the general charge.

4. Complaint is made of the action of the court in overruling the motion for new trial based upon the alleged misconduct of a juror and one of appellees' counsel. This contention raises a question of fact, and the issue was determined by the trial court adversely to appellant. There is evidence to support the finding of the trial judge, and, in view of the finding, we are of the opinion that this assignment is without merit.

5. The jury were not justified in finding, as they did, in their verdict, \$100 in favor of C. J. Freeman, who was the father of W. A. Freeman. The record does not show that C. J. Freeman was receiving any pecuniary benefits from the earnings of W. A. Freeman at the time of his death, or that he had any reasonable expectation of doing so in the future. In all other respects the judgment is correct.

The judgment will be here reformed so as to exclude therefrom the recovery in favor of C. J. Freeman. As reformed, it is affirmed. Reformed and affirmed.

SOUTHERN COLD STORAGE & PRODUCE CO. v. A. F. DECHMAN & CO.

(Court of Civil Appeals of Texas. March 11, 1903.)

WAREHOUSEMEN—INSURANCE—RIGHT OF BAILOR—LIMITATIONS.

1. Goods stored with one are within the insurance policy taken out by him on goods "held in trust."

2. Where a storage company insures in its name property stored with it, without the owner's knowledge, he, by adopting it, even after the loss, is entitled to the benefit; and adoption is not necessary where the insurance is taken out pursuant to a custom of the trade.

3. The claim on which a plea in reconvention is based is not barred by limitations, though the plea filed before the claim was barred was defective; it being susceptible of amendment.

4. Where a storage company, in accordance with custom, takes out in its name insurance on its property and that of one whose goods were stored with it, sufficient to cover goods destroyed, but, without cause, settles for less, it is liable for the loss to its customer.

¶ 1. See Insurance, vol. 28, Cent. Dig. § 350.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by the Southern Cold Storage & Produce Company against A. F. Dechman & Co. From an adverse judgment, plaintiff appeals. Affirmed.

Carden, Senter & Carden, for appellant. Alexander & Thompson and Sam J. Hogsett, for appellees.

NEILL, J. This suit originated in the justice court, and was brought by the appellant against A. F. Dechman & Co., alleged to be a partnership composed of A. F. Dechman and A. T. Lightfoot, to recover \$98.79 due for certain goods sold the alleged firm, and for the storage of them, as well as for the storage of other goods of appellees. A. F. Dechman answered, denying that Lightfoot was his partner, but averred that he alone did business under the name of A. F. Dechman & Co., and was liable upon the account sued upon, which amount of \$98.79 he admitted, by a paper filed in the case, he owed the plaintiff. He then filed a plea in reconvention, in which he alleged, in substance, that the goods he purchased from the plaintiff, together with other merchandise owned by him, were stored by him with and held by the plaintiff in trust on his (defendant's) account; that said goods were of the value of \$197, and were, together with property of plaintiff, and property of other persons likewise stored with and held in trust by plaintiff, insured in the American Insurance Company by the plaintiff against fire, in the sum of \$850; that on the 11th day of August, 1899, a fire occurred, and all of said property held by plaintiff for defendant was destroyed; that after the fire defendant, on August 12, 1899, ratified said contract of insurance, and demanded of plaintiff that he be protected under the policy of insurance against such loss; that after said notice the plaintiff compromised with the insurance company, and collected therefrom on the policy the sum of \$650 in full settlement of the loss; that such compromise was made without defendant's knowledge and consent, and without giving him an opportunity to make claim against the insurance company for the value of his property destroyed; that \$500 of the \$650 paid in the settlement on the policy was for the property covered under the \$850 item of insurance which included the goods of defendant, which were included in the itemized list of property destroyed, made out by plaintiff and furnished the insurance company; and that by reason of these facts the plaintiff is liable to defendant for the value of his property destroyed, and collected from the insurance company. The plaintiff answered the plea in reconvention by general and special exceptions, the two-year statute of limitations, and a general denial. The court overruled each of plaintiff's exceptions, and

upon the trial, which was without a jury, rendered judgment in favor of plaintiff for the amount sued for, and in favor of defendant on his plea of reconvention for the sum of \$197.

The findings of fact by the trial court, which are sustained by the evidence, are in substance, the matter pleaded by appellee in his plea in reconvention. We will add, however (which was found by the trial court, and is not disputed), that the clause in the policy which appellee claims covered his property is as follows: "850.00 on stock produce, fruits, and such other goods as are usually kept in stores of this kind, their own, or held in trust, or in commission." The expression "held in trust," as used in insurance policies, means simply that the goods or property are in the custody of the insured. *Roberts v. Foreman's Ins. Co.*, 165 Pa. 61, 30 Atl. 451, 44 Am. St. Rep. 644; *Joyce on Ins.* § 1727. In fact "bailment" is defined by Sir William Jones (the first author on the subject) as being a delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or been performed. Jones, *Bailm.* 1. See also, *Story on Bailm.* c. 1, § 2.

In the case before us, appellant, as a bailee, had a special interest in the property stored with it by appellee—a lien for the purchase money on a part, and on all for storage charges. It is settled beyond dispute that the special property of a bailee for hire is of sufficient value to give him an insurable interest in the subject of the bailment. *Joyce on Ins.* § 922; *Fire Ins. Ass'n of Eng. v. Merchants', etc., Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162. A policy taken out by such a bailee is valid, though taken without direction by, or notice to, the owner. *Waters v. Monarch Fire & Life Assur. Co.*, 5 El. & Bl. 870. If such a bailee insure goods held in trust in his own name, he may, in case of loss, recover their entire value, holding the excess over his own interest in them for the benefit of those who intrusted the goods to him. *California Ins. Co. v. Union Express Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; *Johnson v. Campbell*, 120 Mass. 449; *Stillwell v. Staples*, 19 N. Y. 401; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 541, 23 L. Ed. 868; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 603. Where the bailee has insured the entire property, the owner is entitled, by adopting such insurance, to the benefit thereof, and such adoption may be made even after loss. *Miltenberger v. Beacom*, 9 Pa. 198; *Finney v. Fairhaven Ins. Co.*, 5 Metc. (Mass.) 192, 38 Am. Dec. 397; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 6 Am. Rep. 146; *Pittman v. Harris* (Tex. Civ. App.) 59 S. W. 1122. No particular form of adoption is nec-

essary. The question is one of fact. *Hooper v. Robinson*, 98 U. S. 528, 537, 25 L. Ed. 219; *Fire Ins. Ass'n of Eng. v. Merchants' & Miners' Transp. Co.*, supra.

Under the facts and the law, there can be no doubt that appellee had the right to reconvene his action against appellant in this case. When the latter obtained by compromise from the insurance company \$500 of the sum in the clause of the policy which covered appellee's goods held by it in trust, the effect of the settlement was the payment to the storage company of the value of the goods. To the extent of appellee's indebtedness, which appellant sued for in this case, the money was appellant's; and the balance to the extent of the value of the goods, was the appellee's, and was held by appellant in trust for him, just as were his goods before their destruction.

If the facts were such as to show that other parties who had stored goods with appellant were entitled to the same protection under the policy that is claimed by appellee, and that the money received in settlement was not sufficient to satisfy the demands of all such parties, and should be prorated among them, such facts should have been pleaded by the appellant in response to appellee's plea in reconvention. Such a defense could not be made under a general denial, which alone was pleaded. Besides, no facts are pleaded tending to show any reason or necessity for the compromise made by appellant with the insurance company. In the absence of such a pleading, though it might have been pleaded and shown that other parties had rights equal to appellee in the money collected, appellant would have to account—to the extent of the value of the goods—to them for the entire sum for which they were insured.

The facts shown by the record do not sustain appellant's plea of limitation. Appellee filed his answer and plea in reconvention in the justice's court on January 13, 1900. Though the plea in reconvention may have been defective, it was susceptible of amendment. Therefore, if, as contended by appellant, appellee's cause of action, upon which such plea is based, accrued on the 12th day of August, 1899, two years had not elapsed between the dates of its accrual and filing the plea in reconvention.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

On Motion for Rehearing.

(April 15, 1903.)

FLY, J. In this case the goods of appellant and those "held in trust, or in commission" were insured by appellant before it had in its possession the goods of appellee, whose value was pleaded, and allowed by the trial court, in offset to the demand of appellant. Appellee had no knowledge that the goods had been insured until after their

loss. It was proved, however, that it was a custom with those engaged in the business pursued by appellant to insure the property left with them in trust or in commission.

It is a familiar and well-settled rule as to agency that where a person, even though acting without authority, makes a contract for the benefit of another, without knowledge, the beneficiary may, at any time while the contract is in force, adopt the acts of the agent, and receive the benefits arising from his contract. The affirmance of the contract may be made at any reasonable time after as well as before the contract may have matured and the benefit have arisen. The general rule applies to policies of insurance, as it does to other matters. *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Insurance Co.*, 45 N. Y. 606. The rule above indicated would be applicable only in cases where the insurance is not taken out in obedience to a custom or rule of trade, but is gratuitously done, without any actual authority. No act of ratification or adoption would be required in cases where it is customary for a person with whom goods are deposited for hire to insure the goods so deposited, and the agent, broker, warehouseman, or other person with whom the goods are deposited and insured, will be liable to the owner for any insurance collected by such agent on account of the interest of the owner in the goods. The money obtained from the insurance company on such account would take the place of the property destroyed, and, as a matter of course, would belong to the owner. If the insurance is taken out on the property of the agent, as well as that of those entrusting him with their property, it is clear that each of the beneficiaries would be entitled to his pro rata share of the insurance collected, or that in proper discharge of duty should be collected, and neither of the principals could receive the full amount of his insurance without it appeared that the agent had collected, or by negligence lost, insurance money sufficient to pay the claims in full. In other words, the agent, by reason of the custom to insure, does not become an insurer himself of the property of each one intrusting him with it, to its full value. He is bound, doubtless, by the custom, if it be shown, to insure in some reasonable amount, but could not be held to insure for the full value of the property, as it is well known that insurance companies rarely insure property for its full value; and this fact should be considered in connection with the custom among agents or brokers to insure the property of their principals.

It was alleged in the amended plea in reconvention that the goods lost by appellant in the fire were of value less than \$500, and that the property of appellee was of the value of \$239.55, and that the insurance on the property was \$850. The allegations made out a prima facie case of liability on the part of appellant, and the proof showed that the

value of the property of appellant was \$540 or \$550, which, together with the value of appellee's property, did not exceed the amount of the insurance on the whole of the property. There was no evidence that tended to show that any other property was destroyed by the fire. In this state of case, it becomes unnecessary to discuss the question as to where the burden of proof rested, and that portion of our former opinion will be withdrawn.

Not only was it the duty of appellant, under the custom of the business in which it was engaged, to insure the property of those who intrusted it with the care of their property, but the duty to protect the interest of the consignors of property follows as a corollary to the first proposition. If the duty of the agent or broker ended with procuring the insurance, and in case of a loss he should be under no obligation to protect the interest of his principal, the insurance would amount to no protection whatever to one whose property was destroyed. The property is usually insured in the name of the agent or broker, and in his name must be collected, and he must be held to diligence and discretion in protecting the interest of one who has reposed the trust in him. It follows that if he has enough insurance on his own and the property of the consignor to pay the full value, and, from 'improvidence, carelessness, neglect, or any other motive, accepts a less sum from the insurance company than the face value of the policy, and that sum is not sufficient to pay the full value to the party owning the property, he must be held liable for any loss resulting from such conduct. The testimony not only established that the insurance would have paid the full loss, but that appellant did not make any effort to collect the insurance due on appellee's property, and settled with the insurance company without regard to his interest. It was disclosed by the evidence of appellant's manager that the \$850 insurance, had it been collected, would have paid the full value of the property of appellee, as well as of appellant. Appellant, by the compromise with the insurance company, deprived appellee of all recourse through the policy, and it must be held responsible for the amount of appellee's loss which was frittered away in the compromise. If appellant wished to give the insurance company \$350, it must come out of its insurance, and not that of its customers.

The motion for rehearing is overruled.

HARRIS et al. v. BRYSON & HART-GROVE.*

(Court of Civil Appeals of Texas. March 4, 1903.)

APPEAL—FILING BRIEFS—DELAY—DISMISSAL—AFFIDAVITS OF EXCUSE—INSUFFICIENCY.

1. Where by reason of appellants' failure to file their brief in the trial court five days before the filing of the transcript in the Court of

Civil Appeals, as required by the statute and court rules, appellees were deprived of their legal right to 20 days before the case was called for submission in which to prepare their briefs, the appeal will be dismissed.

On Rehearing.

2. Where appellants failed to file their briefs in the trial court within the time required, an affidavit alleging that the briefs were sent by mail to the district clerk in the county where the trial was had, several days before appellants were notified that the case would be submitted, and that the county seat of such county was about 20 miles distant from the nearest railroad station by mail road, and that two rivers intervened, but which failed to allege at what time the briefs were forwarded, or that high water interfered with the delivery of the mails, or that the rivers were not bridged, was insufficient to excuse appellants' delay.

Appeal from District Court, Concho County; John W. Goodwin, Judge.

Action by Sidon Harris and others against Bryson & Hartgrove. From a judgment in favor of defendants, plaintiffs appeal. Appeal dismissed.

Sidon Harris, for appellants.

FISHER, C. J. This is an action by appellants in trespass to try title. Judgment below was in favor of appellees. October 29, 1902, the judgment in this cause was rendered in the district court of Concho county. Notice of appeal was given by appellants, and appeal was perfected by filing bond on November 13, 1902. The transcript was delivered to appellants on the 29th day of November, 1902, and was filed in this court on the 3d day of January, 1903. Briefs were filed in the Court of Civil Appeals on the 24th day of February, 1903. An order was entered on the 11th day of February, 1903, setting this case for submission on February 25, 1903. Appellees on the last-mentioned date submitted to this court their written motion, properly verified, requesting the court to dismiss this appeal because the law and the rules were not complied with by appellants in filing a copy of their brief in the trial court five days before the filing of the transcript in this court, and in not giving the appellees notice of such filing. It appears that the brief was filed in the trial court February 12, 1903, which fact was not made known to the appellees or their attorneys until the 23d day of February, 1903.

Under the law, this case could properly be submitted 30 days from the time that the transcript was filed in this court. There are no briefs on file for the appellees. Under the law, the appellees had 20 days from the time that the briefs were filed in the trial court, or from the time that notice of that filing was given, in which to prepare their briefs and have them filed in the Court of Civil Appeals. The briefs of the appellants being filed in the trial court only 13 days prior to the time that this case was called for submission, and assuming that

*Writ of error denied by Supreme Court.

the 20 days should commence to run from the time that the briefs were filed in the court below, the appellees, by reason of the failure of the appellants to comply with the statute, were deprived of their full time given them by law in which to prepare and file their briefs in this court. It has been held in *San Antonio & Aransas Pass Ry. Co. v. Holden*, 93 Tex. 212, 54 S. W. 751, that a strict compliance with the statute requiring the briefs to be filed in the trial court 5 days before the filing of the transcript in the Court of Civil Appeals will not be required unless it appears that the failure to do this would result in depriving the appellee of some right he might have under the statute or the rules in preparing and filing his briefs in the Court of Civil Appeals. This case, with all of the statutes and rules of the Supreme Court bearing upon the subject, was reviewed and set out in the case of *Hunt v. Glasscock* (Civ. App.) 65 S. W. 209, 3 Tex. Ct. Rep. 407; and it was there held that, as the failure of the appellant to comply with the law concerning the filing of a copy of his brief in the trial court had deprived the appellee of a substantial right, the appeal would be dismissed.

There can be no question in this case but that the failure of the appellants to observe the requirements of the statute has deprived the appellees of a substantial right, and as a consequence of such failure their appeal should be dismissed, which is accordingly done. Appeal dismissed.

On Rehearing.

(April 15, 1903.)

We do not regard the statement made by the appellants in their motion for rehearing as sufficient to controvert the facts stated by appellees in their motion to dismiss. The affidavit of appellants is indefinite and uncertain as to just what time they forwarded their briefs by mail to the district clerk of Concho county. It says: "It was forwarded early in February, several days before appellants were notified that the case would be submitted." The affidavit contained this statement: "That said county seat [meaning the county seat of Concho county] is about twenty miles distant from the nearest railroad station by mail road, and two rivers intervene." The affidavit does not state that high water interfered with the prompt delivery of the mail to Paint Rock, the county seat of Concho county, but, to some extent, indicates that the fact that two rivers were to be crossed might have delayed delivering the mail. The appellants do not state that there were bridges across each of the rivers, and this court is reliably informed that there were at the time mentioned by appellants, and long before, substantial bridges across each of the rivers; and it is a fact known to one of the members of the court that there are substantial bridges over

both of said streams, leading from the town of Ballinger to Paint Rock, the mail route between the two places. It does not allege any promise upon the part of appellees' attorney to waive the filing of the brief in the court below. We must, in the absence of a statement to the contrary, presume that the clerk of the district court of Concho county performed his duty in promptly filing appellants' brief when it was received; and if he had then promptly issued notices of the filing of the brief, and the same had been promptly served upon appellees or their counsel, they would not have had 20 days from that time to the submission of the case in which to file their brief.

Motion overruled.

POWERS et al. v. McKNIGHT.*

(Court of Civil Appeals of Texas. March 11, 1903.)

MORTGAGES—NOTES — PURCHASE—EVIDENCE
—ESTOPPEL—APPLICATION OF PAY-
MENT—PRESUMPTION.

1. Evidence that one was sitting just outside the door of a house while one within the house made a certain statement was insufficient to raise an estoppel against the one sitting outside the door because of his failure to deny the statement made.

2. Where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation.

3. Certain notes were secured by mortgage on a woodyard. The owner of the woodyard, who had assumed the notes, was given a check by plaintiff, payable to the bank which held the notes, or bearer—the notes being in the bank for collection, and not for sale—and the owner of the yard took the notes from the bank and delivered them to plaintiff. At that time plaintiff was working for the owner of the yard, who lived with him, and they were intimate. Plaintiff testified positively that he purchased the notes. Held sufficient to show a purchase, and not a payment.

4. The fact that the check was drawn payable to the bank "or bearer" did not raise a suspicion of fraud, or show that the check was given other than for the purchase of the notes.

5. Where the owner of mortgaged property, who has assumed payment of the mortgage notes, gives the holder of the notes certain other notes as additional security for the mortgage notes, and also as security for another debt, and payments are made by the owner of the mortgaged property to the holder of the notes, which payments are credited on the notes last given, it is not to be presumed that application to the mortgage debt was directed.

6. Where judgment was rendered foreclosing a mortgage on mules which were never in the possession of defendant, but no personal judgment was rendered against him, the error was harmless.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by J. McKnight against W. R. Powers and others. From a judgment for plaintiff, defendants appeal. Reformed and affirmed.

*Rehearing denied April 15, 1903.

Robt. T. Neill, Gus. J. Geyer, and T. J. McMinn, for appellants. Bell & McAskill, for appellee.

JAMES, C. J. This action is by McKnight, upon 17 notes, of \$20 each, dated September 16, 1898, and to foreclose a mortgage on a certain woodyard given by the maker, H. L. Thompson, to secure his said notes. The notes were given by J. P. McDevitt to plaintiff, and bear indorsements as follows: That of H. L. Thompson, the erased indorsements of C. G. Franks and of Martin Peterson & Co., and the indorsement of C. L. Lassiter. The defendants sued herein are McDevitt, Lassiter, Wm. Tullos, and W. R. Powers. The two last named were alleged to be in possession of, and to set up some claim to, the mortgaged property. Plaintiff alleged that Thompson indorsed the notes to D. G. Franks; that Franks deposited them with Martin Peterson & Co. as collateral, and that on March 16, 1900, plaintiff purchased them, in due course of trade, through the Lockwood National Bank, for \$380, and that he is the owner and holder of same; and that C. L. Lassiter indorsed them and assumed payment of same. Defendants McDevitt and Lassiter made no defense. Tullos answered that he purchased the yard from one Dickens, who bought it from Lassiter, and admits that the notes sued on would warrant judgment and foreclosure as prayed, except for the following matters: (1) Said notes have been paid, and a fraudulent conspiracy exists between plaintiff and Lassiter to collect said notes and enforce said lien for their common benefit. (2) That at the time this defendant purchased the yard from Dickens, on March 27, 1901, McKnight well knew this defendant's intention to purchase it, and, so knowing, heard defendant Lassiter assure him that the yard was unincumbered, and that this assurance so acquiesced in by plaintiff induced him to purchase the yard. Powers pleaded that the notes were paid off and discharged while owned by Martin Peterson & Co., and were not indorsed and delivered to plaintiff; that he is in possession of the property mentioned in the petition, except four mules and harness; that he came into possession through foreclosure of a chattel mortgage in his favor given by his codefendants McDevitt, Lassiter, and Tullos for wood furnished the yard; that the notes sued on have been paid, and this is a conspiracy between plaintiff and Lassiter to fraudulently subject defendant's property to the notes sued on; and that plaintiff is estopped to set up the notes for the same reason that is alleged by Tullos. The following are substantially the facts shown by plaintiff. The notes and mortgages, duly registered, were as described above. Plaintiff produced them at the trial, and testified: That Lassiter had bought the woodyard from McDevitt, and had assumed payment of these McDevitt notes. That plaintiff told Lassiter he would

purchase the notes, and allow him further time on them, and gave him a check on Frost National Bank for the amount. The check, which was duly paid, was produced, which shows it was drawn to the order of the Lockwood National Bank, where the notes were at the time Lassiter took the check to the bank and brought the notes to plaintiff. He told plaintiff that the machinery in the woodyard was good for the notes. That some time after this, Lassiter sold the yard to one Dickens, and Dickens gave Lassiter his notes for \$650, and these notes Lassiter turned over to plaintiff as security for other money which plaintiff had let him have, with which to buy wood, and also as additional security for the notes sued on. That Dickens paid \$150 on his debt to Lassiter, which plaintiff credited on what the latter owed him for wood.

There was clearly no evidence to support the defense of estoppel. Testimony that, when Lassiter stated that all the notes save one had been paid off, plaintiff, McKnight, was sitting just outside the door, was not sufficient to show that plaintiff heard the statement.

The main and real question is this: Were these circumstances in evidence such as would have warranted the jury in finding that plaintiff paid off the notes, instead of purchasing them? In this state it is held that if a person pays, or advances the money to pay, a mortgage debt, with the understanding with the debtor that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation. *Mievel v. Zuber*, 67 Tex. 275, 8 S. W. 273. Lassiter had bought the property and assumed the notes, and it was his debt at the time. This was undisputed. It is also uncontradicted by the testimony of any one that plaintiff's money paid the notes, and that Lassiter indorsed them and gave them to plaintiff, and told plaintiff that the property was good for them.

We shall now notice the circumstances upon which appellants base their contention that it appears that the notes were paid and discharged, and not bought up by plaintiff, notwithstanding the above testimony: Lassiter was the person who actually paid the money at the bank and took up the notes. The check given him by McKnight was payable to the Lockwood National Bank or bearer; it being improbable that plaintiff should have had so much confidence in Lassiter as to have drawn the check to bearer if he intended to buy the notes. The notes were in the bank for collection, and not for sale. Four of the notes were overdue when plaintiff claims to have bought them. Plaintiff did not know who owned the notes. Lassiter subsequently sold the yard to Dickens, and warranted it free from incumbrances. Plaintiff was working for Lassiter at the yard, and Lassiter lived with him, and they appear to have been intimate. Plaintiff did

not file suit on the notes until February 25, 1902, having bought them, as he claimed, March 16, 1900, and in the meantime the yard had twice changed hands. There was no evidence of the length of time Lassiter had the notes in his possession, except that of plaintiff, which was that he took the check to the bank and brought back the notes to McKnight; and, from all that appears, he indorsed them at that time. It would have been a potent circumstance, had he retained them in his possession, but this does not appear. Plaintiff was not bound in any way by the warranty given by Lassiter to Dickens, and, it not having been shown that he was a party to it, it was not a circumstance against him on any issue in the case. The fact that the check was drawn to the Lockwood National Bank or bearer does not raise a suspicion of fraud, nor is it a circumstance going to show that the check was intended otherwise than as shown by the positive testimony of plaintiff. It shows that he had confidence in Lassiter, and all the testimony goes to show this. The other so-called circumstances are not inconsistent with the testimony upon which the court acted in directing a verdict, and hardly create suspicions. *Joske v. Irvine*, 91 Tex. 575, 44 S. W. 1059. No one of the circumstances relied on was sufficient in itself, and they would not be sufficient taken collectively, either to prove that plaintiff did not purchase the notes as he testified, or to prove fraudulent conspiracy between him and Lassiter to make it appear that the notes were purchased instead of paid.

It is further contended that there was testimony tending to show that plaintiff accepted from Lassiter the Dickens notes in lieu of the notes sued on. The circumstances cited as indicating this are of no probative force to that effect.

Another assignment contends that there was evidence which entitled defendants to have the jury pass on the question whether or not the \$150 paid on the Dickens notes, and received by plaintiff, should be credited on the notes in suit. Plaintiff testified that he credited this payment on a debt Lassiter owed him for additional money he let him have to buy wood, for which debt the Dickens notes had been assigned to him as security, as well as additional security for the notes in question. Plaintiff had the right to apply the payment to either debt, as it does not appear that Lassiter directed how it should be applied. The circumstance relied on here is that, as Lassiter had the right to apply it, it was probable that he directed its application to the mortgage debt. We see no force whatever in this contention.

A further contention is that the uncontroverted evidence shows that the four mules and harness mentioned in the mortgage never came into the possession of appellants, and therefore judgment should not have been rendered against them for foreclosure on the

mules and harness, and in this connection it is claimed that their liability for said mules and harness should have been left to the jury. No personal judgment was rendered against appellants, but only a decree foreclosing on the property as against any right they may have therein. They are not injured by this as to property that they never had in their possession. But to avoid any question in this regard, as the undisputed evidence is that they (Wm. Tullos and W. R. Powers) never had possession of the four mules and harness mentioned in the decree, the judgment will be reformed so as to adjudicate that fact, and in all other respects the judgment will be affirmed. As this modification would doubtless have been made in the trial court if the judge's attention had been called to it, costs of the appeal will be adjudged against appellants.

Reformed and affirmed.

ELLIS v. LIGHT et al.*

(Court of Civil Appeals of Texas. March 4, 1903.)

HOMESTEAD—EXCHANGE—CONTRACT—CONSTRUCTION—RIGHTS OF CREDITORS—JUDGMENT—LIEN.

1. A contract for an exchange of lands between L. and M. provided that L. should give M. a good title to his land, the same to be a deed from himself in his own right, and also a deed as guardian of his minor son, and that M. should deed his land to L. as soon as L. should execute such deeds. *Held*, that L. was not entitled to a deed from M. until he executed both deeds.

2. On October 15, 1897, L. agreed to exchange his homestead for other land; he to execute a deed of his own interest therein, and also a deed as guardian of his minor son, and thereupon to become entitled to a deed from the other party. He executed a deed in his own right on the same day, and on April 17, 1899, executed a deed as guardian. On the last-mentioned day he received the deed from the other party, and immediately deeded the land thus acquired to his codefendant. A judgment creditor of L. in March, 1898, had had an abstract of his judgment recorded in the county where the land received by L. in exchange for his own land was situated. *Held*, that the judgment never became a lien on such land.

Appeal from District Court, Bell County; John M. Furman, Judge.

Action by P. L. Ellis against R. H. Light and George W. Cole, Jr. Judgment for defendants, and plaintiff appeals. Affirmed.

A. J. Harris, for appellant. G. M. Felts and A. M. Monteith, for appellees.

FISHER, C. J. This suit was brought in Burleson county by the appellant against the appellees, Light and Cole, to remove cloud from the title to 125 acres of land in that county, part of the S. C. Robertson league, No. 3, alleging that appellant had purchased the same at a sale made by the sheriff of Burleson county September 6, 1898, under execution issued upon a judgment rendered in the justice's court of precinct No. 1, Bell

*Writ of error denied by Supreme Court.

county, in favor of appellant against defendant R. H. Light, an abstract of which judgment had been duly recorded in Burleson county on May 3, 1898, and that said Light on April 17, 1898, had deeded said land to the defendant George W. Cole, Jr., which operates as a cloud upon his title; praying that he have judgment removing the cloud, but, if he acquired no title by his deed, then praying for foreclosure of his judgment lien. The defendants in their answer defended on the ground that the 125 acres of land was exempt to Light as a head of a family; alleging that said 125 acres was part consideration for Light's homestead in Bell county, which had been traded to W. A. Messer, and that Light never received a deed to said 125 acres of land until the 17th day of April, 1899, and on the same day, and as part of the same transaction, he conveyed said 125 acres to Cole, and with the proceeds of the sale to Cole bought other lands, which he thereafter made his homestead. The plaintiff filed a supplemental petition denying the allegations in defendants' answer, and alleging that W. A. Messer swapped said 125 acres of land in Burleson county to R. H. Light for a tract of land in Bell county, on which there was an incumbrance of \$430—a debt due from Light; that on October 15, 1897, Light made Messer a deed to said Bell county land, and Messer assumed the payment of said \$430, and the same day Messer made Light a deed to said 125 acres of land in Burleson county, etc.

The venue of the suit was changed to Bell county by agreement. On July 10, 1902, the case was tried before the court without a jury, and judgment was rendered in favor of defendants, and plaintiff appealed. There is no statement of facts. The court filed his findings of fact and conclusions of law, which are as follows:

"I find: That plaintiff, P. L. Ellis, recovered a valid judgment against the defendant R. H. Light in the justice court, precinct No. 1, Bell county, Texas, on May 31, 1897, for the sum of \$95.22, with interest thereon at the rate of 10% per annum, and \$5.10 costs of suit. That execution was duly issued on said judgment on January 6, 1898, and placed in the hands of J. B. Furgeason, constable of said precinct, who returned the same March 1, 1898, stating in his return that no property of the defendant was found in Bell county subject to levy. On April 4, 1898, an alias execution was issued on said judgment, and placed in the hands of the same officer, who levied on certain real estate in Bell county as the property of R. H. Light, and sold the same under said execution on May 3, 1898, for \$50, to plaintiff, Ellis, out of which sum all costs were paid, and \$39 paid on said judgment.

"I find that on May 3, 1898, an abstract of said judgment was made and certified by W. H. Estill, justice of the peace of said precinct No. 1, according to law, and his offi-

cial character was duly certified by the county clerk of Bell county, and the said abstract was duly filed, recorded, and indexed in the records of the abstracts of judgments of Burleson county, Texas, on May 3, 1898. And on March 21, 1898, said abstract was re-recorded in said Burleson county in the judgment records; the fact that the same was indexed being shown by certificate of clerk only that same was duly filed, recorded, and indexed.

"I find that a pluries execution was issued on said judgment by W. H. Estill, justice of the peace of precinct No. 1, Bell county, Texas, on July 26, 1898, properly directed to Burleson county, Texas, which act of said justice of the peace was duly authenticated by the certificate of the county clerk of Bell county, and said execution was on August 9, 1898, by the sheriff of Burleson county, levied on certain lands in the S. O. Robertson league, No. 3, situated in Burleson county, as the property of R. H. Light, defendant in said execution, which land so levied upon included within its boundaries the 125 acres of land in controversy in this suit.

"I find that said land was duly advertised and sold at public outcry by the sheriff, before the courthouse door of Burleson county, within the hours prescribed by law, on the 6th day of (it being the first Tuesday in) September, 1898, and the plaintiff, P. L. Ellis, became the purchaser thereof at the price of \$20, and a deed was duly made to him by said sheriff, conveying said land; said deed dated September 29, 1898, and duly recorded in the deed records of Burleson county September 30, 1898.

"I further find that on the 15th day of October, 1897, R. H. Light, who was then a widower, resided with his minor son, Mike Light, on a tract of about 258½ acres of land, about 65 acres being in cultivation, all of which lay in Bell county, Texas, using and occupying the same as his homestead; the said land being the community property of himself and his deceased wife, H. T. Light; she being the mother of the said minor son, Mike Light.

"I further find: That on said 15th day of October, 1897, said tract of 258½ acres was incumbered with an indebtedness of about \$480 for purchase money and interest due thereon; said indebtedness being held by the W. O. Belcher Land Mortgage Company. That at said date said Light being unable to meet said indebtedness, and the said land mortgage company insisting on payment, said Light entered into negotiations with W. A. Messer looking to the sale or exchange of said 258½ acres for 125 acres of unimproved land in Burleson county, Texas. That on said day a contract or agreement was entered into between said Light and said Messer, by the terms of which said Light agreed to exchange said 258½ acres with said Messer for 125 acres in Burleson county upon the following conditions: Said Messer was

to assume the said indebtedness of about \$490, and R. H. Light was to give said Messer a good title to said 258½ acres; the same to be a deed from himself in his own right, and also a deed as guardian of the estate of said minor son, Mike Light. It was also a part of said agreement that said Light should at once take steps to procure the necessary authority to make said last-mentioned deed. It was further a part of said agreement that said Messer should execute and deliver the deed to said 125 acres as soon as said Light should execute and deliver the above-mentioned deeds. I find that in pursuance of said agreement said Light did on the 15th day of October, 1897, execute and deliver to said Messer his general warranty deed to said 258½ acres, and place said Messer in possession thereof, and that said Messer has since that time retained possession thereof and paid all taxes due thereon.

"I find: That in said deed of date October 15, 1897, the consideration recited therein was as follows: 'For and in consideration of 125 acres of land this day deeded to me by W. A. Messer in Burleson county, Texas, valued at \$750, and the further consideration that the said W. A. Messer pay off and satisfy a mortgage of \$480 on the land herein conveyed, said mortgage was given by myself and my deceased wife on the 8th day of December, 1884, and recorded in Book 63, pages 561 and 565, of the records of deeds of Bell county, Texas, and said mortgage being a community debt of myself and my deceased wife H. T. Light given to the W. C. Belcher Land Mortgage Company of Fort Worth, Texas, and this conveyance is given to pay off and satisfy said community debt.' Which said deed was duly recorded October 30, 1897. That after executing and delivering said deed said R. H. Light caused proceedings to be instituted in the probate court of Bell county, Texas, to have himself appointed guardian of the estate of said minor son, and to authorize him to execute a deed as such guardian, conveying said minor's interest in said land to W. A. Messer. I find that upon being placed in possession of said 258½ acres of land said Messer at once, with the consent of W. C. Belcher Land Mortgage Company, assumed said indebtedness of about \$490, and did thereafter, to wit, about two years after, pay off same. I find that the excess of said 258½ acres over and above said Light's homestead was of the value of \$1 per acre, or about \$58.50; said excess being rough, uncultivated timber land.

"I further find that at the time Light executed and delivered his deed to said Messer, and placed Messer in possession of said land, Messer drew up a deed for the 125 acres of land, it being the same in controversy in this suit, but did not acknowledge or deliver the same, and refused to do so, until Light perfected the title to the 258½ acres by qualifying as guardian of his minor son,

Mike Light, and getting an order of court to sell his interest in said land, and making the sale and deed under order of the court.

"I further find: That on the 30th day of October, 1897, said Light made application for letters of guardianship on the estate of said minor, and, having obtained the necessary authority from the probate court, did, as such guardian, sell to W. A. Messer said minor's interest in said 258½ acres of land, which sale was reported to said court, and was confirmed by the said court on March 25, 1899, and on the 17th day of April, 1899, said Light, as such guardian, did execute and deliver to said Messer a deed conveying said minor's interest in said 258½ acres, and said Messer then and there executed and delivered to said Light a deed to said 125 acres in Burleson county, Texas; said last-mentioned deed being dated October 15, 1897, but acknowledged and delivered on the 17th day of April, 1899. That thereafter, on said 17th day of April, 1899, for a recited consideration of \$750, said R. H. Light sold and conveyed said 125 acres of land to Geo. W. Cole.

"I further find that said 125 acres of land was a part of the proceeds of the sale of said Light's homestead tract of 258½ acres, and that said R. H. Light, for a good and valuable consideration, sold and conveyed the same within six months after obtaining title and possession thereof to said Cole.

"I further find that when said Light and Messer were arranging the trade for the land, on or about the time Messer prepared the deed, which was not then delivered, said Messer drew a diagram showing the shape of the 531 acres in Burleson county out of S. C. Robertson league, No. 3, and showed on the diagram or plat the position of the 125 acres herein sued for, and told Light that said 125 acres was adjoining land he (Messer) had sold to Lynch, and was off of the west half of said 531-acre tract, but no field notes or other description was given; that when Messer executed and delivered the deed to said 125 acres the same was described in said deed as being located just as Messer had verbally described the same on said diagram or plat.

"I conclude, as a matter of law, that under the terms of the contract between R. H. Light and W. A. Messer said R. H. Light was not entitled to the deed to said 125 acres from Messer until he had executed and delivered to Messer the deed of his own interest in said 258½ acres, and also the deed as guardian of his minor son, Mike Light, to said Mike Light's interest in said tract. I conclude that said guardian's deed having been executed and delivered on the 17th day of April, 1899, and the deed from Messer to Light to the 125 acres having also been executed and delivered on the 17th day of April, 1899, and the deed from R. H. Light to Geo. W. Cole having been executed and delivered on the same day, and said 125

acres being a part of the proceeds of the sale of Light's homestead, and said Light having disposed of the same within six months from the date of his acquiring title and possession, the record of the abstract of judgment in Burleson county did not fix any lien on said 125 acres, and the plaintiff acquired no title by his purchase of same at the sheriff's sale. Hence I conclude that the defendant ought to recover, and it is so adjudged."

We agree with the court in its legal conclusions. Judgment is affirmed. Affirmed.

On Rehearing.

(April 15, 1903.)

Appellees' motion contains this statement: "This court erred in stating in the opinion that appellant in his petition alleged that Light on April 17, 1898, had deeded the land in controversy to the defendant Geo. W. Cole, Jr. The court probably copied this statement from appellant's brief, but the date of said sale to Cole, as therein stated, is a clerical error, and should be April 17, 1899." The appellant asks this court to correct said error in its opinion. In compliance with the request, the error is corrected.

Motion overruled.

SECURITY, TRUST & LIFE INS. CO. v. HALLUM.*

(Court of Civil Appeals of Texas. March 14, 1903.)

INSURANCE—PREMIUMS—MATURITY—NOTICE—SUFFICIENCY—FORFEITURE FOR NONPAYMENT.

1. Under a New York statute prohibiting a life insurance company from declaring a forfeiture of a policy for nonpayment of the premium when due, unless a notice has been mailed to the insured, stating, among other things, that if the premium is not paid at maturity "the policy and all payments thereon will become forfeited and void, except as to the right to the surrender value or paid-up policy," as provided in the statute, a notice merely declaring that if the premium is not paid at maturity "the policy lapses," without referring to insured's right to the surrender value or paid-up policy, was insufficient to authorize a forfeiture.

Appeal from District Court, Henderson County; John Young Gooch, Judge.

Action by John M. Hallum against the Security, Trust & Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. A. Rasbury, for appellant. Richardson & Watkins and John S. Prince, for appellee.

TEMPLETON, J. John M. Hallum, guardian of the minor children of David W. Milling, deceased, brought this suit against the Security Trust & Life Insurance Company on a policy of insurance in the sum of \$1,000 on the life of said Milling, issued by the American Union Life Insurance Company, and reissued

by the defendant company. Milling died on January 28, 1902, without having paid the sixth annual premium, which matured on December 15, 1901. A check for the said premium was mailed by him to the original insurer on January 3, 1902, and was received by the defendant company on February 8, 1902. The last-named company immediately wrote Milling that his policy had lapsed, and demanded that he be re-examined, as a prerequisite to a reinstatement of the insurance. After it learned of Milling's death, the company denied liability, and this suit was accordingly instituted. A nonjury trial resulted in a judgment in favor of the plaintiff.

The policy provided that a failure to pay the premiums as the same matured should operate as a forfeiture. It further provided that the contract should be governed by the laws of the state of New York. The statutes of said state contain an article (Heydecker's Gen. Laws, p. 3148, c. 38, § 92) which reads thus: "No life insurance company doing business in this state shall, within one year after default in the payment of any premium, * * * declare forfeited or lapsed any policy hereafter issued * * * by reason of the non-payment, when due, of any premium, * * * or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, * * * unless a written or printed notice stating the amount of such premium * * * or portion thereof, due on such policy, the place where it should be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy, * * * at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, * * * or portion thereof then due shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid up policy as in this chapter provided." The defendant company mailed to Milling, within the time prescribed by the said statute, a notice which reads thus: "Notice of premium on policy issued by the American Union Life Insurance Company of New York: The Security Trust and Life Insurance Company, St. James Building, New York. The annual premium of \$16.81 will, if all previous premiums have been paid, become due at the Company's office, St. James Building, New York, on your policy No. 4,798, on December 15, 1901, and if not paid on or before said date the policy lapses. Payments are required to be made direct to this office, and should be made by bank draft, express or post office money order, payable to the Security Trust and Life Insurance Company. No payment to an agent to be

*Rehearing denied April 11, 1903, and writ of error denied by Supreme Court.

recognized. Robert E. Pattison, President." The controlling question in the case is whether the notice was in compliance with the provisions of the statute. The courts of New York have held that the notice need not follow, literally, the language of the statute. The notice is sufficient if every essential fact required to be known is intelligibly stated. *McDougall v. Society*, 135 N. Y. 551, 82 N. E. 251. The facts which are required by the statute to be stated in the notice are (1) the amount of the premium; (2) the place where it should be paid; (3) the person to whom the same is payable; and (4) that, unless the same is paid on or before the date when it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy. All of these requirements, except the last, are sufficiently stated in the notice before us. In stating the effect of a failure to pay the premium, the notice uses the words "the policy lapses" in lieu of the statutory language, "the policy and all payments thereon shall become forfeited and void, except as to the right to a surrender value or paid up policy." It may be doubted whether one not versed in insurance parlance would understand that when a policy lapses it becomes forfeited and void, but, for the purposes of this case, we will assume that the terms are equivalent. The notice, then, informed the assured that, if he failed to pay the premium on or before the date specified, his policy would become forfeited and void. This is not a correct statement of the result of a failure to pay the premium. Such failure would not operate as a forfeiture of all the rights of the assured under the policy. According to the provisions of the policy, a failure to pay the premium would not forfeit the right of the assured to a surrender value or to a paid-up policy. The notice ignored this right of the assured, and informed him, in effect, that if he did not pay the premium promptly all his rights under the policy would become forfeited. The existence of such right was an essential fact which the assured was entitled to know, and which the statute declares shall be incorporated into the notice. There is no pretense that the notice is in literal compliance with the statute, and we find that it was not substantially so. We hold, therefore, with the trial court, that the notice was insufficient, and that appellant cannot insist upon a forfeiture. *Phelan v. Insurance Company*, 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441.

Appellee, in his amended petition, alleged that he had made demand on appellant for the payment of the policy, and that payment had been refused. He claimed and was allowed the statutory damages and a reasonable attorney's fee. Appellant contends that he was not entitled thereto, because it appeared that such demand was made after this suit was begun. The statute does not

require the demand to be made before the suit is brought, and we think the demand may be made after, and the claim for the statutory penalties set up in an amended petition. Rev. St. 1895, art. 3071; *Assurance Co. v. Sturdevant* (Tex. Civ. App.) 59 S. W. 61.

The judgment is affirmed.

REA v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.*

(Court of Civil Appeals of Texas. March 4, 1903.)

SERVANT — INJURIES — EVIDENCE — INSTRUCTIONS — DAMAGES — INCREASED LIABILITY TO DISEASE.

1. Whether or not a servant injured while inspecting a train knew that the brake shoes were not set, *held*, under the evidence, to be a question for the jury.

2. In an action against a railway company for injuries to a servant caused while inspecting a train, a requested charge predicating plaintiff's recovery on defendant's want of ordinary care, if it was such, in failing to set the brake shoes, if they were not set, did not ignore the issue as to whether a failure to set the brakes was negligence.

3. The charge, if erroneous, was sufficient to call for a proper charge submitting the issue.

4. A party cannot complain of a charge submitting the issue as made in his pleading, and a refusal to submit it otherwise.

5. In an action against a railway company for injuries to a servant, caused while inspecting a train, a charge that plaintiff could not recover if he was injured by being caught between the tender and car next thereto, and was guilty of negligence, as previously explained, in going between the cars at the time and under the circumstances, sufficiently presented the issue as to whether plaintiff's negligence, if it was such, was the proximate cause of his injury.

6. In an action against a railway company for injuries to a servant, caused while inspecting a train, where there was evidence that the train was being made up in the ordinary manner, and that plaintiff was familiar with the work and the dangers attending it, it was not error to submit the issue of assumption of risk to the jury.

7. Where injuries are the result of an accident, there being no negligence on the part of plaintiff or defendant, there can be no recovery.

8. In a personal injury action, where plaintiff alleged injury to his lungs, evidence that he was more susceptible to lung disease since his injury than before should have been admitted.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by J. W. Rea against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Reversed.

Randell, Word & Hassell, for appellant. E. B. Perkins and Head & Dillard, for appellee.

JAMES, O. J. Plaintiff, Rea, was injured while between the engine and the car next to it, chaining the couplings. The occasion of his injury was the backing into the rear end

*Rehearing denied April 15, 1903.

of the train by engine and cars doing switch-work, which forced the cars he was between to come together. In his petition, plaintiff alleges negligence: "(1) In the fact that said locomotive and cars struck the rear end of the train upon which he was working with great force and violence, being propelled with great and unusual speed against the rear end of the train upon which he was working. (2) In the negligence of his foreman in not keeping a proper lookout for plaintiff's safety while so engaged between the cars; in the negligence of defendant in not having the brakes set on the cars composing said train, and in not having the cars provided with buffers and chafing irons."

The court submitted the case on the first of the above-named issues, only, and refused the charge which is copied below: "If you believe from the evidence that the plaintiff, while in the employment of the defendant, in the exercise of his duties under such employment, was engaged in inspecting a train of defendant at Texarkana, Texas, at the time alleged in his petition, and securing and adjusting the couplings and coupling attachments thereof; and if you believe that the defendant, in the exercise of ordinary care for the safety of plaintiff and its other employees engaged in work of the same nature, should have, in making up said train, set or caused to be set the brakes on each car thereto before attaching any other car thereto, and that defendant failed to set said brakes or have the same set in this manner, and by reason of such failure plaintiff was injured as alleged in his petition; and if you further believe that the plaintiff was exercising such care for his own safety as a man of ordinary prudence would have exercised under the same or similar circumstances—then you will find for the plaintiff, and assess his damages as directed in the main charge." The only justification that we can conceive for not giving such charge, or one submitting the case on the theory indicated thereby, is that the testimony did not warrant it.

It appears that the train thus being made up was a north-bound train. In such a case, when the train arrived from the south, the engine was taken off, and some of the cars laid out. A north-end engine was attached to such of the cars of the original train as were to go on. Plaintiff's duties and relations as to such train were described by him substantially as follows: "As the train comes into the station, I generally take the numbers of the cars. After I take the numbers, I start at the rear end and inspect the cars that go through, and when I get as far as the engine (the engine that brought in the cars is gone) I couple the engine (that is, to take the train out, so they can use the air), and then I go back and do the repairing. When I was hurt the air was not set on the cars. If the air had been set on the cars when the engine came against them, they would not have moved hardly at all. It

would have taken a very heavy force to move them at all. The switchmen are supposed to set the air every time they couple a car while we are at work. I thought the air was set on that day when I went in between the cars. I had nothing to do with setting the air. When I went in between the engine and car I supposed the switching was over with."

It was an established fact that the air was not set and the brakes were not against the wheels of the cars; and, in our opinion, the question of whether or not the issue should have been submitted is reduced to, and depends on, the fact whether or not plaintiff, when he went into the place where he received his injury, knew the brakes had not been set. If he knew this fact, or necessarily must have known it in the prosecution of his work, then he assumed the risk of the danger attending the failure to set them, and in that case it would not be necessary to submit the issue. The evidence tends very strongly to show that he knew the fact. He testified that he did not know it, and thought the brakes had been set. He, however, in the course of his evidence, said: "In inspecting I examined the running gear of the cars—the drawheads and wheels and all underpart of the car. I looked at the wheels, the journal boxes, and the brake shoes. I looked to see whether the brake shoes were working close and fast, or not, and to see if they were worn out. I looked at the brake shoes on this occasion. The brake shoe is a curved piece of iron which fits up against the wheel to prevent it from turning. I made an inspection such as I have indicated of the brake shoes on this occasion. I do not remember whether they were against the wheels or not. There is no occasion for them to be against the wheels while the cars are standing. There was no occasion for them to be there unless they were going to make a coupling. I went on inspecting, and noticed that the brake shoes were not set when they were fixing the train. I inspected first one side of the train, beginning at the rear, and then coupled the air up, including the air between the engine and mail car. I then inspected down the other side to the rear, and looked to see how many chains were needed, and returned with the chain to fasten the coupling together. Do not remember whether the brake shoes were set or not. I could have told whether they were set or not by looking. I paid very little attention to whether they were set or not. I was looking to see if they were worn out. It was open to my observation whether they were set or not. I could have seen whether they were set or not if I had paid attention, but I was not under the cars. The switchmen are supposed to set the air when the train is being made up. They are supposed to set it every time they couple a car while we are in there at work. It was customary to set the brake shoes. I had nothing to do with

setting the air. I thought the air was set on this day when I went in between the cars. The air on the brakes is generally set by the switch foreman." The most that we can say from the testimony is that the probability is great that he knew or must have known that the brakes were not set. Still, upon plaintiff's entire testimony, this was not admitted nor absolutely certain, and therefore it was a question for the jury.

The answer of appellee's brief to the assignment is: (1) That the assignment itself is not a proposition in itself, as it is submitted by appellant. We think it is a proposition, within the rules. (2) That the issue asked to be submitted by the charge had no support in the evidence. And this we have determined is not the case. (3) The requested charge ignored the issue as to whether or not the setting of the brakes in the manner indicated was usual and customary in doing the work. The charge was conditioned on its having been negligence of defendant in failing to have the brakes set. Even if said charge were erroneous, it was sufficient to call for a proper charge submitting that issue.

The error in not submitting the case with reference to said form of negligence pleaded and relied on requires the judgment to be reversed.

The ninth and tenth assignments are not well taken. The alleged negligence of defendant's servants in bumping against the rear end of the train on which plaintiff was at work was in striking it with great and unusual force. Plaintiff cannot complain of the court submitting the issue as he made it in his pleading, and in refusing to submit it in any other manner.

The eleventh assignment complains of the following clause of the charge: "If you believe from the evidence that plaintiff was caught between the tender of the engine and the car next thereto and injured and if you further believe that he was guilty of negligence, as negligence is hereinbefore explained, in going between said cars and engine to fix the couplings at the time and under the circumstances he was there, then you will return a verdict for the defendant, no matter whether you find the employes who were operating said switch engine were guilty of negligence contributing to cause such injuries or not." The objections stated are (1) that it precluded plaintiff from recovering if he was negligent in going between the cars, regardless of whether or not his injuries were caused thereby, or by the negligent jamming of the cars after plaintiff had gone in between same; (2) it was upon the weight of evidence, in making plaintiff guilty of contributory negligence, as a matter of law, if

he went in between the cars, regardless of whether or not said negligence was the proximate cause of his injuries; and (3) it was error to charge on contributory negligence at all, as there was no evidence to support same. There was evidence to support the issue. While it might have rendered the charge less liable to criticism to have, in terms, required the finding that the negligence contributed to plaintiff's injury, yet that is the sense of the charge as we understand it. It states, if the act of going in between the cars was negligence at the time and under the circumstances he was there, to find for defendant. If the act was negligent "at the time and under the circumstances" existing when he was hurt, such negligence must have proximately contributed to his injury.

There was no issue made as to discovered negligence.

The twelfth assignment complains of the charge on assumed risk. The objection that there was no evidence warranting the submission of this issue is clearly not well taken. There was testimony that what was done on the occasion was done in the usual and customary manner of switching and making up the train. The dangers attending the prosecution of such work done in the usual and customary manner (the evidence being that plaintiff was familiar with this work) were risks assumed by him. In the latter part of the charge in question the court used this language: "Or if you believe from the evidence that plaintiff's injuries were the result of an accident (that is, that neither the defendant, its employes, nor the plaintiff were guilty of negligence), then, in either of these events, you will find for defendant." No error can well be seen in this instruction. In order for the jury to find a verdict under it, they must have found that defendant was not guilty of negligence, and if this was the case it was certainly not liable.

In reference to another trial, we should make some reference to the assignments of error which deal with matters of evidence. The first assignment seems not well taken. The rejected testimony does not appear to us to have been of any importance. The testimony involved in the second, third, and fourth assignments, we think, was admissible under the pleadings. Plaintiff alleged injury to his lungs, and he ought to be allowed to show, in respect to his condition resulting from his injury, that he is more susceptible to lung disease now than before. *Campbell v. Cook*, 86 Tex. 630, 28 S. W. 486, 40 Am. St. Rep. 878. We regard the testimony referred to in the sixth, seventh, and eighth assignments as properly admitted.

Reversed and remanded.

CONNECTICUT FIRE INS. CO. v. HILBRANT.*

(Court of Civil Appeals of Texas. March 18, 1903.)

INSURANCE POLICY—AMBIGUOUS DESCRIPTION—PAROL EVIDENCE—SALE OF PROPERTY—TRANSFER OF POLICY—PROOF OF LOSS—TIME OF PAYMENT—DENIAL OF LIABILITY—WAIVER—INSTRUCTIONS.

1. Plaintiff owned a brick saloon, to which was attached an adjoining frame and brick structure which opened into the saloon, and which, when a policy thereon was issued, was used as a restaurant. The policy described the property as the one-story brick building and attached additions occupied as a saloon, known as No. 129½, in L. street. The brick building was numbered 129½, and the frame part numbered 131. *Held*, that the description in the policy was ambiguous, and parol evidence was admissible to show whether the policy was intended to cover the saloon, only, or included the adjoining structure.

2. Where, on a sale of real estate, the vendor assigned an insurance policy to the purchaser, with the consent of the insurance company, evidence of the previous understanding and agreement and course of dealing between the insurance company and the vendor was inadmissible, in a subsequent action by the purchaser on the policy, to show what property was intended to be covered thereby, unless the vendee knew of the same when he took the transfer.

3. In an action on a policy, a requested instruction defining the term "attached additions," used in describing the property, was properly refused, as not involving a question of law.

4. Where, prior to the bringing of an action on a policy, defendant denied its liability in toto, it thereby waived a provision requiring proofs of loss, adjustment, etc., and entitling defendant to 60 days after notice and proofs of loss within which to pay the same.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by W. W. Hilbrant against the Connecticut Fire Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Alexander & Thompson and S. J. Hogsett, for appellant. Hilbrant & Scott, for appellee.

JAMES, C. J. The policy on which judgment was recovered insured as follows: "\$600.00 on the one-story brick building and attached additions, with composition roof, including foundation, gas and water fixtures, closets, plate-glass doors, windows and awnings, occupied as a saloon, situated and known as 129½ North Lamar street, Dallas, Texas." The court charged the jury to find for plaintiff if they found from the evidence that the policy was intended to cover the property as alleged and claimed by plaintiff (that is, the rooms occupied as a saloon, and also the shoemaker's room and the attached addition), and if they believed that, at the time of filing this suit, defendant had refused absolutely and unconditionally to

pay the loss, and if they further believed that said property had been damaged by fire while the policy was in force.

It is claimed by appellant, under the first, second, and third assignments, that the policy is ambiguous as to the property, and it pleaded "that it was not intended to cover any wooden building; that it was only intended to cover the brick portion; that, if plaintiff sustained any loss, it was on the frame building, No. 131, and not on the brick, No. 129½, described in the policy; that the frame house was occupied as a chophouse or restaurant, and not as a saloon." The trial court seems to have taken the view which we think was correct—that the contract was ambiguous—and allowed evidence to show the surrounding conditions and the situation of the property, as to one being an attachment of the other; and we may say the court is not shown to have excluded any legitimate testimony offered which bore on what property was intended to be covered by the policy; that is, whether it covered only the part used as a saloon, or whether it included, also, the adjoining frame and brick structure, which opened into the saloon building by doors, and which appears to have been used as a restaurant when the policy was originally issued to W. J. & T. J. Staten, and as a shoemaker's shop when the property was sold to Hilbrant, and the policy transferred to him with consent of appellant. The charge submitted the issue, and the verdict was for plaintiff.

The assignments of error from 1 to 5, inclusive, complain of the refusal to admit proof of the agreement and understanding and course of dealing between Staten and the company at and before the time the policy was issued, to show what it embraced. These assignments are not well taken, because it was shown by the undisputed testimony that afterwards Staten sold the property to Hilbrant, and assigned the policy to the latter with the consent of appellant. This created a new and independent contract of insurance with Hilbrant, and the testimony offered could not affect him unless he knew of such facts when he took the transfer. 2 Beach, Ins. § 1128. The testimony does not show he had such knowledge.

Defendant asked a charge defining the term "attached additions," which was properly refused because not a question of law. It also asked a peremptory instruction in its favor, and insists that it should have been given, because (1) the evidence disclosed that at the time of the institution of the suit and at the date of trial the right to sue on the policy had not accrued; and (2) the property destroyed was not described in or insured by the policy sued on. The latter of these matters, as already stated, was a question of fact, as the language of the policy in this regard is not altogether certain in its

*Rehearing denied April 15, 1903.

¶ 4. See Insurance, vol. 23, Cent. Dig. §§ 1391, 1437.

terms, and extrinsic evidence, such as was admitted, was correctly resorted to to give it proper application. The former of the grounds is not good because there was evidence that, prior to the filing of this action, defendant denied its liability, which was, in effect, a waiver of the provision of proofs of loss, adjustment, etc., and likewise a waiver of the provision in the policy "that the amount of the loss or damage having been thus determined [by appraisers] the sum for which the company shall be liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment and estimate and satisfactory proof of the loss have been received by this company at its office in Hartford, Conn." *Ins. Co. v. Josey*, 6 Tex. Civ. App. 293, 25 S. W. 685.

The proposition advanced under the eleventh assignment is that the charge assumed the existence of power or authority on the part of defendant's agent to make the denial of liability. Independently of the question of authority of the agent or the adjuster to make denial of liability for the company, it was testified to by Hilbrant that after the fire the agent came to him and said, "I suppose, from the condition this matter is in at this time, you don't want to insure again in the company." I said, 'I don't know the reason I would not want to insure in your company as well as any other.' He said, 'Well, the company has taken the position that they do not want to pay the policy.' He told me that they had refused to pay it." This was evidence of a refusal by the company itself, and no exception was taken to the character of such evidence.

The language used by counsel in argument was not such as requires a reversal.

Affirmed.

On Motion for Rehearing.

(April 15, 1903.)

The testimony offered concerning the relations and understandings of Staten and appellant was, without doubt, properly excluded upon the ground expressed in the bills of exception—that such testimony was inadmissible without proof that Hilbrant knew of same. His contract was a new one, and based on sufficient consideration. *Ellis v. Ins. Co. (C. O.)* 32 Fed. 650. No such proof was offered at the time in connection with the testimony, if we are to be governed by the bills of exception; hence these assignments which are based solely upon these bills are not well taken. It would not help these assignments any if proof was afterwards offered of such knowledge. It does not appear that the excluded testimony was ever offered in connection with evidence of such knowledge. But we adhere to our statement in the main opinion that the evidence failed to show knowledge. In the absence of knowledge, the real issue was whether or not the description in the policy

embraced the property in question, in view of all the testimony. The court submitted the issue thus: Whether or not the policy was intended to cover the property in question. It is hard to detect any substantial difference. If there be any difference, the charge given was, in our opinion, the more favorable to appellant. The other grounds of the motion have been sufficiently discussed.

Overruled.

SMITH v. BUNCH et al.*

(Court of Civil Appeals of Texas. March 5, 1903.)

APPEAL—SEVERANCE—POSTPONEMENT OF TRIAL—PLAT AS EVIDENCE—ADMISSION OF EVIDENCE—ASSIGNMENT OF ERROR—ADVERSE POSSESSION—ESTOPPEL—CROSS-ASSIGNMENTS—ERROR IN TRANSCRIPT—CORRECTION.

1. Refusal to a defendant of a severance in the trial is not reviewable; it not appearing that a severance was necessary to a proper presentation of his defense, or that he was injured by the refusal.

2. A defendant may not complain of a postponement of the trial, not showing that he was injured by it.

3. A plat of land is not admissible as independent evidence, on the mere testimony of a witness that he was familiar with the location of the land, and that he was with the surveyor who made the survey and plat, and knew the plat was correct.

4. Improper admission of evidence is not ground for reversal where the trial is by the court.

5. An assignment does not point out error; the bill of exceptions referred to not showing the nature of the opinion admitted in evidence, or that its admission could have been prejudicial.

6. One cannot claim under limitation of 3 or 5 years, but only of 10 years, though he had a deed, where before he went into possession another's possession had ripened into title by 10 years' limitation, and divested out of him whatever title he had by his deed.

7. Where the land conveyed is clearly defined, the deed does not pass, by estoppel, land without its description, which the grantor mistakenly thought he had conveyed to others by a former deed.

8. Where the appeal is by one only of the defendants, the court has no jurisdiction to consider a cross-assignment by another defendant as to plaintiff's judgment against him.

9. A probable clerical error in the transcript cannot be corrected by the appellate court. Resort must be had to certiorari.

Appeal from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by Elisha Bunch against George E. Smith and others. Judgment for plaintiff. Defendant Smith appeals. Modified.

John E. Linn, for appellant. Wm. T. Austin, for appellees.

GARRETT, C. J. This action was brought in the district court of the Tenth Judicial District by the appellee, Elisha Bunch, against Geo. E. Smith, the appellant, and C. T. Cade and the Texas Star Oil & Land

*Rehearing denied, and writ of error denied by Supreme Court.

Company, for the recovery of five parcels of land, parts of the Martin Dunman survey, situated at High Island, on Bolivar Peninsula, in Galveston county. The Martin Dunman survey contains $15\frac{1}{4}$ labors. In 1854 it was partitioned in the district court of Galveston county between his widow, Elizabeth, and their eight children, and the western half of the survey was set apart to the widow. The eastern half was divided into eight tracts by cutting it half in two by a line running in an easterly and westerly direction, parallel with the north and south lines of the survey, and cutting these two into four equal tracts each by lines running north and south, parallel with the east and west lines. The four tracts north of the first dividing line were numbered, commencing on the west, 5, 6, 7, and 8, consecutively; the west line of No. 5 being the east line of the half set apart to the widow, Elizabeth Dunman, and the east line of No. 8 being the east line of the survey. Two of the parcels sued for lie in No. 6, and three of them lie in lot No. 7, and all of them lie in an inclosure of land made by the appellee Bunch, extending east and west across lots 6 and 7. Parcel 1 contains 4.213 acres, and parcel 2 contains 1.578 acres. These two are in No. 6. Parcel 3 contains .27 of an acre, parcel 4 contains 2.846 acres, and parcel 5 contains .918 of an acre. The last three lie in No. 7. The appellant pleaded "Not guilty," and the statutes of 3, 5, and 10 years' limitation; also estoppel. The cause was dismissed as to Cade, and the Texas Star Oil & Land Company pleaded "Not guilty." Trial was had to the court without a jury, and resulted in a judgment in favor of the appellee for four of the parcels sued for, and in favor of the appellant for parcel 2.

The appellant had a perfect chain of title from Amanda Dunman, to whom lot No. 6 had been set apart for that tract, and from Martha Dunman for lot No. 8, which had been set apart to her. Lot No. 7 was set apart to Elizabeth Dunman, who first married one Turley, and after his death married James Cronea. Elizabeth Hampshire, widow of Dunman, married again, and, widow a second time, without any evidence of title in her thereto, executed a deed to Elisha Bunch, the appellee, on March 1, 1880, by which she undertook to convey to him "twenty-five acres to be taken off the north end of lot No. 8 of the partition being the part allotted to Martha Dunman, one of the heirs of said Martin Dunman, and includes the high land only and improvements made by the said Elisha Bunch." It was shown by the evidence that Bunch had settled the place where his improvements were in 1878 or 1879, and that his house was actually on lot No. 6. Claiming under the deed from Elizabeth Hampshire, he took possession of land situated in lots Nos. 6 and 7. He had no inclosure or improvements on lot No. 8. On March 27, 1882, Bunch executed a deed

to Elizabeth Cronea, the field notes of which are as follows: "Beginning at a stake on N. E. corner of E. L. Cicero's survey and the S. E. corner of this survey; thence north, 23 west, 635 feet to a stake; thence south, 67 west, 885.5 feet to a stake; thence N., 23 W., 181 feet to a stake; thence S., 67 W., 885.5 feet to a stake, the N. W. corner of this survey and the S. W. corner of Elisha Bunch's survey; thence S., 23 E., 1,062 feet to a stake, the N. W. corner of Crossman & Simpson's survey and the S. W. corner of this survey; thence N., 67 E., 885.5 feet to a stake and the N. E. corner of Crossman & Simpson's survey; thence N., 23 W., 246 feet to a stake and the N. W. corner of E. L. Cicero's survey; thence N. 67 E., 885.5 feet to the place of beginning." And on the same day Elizabeth Cronea, joined by her husband, executed a deed to Elisha Bunch for the following described land: "Beginning at a stake on the N. E. corner of the Elizabeth Turley survey and the S. E. corner of this survey; thence N. 23 S. 595 feet to a stake; thence S., 67 W., 885.5 feet to a stake; thence S., 23 W., 221 feet to a stake; thence to the S. E. corner of Elisha Bunch 15 acre; thence S., 67 W., 885.5 feet to a stake, the N. W. corner of this survey and S. W. corner of the Elisha Bunch survey; thence S., 23 E., 635 feet to a stake, the N. W. corner of Elizabeth Turley survey and S. W. corner of this survey; thence N., 67 E., 885.5 feet to a stake; thence S., 23 E., 181 feet to a stake; thence N., 67 E., 885.5 feet to the place of beginning, and containing $12\frac{3}{4}$ acres, together with all and singular rights, members," etc. The deed from Elizabeth Cronea to Elisha Bunch calls for $12\frac{3}{4}$ acres, but the amount actually included within the bounds is about $22\frac{3}{4}$ acres. The description extends the land conveyed across two of the lots, and, if these lots are 8 and 7, then the part of lot 7 conveyed is about $12\frac{3}{4}$ acres; but, if the field notes are applied to lots 7 and 6, only 9.8 acres of lot 7 would be conveyed. The location of these surveys depends upon where the E. L. Cicero tract lies—whether on lot 7 or lot 8. No title is shown in Elizabeth Cronea to any land except lot 7, and the deeds between her and appellee were probably in settlement of appellee's claim to her land, caused by the deed of Elizabeth Hampshire to him for a part thereof. The evidence shows that the E. L. Cicero tract lies in lot No. 8, and that its northeast corner is a well-established corner in the east line of that lot; and the deed must be construed as applying to land in lots 7 and 8, although there is evidence tending to show that the Cicero tract was in fact situated in lot No. 7.

The plaintiff, joined by his wife, executed the following deeds to the defendant George E. Smith: (1) General warranty deed dated September 8, 1893, recorded October 7, 1898, in which he conveyed to Smith "all that certain tract or parcel of land situated in the

county of Galveston, state of Texas, being a part of the Martin Dunman 15½ labors survey, being 25 acres off the north end of lot or tract No. 8 of the partition of said survey among the heirs of Martin Dunman; said tract or lot being the part allotted to Martha Dunman, one of the heirs of said Martin Dunman, said 25 acres including high land only, and not including the marsh land at the extreme north end of lot No. 8; said tract of land is the same tract that was conveyed to Elisha Bunch by Elizabeth Hampshire, by deed dated March 1, 1880, recorded in Book 32, page 490, of the Deed Records of Galveston county, Texas, and is the same 25 acres that was surveyed and appropriated by Elisha Bunch under and by virtue of said last-mentioned deed, to which reference is made for a more particular description. We hereby reserve and except from this conveyance, however, 12¼ acres out of the above-described tract of land conveyed by us to Mrs. Elizabeth Cronea by deed dated March 27, 1882, recorded in Book 42, on page 345, of the Deed Records of Galveston County, Texas, to which deed reference is made for a more particular description of the 12¼ acre tract, so excepted, the quantity of land hereby conveyed being twelve and one-fourth acres, and being all of the aforesaid twenty-five (25) acre tract except the 12¼ acres so conveyed to Mrs. Elizabeth Cronea, to have and to hold," etc. (2) General warranty deed dated August 14, 1895, conveying "all that certain tract or parcel of land situated in the county of Galveston, being a part of the Martin Dunman 15½ labor survey, being two and three-quarters (2¾) acres off the west side of a tract of land in lot or tract 8 of the partition of said survey among the heirs of Martin Dunman, of which said lot 8, being the part allotted to Martha Dunman, one of the heirs of said Martin Dunman, and the 2¾ acres hereby conveyed lies on the west side and joins the 12¼ acres conveyed by us to George E. Smith by deed dated September 8, 1893." (3) General warranty deed dated December 18, 1896, conveying "all that certain tract or parcel of land situated in the county of Galveston, being a part of the 15½ labor survey, and being the east half of a ten-acre tract owned by us in lot No. seven (7) of said Dunman survey, excepting all improvements now thereon located; said tract contains five (5) acres of land."

The two last conveyances appear to be within the boundaries of the first conveyance. There is no evidence to show what land was taken possession of by Bunch and surveyed under the deed of Elizabeth Hampshire to him, except that the deed describes the land as including high land only and the improvements made by Bunch, who also testified that he held under the deed from Elizabeth Hampshire. But the exchange of deeds between Elizabeth Cronea and Elisha Bunch is evidently of land surveyed for Bunch un-

der his Elizabeth Hampshire claim. It does not appear that he had any other claim there, and the deed from Elizabeth Cronea and husband to him calls to begin on the corner of the tract conveyed to her by Bunch, and in his first deed to Smith the land which is conveyed is all of the Elizabeth Hampshire tract, except that which had been conveyed to Elizabeth Cronea. But if this conveyance should be confined to lot 8, it would not have its full acreage, but would cover that part of lot 8 included in the deed of Elizabeth Cronea to Bunch; and if the second conveyance, of 2¾ acres, should be confined to lot 8, it would cover that much land of the first conveyance instead of adjoining it on the west, as the call is. As has been shown, applying the field notes of the deed from Elizabeth Cronea to Bunch to lots 7 and 8, the tract in No. 7 would be about 12¼ acres. So the third conveyance would not embrace half of that tract, but would extend into Bunch's inclosure, leaving Bunch 7¼ acres of his 13¼ acres in lot No. 7.

On March 4, 1899, the plaintiff, Bunch, conveyed to Edward McCarty and David Fahey 5 acres off the west end of the tract in lot No. 7, as follows: "All that certain tract or parcel of land lying in Galveston county, Texas, out of subdivision No. 7, in the Martin Dunman survey, described by metes and bounds as follows: Beginning at the N. W. corner of a tract of land conveyed to Elisha Bunch by James and Elizabeth Cronea, March 27, 1882, by deed recorded in the office of the county clerk of Galveston county, Texas, in Book 42, page 346; thence N., 67 E., along the north line of said tract conveyed to Elisha Bunch by Cronea, 347²⁵/₁₀₀ feet to a point for corner, being the N. W. corner of a five-acre tract heretofore conveyed to George E. Smith; thence S., 23 E., 635 feet along the west line of said five-acre tract to a point for corner in south line of said tract conveyed to Elisha Bunch by James and Elizabeth Cronea; thence S., 67 W., 347²⁵/₁₀₀ feet to S. W. corner of said tract conveyed to Elisha Bunch by Cronea; thence N., 23 W., 635 feet to the place of beginning, containing five (5) acres of land, more or less, together with all the improvements situated thereon." Thus it will be seen that, if the 2¾ acres of the second conveyance to Smith should be confined to lot 8, there would be left an excess of acreage to that amount in the tract in lot 7.

It was shown by the evidence that the dwelling house of Bunch was situated on lot No. 6, and that his inclosure extended to within 108 feet of the west line of that lot; that he had inclosed about 25 acres of land, extending from near the west boundary of No. 6 across that lot onto No. 7, to a point east of the west line of the 5-acre tract conveyed to Smith, if that tract should be constructed on the west line of No. 8. Plaintiff's inclosure entered No. 7 above the north line of the tract conveyed to him by Elizabeth Cronea, and conveyed by plaintiff to

Smith, and included, outside of the boundaries of that tract, that part of lot 7 described in the petition as the third parcel, containing .27 of an acre. His inclosure also extended over the south line of the tract in No. 7 conveyed to Smith, and included the land described in the petition as the fifth parcel, containing .918 of an acre. Parcel 1, containing 4.213 acres, lies entirely within the inclosure and within lot 6. The inclosure does not include parcel 2, containing 1.578 acres, which lies on the west line of No. 6. Plaintiff had had possession of the land lying within his inclosure for more than 10 years at the time of his first conveyance to Smith, claiming and using it in such manner as to confer title in him thereto by limitation. There is testimony tending to show that the plaintiff and others had taken possession and settled under conveyances of land to them further to the west, by the width of a lot, than their deeds called for; but we conclude from the evidence, as well as from a proper construction of the deeds, that the plaintiff intended to sell, and that Smith intended to buy, the plaintiff's claim in lots 7 and 8, and not in lot No. 6, and that the three deeds from the plaintiff to Smith and the deed from the plaintiff to McCarthy and Fahey embraced all of the land owned by him in lots 7 and 8, included within the boundaries of the deed from Elizabeth Cronea to him. The five acres of lot 7, conveyed by plaintiff to McCarthy and Fahey, passed by mesne conveyances to the Texas Star Oil & Land Company. Plaintiff also conveyed to the Texas Star Oil & Land Company, by deed dated June 24, 1901, by metes and bounds, 5 acres out of lot 6, including his improvements; leaving in his inclosure, not conveyed by him, the parcel 1 described in the petition.

By the first assignment of error the appellant complains of the refusal of the trial court to grant him a severance in the trial from the Texas Star Oil & Land Company. The question of severance in the trial was for the discretion of the court, and unless it should appear that such discretion was abused, and that by reason thereof the appellant sustained injury, the action of the court in refusing a severance will not be revised. *Snider v. Methvin*, 60 Tex. 489; *Ballard v. Perry's Adm'r*, 28 Tex. 362; *Boone v. Hulsey*, 71 Tex. 184, 9 S. W. 531; *Land Co. v. Wood*, 71 Tex. 464, 9 S. W. 340. No reason is shown why a severance was necessary to a proper presentation of the appellant's defenses, and it does not appear that he could have sustained any injury by the action of the court.

It may be that the court should not have postponed the trial of the case, as complained of under the second assignment of error, but the appellant shows no injury by the action of the court in doing so. If he was not ready for trial when the case was called at the time to which it had been postponed, he

might have applied for a continuance, which he did not do, and he has not shown how he could have been injured in any way of which this court can take cognizance.

While the defendant Smith was testifying as a witness in his own behalf, he offered, in connection with his evidence, a plat which he said was a correct map of the tracts of land delineated thereon, as they were located on the ground by their corners, lines, and inclosures, and as claimed and held by the several persons in possession thereof. He offered to testify that he was familiar with the location of the several tracts, and had been about 20 years, and that he was with the surveyor who made the survey and plat, and knew that the plat was correct. The plat was offered as independent evidence, and it was proposed to authenticate it for that purpose by the testimony of a witness who was not a surveyor, had made no survey of the land, and did not make the plat. It was not offered to be used in connection with the evidence of the witness for the purpose of illustrating his testimony, as in the case of *Griffith v. Rife*, 72 Tex. 187, 12 S. W. 168. As independent evidence, it was not admissible. 9 Am. & Eng. Ency. Law, 900, 901, and notes. The exclusion of the plat, if error, would not require a reversal of the judgment, because, admitting that the several tracts were located on the ground as shown by it, the judgment of the court could not have been affected by that fact.

Since the case was tried by the court without a jury, the admission of the testimony of Hensoldt, and the evidence of the abstract and opinion, as shown by the fourth and sixth assignments of error, would not be sufficient ground for reversing the judgment. The sixth assignment, moreover, does not point out any error, as the bill of exceptions referred to does not show the nature of the opinion referred to, or that the appellant could have been prejudiced by its admission in evidence.

By his eighth assignment of error, the appellant contends that the court erred in rendering judgment against him for parcel 1 described in the petition, situated in lot No. 6, and containing 4.21 acres. The appellant showed a perfect chain of record title to lot No. 6, and should have had judgment for the parcel 1, unless it had been devastated by limitation and acquired by the plaintiff, Bunch. It was shown by the evidence that the plaintiff had been in possession of the land for more than 10 years before the execution of his first deed to the appellant, and that his possession was of such character as to confer title by limitation. The deed did not include this tract, but, as we have construed it, only included land in lots 7 and 8. This is shown not only by the recitals in the deed, but also by other testimony which showed that the appellant himself thought that he was buying the plaintiff's claim in lots 7 and 8, and, when no deed

could be found from Martha Harrison to Elizabeth Hampshire for lot 8, he then bought her title, which was after the institution of this suit, April 7, 1902. His first deed calling only for land in lot 8, he made the subsequent purchases to conform his title to land that he contended that he had already bought. The $2\frac{3}{4}$ acres, or second purchase, although it called for lot 8, still described the land conveyed as adjoining the first purchase on the west, and the third deed, for 5 acres, as being the east half of a 10-acre tract in No. 7. There is a confusion in the description, arising from the belief, it seems, that all of the land lay in lot No. 8, but the description in the deed from Cronea to Bunch extended by metes and bounds across both tracts; and, the Cicero northeast corner being clearly identified as on the east line of No. 8, there can be no dispute about the location of the land conveyed by Cronea to Bunch, and subsequently by Bunch to Smith. Another fact which tends to strengthen the conclusion that the parties were not mistaken as to the land included in the first deed is that Smith knew that he was getting by it open land to the east of Bunch's inclosure. The appellant cannot recover the parcel 1 by limitation, because, when he went into possession of it, Bunch's possession had already ripened into title by 10 years' limitation, and had divested out of Smith whatever title he had by his deeds, so that he could not claim under them either 3 or 5 years' limitation. *Land Imp. Co. v. Shelby* (Tex. Civ. App.) 41 S. W. 542; *MacGregor v. Thompson* (Tex. Civ. App.) 26 S. W. 649. Nothing short of 10 years' limitation would be sufficient to confer title on him. There was evidence tending to show that the parties were mistaken in the call for improvements in the deed from Bunch to McCarthy and Fahey, but in all other respects the description fits the 5 acres sought to be conveyed on the west end of the Cronea conveyance. But even if the plaintiff had been mistaken as to the location of the land sold McCarthy and Fahey, and had believed that he had no land left there, it would not pass title to the remainder to the appellant by estoppel, as contended in the brief. The fact remains that the deeds clearly define the location of the conveyances made by Bunch to Smith, when the beginning corner is once established, which is done with a sufficient degree of certainty. The court did not err in adjudging parcel 1 to the plaintiff.

The deed from plaintiff to Smith did not embrace within its boundaries either parcel 3 or parcel 5, and the plaintiff's title to these was shown to have been established by limitation. But parcel 4, containing 2.848 acres, was included in the first deed from Bunch to Smith, as well as in the second deed, and the court erred in giving plaintiff judgment for it.

The remaining assignments of error have been disposed of in passing on the questions

presented by the others, and need not be specially noticed.

The Texas Star Land & Oil Company has undertaken to have the judgment in favor of the plaintiff against it reversed upon a cross-assignment of error. As it did not appeal from the judgment, this court has no jurisdiction to pass upon the controversy between it and the plaintiff. *Halsell v. Neal* (Tex. Civ. App.) 56 S. W. 140.

The judgment of the court below will be affirmed as to all the land recovered by the plaintiff, except parcel 4. As to that it will be reversed, and judgment will be here rendered therefor in favor of the appellant. Affirmed in part. Reversed and rendered in part.

On Motion to Correct Conclusions.

(March 19, 1903.)

1. The finding that the deed from Elsieha Bunch and wife to George E. Smith, dated September 8, 1893, was recorded October 7, 1898, is as the date appears in the transcript. It is probably a clerical error made in transcribing the statement of facts, for the second deed from Bunch to Smith, which was recorded in a later volume of the deed records, appears to have been recorded November 29, 1895. It is probable that the error consisted in writing "1898" for "1893." But this court cannot correct the transcript as requested by the appellant. He should have applied for a writ of certiorari to perfect the record.

2. The deed from Martha Harrison to George E. Smith was dated April 17, 1892, and not April 7, 1902, as stated in the opinion. We cannot understand how we fell into the error, for the date is plainly given in the transcript. Nevertheless, we did so, and the correction is made.

WILLIAMSON et ux. v. GORE et al.*

(Court of Civil Appeals of Texas. March 11, 1903.)

DEEDS — CONSTRUCTION — INTENTION TO CREATE TRUST—HUSBAND AND WIFE—DIVORCE—COMMUNITY PROPERTY—ESTOPPEL AGAINST MARRIED WOMAN—FORGERY—AFFIDAVIT—BURDEN OF PROOF—INSTRUCTIONS.

1. A deed from a purchaser at execution sale to a married woman passed to the latter the legal title as her separate estate or as the community estate of herself and husband, and, unless the legal title was for the use and benefit of some one else, vested the real and beneficial interest in the land either in the grantee as her separate property or in herself and husband as community property.

2. A husband and wife, after divorce, became tenants in common of the community property, and either may recover the entire interest as against a trespasser.

3. Where land is sold under execution, and conveyed by the purchaser to the daughter of the execution debtor, there is no such relation

*Rehearing denied April 8, 1903, and writ of error denied by Supreme Court.

† 2. See Divorce, vol. 17, Cent. Dig. § 822.

between the parties as to create a trust in favor of the execution debtor.

4. No agreements made and no payments made before or after a title is taken can create a resulting trust, unless a trust results from the transaction itself the moment the title passes.

5. Where a deed by a purchaser at execution sale by its terms passes the legal title, and is recorded, the title given is, as against one claiming under a subsequent deed from the execution debtor, valid, though the grantees of the execution purchaser actually makes no claim to the land.

6. The unexpressed intention of a purchaser of land to take the same in trust for another cannot control the terms of an absolute deed of conveyance to the purchaser.

7. A party to an action, desiring a more complete presentation of the law on any controverted issue, should request a special charge.

8. In order to estop a married woman from asserting her claim to real estate, it is essential that she be guilty of positive fraud, or some act of concealment or suppression equivalent to fraud.

9. Where, in trespass to try title, plaintiff files an affidavit that the deed under which defendant claims is a forgery, such deed cannot be received in evidence until its execution has been proved as at common law.

10. The burden of proving the execution of the deed is on defendant, and remains there throughout the entire trial.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Sallie P. Gore and another against Clarence Williamson and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Simkins & Mays, for appellants. Callicutt & Call, for appellees.

NEILL, J. On January 3, 1902, the appellee Sallie P. Gore and her husband, E. E. Gore, instituted this suit in the ordinary form of trespass to try title against the appellants, Clarence Williamson and his wife, Katie, to recover 104.4 acres of land, which is described by metes and bounds, of the John McNeal survey, situated in Navarro county. And on the 11th day of October, 1901, appellees filed their second amended original petition against appellants, which contained two counts. The first count was in the ordinary form of trespass to try title and for rents. In the second appellees alleged that they were the owners of all the rights theretofore owned by Mrs. E. M. Love in the premises; that appellants had entered thereon by virtue of a lease executed to them by Mrs. Love on September 26, 1896, by which she leased the premises in controversy to them from that date until the 1st of January, 1901, they agreeing to make certain improvements thereon for the use and rental of the land, and to return it to their lessor at the expiration of the lease. Appellees further alleged in this count that appellants were setting up so much of the premises by virtue of pretended conveyance purporting to be from Mrs. Love, which bore date August 4, 1897; that said instrument was not executed by Mrs. E. M. Love, but was in fact a forgery, and pur-

ported to convey the land in controversy to appellants in consideration of \$800, none of which has ever been paid. Appellant answered by a plea of not guilty, pleas of limitation of three, five, and ten years, and that he was a purchaser from Mrs. E. M. Love, for value, without notice of appellees' claim, and that he made valuable improvements thereon in good faith, for which improvements he asked judgment for the value in the event of appellees' recovery. The case was tried before a jury, and the trial resulted in a verdict and judgment in favor of the appellees.

Conclusions of Fact.

The appellee Sallie P. Gore is the daughter of Wm. M. Love, deceased, and his wife, E. M. Love. In 1886, at the age of 15, she married Frank Root, from whom she obtained a divorce on March 16, 1898. On the 3d day of July, 1900, she married E. E. Gore, her present husband. The estate of William M. Love, deceased, was, on March 20, 1882, partitioned between his widow, E. M. Love, and his children, A. C. Love, Albert Love, H. O. Love, Mrs. Willie Stewart, and Sallie P. Love. The land in controversy was of his estate, and in the partition was allotted to Mrs. Willie Stewart. She subsequently died, and her estate was, on January 1, 1887, partitioned among her heirs, and in the division the land in controversy was set apart to her mother, Mrs. E. M. Love. On December 10, 1887, Garrity & Huey obtained a judgment against Mrs. E. M. Love, A. C. Love, Frank Root, and Sallie P. Root, Jennie Hayes, and J. H. Hayes, for \$300, with interest. A pluries execution was issued on the judgment January 12, 1891, and levied, together with other lands, upon that in controversy, and sold by the sheriff, and bought in by Garrity & Huey for \$200 on March 3, 1891, a sheriff's deed bearing that date being made to said purchasers. The facts so far are uncontroverted.

On December 11, 1895, Garrity & Huey, by their quitclaim deed, conveyed all the lands purchased by them at said execution sale, including the premises in controversy, to Sallie P. Root, in consideration of the satisfaction of the judgment upon which the execution was issued. It is not clear whether the consideration paid was the separate property of Mrs. Root or of her husband, or their community property. However, the preponderance of the testimony goes to show that the deed was made to the wife, and vested the title in her as her separate estate, and that the consideration paid was vendor's lien notes turned over to her by her husband in lieu of or in payment for some of her separate property, which had been used and appropriated to his own use by her husband. This deed was lost, and never recorded, and on April 5, 1900, Garrity & Huey, in lieu thereof, made Sallie P. Root a quitclaim deed to all the lands conveyed them by the sheriff

at said execution sale of March 8, 1891. This substitute deed recites that it is made in lieu of a deed of the same character theretofore made by the grantors to the grantee on the 11th day of December, 1895, and states that it was made for the purpose of duplicating said deed, and that, to the best of their knowledge and belief, the substance and contents of the deeds are the same. The contention of appellants is that the deed from Garrity & Huey to Mrs. Root was made with the intention of placing the beneficial ownership of the property in controversy in Mrs. E. M. Love, and that it vested in the grantee only with legal title, while it placed the equitable title in her mother. We find, however, no testimony in the record that reasonably tends to support this contention.

On September 26, 1896, Mrs. E. M. Love, with the consent of Mrs. Root, leased the land in controversy to the appellant Clarence Williamson for a term ending January 1, 1901, in consideration of which he agreed to make certain improvements on the land, which improvements he made during the term, and are those which he claims were made in good faith under a claim to the land by virtue of a deed which he claims was subsequently made to him by Mrs. Love, and for the value of which he asked judgment in the event the land was recovered by appellees. There is testimony going to show that at the time the lease was made Mrs. Root, one of appellees, told appellant that it was her property, but that he could lease it from her, who was to have the use of the rents of the tract during her lifetime upon the payment of taxes thereon. Before the instrument bearing date August 7, 1897, purporting upon its face to be a deed executed by Mrs. E. M. Love to appellant Clarence Williamson, conveying to him the land in controversy, was offered in evidence by appellants, affidavit was duly made and filed with the papers in the case that such instrument was a forgery. Upon the question of the forgery of the instrument, thus raised, the testimony is voluminous, and conflicting throughout, and upon it the jury would have been warranted in finding either way. We think, however, from a careful reading and consideration of the evidence, that the preponderance of the testimony goes to show that the instrument was forged. For this reason, as well as the regard we must pay the verdict, our conclusion upon the question is that of the jury.

Conclusions of Law.

1. Our conclusions of fact dispose of appellants' thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh assignments of error, which are directed against a sufficiency of the evidence to support the verdict adversely to appellants.

2. No issue as to whether the appellee Mrs. Gore claimed or asserted title to the land under the deed from Garrity & Huey to her prior to the date of the purported deed

from Mrs. E. M. Love to appellant Clarence Williamson was submitted to the jury by the court in its charge. Therefore it cannot be said, as is asserted by appellants in their thirty-ninth assignment of error, that the verdict is contrary to the evidence upon such issue, for there was not necessarily any finding of the jury upon it. Such an issue may have been incidentally involved in those submitted by the court to the jury in its charge. If it were, and it could be said as an incident to the verdict the jury passed upon it, we believe the evidence is sufficient to sustain the finding that Mrs. Gore not only asserted title to the land prior to the date of the purported deed, but made it known to appellant that she claimed it by virtue of her deed from Garrity & Huey.

3. The first paragraph, after stating the issues between the parties to the court's charge, is as follows: "Mrs. E. M. Love owned the land at the time of the levy of the execution and sheriff's sale in 1891. By such sale and sheriff's deed to them, Garrity & Huey acquired title to the land, and, if they made a deed therefor to Mrs. Root, the plaintiff, in 1895, such deed passed to her a legal title, and, unless it is proved that the legal title was vested in her for the use and benefit of Mrs. Love, also the real and beneficial ownership in the land." It is objected to this part of the charge, by the sixteenth assignment, that it was error to state therein that the effect of the deed of Garrity & Huey was to pass to Mrs. Root the legal title, and to declare that in any other contingency the real and beneficial title would also be in her.

If, as we have found in our conclusions of fact, the deed was made by Garrity & Huey, it divested them of and vested the legal title in the grantee as her separate estate, or as the community estate of herself and husband; and, if this legal title was not for the use and benefit of Mrs. Love, the deed vested the real and beneficial ownership in the land either in Mrs. Root as her separate property or in herself and husband as community property. Her husband, Frank Root, at no time after the execution of the deed from Garrity & Huey claimed or asserted any ownership in the land. It could not, therefore, be considered his separate property. If the effect of the deed, in the event Mrs. Love took no beneficial interest, was to vest the legal as well as the equitable title in the community estate, the effect, so far as appellants are concerned, would be the same as though it vested title in Mrs. Root as her separate estate; for, if it vested title in the community, she, after the divorce from Root, became, by virtue of the deed, a tenant in common with him, and could, as against appellant, who, if the deed under which he claimed was a forgery, was a naked trespasser, recover the entire interest of herself and co-tenant. *Plicher v. Kirk*, 60 Tex. 162; *Murrell v. Wright*, 78 Tex. 523, 15 S. W.

156; *Karnes v. Butler* (Tex. Civ. App.) 62 S. W. 963. Therefore appellants could not have been prejudiced by the charge of the court upon the effect of the deed.

4. The second paragraph of the court's charge, which follows immediately the one just quoted, is as follows: "Whether or not such legal title, if there was such, inured to the benefit of Mrs. Love, depends upon the terms, conditions, and considerations of the conveyance. If the deed was made by Garrity & Huey and accepted by Mrs. Gore merely to divest Garrity & Huey of title, and to place the beneficial ownership in Mrs. Love, then Mrs. Love became thereby the real owner of the land, and Mrs. Gore her trustee." By the eighteenth assignment this part is objected to upon the grounds, first, that there was no proof of the terms of the deed; and, second, that it by its terms vested title in either Frank or Mrs. Root; and, as the latter did not until long afterwards assert any interest in the land, Mrs. Love was not deprived of her right to convey it to the appellants. If the first objection were made by appellees, it would be good, for there is nothing in the record as to the terms of the deed which would tend to show that it was made by Garrity & Huey and accepted by the grantee merely to divest them of the title, and to place the beneficial interest in Mrs. Love. In short, there is nothing tending to show either an express or resulting trust in favor of Mrs. Love arising by reason of the deed. It was not Mrs. Love's money or property which was paid for the land. On the contrary, the consideration paid was either the property of Frank Root or his wife, or of both. There was no understanding between the parties that the deed was to be taken for Mrs. Love's benefit. Nor did any such fiduciary relation exist between her and Frank Root and his wife, or either of them, as would create a trust in the former's favor by reason of the deed of conveyance. A trust must result, if at all, at the instant a deed is taken, and the legal title vested in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such that the moment the title passes that a trust will result from the transaction itself. *Perry on Trusts*, § 133. So far as the first objection is concerned, this part of the charge was more favorable to appellants than the facts and circumstances regarding the deed and transaction warranted. As to the second objection, it may be said that if the deed, by its terms, vested the title in either Frank or Mrs. Root, Mrs. Love had no right to convey the property to the appellants, whether Mrs. Gore claimed title to the land by virtue of the conveyance or not. The sheriff's deed divested Mrs. Love of title. It was of record, and notice to appellants that the title was not in Mrs. Love. The evidence does show that Mrs. Gore did claim the prop-

erty from and after the deed was executed by virtue of it.

5. The third paragraph of the court's charge, following the one last quoted, is as follows: "If Frank Root paid the consideration out of his own separate means or the community effects of himself and plaintiff, or of both, and caused the deed to be made to his wife with the purpose on his part and the agreement between him and Garrity & Huey that they would so reconvey the lands bought in by them under the execution as to reinvest the owners with the title they had before the execution sale, and the deed was made to Mrs. Gore for such consideration, and under and by reason of such agreement, then Mrs. Gore got by such a deed a mere legal title for the benefit of Mrs. Love as to the land here involved, and held the same for her as her trustee." It is urged as an objection, under the nineteenth assignment of error, to this part of the charge, that it instructed the jury that, although Frank Root may have paid the Garrity & Huey judgment with his separate means or in community property of himself and wife, or of both, as he intended the deed as a mere release of the judgment and execution, and that the title theretofore owned by the several defendants in said execution was to be reinvested in the owners, and asserted no title to the interest, that before this could become effective Garrity & Huey must have agreed thereto. We suppose the clause, "that before this could become effective," in the assignment, has reference to the contention that Frank Root intended the deed from Garrity & Huey was to operate as a mere release of the judgment and execution, and to restore the title to the owner. There is no evidence that any such intention was expressed by Root when the deed was made. Ordinarily, the presumption is that a deed expresses upon its face the intention between the grantor and grantee. As between the parties, where no mistake or fraud is shown, and there is no ambiguity in the instrument, its terms are conclusive of their intention. It is only when the rights of third parties intervene that a different intention may be shown. But this intention must have existed at the time the instrument was executed, and, ordinarily, must have been that of the parties to the transaction. In this case, if the deed had been made to Frank Root, and it had been shown that he intended it for the benefit of those who owned the land prior to its sale under execution, it might be immaterial as to what the intention of Garrity & Huey was in making it. But, as the evidence shows that the deed was made to Mrs. Root, an intention of Frank Root, unexpressed at the time, cannot be taken to control its legal effect, there being no evidence of such facts as would raise a trust in favor of the prior owners, or any of them.

6. It seems to us that the charge of the

court presented the law upon the issues involved as fully and as fairly as appellants could ask. But, if they desired a more complete presentation of the law upon the controverted issues, they should have indicated such desire by requesting special charges expressing their view of the law.

7. The fifth paragraph of the court's charge is as follows: "If, under the foregoing instructions, you find that plaintiff was both legal and beneficial owner of the land, and that after divorce from Frank Root, and prior to August 4, 1897, that she knew that Mrs. Love claimed to own the land, and knew that defendant believed Mrs. Love owned the land, and that defendant intended to buy the land of Mrs. Love, and if you further find that, acting under such belief, defendant bought the land from Mrs. Love, took her deed therefor, paid her \$500 cash and made her his note for \$300 for the land, and that plaintiff had either informed defendant that Mrs. Love owned the land, or that from the words and conduct of plaintiff relating to the land the defendant reasonably believed Mrs. Love owned the land, and took such deed under such circumstances, and in reliance thereon made permanent improvements on the land of value in excess of the value of the use of the land during defendant's occupancy, then plaintiff is estopped to recover the land, and, if such is the case, find the land for the defendant." It is urged by appellants in the twenty-third assignment of error that this paragraph is erroneous, because it requires that the knowledge and acts of Mrs. Gore, which are relied upon by appellants to estop her from claiming the land as against the deed which they claim was made to Clarence Williamson and her mother, to have been obtained and done between the dates of appellee's divorce from Frank Root and the date of said instrument. To estop a married woman from asserting any rights to land, it is essential that she should be guilty of some positive fraud, or else of some act or concealment or suppression which in law would be equivalent thereto. *Stone v. Sledge* (Tex. Civ. App.) 24 S. W. 698; *Id.* (Tex. Sup.) 28 S. W. 1069; *Johnson v. Bryan*, 62 Tex. 626; *Steed v. Petty*, 65 Tex. 490; *Williams v. Ellingsworth*, 75 Tex. 483, 12 S. W. 746; *McLaren v. Jones* (Tex. Sup.) 33 S. W. 849; *Bigelow, Estop.* 510, 512. There is no evidence in the record tending in the least to show that Mrs. Gore at any time between the dates of her divorce and of the deed purporting to be from her mother to Williamson, was guilty of any positive fraud, act, or concealment or suppression which would in law be pronounced as such. Therefore this portion of the charge was not obnoxious to the objection.

8. The twenty-fourth assignment complains of the following portion of the court's charge: "Referring to the matter of the proof of the execution of the instrument offered as the deed of Mrs. Love, mentioned in sections 6 and 7 above, you are further instructed that

by force of the affidavit of forgery the defendant is required to offer evidence sufficient to establish prima facie that Mrs. Love signed such deed. If you find that the fact of such signing has been so proved, then you must find the deed to have been signed by Mrs. Love, unless, upon consideration of all the evidence, you believe the deed to be forged; that is, not signed by Mrs. Love. The affidavit of forgery is not evidence, and is not to be considered by you." The objection made to this part of the charge is that it leaves it for the jury to determine whether the execution of the deed had been prima facie established before the burden would shift from appellants, and be cast upon appellees to show that the deed was a forgery after it had been admitted in evidence. When the appellee filed the affidavits of forgery, the deed was no longer admissible in evidence under the statute, but before it could be read in evidence it was necessary to prove its execution as at common law. The acknowledgment and record of the deed, the filing and notice to plaintiff, as well as the affidavit of forgery, ceased to have any bearing upon the trial. The trial, as to the execution of the deed, then had to proceed as though it had not been acknowledged and recorded and no affidavit filed. In other words, the filing of the affidavit of forgery cast upon the appellants, who produced the deed, the burden of proving its execution. *Jester v. Steiner*, 86 Tex. 418, 25 S. W. 411; *Cox v. Cock*, 59 Tex. 524; *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300; *Houston v. Blythe*, 60 Tex. 511. The burden of proving its execution was on the appellants throughout, and it would have been error to have instructed the jury that the burden of proving its forgery rested upon the appellees. *Stooksbury v. Swan*, 85 Tex. 567, 22 S. W. 963. The charge, if not too favorable to appellants, was as favorable as they could ask.

9. The court did not err in refusing to give special charge No. 4 asked by appellants. The mere intention of Frank Root, without more, not to claim the land, though he may have paid the purchase money with his own funds, could not create a resulting trust in favor of Mrs. Love in the property that she could enforce against Root either in a court of law or equity. This matter, however, we have sufficiently discussed in conclusions 4 and 5 of this opinion.

10. A number of assignments complain of the introduction of testimony over appellants' objections. None are in and of themselves propositions, nor have propositions under them in appellant's brief. None shows what objection was made to the testimony, nor is the objection disclosed by the statement under any of them. Therefore, under the rules, they are not entitled to consideration. If they were, we should say, from the consideration we have given them, looking only to the briefs, none of them furnishes any ground for reversing the judgment. It is therefore affirmed.

SCHMITT v. NEW BRAUNFELSER UNTERSTUETZUNGS VEREIN.*

(Court of Civil Appeals of Texas. March 25, 1903.)

BENEFICIAL ASSOCIATIONS — CONTRACT — CHANGE OF BENEFICIARY — RIGHT TO CHANGE BENEFICIARY — CUSTOM — KNOWLEDGE OF CUSTOMS — PRESUMPTION.

1. Neither the by-laws of a beneficial association nor its contracts provided for any change of beneficiary. A member changed the beneficiary by an indorsement on the benefit certificate, and thereafter the original beneficiary, her husband, sued on the certificate. It appeared that there was a custom in the society by which a member was permitted to change the beneficiary. There was no evidence that the insured knew of the custom, but the original beneficiary did not testify that he did not know of it. *Held*, that the facts were sufficient to show that the custom was known to insured and the association, and that they contracted with reference to it, and hence the change was binding.

Appeal from District Court, Comal County; L. W. Moore, Judge.

Action by George H. Schmitt against the New Braunfelser Unterstuetzungs Verein. From a judgment for defendant, plaintiff appeals. Affirmed.

J. D. Guinn, for appellant. Aug. E. Altgelt, for appellee.

STREETMAN, J. Appellee is an unincorporated mutual benefit society, organized in 1876 for the purpose of collecting by assessments on the death of a member a sum not to exceed \$1,000, and paying it to the beneficiary named in the certificate of such deceased member. Elise Schmitt became a member of the society in 1884. In her application for membership her husband, the appellant, was named as beneficiary. She died October 10, 1900, and the society paid the sum of \$1,000 to her brothers and sisters, who had subsequently been designated by her as beneficiaries in lieu of her husband. Appellant thereupon brought this suit to recover the benefit fund, upon the theory that the insured had no right to change the beneficiary.

The district judge filed the following findings of fact: "(1) The defendant association is a voluntary association under article of agreement and its by-laws, without any charter or incorporation. (2) The plaintiff and Mrs. Elisabeth Schmitt were husband and wife in 1884. She filed her application to become a member of said association, designating plaintiff as beneficiary at that time, which was duly accepted, and she became a member thereof. She died October, 1900. The by-laws of the association are wholly silent as to any member making any designation of a beneficiary. The custom prevailing with the association from its organization was to permit its members to make their designation by indorsement upon the application at any time, and to permit

the member to change this designation at any time by a like indorsement upon the application. (3) The plaintiff and Mrs. Schmitt separated in 1891 or 1892, under articles of agreement, and divided their property, and continued to live so separated till her death, he moving out of the state. (4) In 1893 she designated her brothers and sisters as her beneficiaries under her benefit certificate by indorsement thereon. (5) The by-laws provided that upon the death of a member the money collected to pay off any benefit certificate should be held for the heirs of the deceased member." The court concluded from these facts that the appellant had no vested right to the benefit by reason of his original designation as beneficiary, but that the same was under the control of Mrs. Schmitt, and her subsequent designation of her brothers and sisters as beneficiaries entitled them to the fund, and awarded judgment for defendants.

The principal question involved is the right of the insured, under these circumstances, to change the beneficiary originally named in the application, and to designate different persons as beneficiaries. It is pretty well settled in our state that in an ordinary policy of life insurance the beneficiary acquires a vested right upon the issuance of the policy, which cannot be divested by the insured without his consent. *Irwin v. Ins. Co.*, 16 Tex. Civ. App. 683, 39 S. W. 1097, and cases cited. There is much difference of opinion as to whether the same rule applies to insurance in a mutual benefit society. There are authorities of some weight which maintain that, by reason of the very nature of such organizations, the insured retains complete control over the certificate, and may change the beneficiary whenever he chooses. *Niblock Ben. Societies & Acc. Ins.* § 212, and cases cited. Our courts have not yet indicated their support of this doctrine. The only cases which we have examined bearing upon the subject are those in which, either in the benefit certificate itself or in the by-laws of the organization, the right to change the beneficiary was expressly provided for. *Splawn v. Chew*, 60 Tex. 532; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. 38. These and other decisions clearly establish the rule that in such case the by-laws of the society become a part of the contract, and will prevail, even over the designation of a beneficiary in the application. *Thomas v. Leake*, 67 Tex. 469, 3 S. W. 703.

The inquiry at last is as to the understanding of the parties at the time the contract was executed. In this case no certificate was actually issued, the application and its acceptance constituting the only evidence of the contract. This application and the by-laws of the society were entirely silent as to the right of the insured to change the beneficiary. There was evidence, however, which we have concluded was sufficient to

*Rehearing denied April 15, 1903.

sustain the finding of the court, that from its organization there had been an established, universal usage in the society by which a member was permitted at any time to change the beneficiary originally named in the application. We are well satisfied that, if it had been shown that at the time of her application Mrs. Schmitt had been expressly notified of this usage, she would be held to have contracted with reference to it. There is no evidence in the record, aside from that afforded by the existence of the usage itself, that either she or her husband had knowledge of this practice. Appellant, however, who testified in the case, did not testify that he did not know of it, and the act of the wife in changing the beneficiaries would indicate that she understood she had a right to do so. Proof of a usage will not, of course, be permitted to overthrow the express provisions of a contract, but it is frequently resorted to for the purpose of ascertaining the intention of the parties, not only in cases where the contract is ambiguous, but also with reference to matters upon which the contract itself is silent. In such cases the usage, if known to the parties, will constitute a part of the contract; and not only so, but, if the usage is shown to have been long established and universal in its application, it affords presumptive evidence that the parties knew of its existence. Such presumption is not necessarily conclusive, but, under the circumstances of this case, we have decided that it was at least sufficient to authorize the court in concluding that it was known to the parties, and that they contracted with reference to it. *Clarke's Brown on Usages & Customs*, c. 4, and *MacCulsky v. Klosterman*, 10 L. R. A. 785, note.

We therefore conclude that there was no error in the judgment, and it is affirmed. Affirmed.

AUSTIN & N. W. R. CO. et al. v. CLUCK.*
(Court of Civil Appeals of Texas. Feb. 25, 1903.)

PERSONAL INJURIES—EXAMINATION BY PHYSICIANS—MOTION—TIME OF MAKING.

1. In an action for injuries the trial court has no authority to compel plaintiff to submit to an examination by physicians to be appointed by the court.

2. In an action for injuries it is proper not to allow defendant to show on cross-examination of plaintiff that he had refused to submit to an examination by physicians to be appointed by the court.

3. Where, in an action for injuries, the petition apprised defendant that plaintiff claimed injuries to his kidneys, a motion, during trial, that plaintiff submit a sample of his urine for examination by physicians to be appointed by the court, was too late, as it might unreasonably delay the trial.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by John O. Cluck against the Austin & Northwestern Railroad Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

S. R. Fisher and Baker, Botts, Baker & Lovett, for appellants. John Dowell and H. N. Swain, for appellee.

KEY, J. This is a suit for damages caused by the plaintiff's falling into a well dug, operated, and controlled by the Austin & Northwestern Railroad Company. There was a jury trial, resulting in a verdict and judgment for the plaintiff for \$2,000, and the defendants have appealed.

The testimony shows that the Houston & Texas Central Railroad Company, since the accident occurred, has succeeded to all the rights and liabilities of the Austin & Northwestern Railroad Company, and, if one company is liable, both are. The accident occurred at night, and the verdict of the jury involves a finding that the Austin & Northwestern Railroad Company was guilty of negligence in failing to keep the well properly covered, and that the plaintiff was not guilty of contributory negligence, as charged in the answer of the defendants; and that, as a direct result of the defendants' negligence, the plaintiff was injured to the extent of \$2,000. The record contains evidence sufficient to support all of these findings, and therefore the objections to the verdict are overruled.

The plaintiff charged in his petition that, as a result of his falling in the well, he was permanently injured in his back, sides, kidneys, hips, hip joints, spine, bladder, stomach, and bowels. Within proper time the defendants made a motion stating that the plaintiff had been examined by two physicians of his own selection, who would testify in his behalf; that he had not been examined by physicians selected by the defendants, or by any other physicians; and requested the trial court to appoint a committee of two or more competent physicians, and compel the plaintiff to submit to an examination by the physicians so appointed, in order that the defendants might have the benefit of the testimony of such physicians. In support of the motion it was shown that the plaintiff had refused to consent to the appointment of such committee and to the examination requested. The court overruled the motion, and that ruling is assigned as error.

On the question thus presented there is much conflict in the decisions. Some courts hold that, in the absence of a statute authorizing it, a court has no power to compel a litigant to submit his or her person to examination by a physician or any one else. Others deny this proposition, and hold that such power is inherent any court of gen-

*Rehearing denied April 8, 1903.

¶ 1. See *Damages*, vol. 15, Cent. Dig. § 581; *Discovery*, vol. 16, Cent. Dig. § 92.

eral jurisdiction, and that in proper cases it should be exercised. The leading case denying the power to compel such examination is *Railway Co. v. Botsford*, 141 U. S. 253, 11 Sup. Ct. 1000, 35 L. Ed. 734. The doctrine announced in that case, and followed in many other jurisdictions, has been recently applied by the Court of Civil Appeals at San Antonio in *Railway Co. v. Sherwood*, 67 S. W. 776. In the last-named case the Supreme Court refused a writ of error, and, we presume, indorsed the conclusion reached by the Court of Civil Appeals. For this reason, and because we believe that the *Botsford* Case rests upon the sounder doctrine, we hold that the trial court committed no error in overruling the motion referred to.

Nor did the court err in refusing to permit defendants to prove by the plaintiff, upon cross-examination before the jury, that he had refused to consent to be examined by a committee of physicians to be appointed by the court. Having the legal right to refuse to submit to such an examination, the defendants had no right to prejudice him before the jury by proving that he had exercised such legal right.

During the trial the defendants' counsel sought to procure an examination of the plaintiff's urine by a committee of physicians to be appointed by the court, and they now complain of the ruling of the court in refusing to compel the plaintiff to furnish a specimen of his urine for that purpose. In that regard, the bill of exception reads: "Be it remembered that upon the trial of the above entitled and numbered cause, and after the plaintiff had introduced the testimony of Dr. Coker and Dr. Mitchell, plaintiff's witnesses, as to the nature, extent, and probable duration of his injuries, and in particular after said physicians had testified as to the condition in which they found the plaintiff's kidneys, bladder, and other organs connected therewith, and as to urine voided by plaintiff, and as to pus and mucous discharges from the penis, and also as to analysis of the urine for the purpose of discovering the existence of albumen or sugar in the urine, and as to the diseases which might result from the conditions found (as fully and at large set out in the statement of facts herein, to which reference is made for a statement of the testimony of said witnesses as fully as if the same were incorporated herein), and after plaintiff himself, and others sworn in his behalf, had testified as to the ailments of which he complained, and as to his symptoms, manifestations of pain and suffering, and diseased condition, the following, among other, proceedings were had: Counsel for defendants, upon cross-examination of the plaintiff, John O. Cluck, propounded to him the following question: 'Are you willing, in the presence of some reputable person, or by yourself, and subsequently to be supported by your affidavit that it is

urine voided by you into a vessel which is absolutely free from any foreign matter, to furnish a specimen of your urine, voided under the circumstances stated, to a committee of competent physicians to be appointed by the court, so that an analysis of that urine may be made?' To which question counsel for plaintiff objected on the ground that the same was irrelevant and immaterial, and a useless consumption of time, which objections were by the court sustained. And thereafter, in the further progress of the trial of the cause, counsel for defendants moved the court to require and compel the plaintiff to furnish a specimen of his urine, voided by him under the conditions stated, for analysis by a committee of physicians to be appointed by the court; counsel stating to the court that this did not involve a personal examination of the plaintiff, but a separate and distinct matter from an examination of his person; that it was in the interest of the ascertainment of truth; and that plaintiff, having offered testimony as to the condition of his kidneys, bladder, and genito-urinary organs, should now be compelled to submit such specimen of urine for purposes of analysis, and should not be permitted to withhold and conceal knowledge of actual conditions so far as the same might be disclosed by an analysis of his urine for the purpose of determining the existence of Bright's disease or other complaint or ailment, to which plaintiff objected on the following ground: That the order asked of the court by the defendants, if it could be granted at all, could not be granted at that stage of the trial; that the court had no power to grant such an order, and if, at any time, he should grant such an order, it was discretionary with him so to do, and that the ends of justice did not require it in this case. The court overruled said motion, and refused to require plaintiff to furnish such specimen under the conditions stated. To which action of the court in sustaining plaintiff's objections to the question hereinbefore set out, and in overruling defendants' said motion, the defendants then and there in open court excepted."

If it be conceded that the trial court had the power to compel the plaintiff to furnish a specimen of his urine for examination by physicians to be appointed by the court, we are of opinion that, before the defendants can be heard to complain in this court, it must be made to appear that their motion seeking to accomplish that result was seasonably made. The plaintiff's petition apprised the defendants of the fact that he claimed that his kidneys and bladder were permanently injured, and the written deposition of one of his physicians, taken long before the trial, indicated to the defendants the importance of an examination of the plaintiff's urine. Notwithstanding this, the motion now under consideration was not made until after the trial was in progress

before the jury; nor does the record show the particular time during the progress of the trial when the motion was made. The bill of exception set out above, after reciting certain other matters, says: "And thereafter, in the further progress of the trial of the case, counsel for defendants moved the court to require and compel the plaintiff to furnish a specimen of his urine," etc. Whether this was while the plaintiff was on the stand as a witness, or just before the entire evidence closed, is not made to appear. The end which the defendants had in view (which was an examination of the plaintiff's urine by a committee of physicians appointed by the court) would have required time for its accomplishment. The plaintiff would have been entitled to a reasonable time, in the due course of nature, to furnish the urine, and the court would have been entitled to a like time within which to procure competent physicians to make the examination, and the latter would have been entitled to reasonable time within which to make such examination. For aught that appears in the record, to have granted the motion at the time that it was made might have resulted in an unreasonable delay of the trial; and we therefore hold that it is not made to appear that the trial court committed error in overruling the motion referred to.

Several other questions are presented in appellants' brief, but they do not require discussion in this opinion. They have all been considered in consultation, and on all of them we rule against appellants.

No reversible error is shown, and the judgment is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. BROOKS.*

(Court of Civil Appeals of Texas. March 4, 1903.)

INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY—EXTENT OF INJURIES—REFUSAL TO SUBMIT TO EXAMINATION—REBUTTAL TESTIMONY.

1. In an action for injuries to a servant caused by a coal gate giving way, thus permitting the coal to fall against plaintiff, evidence showing that the gate was not properly secured by bolts, and that there was no proper inspection of the gate and its appliances, was sufficient to establish negligence on the part of defendant.

2. In an action for injuries to a servant, it was not error to refuse to permit defendant to prove by plaintiff that he had refused to submit to an examination by defendant's physician.

3. An exclusion of evidence was not prejudicial, where the facts sought to be established by the excluded testimony were otherwise testified to by the same witness.

4. In an action for injuries to a servant caused by a coal gate giving way, thus permitting the coal to fall against plaintiff, where defendant offered evidence to the effect that the bolts in the gate were found in place immediately after the accident, it was not error to permit plain-

tiff to prove in rebuttal that the coal gate came down a second time very shortly after plaintiff's accident, and that then the bolt was replaced.

Appeal from District Court, Bell County; Jno. M. Furman, Judge.

Action by J. R. Brooks against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. John W. Parker and W. C. Holbert, for appellee.

FISHER, C. J. This is an action for personal injuries, wherein the appellee alleges that, while employed by appellant as a fireman, in the discharge of his duties he was injured by reason of the coal gate on the tank giving way, striking him, and causing a large amount of coal to fall on him. The averments in the petition charging negligence are to the effect that, while in the regular discharge of his duties as a fireman on the engine, the gate which held the coal in the tank of said engine gave way, and allowed the coal, which was piled very high, to fall down with great force and violence against the plaintiff; that the gate was caused to give way, and the coal to fall and strike against plaintiff, by the negligence and carelessness of the defendant, its servants and employees charged with the duty in that regard, in allowing the bolts and fastenings which were intended to hold the gate in position to become unsafe and defective and to come out, and in failing to replace one of said bolts which had come out. The appellant answered by general denial, and that it had made regular and proper inspections of the coal gate and its fastenings, and, if there were any defects in the same, they were not apparent, and could not have been discovered by the exercise of ordinary care, and that, if appellee was injured at the time and place as charged, the same was caused by his contributory negligence; that he knew, and was in a position to know, the condition of the coal gate; and that he took no means to look out for his own safety. Verdict and judgment resulted in appellee's favor for \$2,500.

There is evidence in the record to the effect that the coal gate was not properly secured by bolts, and that one of the bolts was not in place, and that thereby the coal gate and part of the coal in the tender fell out and fell upon the appellee, causing the injuries complained of in his petition. The evidence warrants the conclusion that the defect pointed out could have been discovered by the appellant, and that there was no proper inspection of the coal gate and its appliances, and that the failure to provide proper fastenings and the failure to properly inspect was negligence upon the part of the appellant. The evidence of the plaintiff shows that he was not guilty of contributory neg-

*Rehearing denied April 8, 1903, and writ of error granted by Supreme Court.

† 1. See Master and Servant, vol. 34, Cent. Dig. § 235.

ligence, nor did he discover the fact that the gate was not properly secured. From the facts in the record showing the extent of the plaintiff's injuries, we reach the conclusion that the verdict and judgment are not excessive. These findings dispose of appellant's first and second assignments of error.

The charge of the court covered and presented all of the material issues that arose from the pleadings and evidence, and the charge is not subject to the objections urged against it.

There was no error in refusing the requested instructions asked by appellant, which are set out in its brief.

The ruling of the court in declining to admit the evidence complained of in the thirteenth assignment of error is correct. This evidence was immaterial.

The fourteenth and fifteenth assignments of error complain of the refusal of the court to permit the appellant to prove by the appellee that he had refused to permit Dr. White to make an examination of his alleged injuries. Dr. White was a surgeon in the employ of appellant. In view of the recent ruling of this court in the case of *Austin & Northwestern Railroad Co. v. Cluck*, 73 S. W. 569, the court did not err in refusing to admit this testimony; but it appears from the evidence of the appellee, as shown in the statement of facts, that he did refuse to permit the surgeons in the employ of the appellant to make an examination of his condition.

The testimony offered by appellant, as set out under the sixteenth assignment of error, was not material. It sought to bring into the case collateral matter about which the appellee could not be contradicted. Furthermore, the appellee had already testified that he was not on friendly terms with these physicians.

In view of the qualifications of the court to the bill of exceptions set out under the seventeenth assignment of error, there was no abuse of discretion in permitting the deposition of the witness May to be offered in evidence, or in permitting the witness to testify in person during the trial of the case.

The controversy between the appellant and Frank Brooks related to a suit with which the appellee had no connection. It was a collateral matter. And therefore the court did not err as complained of in the eighteenth assignment of error.

The evidence of witness John May, as complained of in the nineteenth assignment of error, was admissible. The testimony was to the effect that the coal gate fell down a very short time after the falling that occasioned the plaintiff's injury. After this second falling of the gate, there is evidence tending to show that the bolt was replaced, and that the gate did not thereafter come down. The evidence of the second falling a short while after the first tended to show that

the gate was not properly secured. The appellant offered some evidence to the effect that the bolt was found in its proper place immediately after the accident. The purpose of this evidence evidently was to establish the fact that the falling of the gate was not attributable to the bolt's being out of place. The fact that the gate fell down under practically similar circumstances a short while afterwards would have a tendency to rebut the evidence of appellant offered upon this subject.

We find no error in the record, and the judgment is affirmed. Affirmed.

STATE v. SAN ANTONIO & A. P. RY. CO.
(Court of Civil Appeals of Texas. April 1 1903.)

RAILROADS—DISCRIMINATION BETWEEN SHIPPERS—RAILROAD COMMISSION—REGULATION—SHIPMENT OF COTTON—FOREIGN SHIPMENT—EVIDENCE.

1. Rev. St. 1895, art. 4574, provides a penalty for unjust discrimination by a railroad between shippers, and one of the rules of the railroad commission requires that cotton not being shipped beyond the state shall be stopped at the first compress for compression. *Held*, in an action against a railroad under the statute, that where one concentrates his foreign shipments at some point within the state, and there classifies them preparatory to their final destination, and some cotton is substituted at that point for that shipped from a certain point to such classification point, such substitution and classification do not render the shipment a local one, which should have been compressed at the first compress.

2. In an action against a railroad company, brought by direction of the railroad commission, for failure to stop a shipment of cotton at the first compress, it appeared that the president of the first compress on the line of shipment telephoned the railroad company that the shipper had stated to him that the cotton which was billed to a foreign port was going to be changed, and asked that his compress get it; and it appeared that some time previous the president of such compress, in going over some bills, had observed a lot of cotton on which the marks had been changed, and yet the defendant had paid for compressing the cotton. *Held*, that the evidence was insufficient to show that the railroad company was aware that the shipper did not intend to ship the cotton abroad.

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Action by the state of Texas against the San Antonio & Aransas Pass Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. K. Bell, T. S. Reese, and W. J. Baker, for appellant. Davidson & Bailey, for appellee.

JAMES, C. J. This suit was brought by direction of the Railroad Commission of Texas against appellee to recover penalties for alleged violations of article 4574, § 1, Rev. St. 1895 (unjust discrimination), and of the regulations of the commission concerning the compression of cotton at the first compress en route from origin to destination of the

shipment, when same is to be compressed in transit. The cotton in question (100 bales) was shipped by A. Breyer from Yorktown, Tex., on defendant's line, to Bremen, Germany, on a through rate, under export bill of lading, via Houston and Galveston, Tex.; the same to be compressed at Houston. The petition alleged: That Breyer, being desirous of concentrating said 100 bales at Houston for the purpose of marking, classing, grading, weighing, and preparing same for market, and for the purpose of determining its final destination, did not class, grade, or otherwise prepare said cotton for market, otherwise than to mark the same at Yorktown with mark "D. O. R.," and had not while it was at Yorktown determined its final destination. That for the purpose of evading the regulations of the commission requiring said cotton to be compressed at the Cuero Cotton Compress (the first compress in transit), he determined to ship it to Houston, passing said compress, upon pretended export bills of lading, and on September 3, 1900, applied to defendant for and obtained such bills of lading, and thereunder caused it to be carried from Yorktown, through Cuero, and by said compress, to Houston. That when it arrived at Houston it was placed on the platform of the Bayou City Compress, and while still in the hands of defendant, and upon previous understanding with defendant, Breyer's employes went upon said platform, and classed, graded, weighed, and remarked said cotton; changing the original marks, "D. O. R.," on 38 of the bales, and placing other marks thereon; separating such 38 bales from the remainder of the said 100 bales, and replacing or substituting said 38 bales with 38 others taken from cotton which had arrived at said compress from Hallettsville, Tex., under other bills of lading and marks, on which they placed the mark "D. O. D." That the 100 bales thus formed were compressed. That thereafter said 100 bales were delivered by defendant to the Texas & New Orleans Railroad Company as being the identical cotton which it had transported from Yorktown, and were shipped out from Houston under other and different export bills of lading than those issued at Yorktown, and transported outside of the state. That said 100 bales were originally consigned to "F. Kruege, Bremen, Germany, notify A. Breyer," but the cotton thus marked D. O. R., which left Houston, and which purported to be the same cotton, but which was not, was consigned to "E. M. Noble, Bremen, Germany, notify C. A. Gruner & Co." "That the agents of the defendant company, at the time of and before the receipt by them of said 100 bales of cotton delivered to them at Yorktown by Breyer's agent, had notice that it was the intention of Breyer to apply to defendant's agent at Yorktown for export bill of lading for said 100 bales of cotton, to enable him to take the same to Houston

for compression, and there to be classed, graded, weighed, and otherwise prepared for market, and there to determine its final destination, and that portions of said cotton would be taken out, and other cotton substituted therefor. That the plan was resorted to by Breyer to enable him to pass the Cuero Compress, and that, with full knowledge of the intention of said Breyer as aforesaid, the defendant issued to him export bills of lading; contriving and intending thereby that the same should be used as a device and cover to evade the compress regulations of the railroad commission. That said regulations required cotton shipped from Yorktown to Houston to be stopped at Cuero for compression; there being a compress at said point in operation at the time, and that being the first compress on defendant's line between Yorktown and Houston. The cotton was shipped on a bill of lading calling for delivery at Bremen, Germany, and was claimed by defendant to be an export shipment, and not subject to the aforesaid regulations. The petition alleges that, notwithstanding the form of the bill of lading, the cotton was a local shipment from Yorktown to Houston, by reason of the fact that it was the intention of the shipper, known to defendant's agent, to stop the cotton at the Bayou City Compress at Houston, there to be compressed, weighed, and classed and graded, and its destination fixed, and to make substitution of the cotton, thereby changing its identity. Defendant answered by voluminous exceptions and pleas to the jurisdiction and exceptions to the merits, which were overruled. Defendant answered further by general denial, and specially denied any notice or knowledge as to Breyer's intentions with regard to the handling of the cotton at the Bayou City Compress at Houston, and denied its power to prevent or in any way interfere with the handling of the cotton at the compress, or its responsibility therefor. The defendant alleged that the shipment was a bona fide export shipment, and, as such, not subject to the compress regulations of the Railroad Commission of Texas." The court instructed the jury to find for defendant.

Appellant makes two assignments of error, which are as follows:

"The court erred in instructing the jury to find a verdict for the defendant, and in refusing to submit to the jury the issues presented by the pleadings and the evidence. If Breyer intended at the time of the shipment of the cotton in question to stop it at the Bayou City Compress, at Houston, there to remark, reweigh, grade, and classify it, and to substitute for the cotton shipped from Yorktown other cotton, so as to make a shipment of one hundred bales of uniform grade before the same was shipped out from Houston, and afterwards did so, then the shipment from Yorktown to Houston was a local shipment, and subject to the compress

regulations of the railroad commission; and, if the defendant's agents knew or had notice at the time of or before the receipt of said cotton for shipment that such was Breyer's intention, they were required to treat the shipment as a local shipment, under the said compress regulations, and to stop it at the Cuero Compress for compression, and this issue should have been submitted to the jury under the evidence introduced, which was sufficient to authorize finding for plaintiff."

"The court erred in refusing to give to the jury the instructions asked by the plaintiff. The evidence raised issues of fact which should have been submitted to the jury with regard to the manner in which the cotton was handled by Breyer at the compress in Houston, the intention of Breyer at the time of the shipment to handle the cotton in this way, and the notice to the defendant's agents at and before the receipt of the cotton for shipment as to Breyer's intentions, which issues of fact, if found for the plaintiff, would have constituted the shipment a local, and not a foreign and interstate, shipment, and would have required a verdict for the penalties sued for; and the evidence was sufficient to authorize a finding for the plaintiff on these issues."

The contentions of the state are, substantially, first, that the shipment to Houston was a local one—rendered so by the facts and circumstances—notwithstanding it went shipped under an export bill of lading, and that it was really a foreign shipment only from Houston; second, that defendant knew or was put on notice of the domestic character of the shipment from Yorktown to Houston.

The testimony on all material matters is undisputed. A. Breyer was a buyer of cotton for shipment abroad. The 100 bales in question he purchased and shipped on a through rate from Yorktown, Tex., via Houston and Galveston, Tex., to Bremen, Germany, to be compressed at Houston, under an export bill of lading, and consigned, "To order of F. Kraege, notify A. Breyer." F. Kraege was a merchant of Yorktown, Tex., from whom Breyer bought the cotton, and on September third, the date of the shipment, the purchase price was unpaid. Therefore it was made to the order of Kraege, to whom the bill of lading was delivered, and who sent it with his blank indorsement to H. Runge & Co., at Cuero, for collection, where the draft was paid and the bill of lading forwarded to Breyer on the 4th. The first compress out from Yorktown was the Cuero Cotton Compress, and the cotton went on to Houston without stopping there. When this cotton arrived at Houston, and was delivered to Bayou City Compress, Breyer had there a lot of cotton which he had acquired at Hallettsville, Tex., and which was, under like export bills of lading, being conveyed in like manner to Bremen,

Germany. The stoppage and collection of all this cotton by Breyer at Houston, where Breyer had his office, clerks, and facilities, was for the purpose of compressing and classifying it, etc. The alleged substitution (what the evidence shows to be classification) while the cotton was at the compress consisted in Breyer taking 38 bales from the Yorktown lot and 38 bales from the Hallettsville lot, and substituting one lot in place of the other, thus classifying the cotton; that is, getting cotton of uniform grade in one lot and under one bill of lading. Incidental to this, the marks on the bales were changed. All the bales thus handled and shifted from one bill to another were the cotton of Breyer, and were under export bills of lading calling for the same foreign port of destination—no other cotton figuring in the transaction—and all the cotton thus collected at that time and place had been purchased by Breyer, and went forward in due course to Bremen.

Although appellant, in the petition, seems to base the action, to some extent, upon the fact or circumstance that the original bill of lading was taken up at Houston, and that defendant issued another export bill of lading for the cotton in question from Houston to Bremen, via New Orleans, instead of Galveston, with change of consignee to "E. M. Noble, notify E. C. Gruner & Co." Appellant does not, in his brief, seem to be relying on said facts. Nevertheless we probably should state the evidence in regard to this. While the cotton was in the compress at Houston the storm of September 8, 1900, occurred, which destroyed Galveston's commerce for the time being. The steamer Helligoland, on which Breyer had a contract for ocean carriage, and had been engaged by him to carry these lots of cotton to Europe, and which was due to arrive on the 10th, arrived at Galveston on the 11th, and, finding the condition of things there, put out from Galveston on the 13th, after notifying Breyer. This necessitated the routing of the cotton to New Orleans by what were in that emergency known as "distress shipments," and the common practice in such cases was to issue new bills of lading. In fact, in ordinary circumstances the original bill of lading would customarily be taken up at Galveston, and a "port side" bill of lading issued by the ship, covering all cotton belonging to one person on that ship. There was no change of destination, and although we regard the change in the name of the consignee in the bills of lading as of no importance in determining whether the shipment from Yorktown to Houston was domestic, or a part of a foreign shipment, we may add that the evidence is that Breyer held the original bill of lading, with F. Kraege's blank indorsement thereon, making him the real owner; and E. M. Noble, the consignee named in the new bill of lading, was Breyer's clerk and representative,

and the cotton was really consigned, "To the order of A. Breyer, notify A. O. Gruner & Co." A. O. Gruner & Co. were his correspondents in Bremen.

The above facts are all that need be stated, to arrive at what, in our opinion, is the proper disposition of the case. Appellant's complaint is that there was certain evidence which should have carried the case to the jury, and this evidence we shall refer to in the opinion.

Conclusions of Law.

1. We take it for granted that no one will insist that the stoppage of cotton en route for compression alone would transform a foreign-billed shipment into a domestic one. Appellant appears to contend that classification, reweighing, and remarking had that effect on this shipment. Breyer's place of business was in Houston. He was engaged in buying cotton at different points in the state for export. He clearly had the right to compress; also to classify and grade his purchases according to the requirements of the particular consignment he desired to make; also he had a right to ship cotton from the points of purchase by foreign bills of lading. It is also clear that he could not classify and grade several lots of cotton, bought at different points, without collecting them at some point. And to our minds it is clear, also, that the act of classifying, as it was done in this instance, at a central point on the lines of these several shipments, was not in any sense an act of preparation or perfection of the cotton for market. Nothing was done to the article itself, but to compress it, and as compressed it went on. It was already destined abroad (that is all the lots of cotton from which the substitutions were made were under export bills to the same destination, and all were actually exported); and we think it should be held, under the circumstances, that the mere shifting of bales from one bill of lading to another was immaterial, and did not interrupt the foreign nature of the several shipments. One of the regulations of the commission seems to recognize that cotton may be concentrated through shipments at some point, and there classified, without constituting such shipments domestic, unless, in addition to such concentration and classification preparatory to final destination, it is brought to that point to determine the point of final destination. Section 4, Commodity Tariff, I-B, Sixth Annual Report Railroad Commission of Texas, p. 48. And it is uncontroverted that the final destination of this cotton was determined before the cotton was started from Yorktown. This appears to signify that, in the opinion of the commission, a foreign shipment does not lose that character by a classification of cotton en route. And it has been held that coal mined in a state, and started to another state, but stopped for separation and assortment, does not thereby lose its character as an interstate shipment.

State ex rel. v. Engle, 84 N. J. Law, 425. We conclude that none of the said acts was sufficient to transform this into a local shipment.

2. The testimony was that at the time of this transaction Breyer was, and had been, engaged exclusively in buying cotton to export abroad. The penalties sought to be imposed are against appellant carrier for not stopping the 100 bales for compression at Cuero. It seems to us, at the start, that it cannot be held liable for not stopping there unless it knew that this cotton was not being bona fide billed for a foreign port; in other words, that, notwithstanding the form of the shipment, it knew that the cotton, or some of it, was not intended for exportation. There is no testimony that would sustain such a conclusion. If Breyer had admitted to appellant that he did not intend to export the cotton, or had so declared to appellant's knowledge, or had admitted or declared, to defendant's knowledge, that he intended to do certain things with the shipment at Houston which would be inconsistent with its interstate or foreign status, and constitute it a local shipment to Houston, defendant's duty to stop the cotton at Cuero could well be claimed. Defendant, however, could not foresee what would happen to it after it reached Houston; hence it must have had previous knowledge of what was to be done with it there, or unmistakable notice of what was to be done with it, in order to devolve upon it the responsibility of stopping the cotton at Cuero, in opposition to Breyer's wishes to have it compressed at Houston. The responsibility was a grave one to defendant, as in either event it would incur liability if mistaken, and therefore it ought not be held liable for the penalties sued for unless it had information more definite than a vague suspicion that Breyer was using a foreign bill of lading in order to evade the laws of the state in reference to local commerce.

3. There was not a particle of evidence that Breyer, in making the shipment, had any intention of doing anything except what was actually done with it at Houston. Certainly what he did was the best evidence of what his intention was, and, in view of it, the mere suspicions on the subject which the president of the Cuero Compress imparted to defendant ought not to count at all. But if he had the intention to substitute some of the 100 bales with local cotton, or to use some of it for local purposes, it would amount to nothing, when it conclusively appears that he did nothing of the kind. It was shown that the president of the compress at Cuero, upon learning that Breyer was about to make this shipment, and after failing to get him to agree to give it to his compress, called up defendant's agent by telephone, and insisted on having the cotton, and told him that he was confident, from Mr. Breyer's statement to him, that the cotton was going to be changed, its identity destroyed, etc., and asked

defendant to see that his compress got it. The same witness detailed the conversation he had had with Breyer, from which it appears that all Breyer had told him was that he wanted to work the cotton at Houston, and would take it there. And in view of the witness' apprehensions, defendant actually exacted a promise from Breyer that he would not "substitute cotton." This information, which only purported to be the suspicion of the witness, and which the event demonstrated was an unfounded suspicion, together with another fact stated by the same witness—that some time previous to this shipment he had, in going over some claims against the Yorktown and Cuero compresses, observed a lot of cotton upon which the marks had been changed, and yet the defendant had paid for compressing the cotton—constitutes all the evidence that could possibly be relied on to show that defendant was aware that Breyer intended to improperly substitute cotton in the present transaction. Its sufficiency for that purpose, in connection with the other evidence, is too patent to require further discussion. After all, it is immaterial what Breyer might have done with this cotton at Houston. It does not matter what he meant by saying that he intended to work it at Houston, when what he did with it there was merely to classify and grade it along with other bales similarly destined. It matters not that he may have promised defendant's agent that he would not substitute cotton, if what he actually did in that respect was permissible in such shipments. The surrender of the original bill of lading, and the issuance of the new one from Houston by way of New Orleans, as we have explained this, if it could possibly be held that it operated to transform the shipment into a local one, was something which neither the defendant, nor even the president of the Cuero Compress, could have anticipated.

We conclude, therefore, that the undisputed evidence established that this shipment was, from its origin to the time it left the state, a foreign shipment; also that the shipper did not have any design in this entire matter except in good faith to export the cotton according to the bills of lading, and that neither facts nor notice existed which would have warranted defendant in disregarding the shipper's instructions to deliver this cotton for compression at Houston.

Affirmed.

FEURT v. CASTER.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

HOMESTEAD — INTENTION — JUDGMENT—COLLATERAL ATTACK—SERVICE OF SUMMONS—RETURN OF AMENDMENT.

1. Plaintiff and his wife owned adjoining tracts of land. For many years before and after her death he lived on his tract, and culti-

vated both tracts, until he conveyed his tract to the grantor of defendant, and moved off, renting a farm $1\frac{1}{4}$ miles away, and selling the standing crop on the wife's tract to defendant. A short time thereafter defendant purchased plaintiff's interest in the wife's tract at execution sale. The tract was fenced, but had no buildings thereon. Plaintiff testified that he intended to make this tract his homestead. *Held*, that it was not his homestead at the time of the execution sale, since mere intention does not make a homestead, and Rev. St. 1899, § 8616, allowed only 160 acres as homestead, which was the amount of his own tract, on which he lived until he moved away.

2. Under Rev. St. 1899, §§ 657, 660, providing that the court may amend any return in an action in affirmance of the judgment therein, the court, after judgment, may, in the exercise of a sound judicial discretion, amend or refuse to amend the sheriff's return on the summons.

3. On an application to amend the sheriff's return on a summons after judgment, where the service was claimed to have been made by leaving the summons and petition with a member of defendant's family, and the sheriff cannot remember with whom he left them, the refusal of the application was not an abuse of discretion.

4. Under Rev. St. 1899, § 570, providing that service may be made on a defendant by leaving a copy of the summons and petition at his usual place of abode with a member of his family over the age of 15 years, where the return does not show that a copy of the petition was served with the summons a judgment by default, based on such service, is void, and may be attacked collaterally, notwithstanding the judgment recites that the defendant "was duly summoned as the law directs."

Appeal from Circuit Court, Daviess County; Gallatin Craig, Special Judge.

Action by Benjamin F. Feurt against William G. Caster. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

Ejectment for the northwest quarter of the northwest quarter of section 5, in township 59, range 28, in Daviess county. The petition is in the usual form, and ouster is laid as of January 2, 1900. The answer is a general denial. Upon the trial below it was admitted that Mrs. Nancy C. Feurt is the common source of title, that she was the wife of the plaintiff at the time of her death, and that she died seised of an indefeasible estate in fee simple of the land. She died in April, 1889, intestate, leaving surviving her the plaintiff, her husband, and seven living children, born of that marriage. For about 10 or 11 years after her death the plaintiff had possession of the land. It adjoined a tract of 160 acres, owned by him, and he used this land in connection with his land. There were no houses or other buildings upon this land, but it was under fence. The plaintiff resided on his 160 acres, with his family, and it was his homestead. He says he farmed this land in connection with his homestead. There was a deed of trust on his land, which was foreclosed in April, 1897, and was bought in by the bank, the cestui que trust, and at the same time he conveyed the land to a trustee for the bank. So the plaintiff lost his own land. The defendant purchased from the bank the 160 acres of land it had

¶ 1. See Homestead, vol. 25, Cent. Dig. § 42.

thus acquired from the plaintiff. Thereupon the plaintiff removed from his former homestead, and rented a farm about a mile and a half therefrom, and moved his family thereto, and has ever since resided there. Over the objection of the defendant, the plaintiff was permitted to testify that he intended to keep the land in question as his homestead, and to build thereon, and to return thereto as soon as he built, but had been financially unable so far to do so. When the plaintiff removed from the 160 acres, the defendant, the new owner, went into possession thereof in October or November, 1899. He then purchased from the plaintiff "the crop and stalk field" on the land in controversy, and went into the possession thereof. Thereafter, on December 16, 1899, the defendant became the purchaser of the right, title, and interest of the plaintiff in the land in controversy at the sheriff's sale thereof under execution, upon a judgment rendered on September 14, 1896, by the circuit court of Daviess county, in favor of Ellen Gilreath, the mother of the plaintiff's deceased wife, against the plaintiff. Thus the plaintiff claims a life estate by the curtesy in the land, which he contends was not subject to execution, because he had established his homestead thereon, and the defendant claims as assignee of his estate by the curtesy under the judgment, execution, and sale aforesaid.

The plaintiff claims that the judgment is void, and therefore may be attacked in this collateral proceeding, because the return of the sheriff on the summons issued in the case of Ellen Gilreath against him was insufficient in law to confer jurisdiction over his person, in that it simply recited: "I hereby certify that I executed the within writ in the county of Daviess, state of Missouri, on the 21st day of August, 1896, by leaving a copy of the same at the usual place of abode of Benjamin F. Feurt, with a member of his family over the age of 16 years;" while the statute requires not only that a copy of the writ shall be served upon the defendant, but also that a copy of the petition shall be served upon him, and this return does not show that a copy of the petition was so served upon the defendant in that case (the plaintiff in this case), and therefore the court never had any jurisdiction to render a judgment against the defendant in that case, and the judgment is void, and hence open to collateral attack. On the other hand, the defendant claims that the land in controversy never was the homestead of the plaintiff, and hence his estate by the curtesy was subject to execution; and, further, that the judgment aforesaid is not void, but only voidable or irregular, and that such irregularities were only subject to attack by the defendant in that case itself, and are impervious to attack in this collateral case; and also that the trial court erred in refusing to permit the sheriff to amend his return so as to show that a copy of the peti-

tion as well as of the writ was served on the defendant in that case. The defendant offered the evidence of the deputy sheriff who served the writs, which tended to show that a copy of the petition was attached to the writ, and that he served both at the same time by leaving them at the defendant's usual place of abode with a member of his family over the age of 16 years; but the deputy sheriff could not remember who such person was, or whether it was a man or a woman, but was certain that, whoever it was was over the age of 16 years. He also said he never served any other writs upon the plaintiff herein. On the other hand, the plaintiff proved by his stepdaughter, Mrs. Sinnie Cathcart, that some one (she could not say who) gave her some papers (she did not know what they were), and asked her to give them to her stepfather, the plaintiff, and that she did not do so. She also said she would be 19 years old on April 5, 1901. The writ in question was served August 21, 1896. So that she was only 14 years old at the time of the service. On motion of the defendant, however, the court struck out all of her testimony, because she did not identify the person who served the papers as being the deputy sheriff who served the writ in question. Hence her testimony is not open to consideration in this case in this state of the record. The defendant, however, contends that the sheriff had a right to make the amendment, and that evidence that the proposed amendment was untrue was inadmissible, for the reason that, if the amended return be false, the party aggrieved would have a remedy on the sheriff's bond, just as if the original return had been as the proposed amendment contemplated, and that such remedy is exclusive. Per contra, the plaintiff claims that such amendment is not a matter of right with the officer, and can only be made by leave of court granted in the exercise of a sound judicial discretion, and that it ought not to be allowed in this case, because a right of action against the sheriff on his bond is now barred by limitation. The trial court entered judgment for the plaintiff, and the defendant appealed.

Rollin J. Britton, Gillihan & Gillihan, and J. W. Peery, for appellant. Selby & Givens, for respondent.

MARSHALL, J. (after stating the facts).

1. The plaintiff had no homestead rights in the property in controversy. It was under fence, but without any house or other shelter or abiding place suitable for human habitation, and there were no visible signs on the premises to give notice to the officer charged with the execution of the writ that it was or might be the homestead of any one. It had never been the plaintiff's homestead. For years he had lived upon the 160 acres that belonged to him and that adjoined this land, and he had farmed this land; but it was in

no sense his homestead. Under the statute he was only entitled to 160 acres as a homestead. Rev. St. 1899, § 3616, and the land he owned and lived on filled the complement of the law's provision for a homestead. He sold or lost his home, and two years before his curtesy in this land was sold he moved away from his former home, and rented a farm about a mile and a half therefrom. He says he intended establishing his homestead on this land, but had been financially unable to do so. Conceding all this, mere intention to establish a homestead upon a tract of land is not sufficient in law. There must be some visible occupancy and appropriation of the land to homestead purposes. *St. Louis Brewing Ass'n v. Howard*, 150 Mo., loc. cit. 451, 51 S. W. 1046, and cases cited.

2. It is contended that the trial court erred in refusing to allow the sheriff to amend the return upon the summons in the case of *Mrs. Gilreath* against the plaintiff. Two reasons are urged in support of this contention: First, that the sheriff had an absolute right to amend, being liable on his bond if the amended return be false, and therefore evidence that the proposed return is untrue is inadmissible; and, second, that under the evidence adduced in support of the application for leave to amend the return the court ought, in the exercise of a sound judicial discretion, to have permitted the amendment. The defendant cites *Phillips v. Evans*, 64 Mo., loc. cit. 23, as authority for his first contention aforesaid. In that case it is said: "The return of the officer is conclusive as to the facts therein recited, except in an action for a false return. * * * And the same reasons which would forbid any contradiction of the return when made must operate with equal and controlling potency in precluding evidence to show that a proposed amendment is untrue." Substantially the same rule was laid down in *Stewart v. Stringer*, 41 Mo., loc. cit. 404, 97 Am. Dec. 278. But on second appeal of the same case (45 Mo. 113) the power of a sheriff to amend a return without due leave of court was denied. And in *Scruggs v. Scruggs*, 46 Mo., loc. cit. 273, it was said: "The right of a sheriff to amend a defective return on leave of the court is beyond question, and it makes no difference that he is out of office. Such amendments, in appropriate cases, are allowed even on application of the sheriff's administrator. And there is no specific limitation of time within which this class of amendments must be made, although, after a lapse of years, the court should grant applications with great caution, lest the rights of innocent third parties should be injuriously affected. Such applications are not granted as a matter of right. The granting of them rests in the exercise of a sound discretion on the part of the court. "Amendments of this description," say the court in *Johnson v. Day*, 17 Pick. 108, "are not regulated by any certain rules; but the court is bound in

every case to exercise a sound discretion, and to allow or disallow an amendment, as may best tend to the furtherance of justice. The forms of the court are always best used when they are made subservient to the justice of the case." *Blaisdell v. Steamer Wm. Pope*, 19 Mo. 157; *Webster v. Blount*, 39 Mo. 500; *Stewart v. Stringer*, 45 Mo. 113; *Welsh v. Joy*, 13 Pick. 477; *Fowble v. Walker*, 4 Ohio 64; *Gwynne on Sheriffs*, 471; *Haven v. Snow*, 14 Pick. 28." In *McClure v. Wells*, 46 Mo., loc. cit. 314, it was said: "Leave should be granted to amend the return in accordance with the facts. Such amendments are always freely allowed in aid of a judgment, although denied where their effect is to create error." In addition to this, any doubt that may heretofore have existed by reason of the divergent views expressed in the cases cited is removed, and the question set at rest, by sections 657, 660, Rev. St. 1899, which provide that before or after final judgment the court may, in furtherance of justice, and on such terms as may be just, amend, if after judgment, "in affirmance of such judgment," if before judgment "in furtherance of justice," "any record, pleading, process, entries, returns, or other proceedings in such cause," etc. By these statutes the power to allow amendments is vested in the court, to be exercised upon such terms as may be just, and the officer is not given any absolute power of amendment; and this must hereafter be taken as the rule of law in such cases.

The second contention is not so easy of solution. The trial court refused to permit the sheriff to amend the return, because he could not identify the person upon whom he served the papers. As herein stated, such amendments are allowed in the exercise of a sound judicial discretion, but, as was well said in *McClure v. Wells*, supra, "Such amendments are always freely allowed in aid of a judgment." And whilst this court is always loath to interfere with discretionary rulings of trial courts, nevertheless such rulings are not conclusive upon this court, and where they are interfered with it is because that discretion exercised by the trial judge is not a personal discretion, but a judicial discretion, and because the ultimate responsibility for every judgment rests upon the court of final resort to which the case is taken, and therefore that court is in duty bound to approve or reject all rulings of lower courts, even when made in the exercise of a judicial discretion. 17 Am. & Eng. Ency. Law (2d Ed.) pp. 844, 845, and cases cited in notes. It is with these principles in mind that the decision of the question under consideration is approached and reached. It is certain that some sort of papers were left by some one for the plaintiff, at his usual place of abode, about the time the case of *Mrs. Gilreath* against the plaintiff was begun. The deputy who served these papers swears positively that those papers consisted of a copy

of the writ and a certified copy of the petition attached to the writ, for he says he remembers stopping in the shade to rest his horse just before he reached the plaintiff's house, and that he took the papers out of his pocket, and examined them to see that they were all right, and then put a rubber band around them, and proceeded to the plaintiff's house. He also swears that he never served any other papers on the plaintiff, or had any to serve on him at any other time. He also remembers that after leaving the plaintiff's house he proceeded further on his way, and served a summons upon a neighbor, to serve on the grand jury. But he is unable to remember upon what member of the plaintiff's family he served the papers, and does not know whether it was a man or a woman, an old or a young person, but is sure it was upon some one who was over 16 years old, whom he found in the plaintiff's house, and who was pointed out to him by the plaintiff's young son, whom he found at the front fence, as a member of the family. It appears by other testimony that at the time of the service the plaintiff's family consisted of his son Gabe Feurt, aged 20 years, his stepdaughter, Mrs. Sinnie Cathcart, aged 14 years, his son Frank Feurt, aged 11 years, and his daughters, Bertha and Mary, aged 10 and 3 years, respectively. Gabe Feurt swears the papers were not served on him. Mrs. Sinnie Cathcart said some one (she did not know who) gave her some papers (she did not know what) at a time she could not specify, and told her to give them to her stepfather, and that she did not do so. Upon motion of the defendant her testimony was struck out because of her inability to identify the person who served the papers on her. And this ruling was unquestionably correct in the abstract, but, taken in connection with the testimony of the deputy sheriff, it is not altogether clear that it was incompetent. The objection that she could not identify the person goes rather to the probative force of her testimony than to its competency in this case, where it appears on all sides that there never were but one set of papers served upon the plaintiff. The testimony of the deputy sheriff made it sure what papers were served, and when they were served, but left it uncertain upon whom they were served; while the testimony of Mrs. Cathcart cleared up that uncertainty by showing that the papers were served upon her, and that she was at that time only 14 years old. Hence the testimony of these two witnesses related to the same and the only transaction of this kind that ever happened, and the one was the fitting complement of the other. But the defendant moved to strike out Mrs. Cathcart's testimony, and so he cannot complain, and the plaintiff submitted to the ruling, so he cannot complain. This leaves the application of the sheriff to amend supported only by the testimony of the deputy sheriff, and he is unable to say upon whom he served the

papers. Gabe Feurt was the only member of the plaintiff's family who was over 16 years old at that time, and he swears the service was not on him. It is shown by other testimony that Mrs. Cathcart was there at the time, and that she was only 14 years old. Under such a showing it cannot fairly be said that the trial court failed to exercise a sound judicial discretion in refusing to allow the sheriff to make the amendment proposed. It would be a wise provision of law if the officer serving process upon a member of a family should be required to state in his return the name of such member of the family.

8. This leaves only the question whether the judgment against the plaintiff and in favor of his mother-in-law, Mrs. Gilreath, under which the defendant claims title, was void or only voidable. The circuit court refused an instruction asked by the defendant to the effect that the judgment could not be attacked collaterally, and also a peremptory instruction to find for the defendant, and entered a judgment for the plaintiff; thus holding the judgment to be void. This conclusion of the trial court was right; for, whatever may be the true rule where the service is on the defendant in person, but not in accordance with the provisions of the statute (*Leonard v. Sparks*, 117 Mo., loc. cit. 110, 22 S. W. 899, 38 Am. St. Rep. 646), the service in this case was not on the defendant, but was on a member of his family, and according to the greater weight of authority and the better reason (19 Enc. Pl. & Pr. p. 613 et seq., and cases in notes), and according to the decisions of this court interpreting the third paragraph of section 570, Rev. St. 1899, which provides for service by leaving a copy of the writ and petition at the defendant's usual place of abode with a member of his family over the age of 15 years, such a service is a substituted or constructive service, and therefore the requirements of the statute must be substantially complied with, or a judgment by default will be void. In *Laney v. Garbee*, 106 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391, the service was "by delivering a certified copy of this writ and the petition to a member of John Laney's family over the age of fifteen years." It omitted to say "at the usual place of abode." This court said: "The service, as shown by the return of the sheriff, was not according to any method known to the law, and was equivalent to no service at all. The third clause of section 3689, Rev. St. 1879, under which, doubtless, the service was attempted, required a copy of the petition and writ to be left 'at the usual place of abode' of defendant, 'with some person of his family over the age of fifteen years.' The service here provided is constructive, and must conform at least substantially to the requirements of the statute. *Bank v. Suman*, 79 Mo. 530; *Brown v. Langlois*, 70 Mo. 226; *Blodgett v. Schaffer*, 94 Mo. 652, 660, 7 S. W. 436. It is insisted that the

manner of service cannot be shown to contradict the recitals of the judgment. If the entry of the judgment upon the books of the court constituted all the record in the case, the contention would have weight. That is not the case. The return of the sheriff is as much a part of the record as the judgment entry. The recitals of the service contained in the judgment cannot import greater verity than the return itself shows. Since the decision in the case of *Cloud v. Pierce City*, 86 Mo. 358, where the question was exhaustively considered, it has been held in this state, even in collateral proceedings, that the jurisdictional recitals of a judgment of due service of process will be controlled by and must yield to the service as it appears upon the whole record. The recitals of the judgment will be deemed to refer to the kind of service shown by other parts of the record. *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175; *Adams v. Cowles*, 95 Mo. 506, 8 S. W. 711, 6 Am. St. Rep. 74; *Crow v. Meyersleick*, 88 Mo. 415; *McClanahan v. West*, 100 Mo. 321, 13 S. W. 674; *Blodgett v. Schaffer*, 94 Mo. 671, 7 S. W. 436. The service of process in this case was wholly insufficient, and unauthorized by law, and, in consequence, the court never obtained jurisdiction of the person of defendant therein, and the judgment rendered was without validity, force, or effect, and defendant acquired no title by the sale and sheriff's deed thereunder." This decision was followed in *Laney v. Sweeney*, 105 Mo. 361, 16 S. W. 832; *Williams v. Monroe*, 125 Mo., loc. cit. 584, 28 S. W. 853; *Harness v. Cravens*, 126 Mo., loc. cit. 253, 28 S. W. 971; *St. Louis v. Flynn*, 128 Mo., loc. cit. 423, 31 S. W. 17; *Rosenberger v. Gibson*, 165 Mo., loc. cit. 23, 65 S. W. 237. In the case last cited this court, per *Brace, J.*, said: "Under the statute, a writ of summons may be served upon the defendant 'by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years.' Rev. St. 1899, § 570; Rev. St. 1879, § 3489. This is constructive service, and the terms of the statute must be substantially complied with. The service in this case is on all fours with the service in the case of *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 832, the defect in the return in each being precisely the same—a failure to show that a copy of the petition and writ was left 'at the usual place of abode' of the defendant. That case is decisive on this question, and is in harmony with a long line of decisions. *Blanton v. Jamison*, 3 Mo. 52; *Smith's Admr. v. Rollins*, 25 Mo. 408; *Brown v. Langlois*, 70 Mo. 226; *Madison County Bank v. Suman*, 79 Mo. 527; *Laney v. Sweeney*, 105 Mo. 360, 16 S. W. 832; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853. In that case it was held that a judgment by default on such a service was null and void, and so it must be held in this case. Hence the plaintiff's judgment was subject to the defendant's attack, unless they

were estopped from making it by the facts pleaded in the reply."

It is argued, however, that the judgment in this case recites that the defendant was "duly summoned as the law directs," and that this is conclusive, or at least cannot be overthrown by the return offered in evidence, because the plaintiff did not show that "the several fragments exhibited in evidence constituted the whole record in the * * * case." *Rumfelt v. O'Brien*, 57 Mo. 569. If there was any other summons and return, it devolved upon the defendants to show it, and thus overcome the case made by the plaintiff. Touching the contention that the recital of the judgment that the defendant "was duly summoned as the law directs" is conclusive, it is only necessary to repeat what was said in *Williams v. Monroe*, 125 Mo., loc. cit. 584, 28 S. W. 855: "We all agree that condemnation proceedings under these statutes are judicial, and that, when once the court has acquired jurisdiction over the persons and subject-matter, the judgment, if within the power of the court, is not open to collateral attack. *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646. But this doctrine, when rightly understood, does not in the least shake the authority of those decisions in this state which hold that, although the record of a court of general jurisdiction recites that defendants have been duly served with process, it is competent to overthrow such recital by showing by other portions of the record of equal dignity, and importing equal verity, that such recital of service is not true. *Cloud v. Pierce City*, 86 Mo. 357; *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175; *Bell v. Brinkmann*, 123 Mo. 270, 27 S. W. 374; 1 *Freeman on Judgments* (4th Ed.) § 125; *Higgins v. Beckwith*, 102 Mo. 456, 14 S. W. 931. It requires no authority to establish the proposition that courts, even of general jurisdiction, can only acquire jurisdiction over parties defendant by an observance of the modes of procedure prescribed by law, unless the parties waive service, and enter their voluntary appearance. In the additional abstract of evidence filed by respondent, and not denied by appellant, 'it appears that plaintiff was notified by publication of the time when the petition would be heard, and had received no personal notice of any sort at any time.' So that there is no question as to the effect of any appearance by herself or her attorneys. It appearing, then, that whatever process issued in this case was the act of the clerk in vacation prior to and in fact without the petition having ever been presented to the court, could it confer jurisdiction over the plaintiff and estop her from questioning it in a collateral proceeding, when these facts appeared of record? In *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep.

391, we held that where the sheriff's return showed service only 'by delivering a certified copy of this writ and the petition to a member of John Laney's family over the age of fifteen years,' the judgment was void, the statute requiring a copy of the petition and writ to be left 'at the usual place of abode' of the defendant 'with some person of his family over the age of fifteen years,' citing *Bank v. Suman*, 79 Mo. 530; *Brown v. Langlois*, 70 Mo. 226; *Blodgett v. Schaffer*, 94 Mo. 660, 7 S. W. 436. If the failure of the executive officer to comply substantially with the mode prescribed for service of the writ, regular on its face, renders the service void where it is constructive, how can a service be held sufficient when the process or writ does not even emanate from the only authority clothed with power to set it in motion? In other words, not only must process be served in the manner prescribed by law, but the process itself must be the mandate of a court, judge, or officer authorized by law to issue or require it to be issued. The stream cannot rise higher than its source."

It follows that the service in this case was a substituted or constructive service, and not a personal service, and that, as it was not made in the manner prescribed by statute in such cases, it was insufficient in law to support a personal judgment, and the court never acquired jurisdiction over the person of the defendant, and the judgment rendered in that case (*Gilreath v. Feurt*) is void, and hence open to attack collaterally. The defendant therefore acquired no title to the land at the sheriff's sale under that judgment, and is not shown to have any title otherwise, but the plaintiff has an estate by the curtesy in the land, and is entitled to a judgment for the possession thereof.

The judgment of the circuit court is right, and is affirmed. All concur.

BECKER v. LINCOLN REAL ESTATE & BUILDING CO.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

CARRIERS—ELEVATORS—DUTY OF PASSENGER—DUTY OF CARRIER—TIME FOR ALIGHTING.

1. It is the duty of a passenger in an elevator to use ordinary care to keep from being hurt.

2. A carrier by elevator is not an insurer, but is required to exercise the highest degree of care.

3. There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad.

4. A carrier by elevator must allow reasonable time for passengers to enter and leave the car with safety in the exercise of ordinary care.

5. Plaintiff averred that she was received as a passenger in defendant's elevator, to be carried to the fourth floor, and was injured by reason of the negligence of the operator in not allowing her a reasonable time to alight at that floor. There was no conflict in the evi-

dence that she was not allowed a reasonable time to alight, but defendant set up that she was allowed a reasonable time in which to indicate a desire to alight, and did not do so. *Held*, that the rule that plaintiff cannot count on one cause of action, and recover on another, especially when proof of the latter necessarily negatives the existence of the former, did not apply.

6. When one passenger in an elevator directs the operator to stop at a certain floor, it is not necessary for every other passenger who desires to get off there to repeat the direction; but it is the operator's duty to stop long enough for the passenger giving the direction, and any other passengers who desire so to do, to alight.

7. It is the operator's duty, before again starting the car, to use reasonable care to ascertain if there are other persons in the act of getting off.

Appeal from St. Louis Circuit Court; W. Zachritz, Judge.

Action by Lucille Becker against the Lincoln Real Estate & Building Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action for \$15,000 damages for personal injuries received by the plaintiff on April 10, 1900, while a passenger in one of the defendant's elevators in its building on the corner of Seventh and Chestnut streets in St. Louis. The petition alleges that she entered the elevator "to be carried as such passenger to the fourth floor of said building, and to be there allowed an opportunity to alight from said elevator. Yet the plaintiff avers that whilst said elevator was stopped at said fourth floor of said building to enable passengers to alight from said elevator, and whilst the plaintiff was proceeding to alight from said elevator whilst so stopped, and before she had time or opportunity to so alight from said elevator, defendant's servant in charge of said elevator negligently caused and suffered said elevator to be started upward, whereby the plaintiff was caused to be jerked, and fell, so that" she was seriously injured. The answer is a general denial and a plea of contributory negligence. There were a verdict and a judgment for the defendant, and plaintiff appealed.

The following statement of the case by appellant's attorney is a fair summary of what was shown on the trial by the testimony, and is therefore adopted: "The action is grounded upon the theory that the respondent was on the 10th day of April, 1900, the proprietor of an office building at the southwest corner of Seventh and Chestnut streets in the city of St. Louis. The respondent rented out the various offices in the building, which were occupied by professional and other business occupants, wherein persons were invited to transact business. The respondent operated a number of elevators in the building to carry passengers from the ground to the various floors above. The elevator in question was one of the elevators so operated by the respondent. On the fourth floor of respondent's said building, H. R. Hall, an

¶ 2. See *Carriers*, vol. 9, Cent. Dig. §§ 1092, 1194.

attorney, occupied an office as a tenant of the respondent. The appellant on the 10th day of April, 1900, entered said building in company with Mr. Hall on her way to his office for the transaction of business with him. They entered from Chestnut street, which was the main entrance to the building. They entered the second elevator, counting from the east; appellant being waved into the elevator by Mr. Hall, the escort, and entering the elevator ahead of Mr. Hall. As the elevator approached the fourth floor, Mr. Hall called for the elevator to stop at the fourth floor, and the elevator did stop properly at the fourth floor to discharge passengers. Mr. Hall, who stood nearer the door than appellant, stepped out first, and appellant was following immediately behind—close enough to touch him with her hand. When appellant was in the door of the elevator, and, as she thinks, with one foot extending from the elevator floor to the floor of the corridor, the elevator started up with full speed; the appellant was caused to fall back into the elevator, probably by the jerk given by the elevator's rapid movement; and, by being pulled back by the elevator operator in her fall, one of her feet was caught and crushed between the elevator floor and the grating of the doors of the elevator, and the bone of her ankle was broken. The ligaments, arteries, and tendons of her foot were ruptured and crushed. After she sank to the floor of the elevator, a passenger, Mr. Mason, clerk for the Wabash Railroad, sustained her head upon his knee. The elevator stopped between the fifth and sixth floors. Appellant was carried down in the elevator to the basement, placed in a chair in the engine room, and thence removed to her home. Her injuries are serious and permanent, as shown by the record, but, for the purpose of this hearing, need not be further detailed. She is crippled and disabled, suffered great pain, and incurred and will incur large expenses in seeking relief. The above is the substantial version of the case as told by the plaintiff and her witnesses Dr. Crosswhite, Dr. Hart, H. R. Hall, and Charles P. Mason. The evidence for the respondent tended to contradict that for the appellant, in that the witness Hiram Ogden testified, for respondent, that he was the conductor of the elevator; that he got the signal to stop at the fourth floor to let off passengers; that he did stop the elevator at that floor, and that Mr. Hall got off; that after Mr. Hall got off, he looked around to see if other passengers wanted to get off, and, seeing no movement by any other passenger, he closed the doors of the elevator, and then started the elevator up, and that after the doors of the elevator were closed, and after the elevator had started up, and had gotten three or four feet above the floor of the corridor, the appellant rushed at the door, and that he threw his arm out and threw her back; and that, in falling, 'somehow' she caught

her foot between the floor of the elevator and the grating of the doors, and was injured. The doors opened and closed automatically; frequently used the hand in closing. The statement of the other witness contained in the application for continuance tended to corroborate the evidence of the conductor, and the conductor and elevator starter testified that after the injury, whilst the appellant was in the engine room, she said it was not the conductor's fault. This statement was contradicted by Mr. Hall and the plaintiff."

The plaintiff concedes that the evidence is conflicting upon the essential issues of negligence and contributory negligence, and therefore the finding of the jury will not be reviewed in this court, and limits her contention to the questions of law in the case.

A. R. Taylor, for appellant. Robert A. Holland, Jr., and Seddon & Blair, for respondent.

MARSHALL, J. (after stating the facts). The plaintiff was a passenger in the defendant's elevator. It was her duty to use ordinary care to keep from being hurt. The duty of the defendant, as a carrier of passengers, as stated in 10 Am. & Eng. Enc. Law (2d Ed.) p. 946, and quoted and approved by this court in *Lee v. Knapp & Co.*, 155 Mo., loc. cit. 641, 56 S. W. 467, is as follows: "A carrier by elevator is not an insurer, but is required to exercise the highest degree of care in everything calculated to insure the safety of his passengers. There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad. Each is bound to the use of the utmost care and skill in the choice and maintenance of machinery and appliances and the selection of operatives, and the liability of both for the slightest negligence of an operative, irrespective of the care with which he may have been selected, resulting in damages to a passenger, is, in its last analysis, identical." The gravamen of the plaintiff's claim and proof is that she exercised ordinary care to leave the elevator promptly when it stopped at the fourth floor, but while she was in the act of so doing, and before she had reasonable time in which to do so, the operator of the elevator started it upward very rapidly, whereby she was wrenched and hurled back, and slipped or fell, and was injured. The defendant's claim and proof is that after the elevator had started upward from the fourth floor, after the doors had been closed, and after the elevator had gotten three or four feet above the fourth floor, the plaintiff, without any previous notice, request, or motion indicating a desire to leave the elevator at the fourth floor, "rushed quickly forward. As she rushed forward, he threw up his arm to force her back—keep her from danger. Her foot slipped and slid down between the floor of the car and the ironwork which

forms the front of the cage—the front of the shaft.” Or as one of the defendant’s witnesses expressed it: “When she got to the door, which was closed, the operator quickly extended his arm, so as to check her motion. Somehow the woman’s foot at that time got caught between the floor of the elevator and the grating.” The plaintiff’s further contention is that her escort, Mr. Hall, called for the fourth floor, and the elevator stopped there, and he got out, and she followed him as closely and quickly as she could, and the elevator started with a jerk before she could get out, whereby she was thrown down and hurt, and that it was not incumbent upon her to call for the fourth floor after her escort had done so, nor to do anything more than she did do.

In *Keller v. Railroad*, 27 Minn. 178, 6 N. W. 486, the rule is thus stated: “Those in charge of trains are bound to presume that there may be such persons in the cars [persons desiring to leave the train are spoken of], and, unless they know there are not, they have no right to start the trains until they have waited long enough to allow such passengers to alight. Nor even after waiting a reasonable time for such persons to get off have they a right to start the train without using reasonable care to ascertain if there are such persons in the act of getting off. It certainly would not be permissible for them to be so reckless of the lives and limbs of passengers as to start the trains when they know, or with reasonable care might know, that passengers are in the act of alighting.” This rule is quoted and made a part of the text in *Hutchinson on Carriers*, § 612, the author in the same section saying: “The exact length of time to be given [for passengers to alight], it is said in a recent case, must depend very largely upon circumstances. For instance, a longer time would be required where there are many passengers to alight than where there are but few; on a dark night, with the landing place badly lighted, than where it is in full light; at a difficult place to alight, than where it is easy. And as railroad companies usually carry not merely the vigorous and active, but also those who from age or extreme youth are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight.” *Dougherty v. Missouri Railroad Co.*, 81 Mo. 325, 51 Am. Rep. 239, was an action for damages, by a passenger, occasioned by starting the car with a jerk, thereby throwing his hand against and through one of the windows of the car, and cutting it. This court said: “With respect to the obligation of the defendant to the plaintiff as a passenger, it is sufficient to say that, whilst it is not an insurer of the safety of passengers, it is bound by its office as such carrier to exercise

due care and vigilance, so as to safely transport them. It must allow reasonable time for passengers to enter and leave its car with safety, in the exercise of ordinary care. It should allow the passengers reasonable time to enter and take a seat, if there be one, or a reasonable time to seize the straps furnished for passengers when standing; and, while it may start its car before the passenger has had time to take a seat or secure hold on the strap, it must exercise the utmost care in starting, so as not to jar or upset him.” This case was cited approvingly in *Bertram v. Railroad*, 154 Mo., loc. cit. 662, 55 S. W. 1040, and substantially the same principle declared to be the law by an instruction given to the jury. *Id.*, 154 Mo., loc. cit. 651, 55 S. W. 1040. These rules regulating the care to be exercised by railroads in allowing passengers a reasonable time safely to alight apply with equal, if not more, reason and force to the running of elevators, for the danger of starting before the passenger has boarded or left an elevator is even greater than it is of starting a train under similar conditions.

The evidence in this case shows that the plaintiff was accustomed to riding on elevators. If the defendant’s showing be true, that, after the doors were closed, and after the elevator had started and gone upward three or four feet, the plaintiff rushed quickly forward, and that to keep her from being injured the operator threw his arm out to force her back, and she slipped and fell, it must be equally true either that she was suddenly bereft of reason in attempting to leave the elevator through a closed door, when the elevator was three or four feet above the fourth floor, or else that the operator must have used an unnecessary amount of force when he threw out his arm, or she would not have slipped and fallen. The defendant’s showing may be the true account, and the verdict of the jury declares it to be so; but, if it is, certainly it is a case without a parallel or a precedent in the books or in the experience of the average citizen. People in their sound minds do not attempt to leave an elevator or a car or a room through a closed door, and the defendant’s evidence is that the door was closed before the elevator was started, and before the plaintiff attempted to leave, or indicated by word or motion any desire to leave the elevator, and that she did not start to leave the elevator until it was three or four feet above the fourth floor. But if all this be conceded, it must still be true that she could not leave the elevator while the door was closed. And if she could do so, or if she could not be hurt while attempting to do so, it is not at all clear why it was necessary for the operator to use so much force in preventing her from hurting herself as to throw her down, or cause her to slip down and be hurt.

The rule laid down in *Chitty v. Railroad*, 148 Mo. 64, 49 S. W. 868, that a plaintiff can-

not count upon one cause of action, and recover upon another, especially when proof of the latter necessarily negatives the existence of the former, is invoked. But that rule has no application here, for the essential cause of action here asserted is that the plaintiff was received as a passenger in the defendant's elevator, to be carried to the fourth floor of its building, and that she was injured through the negligence of the operator of the elevator in not allowing her a reasonable time to alight from the elevator at that floor. The only substantial difference between the parties here is not whether she was allowed a reasonable time in which to alight, as the plaintiff claims is her right, but whether she was allowed time to indicate a desire to alight, as the defendant claims is her right. There is no conflict in the evidence that she was not allowed a reasonable time in which to alight, but the defendant says she was allowed a reasonable time in which to indicate a desire to alight, before the elevator was started, and that she did not indicate such a desire by word or motion. And the defendant's instructions told the jury that if this was true the defendant was guilty of no negligence, and the plaintiff was not entitled to recover. On the other hand, the plaintiff's instructions told the jury that she was entitled to recover if she was not allowed a reasonable time in which to alight. Therefore the instructions given for the plaintiff and the defendant are wholly inconsistent, and those given for the defendant are erroneous, in that they only require the operator, after he has been notified by one passenger to stop at a designated floor, to stop long enough to enable that one passenger to alight, and then to pause only long enough "to enable the other passengers to indicate their desire to alight at that floor." When any one passenger directs the operator to stop the elevator at a certain floor, it is not necessary for every other passenger who desires to get off at that floor to repeat the direction, but it is the duty of the operator, when so directed by any passenger, to stop at such floor for a length of time sufficient for that passenger and any other passengers who desire to alight at that floor to reasonably do so; and, before again starting the elevator, it is the duty of the operator to use "reasonable care to ascertain if there are other persons in the act of getting off." This is particularly true in this case, for the plaintiff was under the escort of Mr. Hall. When they got in the elevator he stood aside and "waved" or showed her in first, all of which was done in full view of the operator. They two were together—she under his escort. There were only two other persons in the elevator. When Mr. Hall directed the operator to stop at the fourth floor, it was manifestly intended as a notice that both wanted to leave the elevator at that floor. It was unnecessary, and would have been very unusual, for the lady to supple-

ment the order of her escort to stop at that floor. He naturally left the elevator first. She followed him as quickly as she could. It was not necessary for her to indicate a desire to leave the elevator in any other manner than to act with reasonable diligence, but not necessarily with hurry or confusion. It was the duty of the operator to ascertain before again starting whether she was in the act of leaving. He had no right to expect her to indicate a desire to leave in any other manner, nor was he entitled to demand from her any word or motion (other than the act aforesaid) of desire to leave. The defendant's instructions are all predicated upon the existence of such a duty on the part of the plaintiff, and of such a right on the part of the operator, and hence are erroneous.

The judgment of the circuit court is therefore reversed, and the cause remanded, to be proceeded with in accordance herewith. All concur.

GUYER v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

RAILROADS—INJURIES AT CROSSING—CON-
TRIBUTORY NEGLIGENCE—DISCOVERED PERIL.

1. Plaintiff's decedent, while driving a team drawing a heavy load, attempted to cross a railway crossing. Just before reaching the crossing he was compelled to ascend a grade, and his horses drew the load with difficulty, and could have been stopped almost instantly. For a distance of 26 feet from the track he had an unobstructed view, and could have seen the engine, by which he was injured, 700 feet away; but he drove on the track without stopping, and was struck and killed. Held, that an instruction that decedent's act in driving on the track was such negligence as would preclude a recovery unless the engine was far enough away for the person in charge of it, by the exercise of ordinary care, to have discovered his peril, and stopped the engine so as to have avoided the injury, was not justified by the evidence, as the engineer was entitled to presume that the driver would not attempt to cross in front of the engine.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by A. D. Guyer against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Plaintiff's husband was killed by a locomotive on defendant's road at a street crossing in Sedalia, and this suit is to recover damages for the injury. The petition alleges several acts of negligence, viz., the failure to ring a bell; running at a rate of speed prohibited by city ordinance; running at a dangerous and reckless speed, without warning by bell or whistle; omitting to have an engineer on the engine, or fireman at his place of duty, or any one on the lookout at the end of the tender while backing. It was also alleged that the men in charge of the

engine, after they saw, or by the exercise of ordinary care would have seen, the peril in which the plaintiff's husband was, could, by the exercise of ordinary care, have avoided the accident, if they had not been running faster than 10 miles an hour, in violation of the city ordinance. The answer was a general denial and a plea of contributory negligence. There was in evidence an ordinance of the city which prohibited the running of a locomotive faster than 10 miles an hour, requiring the bell of the engine to be rung on the approaching of crossings, and requiring, when the engine was backing, a man stationed on the end of the tender farthest from the engine, as a lookout, to avoid accidents. There was evidence on the part of plaintiff tending to show that those requirements of that ordinance were neglected in this case. The plaintiff's evidence also showed that her husband drove on the railroad track at the street crossing when the defendant's engine was approaching in plain view, and when it was obvious that the engine would strike him as it did. Plaintiff and defendant asked a number of instructions. Among those of the latter was one at the close of the plaintiff's evidence to the effect that the plaintiff was not entitled to recover. The court refused all the instructions asked, and submitted the case to the jury under an instruction of its own, designed to cover the whole case. In that instruction the jury were instructed that the act of the plaintiff's husband in driving on the railroad track was negligence, and would preclude a recovery, unless the engine was far enough away for the person in charge of it, by the exercise of ordinary care, to have discovered the peril of the plaintiff's husband, and to have stopped the engine in time to avoid the injury. Then the jury were instructed that, if they found from the evidence that such was the case, they should find for the plaintiff; otherwise for the defendant. There were a verdict and a judgment for the plaintiff for \$5,000, and the defendant appealed.

Martin L. Clardy and Wm. S. Shirk, for appellant. C. C. Kelly and Sangree & Lamm, for respondent.

VALLIANT, J. (after stating the facts). The case should not have been submitted to the jury on that theory, for the reason that there was no evidence to sustain it. According to the plaintiff's evidence, her husband was in the service of the city, in the work of street construction. He and other workmen were returning from their work near the close of the day. He was driving a team that was drawing a heavy street roller, and sitting on an improvised seat above the roller. There were other teams following in procession. He was leading. They were traveling on Mill street from north to south. The defendant's railroad tracks, running east and west, cross this street at right angles. It

was a well-known and much-used railroad crossing. Going south, as these men were, the street was level until they reached a point 80 feet from the crossing. Then the grade begins to ascend, and so continues up to the crossing, which is 4 feet higher than the point from which the ascending grade begins. There are several railroad tracks at that crossing, but the evidence deals with only two of them—one called the "Mill Track," which is the first one reached; the other, the "Main Track," which is the one on which the collision occurred. The space between these two tracks is $7\frac{1}{2}$ feet. Going up that grade, one passes a small watch shanty, about 8 feet square, on the left or east side of the street. Near it on the south, and some 10 feet east, is an electric light pole. Except the shanty and pole, there is nothing to obstruct the view of the railroad tracks in every direction from the point above mentioned 80 feet north. From the south side of the shanty to the north of the mill track is 14 feet; from the same point to the north rail of the main track is 28 feet. After the plaintiff's husband passed the south line of the shanty and the electric light pole, there was a space of 24 feet between him and the north rail of the main track, in which he had a clear view of the railroad tracks to the east and to the west, and could have seen this engine as it came 700 or 1,000 feet away. Attached to the roller, behind, was an empty wagon; following was a team drawing a street grader; and, as they moved along the road, the roller, the wagon, and the grader made considerable noise. Drawing the heavy roller with the wagon attached up the grade was such a burden on the team that it was all they could do to move it. Thus driving, the plaintiff's husband approached the railroad crossing very slowly. Plaintiff's counsel think the team was not going faster than one mile an hour. A witness describes them as "just creeping." Moving in that manner, laboring with their heavy draught, there is no doubt but they could have been stopped in a space of time too short to estimate. The theory of the plaintiff is that the man running the engine saw, or ought to have seen, her husband as he was thus approaching the tracks. Suppose the engineer saw him; what did he have a right to presume? It was daylight. The engine coming was in as plain view to the man on the roller as he was to the engineer. There was nothing to suggest to the engineer that the other was oblivious to the situation, or that he had failed to use his eyes and see what every one else there saw. Any reasonable man in the engineer's position would presume that the man on the roller would stop before crossing, and let the engine pass. But the plaintiff's husband drove straight on. The horses got across the track, but the roller was still on the north rail when the engine struck it. An ingenious calculation is made by learned counsel to show that there was

sufficient time after the horses had passed over the mill track, and before the accident, for the engineer to have stopped his engine if he had used the means at hand. But when a witness who is a casual onlooker comes to guess during the excitement of a shocking catastrophe at the rate of speed an engine was going, and that is made the basis of a calculation to show what could have been accomplished in two seconds by the energetic use of all appliances, the calculation is not reliable. Besides, the argument based on that calculation assumes that the engineer, if he had been watchful, would have realized as soon as the team crossed the mill track that the driver was not going to stop. But the engineer cannot be charged with such knowledge. Even though he saw the driver of the team approach dangerously near the crossing, yet he had a right to presume that the driver had used his eyes, and would act as a reasonable man under the circumstances would for his own preservation. If the team had been approaching rapidly, there might have been in that fact some suggestion that the driver intended to try to cross in front of the engine. But approaching as he was at a very slow pace, there was nothing to indicate that he would not or that he could not stop before going on the main track. This case does not fall within the doctrine laid down in *Kellny v. R. R.*, 101 Mo. 87, 13 S. W. 806, 8 L. R. A. 783, and *Morgan v. R. R.*, 159 Mo. 262, 60 S. W. 195.

The court should have given the instruction asked by the defendant in the nature of a demurrer to the evidence. The judgment is reversed. All concur.

McGINNIS v. MISSOURI CAR & FOUNDRY CO.

(Supreme Court of Missouri, Division No. 1. March 18, 1903.)

DEATH BY WRONGFUL ACT—RIGHT OF ACTION—WHO MAY SUE—SUIT BY WIDOW.

1. 2 Starr & C. Ann. St. Ill. pp. 2155, 2156, c. 70, pars. 1, 2, gives a right of action for death by wrongful act, and provides that an action therefor shall be brought in the name of the personal representatives of the deceased person. Rev. St. Mo. 1899, § 548, provides that, when a cause of action has accrued under the laws of any other state, and the persons entitled to the benefit are not authorized by such law to prosecute the action in their own names, an action for such cause may be brought in any court of this state by a person appointed by the court. An employé of defendant while at work in Illinois was killed, as alleged by defendant's negligence, and on petition of his widow plaintiff was appointed by the court to prosecute this action to recover therefor. Held, that the action authorized by the Illinois statute can be prosecuted only by the persons authorized by such statute, and section 548, attempting to give that right to another, is void.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by W. T. McGinnis, suing for Delia Callahan and others, against the Missouri

Car & Foundry Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action for damages for personal injuries to Daniel Callahan on December 27, 1898, at the town of Madison, Ill., which resulted in his immediate death. The deceased was an employé of the defendant. The negligence charged is that the defendant allowed the electric wires by which its building at Madison, Ill., was lighted, to come in contact with the shift wires that the deceased had to catch hold of in the course of his duties, which gave the deceased an electric shock that caused his death. The answer is a general denial, and a special plea that McGinnis has no right to maintain this action. The injury and death occurred in the state of Illinois, and the right of action is predicated upon a law of that state (paragraphs 1, 2, c. 70, 2 Starr & C. Ann. St. Ill. pp. 2155, 2156), whilst the action is brought in this state under the act of 1891 (now section 548, Rev. St. 1899), and, as the case at bar hinges entirely upon a construction of these statutes, they are set out in full. The Illinois statute is as follows:

"Paragraph 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the injured party to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Par. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000; provided, that every such action shall be commenced within two years after the death of such person."

The statute of this state is as follows:

"Sec. 548. Parties not Authorized to Sue. Court may Appoint. Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to

prosecute such action in his, her or their own names, then, in every such case, such cause of action may be brought in any of the courts of this state, by a person to be appointed for that purpose by the court in which such cause of action is sought to be instituted, or the clerk thereof in vacation, and such person so appointed may institute such action and prosecute the same for the benefit of the person or persons entitled to the proceeds thereof under the laws of the state or territory wherein the cause of action arose."

Before the institution of this suit, Delia Callahan, the widow of the deceased, filed a petition asking the appointment of McGinnis under the section of the statute quoted, and the appointment was duly made.

There was a direct and sharp conflict in the evidence on the question of the cause of the accident, and likewise as to whether the deceased received any such injuries as are alleged, or whether he died from heart disease; but, as no point is made by the defendant in this court with respect to any question except the right of McGinnis to maintain this action, it is unnecessary to refer to any other branch of the case. There was a verdict and judgment for the plaintiff for \$1,000, and the defendant appealed.

Seddon & Blair and Robt. A. Holland, Jr., for appellant. Kinealy & Kinealy, for respondent.

MARSHALL, J. (after stating the facts). 1. The contention of the defendant is that no right of action in a case like this existed at common law; that the right is purely statutory; that the state of Illinois created the right, and prescribed who should bring the suit, and how the proceeds should be distributed; that the statute of Missouri has no extraterritorial force, and could not authorize a right created by the laws of Illinois to be enforced by any one else than the person who is authorized by the laws of Illinois to enforce it, and therefore McGinnis has no right to maintain this action.

Vawter v. Railroad, 84 Mo. 679, 54 Am. Rep. 105, was an action for damages, based upon the statute of Kansas, which is substantially like the Illinois statute, and which prescribed that the administrator should bring the action. The plaintiff was appointed administratrix in this state. It was held that she could not maintain the action; that the laws of this state expressly deny to an administrator a right to maintain such an action; that the Kansas administrator could not maintain such an action here, because he has no extraterritorial rights.

In *Oates v. Railroad*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348, the widow brought the action. The accident occurred in Kansas. It was held that the cause of action was created by the statute of Kansas, and that statute which created the right prescribed who should enforce the right, to

wit, the personal representative, and that no other person could maintain the action.

In the *Vawter* Case it was noted that the St. Louis Court of Appeals (*Stoeckman, Adm'r, v. Railroad*, 15 Mo. App. 503), the New York courts (*Leonard, Adm'r, v. Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491), and the Supreme Court of the United States (*Dennick v. Railroad*, 103 U. S. 11, 26 L. Ed. 439), had held that a personal representative appointed in the state where the action was brought could maintain an action based upon such a statute of another state, the reasoning employed in those cases being that the foreign statute created the right, and prescribed that the personal representative should bring the suit, but the right thus created was transitory, and the statute did not say the suit should be brought by an administrator appointed in the state that created the right, and therefore an administrator appointed in the state where the suit was brought filled the requirements of the statute; but it was held that those cases were not supported by the weight of authority, and the reasoning employed therein could not apply in this state, because our law expressly prohibited an administrator from maintaining an action of that nature, and the laws of no foreign state could confer upon a Missouri administrator a power that is expressly denied him by the laws of this state. The matter was summed up by the court, in that case, as follows: "Most courts, and text-writers of acknowledged authority, hold that these actions, given by statute for causing death by neglect, default, or a wrongful act, can only be enforced by the courts of the jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory, and enforce the statute law of the state where the injury was suffered, though the action be not one of any generally recognized right. Others, again, entertain such actions when the laws of the two states upon the same subject are similar. If these statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity. Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, i. e., to say to an administrator, 'You may sue in the county of the state of your appointment, under the law of another state, when denied the right to bring the same, or a like suit, by the laws of the state conferring the appointment.'"

Other states have adopted the rule that prevails in this state, and held that, "the right of action to recover damages for injuries resulting in the death of the person being entirely statutory, the action must be brought in the name of the person to whom the right is given by the statutes of the state where the injuries are inflicted." *Usher v. Railroad*, 126 Pa. 206, 17 Atl. 597, 4

L. R. A. 261, 12 Am. St. Rep. 863; Taylor's Adm'r v. The Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244; Woodward v. Railroad, 10 Ohio St. 121; Richardson, Adm'r, v. Railroad, 98 Mass. 85; McCarthy v. Railroad, 18 Kan. 46, 26 Am. Rep. 742.

But it is contended that the courts of Illinois hold that the law of that state touching this question is divisible; that the first paragraph creates the right, while the second paragraph prescribes who shall bring the suit (*City of Chicago v. Major, Adm'r*, 18 Ill. 349, 68 Am. Dec. 553), and therefore it is argued that, the right being transitory and divisible from the remedy, it may be enforced in this state by an agency or person other than that required by the laws of that state. It must be noted, however, that the case of *City of Chicago v. Major, Adm'r*, supra, was an action in the courts of Illinois by an Illinois administrator to enforce a right created by the laws of that state; so that the question here involved was not decided in that case, nor would it be at all controlling authority in this case if it had been expressly decided, for, manifestly, neither the Legislature nor the courts of one state can give jurisdiction to the courts of another state, nor dictate to those courts what statutory rights they shall recognize, or who shall be the proper party to enforce them. Purely statutory laws of one state are enforced in other states simply as a matter of comity, and are never enforced where they are inconsistent with the policy of the law of the state where they are sought to be recognized.

It is manifest that an Illinois administrator could not maintain this suit in this state without express authority from this state. If suit had been begun in Illinois, it could be maintained, under the statute of that state, only by an administrator appointed by the courts of that state. The first paragraph of the section of the statute of Illinois, cited, creates a liability on the part of the person or company or corporation that caused the injury, but that paragraph does not create a right of action in favor of any one. If this paragraph stood alone, it would not afford the basis for any civil action whatever. The Illinois court (*City of Chicago v. Major, supra*), construing this paragraph, said: "This is a new cause of action given by this statute, and unknown to the common law, and should not be extended beyond the fair import of the language used." Thus the court held that the first paragraph created a new cause of action, notwithstanding that paragraph of the statute only relates to the liability of the defendant. Metaphysically it might be said that, where there is a liability on the part of a defendant, there must be a right in some one to enforce the liability. But, however this might be if it was as a matter of general liability, it cannot be true where the liability is a liability that was unknown to the common law, and depends for its existence upon

a statute. In such a case, the statute creating the liability must confer upon a specified person the right to enforce the liability. Unless it does so, no one can enforce it, because no one has a right under the general common law to do so. When, therefore, a statute creates a liability and prescribes the person who shall have the right to enforce it, the two parts of the statute are component parts of the whole, and both are necessary to constitute the whole, and it must be done exactly in the manner and by the persons or agencies that the statute prescribes. There can be no equivalent or other means employed. Without the construction placed upon the statute by the courts of Illinois, it would seem quite evident that the first paragraph creates a liability, while the second paragraph confers a right of action upon the personal representative of the deceased, and that the two are not divisible, but are necessary parts to make the right complete. But, however this may be, it still remains that, under any construction that may be put upon the Illinois statute, no one but the administrator can maintain the action, and that administrator cannot maintain the action in this state.

This naturally brings us to a consideration of the section of the statute of this state (section 548, Rev. St. 1899) which authorizes the court to appoint some person in this state to bring the action for the benefit of the persons who are not allowed, by the laws of the state that created the liability and the right of action, to sue in their own names, and which it is said was enacted because of the decisions of this court that neither the foreign administrator, nor an administrator appointed under the laws of this state, nor the widow or next of kin, could maintain an action therefor. It seems probable that such was the origin of this statute. But what was its legality and effect? The accident occurred in Illinois. Without the statute of that state, there would be no liability or cause of action anywhere or in favor of any one, no matter what might be the law of this or any other state in reference to similar accidents that happened here or there. In short, the whole matter depends upon the Illinois statute. That statute confers a right of action upon the administrator, and not upon the widow or next of kin. It is for their benefit, but they cannot maintain an action therefor. Our statute attempts to enforce the liability created by the statute of Illinois, not through the person who alone is given the right under the Illinois law to enforce it, but through a person who would have no right to enforce the liability in that state. And with this result: Under the Illinois law the administrator could sue in that state to recover damages for the accident that occurred in that state, and at the same time, under the statute of this state (section 548), the person appointed by the court could maintain a suit

in this state to recover the damages for the identical accident, and neither suit could be pleaded in abatement of the other, and a recovery in one would be no bar to a recovery in the other, for the reason that each would have a cause of action conferred upon him by the law of his state. This demonstrates the infirmity that underlies a construction of the statute which holds the Illinois statute to be divisible, and therefore holds that the cause of action is transitory, while the person who is to enforce the right must be determined by the *lex fori*.

As pointed out, it takes both paragraphs of the Illinois law to support the action in that state, and it is incongruous to say that a vital, component part can be segregated from the entity of which it is a necessary part, and be transplanted into the laws of another state, while the entity is incapable of being so transplanted or enforced. Nor can such a component part be transplanted and be grafted onto or supplemented by a law of such other state so as to make the two parts, dependent for their existence upon separate sovereign wills, a complete and valid law. For no state has any power to create a liability for an act done beyond its territorial limits, and then to appoint any person to enforce such a liability in its own courts or in the courts of any state. A liability or a cause of action that does not exist under the common law can only be created by the lawmaking power of a sovereign state, or of the United States in proper cases. And when the laws of the creating state prescribe the person who shall enforce the right, no other person in that or any other state can enforce it. The law must be enforced as written, or not at all. It cannot be partitioned and some of its parts transplanted to another state and added to, or be supplemented by, laws of that state. The Legislature of this state had no power to create a liability or preserve a right of action for an act done in Illinois, and it had no power to authorize any one here to enforce, in the courts of this state, a liability, or to assert a right, that is created by the laws of Illinois, when such person would have no right to enforce such liability or assert such a right in the courts of Illinois. And this is manifestly true, because such a law would be tantamount to an extraterritorial enactment. And what is here said is not at all in conflict with what was said by the Supreme Court of the United States in *Dennick v. Railroad*, 103 U. S. 11, 26 L. Ed. 439. But, if it was so in conflict, it would not change the result, for this court expressly referred to that case, and refused to follow the rule there laid down, in *Vawter v. Railroad*, 84 Mo., loc. cit. 684, 54 Am. Rep. 105, and, as there is no federal right involved, a decision of that court is not necessarily conclusive in construing a state statute.

For these reasons it is clear that the plaintiff has no legal capacity to maintain this

action, and that section 548, Rev. St. 1899, is void and without legal force. It would have been within the power of the Legislature, however, to confer express power upon the Illinois administrator to maintain an action, based upon the statutes quoted of that state, in the courts of this state, for that would be a mere matter of state comity, and not the creation of a new liability and right.

The judgment of the circuit court is therefore reversed. All concur.

LUCAS v. ST. LOUIS & S. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

STREET RAILWAY—MAINTAINING STUMP IN PLATFORM—INJURY TO PROSPECTIVE PASSENGER.

1. A street railway which builds a platform for passengers around a stump placed by an electric light company in a street is not liable, on the ground of maintaining the stump, to one who, hurrying to catch a car, fell over it.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Ella Lucas against the St. Louis & Suburban Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action for damages for personal injuries. There was a verdict for \$3,000, and the defendant appealed. The constitutionality of the jury law is called in question, and that gives this court jurisdiction. The negligence charged on the petition is "that at or near the intersection of Euclid avenue and defendant's right of way in the city of St. Louis the defendant at the times herein mentioned was maintaining a platform to enable passengers to get on its cars bound east; that in the said platform, which was of granitoid, there was a stump about eleven inches in height, and defendant was negligently maintaining said platform at said times with said stump therein, which was a dangerous obstruction to passengers intending to get upon defendant's cars from said platform; that on the 1st day of January, 1900, the plaintiff was upon said platform, intending to become a passenger upon defendant's east-bound car, and, whilst she was signaling the car to stop for her as a passenger, her foot struck said stump, and she fell from said platform upon defendant's track, and was struck and dragged by defendant's east-bound car, and was thereby greatly and permanently injured." The answer is a general denial and a plea of contributory negligence.

The case made is this: The parties stipulated that in 1857 Charlotte Lay dedicated to the county of St. Louis a strip of land 80 feet wide, running north and south, as a public road, and called it "Lay Avenue." At that time there was no railroad there. Subsequently the Narrow Gauge Railroad

was built, and it crossed the said road. The defendant is the mesne grantee of that railroad, and operates a street railroad across said strip of land. When the city limits were extended so as to embrace this territory, the city changed the name to "Euclid Avenue." At that time the street was an unimproved dirt road, and there were no sidewalks. At a time not disclosed by the evidence, the Missouri Edison Electric Lighting Company placed one of its poles in the sidewalk on the east side of said Euclid avenue. The pole was about 12 inches in diameter, and stood a little to the right of the middle of the sidewalk. The defendant owns its own right of way, but, of course, does not own the street. It only crosses the street by permission. The pole stood entirely within the lines of the street, and no part of it was upon the defendant's right of way. Formerly, for the convenience of the traveling public, the defendant constructed a wooden platform, 7 or 8 yards in length, and 3 or 4 feet wide, and which ran parallel with its tracks, and which was partly upon its right of way and partly upon the sidewalk—in fact, extending across the sidewalk on the east side of Euclid avenue. The pole aforesaid being already there, the platform was built around the pole. The platform was raised from 4 to 6 inches above the ground. Thereafter the lighting company sawed down the pole and beveled the edges, but left the stump of the pole projecting about 11 inches above the platform. The lighting company then put up a pole in the sidewalk, to the east of the stump, and nearly touching it, and nearer the east side of the sidewalk. Thereafter the defendant removed the wooden platform, and replaced it with a granitoid platform, and left the stump and the new pole standing; building the granitoid platform around them. Immediately south of the granitoid platform there is an alley running eastwardly, which is paved with brick. Immediately south of the alley there is a drug store, and south of that a butcher shop, both of which have large glass windows, and are brightly lighted. In front of these two stores there is a cement sidewalk. South thereof there does not appear to be any improved sidewalk, and the street does not appear to be improved. The plaintiff's daughter lives, and has for some time lived, on the east side of Euclid avenue, just a short block south of the railroad. On the tall pole aforesaid there was an electric light. The defendant's car that was approaching had a headlight. So that between the lights in the windows of the drug store and the butcher shop, and the electric light on the tall pole, which was almost touching the stump, and the headlight on the approaching car, the place was well lighted, and the stump could have been easily seen. The plaintiff was familiar with the place, and knew of the existence of the stump on the platform, and had frequently spoken of it and wondered why it was allowed to re-

main there. She visited her daughter frequently, and always got off and on the car at that place. On January 1, 1900, she visited her daughter. About half past 5 o'clock she started home. It was dusk, but not dark. As she approached the platform she saw the car coming from the west, and, fearing she would be left, when she was 70 or 80 feet from the track she increased her pace and ran, signaling the car as she ran. She reached the platform, got up on it in safety, and, while signaling the car to stop, she stumbled against the stump of the old pole, and was thrown against the side of the car, near the rear portion thereof, and seriously injured.

For the plaintiff the court gave the following instructions, which are claimed to be erroneous:

"If the jury find from the evidence in this case that the defendant on the 1st day of January, 1900, was a carrier of passengers for hire by street railroad, and, as such, had erected and was maintaining the platform mentioned in the evidence for the purpose of receiving passengers therefrom bound east from Euclid avenue, then the defendant was bound, in duty, to exercise ordinary care to keep said platform reasonably secure and safe for passengers who should be thereon for the purpose of entering defendant's cars therefrom; and if the jury find from the evidence that on said day there was existing in said platform a stump of a post, extending above the surface of said platform, and that said stump in said platform made it dangerous for persons on said platform for the purpose of entering upon defendant's cars as passengers; and if the jury further find from the evidence that defendant did not exercise ordinary care in maintaining said platform for passengers in such condition; and if the jury further find from the evidence that on said day the plaintiff was on the said platform for the purpose of becoming a passenger upon defendant's east-bound car, and that whilst so upon said platform for said purpose she stumbled over said stump, and was thereby caused to fall and be injured by defendant's car; and if the jury believe from the evidence that the plaintiff was exercising ordinary care at the time of her injury—then the plaintiff is entitled to recover, although said stump, or the post of which it was a stump, had been planted in said place by some other person or corporation than the defendant."

"No. 3. The court instructs the jury that the mere fact that the plaintiff knew that the stump mentioned in the evidence existed in the platform, and that she stumbled over it (if she did stumble over it) and was injured, will not defeat a recovery in this case."

At the close of the plaintiff's case, and also at the close of the whole case, the defendant asked peremptory instructions to the jury to find for the defendant, and also asked other

instructions, which, in the view taken of the case, it is unnecessary to set out or refer to.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant. A. R. Taylor, for respondent.

MARSHALL, J. (after stating the facts). The plaintiff predicates a right to recover solely upon the charge that the defendant maintains the stump in the granitoid platform. The stump is within the lines of a public street, and not upon the defendant's property. It was placed there by the lighting company, and the defendant had nothing to do with its being placed there. It is on public property, and the defendant is under no duty and has no right to remove it. The defendant built a wooden platform, and left the stump projecting above it, on the public highway, for the benefit of the traveling public. It was under no duty to build the platform. Subsequently it replaced the wooden platform with a granitoid platform. This is the sum of its offending. Yet it is sued, and a recovery had against it, on the charge and theory that it maintains the stump in the platform, and that this makes it dangerous. Webster's International Dictionary defines "maintain" to mean: "(1) To hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; not to suffer to fall or decline. (2) To keep possession of; to hold and defend; not to surrender or relinquish. (3) To continue; not to suffer to cease or fail. (4) To bear the expense of; to support; to keep up; to supply with what is needed." It is demonstrable that the defendant has done nothing which would bring it within any of these meanings of the word "maintain." It did not put the pole or stump there. It was under no obligation to remove it. It has done nothing to keep it there, or to prevent it from falling or declining. The pole was put there by the lighting company, and was cut down and the stump left there by that company, and the stump has kept itself there ever since. It is located upon a public highway. It was there before there was any platform. Neither the wooden nor the granitoid platform affected the stump, or the dangers arising therefrom, in any manner whatever. If an owner raises up, or permits any one else to do so, or keeps up or fails to remove, a nuisance, on his own premises, by which any one suffers injury, he is liable, because he violates his duty as a citizen. If any one creates a nuisance on a public highway, he is primarily liable to any one who is injured thereby, because he has violated his duty as a member of society, and has been guilty of a wrongful act for which he is primarily liable. But no citizen is under any personal, legal obligation to remove a nuisance from a public highway, notwithstanding he may know it is calculated to do injury to a traveler on

the highway if it is allowed to remain there. To make any man liable for a tort, he must have done or omitted to do a duty imposed upon him by law. In the absence of such a duty, there is no liability. The law imposes no duty upon the defendant to remove a nuisance in a public highway which it did not put there, and has nothing more to do with than any other citizen. The building the platform around the stump neither increased nor diminished the danger. The proximate cause of the accident in this case was the stump. The platform in no way had anything to do with the accident. The proximate cause would be the same whether there had been a platform there, or whether it had been allowed to remain a dirt walk, as it was when the pole was put up, when it was sawed off, and when the stump was left there. The defendant maintains the platform, but it does not maintain the stump. The stump, and not the platform, caused the accident. The only thing the defendant did with respect to the stump was to leave it in the highway, where some one else had placed it; and, being under no legal duty to remove it, it cannot be adjudged guilty of negligence in failing to remove it, or in building the platform around it.

All of the adjudicated cases wherein a citizen has been held liable for an obstruction or nuisance in a highway have been cases where the person held liable placed the obstruction or nuisance on the highway, or was under some duty to remove it. *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Donoho v. Vulcan Ironworks*, 75 Mo. 401; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Grogan v. Foundry Co.*, 87 Mo. 321; *Merrill v. St. Louis et al.*, 83 Mo. 244, loc. cit. 255, 53 Am. Rep. 576; *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187. Of course, if one creates the nuisance, and another adopts it, and continues it, and keeps it up, as where one constructs a coal hole in a sidewalk, and another uses it and maintains it, both are liable. *Merrill v. St. Louis*, 83 Mo., loc. cit. 255, 53 Am. Rep. 576. The general rule is thus stated in 2 *Smith's Modern Law of Municipal Corporations*, § 1525: "The general rule is that the primary duty to keep highways and streets in repair rests upon the municipal corporations within whose limits they are, this duty being implied in the acceptance of a charter from the state. Such duty is not discharged by the fact that a duty is also imposed upon abutting owners to keep the highway in repair in front of their land. A lot owner's obligation to repair streets or sidewalks does not exist at common law, but is statutory or arises from contract. It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair, and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or to the city himself, unless

such owner himself caused the defect." (The italics are added.) In support of the text the author cites St. Louis v. Insurance Co., 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402, and cases from New York, Massachusetts, Wisconsin, New Jersey, Maryland, Rhode Island, Connecticut, California, Kansas, and Iowa. This defendant never caused this defect in the sidewalk; never adopted it, used it, continued it, or maintained it. It did not remove it, it is true, but it owed no duty to the city or its citizens to remove it. It was neither the active, primary, nor remote cause of its being there, and it did not keep it there for its own use or benefit or at all. It simply left it where it found it, and let it remain in no more dangerous condition than it was when it found it.

It follows that the defendant is not liable for the plaintiff's injuries, and the trial court should have so peremptorily charged the jury. The judgment of the circuit court is therefore reversed. All concur.

FETTER et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

ACCIDENT INSURANCE—CAUSE OF DEATH— BURDEN OF PROOF.

1. Death from a rupture of a kidney, produced by an accidental fall, is the result of the accident, "independent of all other causes," within the provision of the policy—this meaning direct or proximate causes—though a cancerous condition of the kidney made the rupture possible.

2. Plaintiff in an action on an accident policy makes out a prima facie case by evidence tending to show that insured died of hemorrhage resulting from an accidental fall; so that defendant has the burden of proving its claim that insured died of cancer.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Albert T. Fetter and others against the Fidelity & Casualty Company of New York. Judgment for plaintiffs. Defendant appeals. Affirmed.

Appeal from a judgment of the circuit court of Jackson county in favor of plaintiffs founded on two accident insurance policies issued by defendant on the life of plaintiffs' father. The petition is in two counts. In the first it is averred that the defendant issued its policy February 21, 1892, whereby it insured the life of plaintiffs' father against bodily injuries sustained through external, violent, and accidental means, and agreed to pay plaintiffs \$5,000 if death should result to their father from such injuries, independent of all other causes, within 90 days from the date of the infliction of such injuries. It then goes on to state in detail the accident which it alleges caused the death of their father within less than 30 days from the date of its occurrence. The second count is in

form substantially like the first, based on another policy, issued November 18, 1893, for \$6,000. The answer of defendant was a general denial and a special plea that the insured died a natural death, resulting from a diseased kidney. Reply, general denial.

The evidence on the part of the plaintiffs tended to show that W. J. Fetter, their father, whom we will hereinafter call the "insured," was past 69 years of age. August 6, 1899, he was at his office, and about 5 in the afternoon, preparatory to leaving, he and his son, who was with him, attempted to close a window, the upper sash of which had been let down. The sash did not move smoothly; therefore each of them took a window pole, which was designed for the purpose, and, inserting one end under the upper rim of the sash, endeavored to push it in place. But it seemed to be stuck, and required hard pushing to move it. In this effort the upper end of the stick held by the insured slipped off the rim, and the sudden release of its hold had the effect to throw the insured upon his right side against the edge of a table that was in place at the window, designed to hold maps and drawings to be used by one standing, and therefore tall enough to strike the insured high on the side. He immediately dropped the stick, turned pale, and groaned. In a few minutes afterwards he went home. He was looking tired and pale when he arrived. He took a light repast, and went to bed. During the night he passed blood in his urine, and very early in the morning he sought his family physician, Dr. Porter, but did not see him, and returned home about 7:30 o'clock, pale and suffering. His physician came, and found him suffering pain in the right kidney, and passing blood in his urine. August 13th he was taken to St. Joseph's Hospital, where an exploratory examination was made by Dr. Binnie, assisted by Drs. Porter and Shy. Incision was made in the back, and Dr. Binnie introduced his fingers into the pelvis of the kidney, but found nothing abnormal except the rupture and an enlargement. The patient rallied from the operation, and the wound healed from the inside, but the hemorrhage continued as before until his death, which occurred September 2, 1899, less than 30 days from the occurrence of the accident. He died from hemorrhage—from loss of blood. The autopsy held September 4th revealed a normal left kidney. The right kidney revealed a rupture, and the lower end of that kidney was cancerous, harder than the normal part, and less vascular; that is, less full of arteries and veins that would bleed. The rupture found in the kidney was between the normal and the cancerous parts, or into the healthy tissue. The hemorrhages were from the rupture, and the hemorrhages caused the death. Before the accident the insured was an active, spare, hardworking man past 69 years, engaged in the business of fire insurance. He was in good health,

having had no hard spell of sickness within the memory of any member of his family. His family physician had several times examined and passed him for life insurance. Had examined his urine three months before the accident, and found it normal, with no evidence of diseased kidney. All the testimony was to the effect that the accident of falling against the table caused the rupture, the rupture caused the hemorrhage, and the hemorrhage caused the death. The majority of the expert witnesses were of the opinion that the cancerous condition of the kidney existed at the time of the accident, and that that condition was the predisposing cause of the rupture; that is, that that condition rendered rupture more liable to occur under the force of the blow than if the kidney had been sound. But some of the expert testimony was to the effect that the cancerous condition itself might have been produced by the blow. Dr. Hall, a scientific witness for defendant, who examined the kidney after it had been taken from the body, after death, was of the opinion that the cancer existed before the accident, and that the rupture occurred only in the diseased part of the kidney. He said: "The existing cause of the hemorrhage was the injury, and the predisposing cause was the cancer. Q. What do you mean by the 'predisposing cause'? A. That was the condition of the kidney which gave rise to the production of the fracture. The predisposing cause is the remote cause. * * * The cancerous condition weakened the kidney to such an extent that it responded to this injury by some accidental means." He was asked as to the length of time required to develop a cancer. He answered: "That is a matter which must be stated relatively. I think this is, relatively, a rapid-growing cancer. Some cancers are matters of years—most of them; but some are matters of months, and others matters of days."

The cause was submitted to the jury under the following instructions asked by the plaintiff:

"(1) The court instructs the jury that if they find from the evidence that W. J. Fetter died in Kansas City, Mo., September 2, 1899, and that such death resulted from bodily injuries sustained through external, violent, and accidental means, and that the cause of said Fetter's death was the accidental rupture of his right kidney by an accidental strain, jar, or fall while endeavoring to raise a window in his office in the American Bank Building in Kansas City, Missouri, on the 6th day of August, 1899, that their verdict will be for the plaintiffs on both counts of the petition.

"(2) The jury is instructed that if they believe from the evidence that the death of William J. Fetter was directly caused by the accidental rupture of his right kidney, then their verdict should be for plaintiffs on both counts of their petition—on the first count in the sum of five thousand dollars,

and on the second count in the sum of six thousand dollars, with interest on both said sums at six per cent. per annum from February 21, 1900; notwithstanding that the jury further believes from the evidence that said kidney at the time of the rupture was diseased; provided, that the jury further find that said Fetter would not have died at the time, under the circumstances, and in the manner he did die, had it not been for the accidental rupture of his kidney.

"(3) The court instructs the jury that, the defendant in this case having pleaded an exception in the terms of the insurance policies sued on, and having alleged in their answer that the death of W. J. Fetter was caused by disease, and not by accident, the burden of proving that said Fetter's death was caused by disease is upon the defendant, and, unless they believe from the preponderance of the evidence that said death was caused by disease, they will find for the plaintiffs.

"(4) The jury are instructed that they are the judges of the question of fact as to what was the cause of Mr. Fetter's death. If they find from the evidence that the cause of said death was accidental rupture of the right kidney on or about August 6, 1899, under the circumstances as detailed in evidence, they will find for the plaintiffs, even though they believe from the evidence that said right kidney, when so ruptured, was diseased."

The defendant asked the following, all of which were refused except No. 2, which the court gave after modifying it by writing the word "direct" before the word "cause":

"(1) The court instructs the jury that under the pleadings and the evidence in this cause you will return a verdict for the defendant.

"(2) The court instructs the jury that, before they can find the issues for the plaintiffs, they must find that the alleged accident was the sole and only cause of the death of the insured.

"(3) Upon the question of whether the act of the deceased was an accident or not, you are instructed that if he was suffering or affected at that time with a disease of the kidneys, and the raising of the window would not have injuriously affected him in ordinary health and condition, but would be dangerous to him and result in injury because of the diseased condition of the kidney, then the injury was not due to accidental means independent of all other causes.

"(4) The court instructs the jury that if you find the deceased, W. J. Fetter, sustained an accident, but that at the time it occurred he was suffering from a pre-existing disease of the kidney, and if the accident could not have caused death if he had not been affected with disease of the kidney, but that he died because the accident aggravated the effect of the disease or the disease aggravated the effect of the accident, the death of deceased in such case would not be the result of the accident alone, but would be caused partly by the accident, and in such

case the plaintiffs cannot recover upon the accident policies sued on in this case.

"(5) The court instructs the jury that if you find from the evidence that the kidney of the insured was diseased, or affected by some disease, or otherwise impaired, at the time he attempted to raise the window, and that the blood vessel in the kidney was ruptured while he was attempting to raise it, but further find that the rupture would not have been occasioned by the raising of the window if this kidney had not been diseased or impaired, then you are instructed that the insured did not die of an injury from the accidental means independent of all other causes; and if you so find your verdict must be for the defendant.

"(6) The court instructs the jury that the plaintiffs cannot recover unless the jury find from the evidence that the insured died from external, violent, and accidental means independent of all other causes, and that there is no evidence showing or tending to show that any accidental means resulting in an injury was either violent or external.

"(7) The court instructs the jury that the insurance policies in question do not undertake or bind the defendant to pay the policies because or on account of death resulting from an accident, but are limited to and bind the defendant to pay only in case death results from accidental means independent of all other causes. If you find from the evidence that the means employed by the deceased to raise the window were such means as he intended, and that he did not push or shove upon the pole with greater force or strength than he intended, then the plaintiffs cannot recover, even though the result of the means employed may have produced the injury.

"(8) The court instructs the jury that the policies in question do not make the defendant liable by reason of an accident alone, but only make them liable by reason of an injury received from accidental means independent of all other causes. If you believe from the evidence that the means employed by W. J. Fetter to raise the window and his act in raising it, was just what he intended to do—that he did it in the manner that he intended, and voluntarily did it—then you are instructed that the means employed by W. J. Fetter was not accidental, although you may further find that the result of the means employed was not contemplated or intended by him.

"(10) The court instructs the jury that this action is founded upon accident insurance policies, and that the death of the party insured does not make the company liable because of his death, but that the insurance policies are directly and only applicable to death resulting from an accident independent of all other causes. And in order for the plaintiffs to recover in this case upon the policies, they must establish and show by a preponderance of the evidence that the insured's death was directly caused by some accidental means

independent of all other causes. In passing upon this question you will bear in mind and be guided by the fact that, if any other cause contributed to the death of deceased than the alleged accident which he received, then plaintiffs cannot recover. In this connection you are instructed that the testimony in the case shows that at the time of the death of the insured he was affected with a diseased condition of the kidney. Therefore, if you find that such diseased condition of the kidney existed at the time the assured attempted to raise the window, and the raising of the window caused the rupture of the kidney because and on account of the already diseased condition of the kidney, and that such diseased condition of the kidney was of such character as that the pushing upon the window might necessarily cause the rupture of the kidney because of its diseased condition, and that the pushing upon the window would not of itself have produced the rupture but for and on account of the diseased condition of the kidney, then the plaintiffs cannot recover in this action."

Exceptions were duly saved. The verdict and judgment were for the plaintiffs on both counts, and defendant appealed.

Harkless, O'Grady & Crysler, for appellant. Ashley, Gilbert & Dunn, for respondents.

VALLIANT, J. (after stating the facts). 1. If, after weighing all the evidence in the case, the jury had reached the conclusion that the cancerous condition of the kidney was the result of the blow caused by the falling of the insured, striking his side heavily against the edge of the table, and had based their verdict on that conclusion, it would have had substantial evidence to sustain it. There were seven surgeons who testified in the case, who were all men of intelligence, learning, and high character. They gave their testimony in a manner to show that they were expressing only their honest opinions. They agreed on some, but disagreed on other, points. The majority of them were of the opinion that the cancer was there before the accident occurred, but that it might not have been. Dr. Hall, a witness for defendant, expressed a more positive opinion than any other surgeon that the cancer existed before the accident: He said, "There is no question, in my opinion, that it did exist at that time." Yet he also said: "I think this is, relatively, a rapid-growing cancer. Some cancers are matters of years—most of them; some are matters of months; and others are matters of days." One of the learned witnesses—Dr. Horigan—said that a blow of the kind in question is a common cause of cancer. Add to this the fact that Mr. Fetter was an apparently healthy, active, energetic business man, who had never had a serious spell of sickness within the memory of any member of his family; that a few

days after the accident he was examined by a number of surgeons, who made an incision into his back to explore the kidneys, and who, with all the aid that science could afford, discovered nothing wrong except the rupture of the right kidney, and an enlargement of it—under those facts, and in the light of the scientific evidence, who can say with certainty that the blow which ruptured the kidney did not also cause the cancerous growth?

The genius of our law does not claim for it infallibility. It recognizes that there is an element of uncertainty that enters into every forensic contest, which human wisdom cannot always make certain, and its aim is to come as close to the right as the means at hand will permit. Under our system of jurisprudence the jury is the tribunal to which questions of this kind are submitted for determination, and with all their human liability to err we have never yet discovered any better tribunal for the trial of questions of fact, even where highly scientific propositions are involved. Science itself appeals to common sense for its recognition. On the question of whether or not the blow caused the cancer, if the jury had found either way, the verdict would have had honest, intelligent, scientific testimony to support it.

2. There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental; that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. They also concur in the opinion that, conceding the previous existence of the cancer, the man would not have died as and when he did if the accident had not occurred; that, whilst death from the cancer might have resulted, it would probably have been deferred several years. But the contention of the defendant is that the accident would not have resulted in the rupture if the cancer had not been there. As defendant's witness Dr. Hall said, "The exciting cause of the hemorrhage was the injury, and the predisposing cause was the cancer." On this testimony the defendant says that the death was not the result of the accident "independent of all other causes." If we should give to those qualifying words of the policy the meaning that is now claimed by defendant they were intended to have, there would be scarcely any limit to their nullifying influence. Dr. Hall said in explanation of what has just been quoted of his testimony, "The predisposing cause is the remote cause." If, therefore, there could be discovered in a man's body, after his death, any condition before undiscovered and unsuspected, that, under scientific tests, would render him more amenable to accidents, or less capable of resisting their influence, the policy would not cover the case. The fact that a man is 69 years old, yet with an activity of body ordinarily found only in one much younger, might have something to do both with the fact of an accident and its

result, and thus his age and unusual activity could be said to be a predisposing cause—remote, perhaps, as the learned witness designated the cancer in this case—still, in such case, in that sense, the accident could not be said to have been the cause of the death "independent of all other causes." The causes referred to in the policy are the proximate or direct, not the remote, causes. This was evidently the view of the trial court when it modified the second instruction asked by defendant, inserting the word "direct" before the word "cause," thereby directing the jury that they could not find for the plaintiff unless they found that "the accident was the sole and only direct cause of the death of the insured"; and that view of the law was correct. *Freeman v. Accidental Association*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. In that case the court said: "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim, '*Causa proxima, non remota, spectatur*,' is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes." The undisputed evidence and conceded facts make out a *prima facie* case for the plaintiffs, and the defense that there was a remote predisposing cause of the death was given as full and fair consideration as the defendant was entitled to, and there is not sufficient in the evidence bearing on it to justify any impeachment of the verdict.

3. The theory of the instructions given at the request of the plaintiff is that, if the death of the insured resulted from the accidental rupture of his kidney, the plaintiffs were entitled to recover. These were supplemented by the modified instruction for defendant that the plaintiffs could not recover unless the "accident was the sole and only direct cause of the death." Those instructions, taken together, put the case on the cor-

rect theory, and they include whatever there legitimately was in the defendant's theory of any other cause. There was really so little in the remote—predisposing—cause theory that the court would have been justified in ignoring it altogether. It is complained that the third instruction for the plaintiffs was erroneous in placing the burden on the defendant to show that the insured died of cancer. When the plaintiffs introduced evidence tending to show that the insured died of hemorrhage resulting from the accidental fall, they made out a prima facie case. *Laessig v. Travelers' Protective Ass'n* (Mo. Sup.) 60 S. W. 469. It was not necessary then for them to take up the defendant's side of the case, and prove that the death did not result from any of the excepted causes named in the policies. The defendant, in its answer, had averred that the man died of cancer. The burden was on the defendant to prove it. From what has already been said, it is unnecessary to say that the court did not err in refusing the defendant's first instruction, which was in the nature of a demurrer to the evidence. Defendant's sixth instruction is also, in effect, a peremptory direction to find for defendant. Instructions 3, 5, 7, 8, and 10 refer the cause of the rupture to the strain in raising the window, and leave out of view entirely the accident of the pole slipping off the rim of the window sash, and causing the insured to fall against the edge of the table. Defendant's instruction 4 directs the jury that the plaintiffs cannot recover "if the accident could not have caused death if he had not been affected with disease." There was no evidence to sustain any such hypothesis. We find no error in the record.

The judgment is affirmed. All concur.

NALLE v. PARKS et ux.

(Supreme Court of Missouri, Division No. 2.
Oct. 27, 1902.)

TENANTS IN COMMON—PURCHASE OF OUTSTANDING TITLE—RIGHTS OF CO-TENANT—EJECTMENT—LACHES—RATIFICATION.

1. Plaintiff and defendants' grantor became tenants in common of land by a deed executed in July, 1891, subject to prior deeds of trust. Defendants' grantor subsequently acquired the fee to the land at different trustee sales in December, 1891, and in April and November, 1892, and thereafter conveyed to defendants. The evidence failed to show that plaintiff had at any time offered to pay defendants' grantor his proportion of the consideration paid for the land under the trustee sales, up to 1898. Held that, after the lapse of so long a time, plaintiff would be presumed to have repudiated the transaction and abandoned its benefits.

2. Ejectment cannot be maintained on a title which is merely equitable.

3. Where plaintiff, as tenant in common, brought suit against his co-tenant, and obtained judgment against him for part of the purchase price received by such co-tenant on a sale of the land by the latter to defendants, plaintiff thereby ratified and confirmed the sale.

Appeal from Circuit Court, Madison County; Frank R. Dearing, Judge.

Action by William N. Nalle against William Parks and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action of ejectment for the possession of 21 acres of land in Madison county. The petition is in the usual form. Ouster laid November 24, 1892. Defendants, by their answer, deny all of the allegations in the petition, and then allege that they are the owners of said real estate, and that it was conveyed to them by one Benjamin B. Cahoon, Sr., by general warranty deed, on the 24th day of November, 1892, and that said deed was duly recorded in the recorder's office of said county; "that plaintiff has pending in the circuit court of said county an action against said Cahoon, wherein he approves and whereby he has approved of said conveyance and sale by said Cahoon of said land to said Parks and wife, and wherein he, the said Nalle, seeks to recover from said Cahoon the said Nalle's alleged share of the purchase money so paid by said Parks and wife to said Cahoon for said real estate, by which said action and conduct these defendants charge that said Nalle is and should be estopped from prosecuting this action, and that to do so is inequitable on his part, in that he should not in this court, which defendants pray it take cognizance of its own records, at one and the same time seek to recover said real estate, and at the same time seek in the same court to recover said Nalle's alleged share of the money paid by said O'Bannon [Parks and wife?] to said Cahoon for said real estate, for defendants state that by such suit against said Cahoon by said Nalle said Nalle admits and is bound to admit the conveyance of said real estate by said Cahoon to said Parks and wife was right and proper, and that said Cahoon had good right to convey said land to said Parks and wife, and that he, the said Nalle, looks to and seeks to obtain from said Cahoon his alleged share, if any he has therein, of the money paid by said Parks and wife to said Cahoon for the whole of said real estate." "Defendants further allege that by reason of the premises the present action by said Nalle is inequitable and inconsistent with his said suit against said Cahoon, and is wholly unjust. By this suit said Nalle is seeking to and is making of this court a vehicle to prosecute two suits at the same time in the same court for practically the same subject-matter, in this: that alleged suit being for the recovery of said real estate by said Nalle, and his said other suit against said Cahoon being for the recovery against said Cahoon by said Nalle of his alleged share or interest in the proceeds of the sale of said real estate by said Cahoon to said Parks and wife, by which action he, the said Nalle, in fact as well as in equity, admits said Cahoon had good right and title to convey said real estate to said Parks and wife, and said Nalle there-

¶ 2. See Ejectment, vol. 17, Cent. Dig. § 56.

by assumes the position that he, the said Nalle, is entitled to and seeks from said Cahoon his, the said Nalle's, alleged share of the money so received by said Cahoon from said Parks and wife for said real estate; that to permit said Nalle to prosecute this action while his said action against said Cahoon is, as it is now, pending as aforesaid, is inequitable; hence defendants pray that this cause be dismissed and stricken from the docket of said court." Appellant's replication, omitting caption, is as follows: "Plaintiff, replying to defendants' answer, states that it is not true that William Parks and wife are the owners of said real estate. They [are] the co-tenants or tenants in common with plaintiff through and by the conveyance to them by said Cahoon, then and for a long time prior to said conveyance a tenant in common with plaintiff. Plaintiff, further replying, states that it is not true that in his said action against Cahoon he (plaintiff) approves or has ever approved said conveyance by said Cahoon, other than to the extent that he, the said Cahoon, conveyed to said William Parks and wife the moiety of said lands then and theretofore owned by the said Cahoon; and plaintiff denies that he, in said action, seeks to recover from said Cahoon the purchase money, as alleged by defendants. Plaintiff further states that said defendants' plea of estoppel does not state facts sufficient to constitute a defense; that the facts stated do not constitute a defense; that the plea is indefinite, vague, and uncertain; that it only states conclusions, not supported by facts contained in it, and is argumentative, impertinent, and frivolous, all of which plaintiff denies, and each and every statement of fact and allegation therein set forth. Plaintiff, further replying, avers that defendants ought to have known, had means of knowing, and did know that plaintiff and said Cahoon were co-tenants, and that as such tenants they derived their title from a common source, to wit, Robert Gray, deceased, and his representatives. And so, having full notice, defendants wholly failed to inquire of or from plaintiff for any fact touching, affecting, or appertaining to his title, possession, or right of possession, and, without notice, on said day, to wit, November 24, 1892, unlawfully entered upon said real estate, and ousted him, the said plaintiff, out of and from his said moiety and all of said real estate. Plaintiff, for further reply, avers the truth and the facts to be that said Cahoon, under whose conveyance the defendants claim title to and possession of the whole of said real estate, came into possession of said land, and his moiety thereof, through and by means of a conveyance of Mary F. Gray to him and plaintiff by deed dated July 16, 1891, duly recorded same day; the election of said Mary F. Gray, widow of Robert Gray, deceased, dated August 21, 1890, duly filed in the probate court, and duly recorded in the re-

corder's office; by deed from R. A. Anthony, trustee for William A. Hudson, and Robert Gray, dated December 29, 1891, and duly recorded, which said last deed or conveyance was by said Cahoon obtained for the sole purpose of protecting his own moiety therein, and was the only and sole consideration he ever paid for his interest in said land; the plaintiff paying the full consideration for the whole of said real estate, subject to said incumbrance on the farm of said Gray. Wherefore plaintiff again prays judgment for his moiety of said real estate, and for said damages and costs of suit."

The facts are about as follows: Robert B. Gray died intestate and childless in Madison county, Mo., in August, 1890, leaving Mary J., his widow, and the real estate involved in this suit, which was all incumbered by a deed of trust made by him to Robert A. Anthony, trustee, in said Gray's lifetime, to secure a note to one Hudson, which note represented a part of the purchase money Gray had agreed to pay Hudson for the land therein described, and in which deed of trust said Gray expressly declared said note was given Hudson for said land. That deed of trust was subsequently foreclosed. In addition to said incumbrance, Gray owed general debts, to pay which all his real estate was, on petition, sold by his administrator. Prior thereto his widow, on August 26, 1890, by her legal election, which was written by plaintiff as her attorney, elected to take one-half of the real estate of said Gray, subject to the payment of his debts. Gray and wife had also conveyed his homestead by deed of trust to Gabriel, beneficiary, and Edwards, trustee. B. B. Cahoon became the purchaser of all of said Gray's real estate, at the sales thereof, for the sum of \$1,055, receiving three different deeds therefor, which were recorded, respectively, on December 29, 1891, and April 4 and November 5, 1892. On November 24, 1892, Cahoon, for and in consideration of the sum of \$1,050, sold and conveyed the land in controversy, in connection with 56 other acres, to the defendants, who were innocent purchasers, and who have been in possession thereof ever since. Plaintiff's paper title to the land in question is based on a warranty deed executed and recorded July 16, 1891, wherein said widow, Mary J. Gray, conveyed to Nalle and said Cahoon, subject, however, to said incumbrances, to wit, the two deeds of trust of Gray and herself, executed in his lifetime, and also a deed of trust to Hiram Bevry, Jr., as trustee, executed August 21, 1891, to Nalle himself, as beneficiary, to secure the payment of a note for \$250 six months after said date, with 10 per cent. interest from the date of said note and deed of trust, which Nalle sold and assigned to Ed. B. Goff, and which deed of trust is yet unsatisfied of record. Said warranty deed of July 16, 1891, conveyed all the interest the said Mary J. then had in all the real estate of said Robert B. Gray, deceased. Said

deed of trust of said Mary J. to said Berry, trustee, was offered by defendants to show an outstanding title from Mary J. of date prior to her said deed to Nalle and Cahoon. That deed of trust has never been satisfied, and no evidence was offered by plaintiff to show it had ever been paid. The other grounds upon which plaintiff claims the right to recover are purely equitable, and cannot be considered as furnishing any ground for recovery in a case of this character.

The case was tried by the court, a jury being waived. The trial resulted in a judgment for defendants. In due time plaintiff filed a motion for a new trial, which being overruled, he appeals.

Wm. N. Nalle and Anthony & Tesereau, for appellant. J. J. Russell, Moses Whybark, and B. B. Cahoon, for respondents.

BURGESS, J. (after stating the facts). Plaintiff claims that he and Cahoon were cotenants under the deed for the land to them by Mary J. Gray, executed on the 16th day of July, 1891, and that the court erred in holding that plaintiff was ousted of all ownership and title by Cahoon's purchase of the land at the sale made by the trustee, Anthony, under deed of trust executed to him by Robert B. Gray in his lifetime to secure the payment of part of the purchase money for said land. There is no doubt of the general principle that, when land is conveyed to two or more persons by the same deed, they are tenants in common, and that they occupy such a relation to each other that one will not be permitted to buy up an outstanding title to or incumbrance on the land for his exclusive benefit, but such purchase will inure to all such tenants as are willing to contribute their just proportion of the amount necessarily expended in the acquisition of the title or incumbrance. *Aubuchon v. Aubuchon*, 133 Mo. 260, 34 S. W. 569, and authorities cited. In *Mandeville v. Solomon*, 39 Cal. 125, it is said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property. It, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it at the same time exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his co-tenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying until the rise of the land, or some event yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute or offer to contrib-

ute his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits." *Cockrill v. Hutchison*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564. See note to *Keech v. Sandford*, 1 W. & T. Leading Cas. in Eq. 70; *Lee v. Fox*, 6 Dana, 176; *Weaver v. Wible*, 25 Pa. 270, 64 Am. Dec. 696; *Lloyd v. Lynch*, 28 Pa. 419, 70 Am. Dec. 187; *D. v. K.*, 84 Mo. 561.

Now the deed by which plaintiff and Cahoon became tenants in common in the land was executed on the 16th day of July, 1891, while Cahoon acquired the fee to the land by purchase at different trustee sales on December 29, 1891, and April 4 and November 5, 1892, paying in the aggregate quite a sum therefor; and, while this suit was not begun until in 1898 or 1899, plaintiff never at any time, in so far as this record discloses, offered to pay to Cahoon his proportion of the consideration actually paid by him for the land, and, after the lapse of so long a time, will be presumed to have repudiated the transaction and abandoned its benefits. Not only this, but Cahoon, by his purchase under the deed of trust which was given by Gray and wife to Anthony, trustee, to secure in part the payment of the purchase money, acquired the legal title free from any dower or homestead right in Mrs. Gray, to which defendants succeeded thereafter by the conveyance of the land to them by Cahoon, and this title was in them at the time of the institution of this suit. There was never at any time the legal title to the land, or any part of it, in plaintiff, and at most, only an equitable one; and it is well settled that ejectment cannot be maintained upon a title which is merely equitable. *Hunt v. Selleck*, 118 Mo. 588, 24 S. W. 213; *Kingman & Co. v. Sievers*, 143 Mo. 519, 45 S. W. 266; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157. And if plaintiff had desired to obtain the benefit of the purchase which Cahoon made, he should have in a reasonable time resorted to a court of equity, where all the matters relating to the transaction might have been investigated, the expenses attending the purchase apportioned, and the title acquired by the defendants, or one-half of it, transferred to the plaintiff, if it had been found, in equity, the purchase inured to his benefit, and that defendants had notice of his equities at the time they obtained a deed for the land from Cahoon. We are also of the opinion that plaintiff is estopped from claiming title to the land by reason of the fact that he brought suit against Cahoon, and obtained judgment against him for part of the purchase money received by him for the land, which Cahoon thereafter paid him, thereby satisfying and confirming the sale of the land by Cahoon to defendants. From the conclusion reached, it is deemed unnecessary to pass upon other questions presented by counsel in their briefs.

The judgment is affirmed. All of this division concur.

NALLE v. THOMPSON et al.

(Supreme Court of Missouri, Division No. 2.
Dec. 16, 1902.)

**TITLE NECESSARY TO MAINTAIN EJECTMENT
—INSUFFICIENCY OF EQUITABLE TITLE
—RATIFICATION—ESTOPPEL.**

1. Ejectment cannot be maintained unless plaintiff is vested with the legal title at the time he commences the action.

2. Though plaintiff in ejectment had taken title together with defendants' grantor, subject to certain prior trust deeds, yet where defendants' grantor had acquired the legal title in his own name at the subsequent foreclosure of the trust deeds, and then conveyed it to defendants, plaintiff was not in a position to maintain the action.

3. Though two parties are tenants in common of certain premises under a deed conveying the grantor's equitable interest, the acquisition by one of them of the outstanding legal title under deeds to him alone does not thereby vest the legal title in them in common.

4. Though plaintiff in ejectment might have had such equitable interest in the premises as would have entitled him to have maintained a suit in equity against defendants' grantor for a half interest in the legal title held by such grantor, he cannot maintain the ejectment under this merely equitable title.

5. A. and B. took a deed to certain land from the widow of the owner, subject to outstanding trust deeds. Afterwards B. acquired deeds in his name to the property at sheriff's sale under the trust deeds and at a sale by the administrator, and conveyed the land to a third party. *Held* that, while A. might have a cause of action for a decree for a one-half interest in the land as against B., such proceedings could not affect B.'s grantee unless he was made a party to the suit, and was shown to have had notice of A.'s equity when he purchased.

6. Where a party who has an equitable interest in lands with a co-owner, who also holds the legal title, sues the co-owner to recover his share of the purchase money received by the co-owner at a sale of the land, he thereby ratifies the sale, and is estopped from maintaining ejectment against the grantee of the co-owner.

Appeal from Circuit Court, Madison County; Frank R. Dearing, Judge.

Ejectment by William N. Nalle against James Thompson, Jr., and Joseph W. O'Bannon. Judgment for defendants, and plaintiff appeals. *Affirmed*.

This is ejectment for the possession of the following described tracts of land in Madison county, to wit: "Beginning at the southeast corner of survey No. 2,135, and running north and along and with the eastern line of said survey so far that a line drawn westwardly on the same course with the south boundary line of said survey will include the improvements made by Powell Callaway, and on which Robert B. Gray lived and died; thence west so far that a line drawn southwardly on the corner of the eastern line of said survey will include 80 acres, excepting therefrom 4 or 5 acres, more or less, sold by John Crissop and wife to John M. Teal; said tract of land being a part of the confirmation made by Congress to William Dillon, under Christopher Anthony; also northeast quarter of southeast quarter and northwest fractional

quarter of section thirty-one (31), township thirty-three (33) north, range seven (7), excepting, however, from said northwest fractional quarter a tract out of it containing 22.50 acres, more or less, conveyed by deed of Powell Callaway to Eliza H. Spira, dated January 11th, 1839, recorded in the recorder's office of said county and state, in Book H, page 418. All the foregoing real estate being the same land conveyed to Robert B. Gray by Powell Callaway by deed dated November 7th, 1863, recorded in said recorder's office, in Book K, at page 178, containing in all about 171 acres, being a part of the homestead property on which Robert B. Gray lived and died." Ouster is laid October 28, 1897. The answer of defendant Thompson is first a general denial. It then proceeds as follows: "Defendant Thompson states that he is in possession of said real estate described in plaintiff's petition as the tenant of his codefendant, Joseph W. O'Bannon, who claims and is the owner of said real estate, and to whom it was conveyed on, to wit, the 28th day of October, 1897, by Benjamin Benson Cahoon, Sr., the deed to which is recorded in the recorder's office of Madison county, Missouri, in Deed Book 24, page 180; that said plaintiff, William N. Nalle, has pending in the circuit court of Madison county, Missouri, an action, as plaintiff, against said Cahoon, as defendant, wherein he, the said Nalle, seeks to recover from said Cahoon the said Nalle's alleged share of the purchase money so paid by said O'Bannon to said Cahoon for said real estate, by which said actions and conduct this defendant charges that said Nalle is and should be estopped from prosecuting this action, and that to do so is inequitable on his part, in that he should not in this court (which defendants pray it take cognizance of its own records) at one and the same time seek to recover said Nalle's alleged share of the money paid by said O'Bannon to said Cahoon for said real estate; for defendants state that by such suit against said Cahoon by said Nalle, the defendants say that said Nalle admits, and is bound to admit, the conveyance of said real estate by said Cahoon, who had good right to convey said land to said O'Bannon, and that he, the said Nalle, looks to and seeks to obtain from said Cahoon his alleged share (if any he has therein) of the money paid by said O'Bannon for the whole of said real estate. Defendants further allege that by reason of the premises the present action by said Nalle is inequitable and inconsistent with his said suit against said Cahoon, and is wholly unjust; that by this suit said Nalle is seeking to and is making of this court a vehicle to prosecute two suits at the same time in the same court for practically the same subject-matter, in that this alleged suit being for the recovery of said estate by Nalle, and his said other suit against said Cahoon being for the recovery against said Cahoon by said Nalle of his alleged share or interest in proceeds of the

¶ 1. See Ejectment, vol. 17, Cent. Dig. §§ 17, 28.

sale of said real estate sold by said Cahoon to said O'Bannon, by which action the said Nalle, in fact as well as in equity, admits said Cahoon has good right and title to convey said real estate to said O'Bannon, and said Nalle thereby assumes the position that he, the said Nalle, is entitled to and seeks from said Cahoon his, the said Nalle's, alleged share of the money so received by said Cahoon from said O'Bannon for said real estate; that to permit said Nalle to prosecute this action while his said action against said Cahoon, as it is now pending, as aforesaid, is inequitable, and is trifling with this court; hence defendants pray that this cause be dismissed and stricken from the docket. Defendants demand all other and further proper relief to which they may be entitled, as well as judgment for costs of suit." The replication is, in effect, a general denial. The case was tried by the court, a jury being waived.

It was admitted on the trial that Robert B. Gray is the common source of title, and that he died about August 1, 1890, without heirs; that his widow survives, and that she elected to take one-half interest in fee in all her deceased husband's lands in lieu of dower; that this was done August 26, 1890, in writing, duly acknowledged and recorded in the recorder's office of said county, and in the office of the probate judge of said county. It was also admitted that letters of administration were duly granted upon the estate of said Robert B. Gray, and the estate finally settled. Plaintiff then read in evidence a warranty deed from Mary F. Gray to William N. Nalle and B. B. Cahoon for the land in question, dated July 16, 1891. This deed recites that "there are the following incumbrances upon parts of said land, viz.: One to secure a promissory note made payable to Joseph P. Gabriel, which embraces the eighty acres in the survey 2,135, and the northeast quarter of the southeast quarter of section thirty-one, township thirty-three north, of range seven east; one to secure a promissory note executed to William A. Hudson, which covers the twenty-one acres last above described, executed and delivered by said Robert B. Gray in his lifetime, and one promissory note executed and delivered to William N. Nalle, which covers the said eighty acre tract, the twenty-one acre tract, and the northeast quarter of the southeast quarter of said section thirty-one. So far as homestead and dower, and one-half the fee thereon, executed to him by said Mary F. Gray, and it is the intent of this deed to convey to said grantees the said above-described lands, together with all of the grantor's title, right, claims, interest, and estate therein, in fee absolutely, subject only to said liens thereon as above designated." Plaintiff then introduced evidence with respect to the rents and profits of the premises, and rested.

Defendants then read in evidence, over plaintiff's objection, a deed of trust dated October 28, 1889, executed by Robert B. Gray

and Mary F. Gray to J. F. Edwards, trustee for J. P. Gabriel, and duly recorded, conveying the land in controversy, to secure a note for \$150, due 12 months after date. Next a deed executed April 25, 1892, by R. P. Callaway, sheriff of Madison county, acting trustee under said deed of trust, conveying the same land described in said deed of trust to B. B. Cahoon. This deed was recorded on the day of its date. Also administrator's deed made by M. A. Jackson, administrator of Robert B. Gray, deceased, on May 11, 1892, to B. B. Cahoon, and duly recorded, conveying to him the land in question, or part of it. Defendants also read in evidence over plaintiff's objection a notice in writing, signed by Mary Gray, dated February 8, 1892, and addressed to the probate court of Madison county, in which she stated that she consented that the real estate of her late husband, Robert B. Gray, in Madison county, be sold for the payment of his debts, and waiving all notices on her part as to such sale. Also deed from B. B. Cahoon and wife to Joseph O'Bannon, dated August 28, 1897, and duly recorded on the 12th day of November, 1897, conveying to him said land. Also deed of trust on one undivided half of 21 acres of said land, executed by Mary F. Gray to Hiram Berry, trustee for William N. Nalle, dated the 21st day of August, 1890, to secure the payment of a note for the sum of \$200 executed by her to said Nalle. The defendant then rested.

Plaintiff then testified in rebuttal as follows: "The incumbrances specified in the Mary J. Gray deed to Cahoon and Nalle were to be removed by Cahoon, as his part of the consideration. Plaintiff's part was his fee, including the note to him of \$250; the retainer amounting at that time to \$1,000. That the promissory note for the \$250 is now in plaintiff's possession, and is held for collection, and to enable him to control the incumbrance, if any, upon his interest in the land in suit. Neither defendant, and particularly Cahoon, ever claimed one cent from plaintiff as contribution. Cahoon and myself were friends, and acted together in many lawsuits. Cahoon was deaf, and, because of that defect, employed me for his clients, and he paid me. Plaintiff was the sole attorney for the grantor, Mary F. Gray, charged with murder of her husband. Cahoon, having the means, was brought in the land deal to protect the title, and, if needed, to pay off the incumbrances mentioned in the deed to plaintiff and Cahoon. Cahoon was first in full possession of the land. Plaintiff put full confidence in him, and asked no accounting from him till he claimed that plaintiff was indebted to him in January of this year (1899); nor had plaintiff thought to inquire what, if anything, he had done with the Gray land till that time. Upon examining the record, and inquiring of defendant Thompson and of Parks, plaintiff learned that Cahoon had utilized the Gabriel claim

and the Hudson claim to acquire the entire title of the Gray estate, and the equity of the widow Gray therein, as it affected the Nalle incumbrance; letting it out, as he now discloses for the first time, he intended to assert full title, and to exclude plaintiff. Cahoon never paid any consideration to his grantor, Mary J. Gray, for her homestead right to the 160 acres, which includes the land in suit. He paid \$100 on the Hudson claim, and paid off the Gabriel claim, had it assigned to him, and then had it sold under the deed of trust, and bought it in, getting the Gray estate title. Cahoon and defendants, claiming under him, never claimed contribution from plaintiff; and, if any could have been claimed, the rents would have more than paid plaintiff's part."

On cross-examination, appellant testified as follows: "Q. You wrote the deed under which you claim title to you and Cahoon? A. Yes, sir. Q. It was made subject to the other claims, and the deed of trust made to Hy Berry for you? A. Yes, sir. Q. Do you claim that under that deed from Mary J. Gray that you have a legal title? A. I got what title she had in her at that time. I think the Gabriel note amounted to about \$160. Q. It was also under the deed of trust to Gabriel, and do you suppose it was made subject to that deed of trust? A. Yes, sir. Q. That deed of trust to Hy Berry for you has never been satisfied? A. Except as I have stated. The trustee, not that I know, ever satisfied it. The Robert B. Gray land was sold under the Gabriel deed of trust, and the deed discloses that Cahoon paid \$605 for it. Q. I understand that that sale was at the instance of Cahoon or Gabriel, and, no matter what was the face of the note, he paid \$605 for the land at the trustee's sale under the Gabriel deed of trust? A. I suppose he paid it, but, if so, it [the surplus] was never turned over to the estate. Q. If Cahoon paid \$605 under the Gabriel deed of trust and you had a deed of trust for \$250, he paid all the land was worth? A. He paid \$100 for the Parks 21 acres, but [the debt] it was \$123.47. At the time he paid the Gabriel deed of trust there was due on it \$179, and he stated in his letter to me that he bought from Gabriel. This sale was at the instance of Cahoon, the owner of the note—otherwise he paid \$179.90—and the \$605 was never given the estate of Robert B. Gray. Q. Well, as a matter of fact, he paid all that farm was worth? A. My understanding was that the property was worth \$2,000. Q. Did the widow own it all? The life estate and homestead? A. The testimony shows the value of the farm to be about \$1,000, as the consideration we were to pay for that land. We estimated the Mary Gray interest at the value of \$1,000, and took it— With the consideration of Cahoon was the payment, for his one-half of it, of the incumbrances. The Bob Gray interest was valued at \$1,000. Q. Her interest

was how much—\$750? A. I don't know how much was due at that time. At the time of Cahoon's acquiring of title he got the Bob Gray interest—one-half—for \$179.90, and undertook to claim he paid off that incumbrance."

Appellant here closed, and submitted the issue to the court. Thereupon the respondents' witness B. B. Cahoon, testified as follows: "That he knew the land in controversy—the Gray homestead proper. That he knew the plaintiff. That he knew the deed executed by Mary F. Gray to himself and Nalle. That Nalle wrote the deed. That he knew of the incumbrance mentioned in the deed—the Gabriel, Hudson, and Nalle trusts—at the time, July 16, 1891. Q. State if when that deed of Mary J. Gray was executed, or at any time, if the consideration was that you were to pay off these three deeds of trust named in the Mary J. Gray's deed to you and Wm. N. Nalle? A. No, sir; what interest I had under the deed is shown altogether on its face. After or before that deed was made to Nalle and myself it was never agreed by me that I was to pay off the incumbrances named in that Mary J. Gray deed. She, when it was made, had practically, in view of the deeds of trust made by Robert Gray and herself, and her election, but a very small interest. I simply ignored the deed of Mrs. Gray to Nalle and myself, and everything I have done since I have taken steps to show I had the title to the whole land. Q. Did you assist Judge Nalle in the selection of the jury and looking up the law? A. I will explain that, and how the deed of Mary J. Gray was made: Judge Nalle was employed to defend Mary J. Gray, charged with the poisoning of her husband. He defended her successfully. Pending her prosecution he said he wanted me to help him in the case. I had taken Judge Nalle in a number of cases with me, in which I was original counsel, and divided fees with him; and the judge, for his own reasons, stated that he wanted me to help him in that case. Well, in the beginning I had taken him in many cases in which I was original counsel. I was pretty well informed on all questions of law in those days, and had a large business and a good library, but I could not hear the witnesses in court at all. He then stated he wanted me to help him in that case against Mary F. Gray. I said, 'Judge, you know I can't hear the testimony in court, and I will be of very little service to you.' I never asked Judge to take me in his case in return, but as to what his motive was, I can't say. He asked me to help him in the Gray case. Her acquittal was a surprise to the community. He said, 'I want you to help me anyway.' I told him I would assist him in law and medical jurisprudence in the case, and in the selection of the jury, but I could not hear the testimony of the witnesses. He said, 'All well and good.' The case had been pending for

some time. She had been arrested, and she was then arraigned before the justice of the peace. I rendered him what help I could. I knew he received of Mary Gray the deed of trust to secure the \$250 for his fee. I never asked Judge Nalle to divide that fee. I had been before dividing fees equally with him in cases in which I had taken him in. I had a good run of business. Well, while the matter was going on, after he got his fee secured by his deed of trust from Mary Gray to Hy Berry, he said one day, 'I am going to make Mrs. Gray give us a deed to all her land, and I am going to pay you, so I can get more fees, and you can get some.' At the time it was made, she had already made her election to take her child's part. I knew of the Gabriel deed of trust on the homestead proper. I knew of the Hudson deed of trust on the Parks 21 acres, and I knew of Judge Nalle's deed of trust to secure a \$250 note. I knew the land was already incumbered, and knew of certain debts against the estate of Robert Gray. Judge Nalle was, as I supposed, very kind to me when he asked me to help him in the case. I never talked in my life to Mary Jane Gray about the deed she made to Nalle and myself. It was Judge's sole act, and nothing was ever said about me paying the incumbrances. I never agreed to pay them, directly or indirectly. Q. Do you believe now that Mrs. Mary J. Gray's equity of redemption was worth very much? A. I never expected, Judge Dearing, to realize anything from the property—the deed of Mary J. Gray to Nalle and myself. I knew the property would be sold to pay the Robert B. Gray and wife's deed of trust and Gray's. I had never placed any great expectations on this deed of Mary Gray to Nalle and myself. Q. State to the court, if, whether before you got possession of the property, the houses were burnt down? A. Before I got possession of the farm there was a large house, with two old-fashioned rooms. Then across the creek was an excellent log house and a stable. The buildings were all old, except the log house. They could not all have been replaced for \$450. The main house was an excellent log house, with a large chimney, and good-sized timber in the logs, and weather-boarded and celled inside. Every one of those three buildings were burned before I got possession of the farm. Q. Was the property sold under the Gabriel deed of trust? A. Yes, sir. Q. What did you pay for that property? A. What was paid by me at the time of sale under the Gabriel deed of trust was \$605, and at the administrator's sale the amount paid by me was \$355, and the administrator's deed shows that I also bought it at the administrator's sale. I paid the one to M. A. Jackson, administrator of Robt. B. Gray, and the other to R. B. Callaway, sheriff of Madison county, Mo., and ex officio trustee under the deed of trust of Robt. B. Gray and wife to J. P.

Gabriel. Q. State whether you paid other expenses on that farm? A. At the time that I bought the Gray land I told Judge Nalle that, if I got my money back I had invested on this property, he and I would divide the profits. I expected at that time to make something out of the place. I served notice on Mary Gray to vacate the premises, but before she did so she burnt the houses, thereby depreciating largely the property and scaring off buyers for it, and she was sent to the penitentiary for six years. I tried for years and years to sell the property, and at last I sold the Gray homestead property—the property in the suit—to Joseph B. O'Bannon. Q. How much did you get from O'Bannon? A. I believe, \$750. The place, when I bought it, was run down. There was something about 40 acres in cultivation, and, to make a long story short, I believe I had it for five years. All, except two years, I rented it, and kept up the repairs. I got about \$125 net rents. Q. How did you come out of the deal? A. At the little end of the horn. Counting interest on the two places, and what I paid out for taxes, fencing, fertilizer, etc., I came out loser about \$380.09. The Parks' place cost me \$100. That was \$12½ per acre. I made about \$150 on the Parks' 21 acres, but am loser on the Gray farm I sold to Jos. O'Bannon. Q. You made about \$150 on the Parks' place, and lost \$300 on the other land? A. Yes, sir. Q. State whether Judge Nalle ever offered to pay one-half on these premises? A. No, sir; after I sold the 21 acres, six years last January, 1899, and then in January, 1899, Judge Nalle for the first time claimed that I had got big money for my investments in these Robert B. Gray lands. Q. State if he is not now suing you in this court for the proceeds of the sale of the O'Bannon land. (To which plaintiff objected, as it was not the best evidence, the petition being the best, and that it called for the witness' opinion. The court overruled the objection, and the plaintiff excepted at the time.) A. Yes, sir; and is asking judgment for the proceeds of the sale of this land. He is asking judgment for one-fourth of \$1,070, the whole amount received by me from both O'Bannon and Parks. He is seeking to recover judgment for one-fourth of this sum. O'Bannon lives in Colorado. Q. Did he know anything about Nalle having any claim to the property? A. He is perfectly innocent purchaser. He came here on a visit at the time I sold him this property, and he had no idea that anybody had any claim to the property."

On cross-examination, he states: "Q. Benson, when I was working in the Gray case, didn't I tell you, in your office, that I could not take you because she would not tolerate you to be in the case? A. If you told me, I don't remember it. Q. Didn't I tell you at the time that we would take that deed and share equally in the estate? A. No, sir; I never heard you say anything about it. Q. Don't you know that, when you bought at

the administrator's sale, that was a voluntary payment on your part, when you owned the Gabriel note [title]? A. I bought that to get a clear title to this property. Q. Then at the Gabriel sale you got the entire homestead? A. Yes, sir. Q. The incumbrance was \$185? A. I don't know what it was. Q. You say you paid \$605 on the Gabriel deed of trust sale? A. Yes, sir. Q. You had that note allowed against Bob Gray? A. No; if I had an allowance, it was money which was due to me individually. Q. Now, don't you know that that money, \$605, less the \$185 Gabriel debt, was never turned over to the estate? A. That did not concern me. Q. The \$185 was the incumbrance. It was assigned to you at the time you were co-tenant with me—at the time you got the Gabriel debt? A. Yes, sir. Q. Was it not your business to see where it went? A. No, sir; I did not so consider it. Q. At the time you received the title from Mary F. Gray, you knew I paid the purchase money. Did you not know that for my services the \$250, as you state in your answer to my petition, was the retainer for my services rendered her in the justice of the peace court? A. I did not know what your contract was with Mrs. Gray. Q. Didn't you know it was the retainer alone? A. I didn't know what your \$250 was. I considered it was your fee in that case. Q. You were then able to pay off this incumbrance? A. Yes, sir. Q. You knew that all that had been against the Gray property was the Hudson note and the Gabriel note; also the note of \$255? A. That is all in Bob Gray's lifetime. Q. Now, the other liens were general creditors. The general creditors could only take part interest in the Bob Gray estate? A. I can't swear as to that. Q. You became owner in part with me in the Mary Gray interest in that land prior to your acquiring any title to that land? A. I believe the deed of Mary F. Gray to Nalle and Cahoon, dated the 16th day of July, 1891. The deed itself answers your question. The deed of R. P. Callaway, under the Gabriel trust, to B. B. Cahoon, seems to have been executed on the 25th of April, 1892. Q. You became owner under the deed of trust to Hudson prior to the time you bought at the Callaway sale? A. About two weeks before. Q. I will ask you if you were not to pay off these incumbrances? A. You, nor anybody else, never told me that you expected me to pay off that incumbrance, and I never agreed to do so, or expected or intended to do so. Q. Under that sheriff's deed you took possession of the whole estate? A. I took possession of the estate under the Hudson deed. Q. You stated awhile ago that you took possession of the estate under the Hudson deed of trust? A. Not till after both sales—under it and the Gabriel deed of trust. Q. You had before the administrator's sale the title under the sheriff's sale? A. Of the homestead proper, I think

I had. Q. You bought at the administrator's sale? A. Yes, sir. Q. Did you at any time from the time of this transaction up to the present time claim that I owed you anything, or ask me to contribute for acquiring the title to that property? A. Judge, I had lost money on that property. Buying the property, as I have explained, under the two deeds of trust and the administrator's sale, it was mine, and I did not ask you. Q. You knew that, under that deed to you and me from Mary Gray, we were co-tenants in common to that land? A. In a sort of legal sense, I suppose we were. I acquired my legal title from Callaway deed of trust and from the administrator's sale. Q. You knew that I never received from Mary Gray one dollar, except that note? A. I didn't know what you received. I heard shortly afterwards that you had cashed that note. Q. You didn't consider that a reasonable fee in that case? A. A very reasonable fee for you, Judge, had you received it, would have been \$5,000, for the saving, as you did, of her neck. Mary J. Gray never had enough land or property to pay you for what your services were worth to her, for you, in my judgment, saved her from hanging. (Witness, in all of the cases in which he was senior counsel, and in which appellant assisted, collected the fees, and paid appellant one-half, as he says, amounting to about \$2,000.) Q. From the time of our acquiring title up to the present time, you never asked me for contribution? A. No; I told you three or four times that I came out of the little end of the horn. Q. Now, here, we were co-tenants in common (in fee) under that Mary J. Gray deed, and you had possession of the property from that time up to the present time? A. In a legal sense, I suppose we were in common, so far as what Mary J. Gray had left in that land after the deeds of trust and her election. Q. She elected to take a child's part? A. Yes, sir. Q. Then we owned deed of Mary J. Gray? A. Yes, sir; with you for what it was worth. Q. You say that you didn't give us notice of your intention to pay off the liens against the homestead? A. I testified that, for I never paid off the Gabriel deed of trust, and you know when I bought it. I kept nothing from you at all. Q. What have you claimed against me that you didn't inform me of? A. I informed you. You knew that the money was paid by me for the assignment of the Gabriel deed of trust. I don't believe that you suggested that I should buy at the administrator's sale. Q. Don't you know that no part of the \$605 you paid at the sheriff's sale was ever paid into the estate—to the administrator of the Gray estate? A. I don't know what became of it. Q. Don't you know that you were the cause of paying both the \$605 and the \$100 you paid at those sales? A. I don't know anything about that. I don't know whether the money went back

to the Robert Gray estate or ours, because I was not concerned in the management of the Robert B. Gray estate."

Cahoon testified in behalf of the defendants, and denied substantially Nalle's statement with respect to the transaction out of which this litigation has grown. He also testified that at the time of the trial of this suit there was pending in the circuit court of Madison county an action by Nalle against him upon open account, in which one of the items is as follows: "To said Nalle's fee in case of State v. Mary J. Gray, collected on sale of land to Wm. Parks and Joseph O'Bannon, net receipts by said Cahoon on such sales and rents, \$1,070.00, of which said Nalle is entitled to one-fourth, \$254.00"

The trial resulted in a judgment for defendants, from which plaintiff, after unsuccessful motion for new trial appeals.

Wm. N. Nalle and Anthony & Tesereau, for appellant. B. B. Cahoon, Jos. J. Russell, and Moses Whybark, for respondents.

BURGESS, J. (after stating the facts). It is well settled in this state that, to support an action of ejectment, the plaintiff must be vested with the legal title to the land in question at the time of the commencement of the action, and that he cannot recover upon a merely equitable title. *Ford v. French*, 72 Mo. 250; *Dunlap v. Henry*, 76 Mo. 106; *Turner v. Dixon*, 150 Mo. 416, 51 S. W. 725. Therefore, conceding that plaintiff and Cahoon acquired, as tenants in common, all of the right, title, and interest of Robert B. Gray and his wife, Mary F. Gray, in the land in question, by virtue of the deed by Gray and wife to them of date July 16, 1891, it was subject to the deed of trust then upon the land executed by Gray and his wife prior thereto, to wit, on the 28th day of October, 1889, to J. F. Edwards, trustee for J. P. Gabriel to secure the payment of a note for \$150, payable by the grantors in said deed to Gabriel; hence Nalle and Cahoon only acquired by said deed to them the equity of redemption of Gray and wife in the land, or, in other words, the title subject to the deed of trust. Then, when Cahoon purchased the land at the sale made by the sheriff of Madison county, acting as trustee under the deed of trust, and received a deed therefor, he acquired the legal title to the land; the effect of the sale and deed being the extinguishment of all right of Gray and wife in the land, and all persons claiming under them. In *Kingman v. Sievers*, 143 Mo. 519, 45 S. W. 266, it is said: "While in the action of ejectment the legal title to real estate is not always determined, the action, by the express language of the statute, can only be

maintained by those who are 'legally entitled to the possession thereof,' in contradistinction to those holding an equitable claim or right thereto, that may, on proper proceedings to that end, be made legal, so as to authorize an after-action of ejectment for possession for such real estate. It is the legal title only that is recognized as the ground of action, and the plaintiff must recover in ejectment, if at all, on the strength of that title, and not on the weakness of that of defendant, or that it has a superior equity to him. Plaintiff's interest in the land in suit, if it be conceded that S. P. Nichols paid to defendant the entire consideration therefor, was still equitable, and not legal." So that, whatever the equities between plaintiff and Cahoon may be with respect to the land, as the legal title was at the time of the commencement of this suit in the defendant O'Bannon, plaintiff cannot recover in this action. It will not do to say that, because Nalle and Cahoon were tenants in common in the land, when Cahoon bought a prior title thereto it at once vested in them in common, although the deed was to Cahoon alone, for the title to land can only be conveyed by deed, so that, at most, that deed only created in plaintiff an equitable one half interest in the land. While the facts might have formed the basis for a suit in equity by Nalle against Cahoon for a decree for one-half interest in the land acquired by him through his deed from the trustee, upon the payment of an equal proportion of the expenses incurred by Cahoon in obtaining it (*Van Horne v. Fonda*, 5 Johns. Ch. 388; *Baker v. Whiting*, 3 Sumn. 475, Fed. Cas. No. 787; *Nalle v. Parks* (not yet officially reported) 73 S. W. 596, he cannot maintain this action upon a title which is merely equitable. Nor would such a proceeding affect O'Bannon, unless he be made a party thereto, and it be shown that he had notice of plaintiff's equity at the time he purchased the land from Cahoon. Moreover, the record discloses that on the 8th of February, 1899, Nalle brought suit against Cahoon in the circuit court of Madison county on an account for \$2,273, which was pending at the time of the trial of this case, one of the items in which was for \$254, being one-fourth of the purchase money received by Cahoon on this sale of land to William Parks and Joseph O'Bannon, and rents, which amounted to a confirmation of the sale of the lands by Cahoon to them, and should estop plaintiff from the prosecution of this suit, for he could not, either at law or in equity, claim both the land and the proceeds arising from its sale.

Finding no reversible error in the record, the judgment is affirmed. All of this Division concur.

STATE v. RODMAN.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

HOMICIDE—CHANGE OF VENUE—SUFFICIENCY OF CLERK'S CERTIFICATE—SPOILIATION OF TRANSCRIPT—PAROL EVIDENCE—FILING ORIGINAL INDICTMENT—ADMISSIBILITY OF EVIDENCE—REMARKS OF COUNSEL—MURDER IN THE SECOND DEGREE—SUFFICIENCY OF EVIDENCE.

1. Under Rev. St. 1899, § 2586, relating to change of venue, and providing that the clerk of the court shall make out a full transcript of the record "and proceedings" in the cause, the clerk's certificate on a change of venue in a prosecution for murder that "the above and foregoing is a full, true, and a complete transcript in the above-entitled cause" is sufficient.

2. An insufficient certificate to the clerk's transcript required on a change of venue in a murder prosecution will not affect the jurisdiction of the court to which the cause is transferred.

3. It is not error, as permitting proof by parol evidence of spoliation of a transcript, to permit the clerk of the court from which a murder prosecution is transferred on change of venue to testify to his official capacity, and to identify the original indictment, containing words which have been erased in the transcript.

4. On a change of venue in a murder prosecution, where the state claims an erasure from the transcript of words contained in the original indictment, it is proper to permit the original indictment to be introduced in evidence, instead of a copy thereof.

5. On a change of venue in a murder prosecution, where the state has proved an erasure from the transcript of words contained in the original indictment, the filing of the original indictment and proceeding, with the trial thereon, while perhaps irregular, is not prejudicial error.

6. In a prosecution for murder, where it appears that, about a year before the homicide, deceased had assaulted and wounded defendant, and that between that occurrence and the killing a committee of neighbors had called on deceased in regard to the difficulty between him and accused, evidence of the personnel of the committee is properly excluded.

7. Where a witness in a murder prosecution has already testified that, immediately after deceased made threats against accused, he communicated them to the latter, it is not error to exclude a repetition of the testimony.

8. Where, in a criminal trial, defendant's counsel, after an objection to a question had been sustained, framed the question so as to include time and place, whereupon another objection is overruled, and counsel then excuses the witness from answering, there is no error as against accused.

9. In a prosecution for murder, growing out of a difficulty occasioned by accused's attentions to the daughter of deceased, it is not error to exclude the daughter's testimony in regard to her engagement to accused, or how she departed herself in his presence.

10. On the trial of a murder case the state's counsel said to the jury that, when the commission of a crime was charged, an accused had the right to a preliminary examination before a justice, and if the justice made a mistake it could be corrected by the grand jury, and if the grand jury made a mistake it might be corrected on trial in the circuit court, and if the circuit court made a mistake it might be corrected by the Supreme Court, and if that court made a mistake the Governor might pardon. At this point defendant's counsel interposed an objection, which was sustained. *Held*, that the remarks were not ground for reversal.

11. The fact that decedent had previously assaulted and wounded his murderer, and that

bitter feeling existed between them, does not justify the latter in lying in wait and murdering decedent.

12. Evidence in a prosecution for murder, considered, and *held* to sustain a conviction of murder in the second degree, as against defense of self-defense and circumstance on to reduce the crime to manslaughter.

Appeal from Circuit Court, Randolph county; John A. Hockaday, Judge.

Mayo Rodman was convicted of murder in the second degree, and appeals. Affirmed.

The defendant, Mayo Rodman, was arrested at the December term, 1900, of the circuit court of Callaway county for murder in the first degree, of Charles Davis, in Randolph county, on the 25th day of October, 1900. He was duly arraigned and pleaded "guilty" in the Callaway court. After the February, 1901, he made application to the circuit court, for a change of venue to Randolph county on account of the prejudice to the inhabitants of Callaway county against him, and this application was sustained. The change awarded to Randolph county was made in the same circuit; and the clerk was directed to transmit a complete transcript of the record to the clerk of the Randolph circuit court, which was done, and the transcript was filed in the latter court February 11, 1901. The cause was continued at the March term of the Randolph court, and was tried at the September term, 1901, and resulted in a verdict of guilty of murder in the second degree, and his punishment assessed at 25 years of the penitentiary. After motions for new trial and in arrest were filed and overruled, defendant was sentenced in that court.

The homicide out of which this prosecution grew occurred on the 25th of October, 1900. The defendant, Rodman, and Charles Davis, the deceased, resided on adjoining farms in Callaway county, near the town of Armore. The defendant lived with his widow, and sister, and was a bachelor. Davis, the deceased, was a farmer, and some 10 years before he was a school-teacher. Davis, the deceased, was a married man. His family consisted of a wife and five children, among whom was a daughter, Minnie Davis, a girl about 15 years of age at the time of the homicide. The defendant became enamored of this young girl, and began to pay her marked attention. This was finally ordered by deceased to cease. Attention to the girl, as it was distasteful to her parents; but he continued to go on the road to school, and wherever he went when she was away from her home, until finally culminated in a difficulty between them about a year before this homicide. On the day of the homicide, the deceased shot and wounded defendant. The matter was taken before the grand jury, and the deceased was discharged. From that time a very bitter feeling existed between deceased and defendant. Threats were made by both sides. Some weeks before the killing of deceased, defendant procured a new Smith & Weston revolver, and

different occasions that, if deceased ever assaulted him or crossed his path, he intended to kill him. On the afternoon of October 25, 1900, deceased was engaged on his farm, working at his corn pens, stretching wire around them; and his son, Nelson Davis, 17 years old, was plowing in the field adjoining the pens, about a quarter of a mile distant. The deceased had one mule, that he was using to pull the wire up to the pens. The son could see his father at work. About sundown the boy quit plowing a little before his father did. He saw his father stop work and start home, and the boy also started to the barn with his team. When within 15 or 20 feet of a gate through which he had to go to reach the stables, his son heard a shot fired. He looked toward his father, and saw him jump or slide off of his mule, and the mule ran away. He testified that the first shot did not strike his father, but immediately a second shot was fired, which caused his father to drop on his face. Four shots were fired in rapid succession. He saw Rodman, the defendant, standing behind the partition hedge fence, firing at his father. When the first shot was fired, he heard defendant say, "Now, by G—d! your time has come." He was then about 100 yards from his father, and ran to him. The deceased fell about 27 steps from the hedge fence. Defendant was about 40 yards distant from deceased when he shot him. The hedge at the point from which defendant shot was thick and well calculated to conceal him from deceased. As defendant shot the last shot, he called to the son, Nelson, and said, "I dare you to come up here." When the first shot was fired, Mrs. Davis heard it, and ran out and ran to her husband. According to the state's evidence, the deceased had his back to defendant when the latter shot him. On the part of defendant, he testified that deceased was approaching him with an uplifted ax in his hand, and his other hand at his pistol pocket, and cursing, abusing, and threatening him, and remembering the former difficulty between them, he shot him in self-defense. On the part of the state, William Black testified he was at the home of Rodman the next morning after the shooting, and defendant was in charge of the sheriff, who permitted the defendant to go to the barn. Black walked with him, and said to him: "Mayo, how did it happen? Where did it occur?" Defendant answered: "East of the dead tree. I was there, and Davis was there, on his side of the fence, and he came running along there with his ax drawn, and I pulled my pistol and shot three times in succession." "He said Davis aimed to turn, and he shot three times. He said the second shot did it." Other witnesses stepped off the ground, and testified it was 27 steps from where deceased fell to the point behind the hedge from which defendant shot. There was also evidence tending to show that deceased was on his mule when defendant first shot at him, as

the ball struck the gable of a chicken house, and ranged upwards into the shingles; the house being in a direct line from the point at which defendant shot, and where deceased fell. Mrs. Davis, the wife of deceased, testified that when she reached her husband he was dead, and she straightened out his limbs and put a shawl over him. In turning him, she found he was lying on an ax, and she pulled it out and threw it aside. The testimony further showed he had sent to the house for the ax, to use it in his work about the corn pens that afternoon. The evidence on part of defendant further tended to prove several other assaults by deceased on defendant between the shooting in October, 1899, and the fatal encounter on October 25, 1900. The court fully instructed the jury on murder in the first and second degrees, manslaughter in the fourth degree, and self-defense, and on all other propositions of law arising in the case which were necessary. Indeed, no objections are urged in this court to the instructions given by the court of its own motion, and none asked by defendant were refused. The facts upon which a reversal is sought will be noted in connection with the several assignments of error.

L. W. Boulware and D. P. Bailey, for appellant. The Attorney General and Sam B. Jeffries, for the State.

GANTT, J. (after stating the facts). 1. The main insistence of the defendant is that the circuit court of Randolph county had no jurisdiction to try this case, first, because the transcript from the Callaway court was not properly or legally certified by the clerk of that court. Section 2586, Rev. St. 1899, provides that "whenever any order shall be made for the removal of any cause under the foregoing provisions, the clerk of the court in which the same is pending shall make out a full transcript of the record and proceedings in the cause, including the order of removal, the petition therefor, if any, and the recognizance of the defendant and of all witnesses, and shall transmit the same duly certified under the seal of the court to the clerk of the court to which the removal is ordered." The certificate of the clerk of the circuit court of Callaway county to the transcript sent to the Randolph court is as follows: "State of Missouri, County of Callaway—ss.: I, A. M. Jameson, clerk of the circuit court within and for the county and state aforesaid, do hereby certify that the above and foregoing is a full, true and complete transcript in the above-entitled cause as full as the same remains of record in my office. Witness my hand and official seal. Done at office in the city of Fulton, county and state aforesaid, this February 7th, 1901. A. M. Jameson, Clerk. [Seal.]" The transcript itself contained the opening order of the circuit court of Callaway county on the 10th day of December, 1900, showing the

presence of the judge of said court, Hon. John A. Hockaday, the prosecuting attorney, sheriff, and clerk; the administration of the oath to the sheriff and his deputies in regard to summoning jurors; the impaneling of the grand jury; and then, on the 18th day of December, 1900, the return into court of an indictment against Mayo Rodman for murder, and of the delivery of a copy thereof to the defendant's counsel; and then follows a copy of the indictment itself; that afterwards, on the 15th of December, 1900, the defendant was duly arraigned, and entered his plea of not guilty; and the continuance of the case till the next term of the court. The transcript then contains a copy of the petition for a change of venue, in vacation, before the next term, and the order of removal, granting a change of venue to Randolph county. The certificate is a substantial compliance with the statute. The statute requires a full transcript, but the clerk, in addition, certifies, and properly, that it is a true and complete transcript. It would seem that the omission of the words "and proceedings" is the basis of the contention; but as the proceedings in a court of record can only be known by its record, and as the clerk certified a full and complete copy of the record, he certified everything that he was authorized to do, and that was sufficient. But if there had been an insufficient certificate, it would by no means have followed that the circuit court of Randolph county had no jurisdiction of the case. On the contrary, it would have been entirely competent for the circuit court of Randolph county to have made a rule on the clerk of the Callaway court to have perfected his transcript by a proper certificate. The power and the right to so order necessarily admits jurisdiction in the court making such order. Nothing is better settled than this. *State v. Bell*, 136 Mo. 120, 37 S. W. 823; *State v. Haws*, 98 Mo. 193, 194, 11 S. W. 574, 12 S. W. 126; *Henderson v. Henderson*, 55 Mo. 534; *Laporte v. State*, 6 Mo. 208. The mere inaccuracy of the clerk in certifying a transcript does not affect the jurisdiction of the court to which the cause is ordered removed. It is the order of removal that divests the court making it of its jurisdiction. *Belt Ry. Co. v. Ry. Co.*, 118 Mo., loc. cit. 619, 24 S. W. 478. Nor is this principle inconsistent with the rule that during the term, and before the change of venue is certified, the court may set aside its order. *State v. Noland*, 111 Mo. 488, 19 S. W. 715; *State v. Daniels*, 66 Mo. 192. We must therefore hold that the circuit court of Randolph county was fully possessed of jurisdiction to hear and determine the case.

2. The next proposition urged by defendant is that the circuit court had no power to permit the transcript to be amended by parol evidence. To a correct understanding of this point, we must have recourse to the record, to see what was in fact done. The

record recites that before any evidence was heard, and before the indictment was read, the prosecuting attorney stated to the court that he had just discovered that the copy of the indictment in the transcript had been effaced and mutilated by the erasure of the words "of which," near the close of the indictment, by some one unknown to him; and, to make good his assertion, he exhibited to the court the transcript, which disclosed that a line had been drawn horizontally through the words "of which," just before the words "mortal wound," in the closing words of the charging part of the indictment; and he thereupon asked leave to prove the erasure, and to show that no such spoliation was in the original indictment, or in the copy thereof in the transcript when it was certified to the Randolph court. To which defendant objected that it was immaterial, irrelevant, and incompetent, and no way to prove the records of another court, which objection was overruled, and defendant excepted. Thereupon Mr. A. M. Jameson, the clerk of the circuit court of Callaway county, was called and sworn, and testified that he was the clerk of the circuit court of Callaway county. Thereupon the original indictment preferred by the grand jury of Callaway county was handed to him, and identified by him as the original indictment preferred by the grand jury of Callaway county at the December term, 1900, of said court, against the defendant in this case, and that it was filed December 13, 1900. Upon an inspection of the original indictment, it was apparent that the erasure had been attempted after the transcript was certified; and the trial court so found, and then and there permitted and ordered the original to be filed and read as the true indictment in the case. Pursuant to the authority vested in this court by section 817, Rev. St. 1899, this court, by its rule on the clerk of the Randolph circuit court, directed him to transmit to this court said original indictment for our own inspection; and from such inspection it is plain that the spoliation occurred after the filing of the transcript in Randolph county. To this action of the court in thus correcting the record the defendant objected because the paper identified by the clerk was a record of the Callaway court, and has nothing to do with this court. In their brief the learned counsel for defendant state the transcript was withdrawn, and the original indictment substituted. This is a misapprehension. Nowhere in the record was there any offer to withdraw the transcript, nor was it allowed. To properly dispose of the contentions of defendant, we proceed to examine them in their order: First. It is insisted that it was not competent to prove the spoliation of the transcript by parol evidence. This is a mistake of fact. What the court permitted the prosecuting attorney to do was to produce the original indictment of the Callaway court, in the hands of the law-

ful custodian thereof, to wit, the circuit clerk of that county, and, having proved he was such clerk, have him identify the original indictment, which, on its face, disclosed that there was no line through the words "of which." This original record was the highest and best evidence of what that indictment was when preferred by the grand jury. It was record evidence, not parol evidence. While the proceedings of a court are provable only by its record, or by an authorized copy, properly authenticated, it was very correctly observed in *State ex rel. v. Maloney*, 113 Mo. 371, 20 S. W. 1064, that "this general rule carries with it the corollary that verbal testimony may sometimes be requisite to identify as the record a particular document." *Walter v. Belding*, 24 Vt. 658. This was all Mr. Jameson was called to do. He identified the paper offered in court as the original indictment—a record of the court of which he was the clerk, and the lawful custodian of its records. The proposition that it was not competent to prove the contents of the indictment by the original itself, because it was a file of the Callaway court, is utterly untenable. Nowhere is the true doctrine more clearly enunciated than by Mr. Justice Scholfeld in *Stevison v. Earnest*, 80 Ill. 513, in which he says: "It is said in books treating on evidence 'that the record itself is produced only when the cause is in the same court whose record it is, or when it is the subject of proceedings in a higher court.' But this has reference to the ability of the court to compel the production of the record, and not to the question of its sufficiency as an instrument of evidence if actually produced. The copy is receivable in evidence, not because it is better evidence than the original, but because it is presumed the original cannot be obtained. * * * It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence, for the mere fact of obtaining them does not change that which is written in them. Whether they are where they ought to be, or elsewhere, they are records of the court. * * * What end of justice can be subserved, when the records of one court are actually present in another court, by refusing to receive them in evidence, and requiring them to be returned to their proper custody, there to be copied, and then receiving the copy in evidence? The facts proved must be precisely the same, whether the originals or copies are read in evidence, and it must therefore be totally unimportant to the party against whom the evidence is offered, which it shall be." The doctrine is well-nigh universal. *Gray v. Davis*, 27 Conn. 447; *Williams v. Conger*, 125 U. S. 397, 8 Sup. Ct. 933, 31 L. Ed. 778; *Day v. Moore*, 13 Gray, 522; *Britton v. State*, 54 Ind. 541; *Folsom v. Cressey*, 73 Me. 270; *Miller v. Hale*, 26 Pa. 432; *People v. Gray*, 25 Wend. 465. The circuit court of Randolph county had indisputable evidence that

some one, either intentionally or by inadvertence, had drawn a line through two words of the indictment, as copied into the certified transcript. It had the original before it, and it had full jurisdiction to purge its records of anything which had been unlawfully placed upon them. No doubt whatever exists that it could have delayed this highly important public prosecution, and issued its writ of certiorari to the clerk of the Callaway court to certify anew the indictment found by the grand jury, or it could have made a rule on him to perfect the transcript, and for that purpose transmitted the record to him, or the clerk, by leave of the court, doubtless could have corrected the transcript by a new copy without either a rule or certiorari, but the mode adopted by the circuit court was equally efficient. His action was tantamount to a finding that the line drawn through the two words, "of which," was an unauthorized spoliation of a record of his court, and he ordered the true indictment filed, to correct his record; and, while this may have been somewhat irregular and unusual, it could not possibly have resulted in injury to the prisoner. It was this original indictment on which defendant had been arraigned, and to it, not the spurious copy, he had pleaded "Not guilty." It was his constitutional right to be tried on that charge, without change or variance. The issue was made up on that paper, and what possible benefit could have accrued to him to have sent the clerk back to Callaway and make a new copy of it? When the court ascertained, as it necessarily did, that some one had trifled with its records, it was its unquestionable and inherent right and duty to restore the same to their original state. In this case, in view of the unimpeachable and conclusive nature of the evidence, the court could have properly directed its clerk, by an order of record to that effect, to erase the unauthorized line; but it arrived at the same practical result by the method adopted, and in so doing committed no reversible error.

3. We come now to the other assignments of error. L. W. Bratton had testified that after the shooting of defendant, and prior to the fatal encounter, a committee of neighbors waited on deceased in regard to the difficulty between deceased and defendant. In the course of the cross-examination, counsel for defendant inquired the names of the committee, and on objection the court excluded the answer, and defendant excepted. This was not error. The action of the neighbors, while highly commendable and praiseworthy, did not affect the duty or obligations that deceased owed to defendant, or vice versa. It was entirely immaterial who constituted the committee, and the purpose of the inquiry was never disclosed to the trial court, and is not apparent to us. It is further alleged that error was committed in not permitting William Rodman, brother

of defendant, to testify when he communicated to defendant certain threats made by deceased against defendant. As the witness had already testified that, immediately after the deceased had made the statements to him, he told defendant, it would and could only have been a repetition of the same answer; and we doubt not that it was excluded on that ground alone, as otherwise it would have been competent and material. Having once answered the question, it was not error to decline to hear it again. Exception was also saved to the action of the court in refusing to permit Jeff Hume to testify to certain threats by deceased in the presence of the witness. The record discloses that, when the defendant's counsel framed the question so as to indicate the time and place when the alleged threats were made, the court overruled the objection and directed this witness to answer, and defendant's counsel said, "I will excuse him from answering it." Obviously there is no merit whatever in this contention. It is hardly necessary to add it was not erroneous to exclude what Minnie Davis had said in regard to her engagement to defendant, or how she departed herself in his presence. They threw no light on the issue on trial.

4. Error is predicated on the remark of the prosecuting attorney. It appears that the prosecuting attorney, for some reason not disclosed, because we are not favored with the connection in which he used the words, said: "Gentlemen of the jury, when a crime has been charged to have been committed, the defendant has the right to a preliminary examination before a justice of the peace. If the justice makes a mistake, the mistake may be corrected by the grand jury; and, if the grand jury makes a mistake, then it may be corrected on trial in the circuit court; and, if the circuit court makes a mistake, then it may be corrected by the Supreme Court; and, if that court makes a mistake, the Governor may pardon." At this point, and before any application of this statement had been made, defendant's counsel objected; and the court sustained the objection, and directed counsel to proceed and keep in the record, and thereupon that line of argument was abandoned. No complaint was made that the rebuke was not severe enough, if it merited any. But it is obvious that, while it had no relevancy to the issue, the counsel made no misstatement of the law, and we are wholly in the dark as to what use he intended to make of it when he was stopped. It is too plain for serious consideration that this statement of what every intelligent citizen in the state knows to be the law, without making any application of it, is no ground to reverse a judgment.

5. Finally it is insisted the judgment is against the law and the evidence. No objection is made to the instructions, and we discover none after a careful examination. Indeed, we may say that more liberal and

favorable instructions have never been given a defendant, within our experience. The evidence discloses a case of extreme bitterness on both sides, which had resulted in the deceased shooting the defendant about one year previous to the shooting of deceased by defendant. The cause of this ill feeling is not left in doubt. It originated in the attentions of defendant to the young daughter of deceased, and his persistency after being forbidden to see her. That deceased manifested and expressed a deep feeling of hatred toward defendant, growing out of his relations with Miss Minnie Davis, is apparent; but, granting and conceding all this, the evidence tended strongly to show that defendant, armed with a deadly revolver, on the evening of the homicide, secreted himself behind the hedge fence which formed the partition between the farm of Mrs. Rodman and deceased, and near the route which deceased would naturally take when he quit work and returned to his house that evening, and that as deceased was riding to his house on his mule the defendant, from his hiding place, shot at deceased, and missed him the first time, and that deceased, having jumped from his mule, and with his back to defendant, was shot by defendant without having made any assault, or given defendant any just or lawful provocation at the time. We say the evidence, if believed by the jury, would have sustained such a finding, and it was their province to believe or disbelieve this evidence. If they did, it amply justifies a conviction of murder. Grievous as were the previous provocations and assaults by deceased on defendant, they did not authorize defendant to lie in wait and take the life of deceased, and thus avenge his wrongs. In the absence of some act on the part of deceased that evening showing a determination to renew the difficulty with defendant, the law will not justify his gratification of his revenge for the past indignities and assaults put on him by deceased. On the other hand, if the jury had found and credited the evidence of defendant that deceased, without provocation, assaulted him with an ax, and was close enough to have hit him with it by throwing it at him, and knowing of the threats of deceased, and remembering the previous difficulties, the defendant had cause to believe deceased was about to kill him or inflict great bodily harm on him, and, so believing, shot and killed deceased, he was justified in so doing on the ground of self-defense. The court so instructed the jury. They believed the evidence for the state, and rejected defendant's account of the tragedy. The case was fairly and impartially presented to the jury, the law was correctly laid down, and there is no ground for ascribing passion or prejudice to the jury in reaching their conclusion.

After a careful review of all the evidence and the law as declared by the court, we

are unable to find any error which would justify us in reversing the judgment, and it is accordingly affirmed.

BURGESS and FOX, JJ., concur.

WHITE v. SMITH et al.

(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

MORTGAGES—FORECLOSURE BY ACTION—REDEMPTION—EQUITABLE REDEMPTION—MORTGAGE OF WIFE'S PROPERTY—SURETY FOR HUSBAND—EXTENSION OF TIME—DISCHARGE—SALE OF PROPERTY—SURPLUS—RENTS—APPLICATION.

1. Rev. St. 1899, § 4342, authorizes the foreclosure of a mortgage by judgment, and declares that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount due. Sections 4343, 4344, provide that when a mortgage or deed of trust is foreclosed according to a power of sale contained therein, the mortgagee may redeem within 12 months. *Held* that, where foreclosure is had by judgment under section 4342, the mortgagor has no right of redemption after sale.

2. Where a mortgage is foreclosed by judgment, as authorized by Rev. St. 1899, § 4342, providing for a foreclosure of the equity of redemption, a right to redeem in equity after the sale does not exist in the absence of fraud, mistake, or overreaching.

3. Plaintiff's husband borrowed money, to secure which he executed mortgages on his separate property to improve it, and no part of the money borrowed was applied to the benefit of plaintiff's separate estate. After such mortgages had matured, plaintiff and her husband, as additional security, executed a deed of trust on three city lots, numbered 1, 2, and 3, respectively, of which plaintiff owned lot 1 and a half of lot 2, and the husband owned lot 3 and the other half of lot 2. The beneficiaries under such deed had knowledge that it was given to secure the husband's debt, and that the money loaned had not been applied to plaintiff's benefit. *Held*, that the wife and her property were surety merely for the husband's debt.

4. Where, in consideration of \$180 paid by a mortgagor to the mortgagees on the indebtedness secured and the payment of costs of the advertisement of a foreclosure sale of the property, the mortgagees agreed, without the knowledge of the mortgagor's wife, who was surety for the debt, that the sale should not be made as advertised, and that they would not advertise the property for sale under the mortgage until a later date, such agreement constituted a suspension of the mortgagees' right to foreclose the mortgage, which operated to discharge the wife from liability.

5. Where, at the trial of an action of ejectment to recover land sold under mortgage foreclosure, the mortgagor's wife, who was liable only as surety, had no knowledge of an agreement between the mortgagees and her husband extending the time of payment, by which she was discharged from liability, her failure to interpose such defense was no objection to her urging the same in a subsequent bill to restrain the enforcement of the judgment in ejectment, and for the surplus arising on the sale.

6. Where a wife, who was surety for her husband in a second mortgage, including her separate property, to secure his debt, was discharged from liability by an extension of time by the mortgagees, who subsequently purchased a judgment foreclosing the first mortgage, on

which the wife was liable, a surplus arising on the sale of the wife's property under the first mortgage was payable to her, and was not applicable to the second mortgage.

7. Where a wife mortgaged her separate property as surety for her husband's debt, and was discharged by an extension of time given by the mortgagees to her husband under an agreement permitting them to collect the rents from the property, together with property owned by the husband, which was covered by the mortgage, the wife was entitled to recover such part of the rent so collected as accrued from the property belonging to her.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by Mary B. White against Martha E. Smith and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This is a bill in equity for leave to redeem the land in controversy from sale under execution in an action to foreclose a mortgage, or, if not allowed to redeem, then for the surplus arising from the sale, and for an injunction to restrain the enforcement of a judgment in ejectment. The trial court found for the plaintiff, permitted her to redeem upon certain terms imposed, and enjoined the enforcement of the judgment in ejectment. The defendants appealed.

The case made is this: On October 10, 1888, the plaintiff owned lot 1 and the west half of lot 2 in block 93 of Smith & Martin's First addition to Sedalia. Her husband owned the east half of lot 2 and the whole of lot 3. They lived upon lot 1. Lots 2 and 3 were improved, and the tenement houses thereon were leased. On October 10, 1888, Joseph G. White borrowed \$5,000 from the Penn Mutual Insurance Company, and gave therefor his note, secured by a deed of trust, in which his wife, the plaintiff, joined, covering all three lots aforesaid. On February 6, 1890, Joseph G. White borrowed \$7,000 from the defendants Martha E. Smith and Sarah E. Cotton, and to secure the same Mr. and Mrs. White executed their note, secured by a deed of trust on certain land owned by Mr. White in Kansas City. At the same time Joseph G. White borrowed \$5,000 from L. S. Mitchell, and to secure the same gave him a deed of trust on certain land owned by him in Kansas City. Thereafter the defendant Phil E. Chappell purchased the Mitchell note, and still owns it. S. P. Johns was surety for Joseph G. White, and, to secure him, Mr. and Mrs. White, on November 23, 1896, executed to him a deed on all three of said lots for \$3,500. Afterwards Johns had to pay the debt of White, for which he was surety, amounting to \$232.05, and was about to foreclose the deed of trust, when, at the request of Mr. and Mrs. White, the defendant Phil E. Chappell, on October 30, 1897, purchased the deed of trust from Johns, and still holds it. On November 23, 1896, Mr. and Mrs. White executed to the defendant Ittel, as trustee for the defendants Mrs. Smith, Mrs. Cotton, and Mr. Chappell, a deed

¶ 3. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 630, 682.

of trust on the three lots aforesaid, as an additional security for the \$7,000 borrowed from Mrs. Smith and Mrs. Cotton and the \$5,000 borrowed from Mitchell, and then held by Chappell, as aforesaid, and to cover certain unpaid interest due on said loans. As a consideration for this additional security the holders of the notes secured reduced the interest on the loan to 7 per cent. This deed of trust recites that it is subject to the deeds of trust given to the Penn Mutual Life Insurance Company and to Johns, and contained a provision that, if the makers did not pay off the said prior deeds of trust, the parties of the third part (Smith, Cotton, and Chappell) might, at their option, do so, and in such event the same should become a debt due to said third parties, "and be secured by this instrument in the same manner as said notes were secured." The Ittel deed of trust was made to fall due October 20, 1898. None of these deeds of trust were paid by Mr. or Mrs. White, and thereafter, in July, 1899, Mrs. Smith, Mrs. Cotton, and Mr. Chappell caused the trustee, Ittel, to advertise under the deed of trust dated November 23, 1896. Thereupon Mr. White entered into the following contract with Mrs. Smith, Mrs. Cotton, and Mr. Chappell (Mrs. White did not sign the contract, and does not seem to have known of it at that time): "Certain property of J. G. White is advertised to be sold this 22nd day of July, 1899, under a deed of trust made by said J. G. White and Mary B. White, his wife, to Adam Ittel, trustee for Martha E. Smith, Sarah E. Cotton and Phil E. Chappell, dated Nov. 23, 1896, and recorded at the recorder's office in and for Pettis Co., in Book 111, page 526. To which deed of trust and record thereof reference is specially made. In consideration of \$180 paid by the said J. G. White to said Smith, Cotton and Chappell on the indebtedness secured by said deed of trust and the payment of costs of said advertisement, said Smith, Cotton and Chappell hereby agree that said sale shall not be made as advertised and also agree to not advertise said property for sale under said deed of trust until after Sep. 11, 1899. On Sept. 12, 1899, said White agrees to deliver possession of the property covered by said deed of trust to the said Adam Ittel, trustee as aforesaid, for the use of said Smith, Cotton and Chappell, and at that time said White is to have the tenants in the houses on said lots two (2) and three (3) attorn to said Ittel as trustee as aforesaid. And said White who now occupies the building on said lot one (1) agrees to rent the said lot 1 at a rental \$20.00 per month, payable monthly at the end of each month, and in case of the sale of said property under said deed of trust and a purchase of said lot one (1) by said Smith, Cotton and Chappell, they agree to continue the said White as tenant of lot one (1) and the buildings thereon for one year from Sept. 12, 1899, at a rental of \$20.00 per month,

payable at the end of each month. Signed and delivered in duplicate by said parties this 22nd day of July, 1899." Pursuant to this agreement Mr. White paid the \$180 on the past-due indebtedness, and gave an order to the tenants on lots 2 and 3 to attorn to Ittel, the trustee, which they did, and the trustee has collected the rents ever since. A lease on lot 1 was also prepared for Mr. and Mrs. White to execute, but they refused to do so, and repudiated that part of the contract. In the meanwhile, however, the Penn Mutual Life Insurance Company brought suit to foreclose its deed of trust, and made Mr. and Mrs. White, Mrs. Smith, Mrs. Cotton, Mr. Chappell, Mr. Johns, Mr. Lamm, and Mr. Ittel parties defendant, and on June 3, 1899, a judgment of foreclosure was duly entered as prayed, adjudging the debt to be \$5,171.70. No appeal appears to have been taken from this judgment. On October 14, 1899, Mrs. Smith, Mrs. Cotton, and Mr. Chappell purchased the judgment from the insurance company, paying therefor \$5,269.63.

This was the status of affairs on December 27, 1899, and on that date Mrs. Smith, Mrs. Cotton, and Mr. Chappell, the beneficiaries, caused Mr. Ittel, the trustee under the deed of trust of November 23, 1896, to institute a suit in ejectment against Mr. and Mrs. White for the recovery of lot 1 aforesaid. They appeared on February 5, 1900, and filed a joint answer, and such proceedings were had in the case that a judgment was entered for the plaintiffs on March 26, 1900, for possession, \$93 damages, and the rents and profits were assessed at \$25 a month. From this judgment the defendants appealed to the Supreme Court.

On March 31, 1900, Mrs. White began this suit, asking to have the Ittel deed of trust canceled, and the enforcement of the judgment in ejectment enjoined. On September 7, 1900, Mrs. Smith, Mrs. Cotton, and Mr. Chappell, the assignees of the judgment foreclosing the Penn Insurance Company deed of trust, caused an execution to be issued on said judgment, and the land (lots 1, 2, and 3) was sold on October 6, 1900. Lot 3 was sold first. A third party became the purchaser for \$1,600. Lot 2 was next sold to Mrs. Smith, Mrs. Cotton, and Mr. Chappell for \$3,375. Lot 1 was sold last to Mrs. Smith, Mrs. Cotton, and Mr. Chappell for \$3,000. Thus the sale realized \$7,975. The sheriff applied \$151.40 to the costs, \$5,587.88 to the judgment, and the balance of \$2,235.69 he asked leave to pay into court, because Mrs. White on the one hand and Mrs. Smith, Mrs. Cotton, and Mr. Chappell on the other had served written notices on him claiming the surplus. Mrs. White failed to prosecute her appeal in the ejectment suit, and on November 23, 1900, the appeal was dismissed by the Supreme Court for failure. But on November 10, 1900, Mrs. White filed an amended petition in this case. The gravamen of that petition is that she was a mere surety

for her husband, and that the defendants knew that to be the fact when they took the deed of trust on November 23, 1896, and that by the agreement made between Mr. White and the defendants on July 22, 1899, the time for the payment of the debt by Mr. White was extended by the defendants without the knowledge or consent of Mrs. White, and therefore she, as surety, was discharged, and the deed of trust on her lot 1 became extinct, and therefore the judgment in ejectment in favor of Ittel, the trustee thereunder, was without support or authority in law, and that she (Mrs. White) never knew of the agreement of July 22, 1899, until after the judgment in ejectment was rendered. The petition alleges that after the institution of this suit the defendants Mrs. Smith, Mrs. Cotton, and Mr. Chappell, assignees of the Penn Insurance Company judgment of foreclosure, caused an execution to issue on said judgment, and the land to be sold, and that at the date of the sale, on October 6, 1900, the judgment, with interest, amounted to \$5,586.93, and that lot 3 and the east half of lot 2 (this is a mistake, as the sheriff's return shows it was the whole of lot 2) sold for \$4,975, which was within \$611 of the amount due on the judgment, and that by deducting the rents that the trustee had collected from the tenants on lots 2 and 3, amounting to \$572, there was only \$99 due on the judgment after the proceeds of the sale of lots 2 and 3 were applied to the judgment. The plaintiff then says she is entitled to redeem lot 1, and asks that the defendants be compelled to accept \$99 as the balance due on the judgment, and that lot 1 be vested in her, or, if she be not entitled to redeem, then she asks that the surplus of \$2,901 be decreed to her, and, further, that the deed of trust of November 23, 1896, to Ittel, as trustee for the defendants, be canceled, and that the judgment in the ejectment suit be enjoined, and the execution issued thereon be quashed.

The circuit court canceled the deed of trust of November 23, 1896, enjoined the enforcement of the judgment in ejectment, quashed the execution, and entered a decree allowing the plaintiff to redeem lot 1 from the sale under the judgment of foreclosure in favor of the Penn Insurance Company upon condition that the plaintiff pay into court \$899.13, to be applied as follows: If the judgment should be affirmed on appeal, the fund to go to the defendants as the price of redemption; but if the judgment was reversed, and Mrs. White lost the case, then the fund, or so much as was necessary for the purpose, was to go to the defendants to pay them the rent for the house on lot 1 at the rate of \$25 a month. The surplus of \$2,235.69 was adjudged to the defendants. The court refused to take into account the rents collected by the trustee from lots 2 and 3. From this judgment the defendants appealed.

Sangree & Lamm, for appellants. Wm. S. Shirk, for respondent.

MARSHALL, J. (after stating the facts).

1. The first question is whether the plaintiff is entitled to redeem. There is no statute in this state allowing land sold under a judgment foreclosing a mortgage or deed of trust to be redeemed. A judgment in such a case stands upon the same footing as any other judgment, so far as the right of redemption is concerned. Section 4342, Rev. St. 1899, provides for a foreclosure of a mortgage by a judgment, "and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount due." In such cases no right of redemption after a sale under the judgment exists. If, instead of proceeding on the mortgage by judgment, the holder of the mortgage or deed of trust elects, as he may under section 4343, Rev. St. 1899, and has the mortgage or deed of trust foreclosed according to the power conferred by the instrument, and if the cestui que trust becomes the purchaser at the foreclosure sale, the mortgagor is entitled to redeem within 12 months after the sale, but is required to give bond to secure the interest to accrue within the year. Rev. St. 1899, §§ 4343, 4344; *Johnson v. Atchison*, 90 Mo. 48, 1 S. W. 751; *Godfrey v. Stock*, 116 Mo. 403, 22 S. W. 733; *Updike v. Elevator Co.*, 96 Mo. 160, 8 S. W. 779; *Vanmeter v. Darrah*, 115 Mo. 153, 22 S. W. 30. The Penn Insurance Company mortgage or deed of trust was foreclosed by a judgment of the court, and the equity of redemption was foreclosed by the judgment, as contemplated by section 4342, Rev. St. 1899. Hence no statutory right of redemption is present in this case.

This is a bill in equity, and therefore it is claimed the plaintiff had a right of redemption in equity. No ground for invoking the aid of a court of equity is stated in the petition. The debt, the deed of trust, the judgment of foreclosure, the assignment of the judgment, the execution and sale are all admitted, and there is no intimation of any fraud, mistake, unfairness, or overreaching in any of these predicates. The petition is predicated solely upon an absolute right in equity to redeem the land after the foreclosure of the deed of trust by a suit, a judgment, an execution, and a sale. No authority is cited in support of the position, and it is believed none can be found. The statute expressly provides for foreclosing the equity of redemption as well as for foreclosing the mortgage by the judgment. The doctrine that "the right to foreclose and the right to redeem are reciprocal and commensurable" (2 Hilliard on Mort. [4th Ed.] p. 2, § 2), does not apply to foreclosures under our statute, where the equity of redemption is also foreclosed, and applies to foreclosures by the mortgagee or trustee only as allowed by our statute (section 4343, Rev. St. 1899).

But, aside from all this, it will be noted that this suit was begun on March 31, 1900. The Penn Insurance Company judgment was rendered on June 3, 1899. The petition asked no relief as against that judgment. No request was made for leave to redeem the land then, nor was there any doubt cast upon the force or effect of that judgment. Thereafter, on October 6, 1900, the judgment was executed, and the property sold. The plaintiff stood by and saw her lot sold, and said not a word, and did not offer to pay anything. Lots 3 and 2 were sold first, and, according to the allegations of the petition and the evidence in this case, those two lots brought within \$611 of enough to satisfy the judgment. The plaintiff did not offer then to pay that (or any other) amount, and stop the sale, and save her property. On the contrary, she stood by, and permitted the sale to proceed. The sheriff had not received enough from the sale of the other lots to satisfy the execution, so he had no option but to proceed and sell the plaintiff's lot No. 1. After he sold it, the plaintiff made no claim or demand that she had any right of redemption, but, on the contrary, she filed a claim, in writing, with the sheriff, for the surplus after satisfying the execution. Thus at that time she asserted no claim of any right to redeem. After that she did not give the bond to secure the accruing interest, as required by section 4344, as a condition precedent to a right to redeem, even where the foreclosure is by the trustee or mortgagee, and not by suit. In short, no right to redeem is pleaded or proved, and that the plaintiff did not feel that she had safe ground to stand on in asserting a right to redeem, she pleaded, in the alternative, to be awarded the surplus if she was not allowed to redeem. The judgment of the circuit court allowing the plaintiff to redeem was, therefore, erroneous.

2. The next question is whether the plaintiff is entitled to the surplus resulting from the sale of the land under the judgment foreclosing the Penn Insurance Company deed of trust. This depends upon whether the plaintiff is entitled to have the deed of trust of November 23, 1896, to Ittel, trustee for the defendants, canceled, and the judgment in ejectment enjoined. If she so succeeds, there can be no question that she is entitled to the surplus, under the issues and pleadings as they stand in this case. The original purpose of this suit was to have the Ittel deed of trust canceled, and the enforcement of the judgment in ejectment enjoined. The plaintiff bases her claim upon the grounds: First, that she was a mere surety for her husband, and that the defendants knew it, and that her separate property (lot 1) was mortgaged solely as surety for her husband's debt to the defendants; and, second, that as such surety she was discharged, and her property released from the mortgage, because by the agreement of July 22, 1899, the defendants extend-

ed the time for the payment of the debt for which she was surety without her knowledge or consent. There is no room to doubt that the plaintiff and her property were merely surety for her husband's debt to the defendants, and that the defendants knew such to be the fact. The \$7,000 loan from Mrs. Smith and Mrs. Cotton to the plaintiff's husband was made on February 6, 1890, as was also the loan of \$5,000 from Mitchell to her husband, and these loans were secured by deeds of trust upon her husband's lands in Kansas City. The Ittel deed of trust was given November 23, 1896. At that time the debts it was given to secure were more than two years and a half past due. The Ittel deed of trust expressly declared on its face that it was given as additional security for the original debts. No new note was given, but by the terms of the Ittel deed of trust the grantors were given until October 20, 1898, in which to pay the original debt, and until default the deed of trust could not be foreclosed. It is true Mrs. White signed the original notes with her husband, but she testifies that Mrs. Smith and Mrs. Cotton and Mr. Mitchell knew that she was to be only a surety for her husband, and that of the \$12,000 so borrowed by her husband he expended \$10,000 in improvements on the Kansas City property belonging to him, that was mortgaged to secure those loans, and the remaining \$2,000 in providing sewers for the property, and that neither she nor her separate property profited a cent by the loan, and that the lenders knew these facts. Her testimony in this regard stands uncontradicted. The defendants were not even questioned on the subject.

In *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554, it was said: "Whether a contract executed by a married woman is one of suretyship or not will be determined by a consideration of whether or not it was made by her, or on her behalf, and upon a consideration moving to her, or for the benefit of her separate estate. To the extent that the consideration was received by her, or inured to the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was received by her husband, or that it went to pay a debt or liability for which neither she nor her property was bound, it will be held to be a contract of suretyship. * * * And whether she was principal or surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she receive, the consideration upon which the contract rests?" In *Bank v. Burns*, 48 N. Y. 170, *Smith v. Townsend*, 25 N. Y. 479, and *Trentman v. Eldridge*, 98 Ind. 525, it was held that, "where the title to the wife's property mortgaged for her husband's debts is recorded, such record will be sufficient notice to the

creditor of the fact of suretyship." In *Hubbard v. Ogden*, 22 Kan. 363, it was held that, where a husband and wife execute a mortgage on two separate pieces of real estate, one of which belongs to the husband and the other to the wife, and the mortgage is executed for the purpose of securing the individual debt of the husband, the wife is surety for the husband to the extent of her mortgaged separate estate. "Where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety." *Wheelwright v. Loomer*, 4 Edw. Ch. 232; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *McCollum v. Boughton*, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480. In *Knight v. Whitehead*, 28 Miss. 245, it was held that: "Where the fact of suretyship does not appear from the mortgage, the wife must show that the creditor knew of the suretyship, in order to entitle the property to stand in the position of a surety. But the fact of suretyship may be proved by parol." In *Leffingwell v. Freyer*, 21 Wis. 398, it was held that, "when a wife mortgages her real estate for the debt of a firm of which her husband is a member, such real estate occupies the position of a surety, and, if it becomes released at law, equity will not charge it." *Brandt on Suretyship and Guaranty*, vol. 1 (2d Ed.) § 35, lays down the general rule as follows: "While a married woman cannot usually become personally bound for the debt of her husband, she may ordinarily pledge or mortgage her separate property for his debt, and, if she does so, such property occupies the position of a surety or guarantor, and will be discharged by anything that would discharge a surety or guarantor who was personally liable." The author cites a large number of cases which fully support the text. It follows, therefore, both from the uncontradicted testimony of Mrs. White and from the record evidence and physical facts in the case, that Mrs. White and her separate property stood only as surety for her husband's debt, and that the defendants knew such to be the fact.

The defendants claim, however, that *Chappell* bought the Johns deed of trust, and that by the terms of the *Ittel* deed of trust he was entitled to buy it, and, if he did so, the *Ittel* deed of trust was to stand as security for the Johns debt. This is true. But the Johns deed of trust was given to secure Johns against loss as surety for plaintiff's husband, and Johns afterwards paid the debt for which he was surety. So this does not help the defendants at all, for this is a debt of the husband, and at best the wife and her separate property is only surety for it.

The preponderance of the evidence likewise sustains the finding of the trial court that the plaintiff did not know of the contract of July 22, 1899, between her husband and the

defendants, until the conclusion of the trial of the ejectment suit, and that she never ratified that agreement, but within a very few days after that trial she brought this suit. The serious question in this case, however, is whether or not the contract of July 22, 1899, granted an extension of time to the plaintiff's husband, and therefore, in law, operated to release the plaintiff and her property that stood as surety for her husband's debt. The contract was that the defendants "agree that said sale shall not be made as advertised, and also agree to not advertise said property for sale under said deed of trust until after September 11, 1899." The defendants claim that this was not an agreement extending the time for the payment of the debt, but only an agreement not to enforce the deed of trust until after September 11th, and that they could have demanded and sued for the debt immediately, notwithstanding such agreement, and that it is only in cases where the payment of the debt is postponed that the surety is released. The general rule of law is that, "when time is given to the principal debtor by a valid agreement, which ties up the hands of the creditor, though it be for a single day, the surety is discharged." *Bank v. Leavitt*, 65 Mo., loc. cit. 565. In *Stillwell v. Aaron*, 69 Mo., loc. cit. 542, 33 Am. Rep. 517, it was said: "It has uniformly been held in this state that if a creditor, for a valuable consideration, make an agreement with the principal debtor which suspends his right of action on the demand for a definite period of time, without the consent of the surety, it operates to discharge the surety. *Rice v. Morton*, 19 Mo. 263; *Dodd v. Winn*, 27 Mo. 501; *Ins. Co. v. Carson*, 31 Mo. 218; *Smarr v. Schnitter*, 38 Mo. 478; *German Sav. Ass'n v. Helmrick*, 57 Mo. 100; *Coster v. Mesner*, 58 Mo. 550; *Kincaid v. Yates*, 63 Mo. 46; *Bank v. Leavitt*, 65 Mo. 562; *State, to Use, v. Roberts*, 68 Mo. 234 [30 Am. Rep. 788]." To the same effect are the cases of *Headlee v. Jones*, 43 Mo. 237; *Rucker v. Robinson*, 38 Mo. 154, 90 Am. Dec. 412; *Smarr v. Schnitter*, 38 Mo. 478; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Schuster v. Weiss*, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

In *Smarr v. Schnitter*, 38 Mo. 478, the facts were that Schnitter, as principal, and Stevens and McMaster, as sureties, executed a promissory note in favor of Smarr. After the maturity of the note, and pending a suit upon the note, Schnitter, without the knowledge or consent of the sureties, executed a deed of trust to Smarr to secure the note. The deed of trust provided that it should not "in any way conflict with the judgment sought to be had on said note in the Hannibal probate court against the estate of J. K. K. McMaster, except that no sale shall be forced on said estate and judgment until the expiration of eighteen months from the date of this deed. It was further stipulated in the

deed that if the parties to the note should within the time limited in the deed—i. e., within the eighteen months—pay off the whole of the debt, it was to be null and void; otherwise to remain in full force." Stevens, one of the sureties, pleaded that the taking of this deed of trust discharged him as surety on the note. The plaintiff contended, as here, that there was no time given for the payment of the debt, but that the extension of time applied only to the deed of trust, and upon this line asked the following instruction: "That the deed of trust, by its terms, did not give any further credit to Schnitter in said note, nor did it extinguish or suspend the right of Mrs. Smarr, the plaintiff, to sue said principal, nor did it operate to release said Stevens, his surety." The court refused to give the instruction, and error was assigned in that regard. This court said: "It is very clear that this was an extension of the time of payment, and, although it was not so stated in direct terms in the instruction given at the instance of the respondent Stevens, yet that seems to have been assumed as the correct interpretation of the deed, and the law was correctly declared." This case is authority, therefore, for the proposition that Mrs. White's property was not only discharged from the Ittel deed of trust by virtue of the contract of July 22, 1899, but also that she herself was discharged from liability on the original \$7,000 note of February 6, 1890, to Mrs. Smith and Mrs. Cotton, and the \$5,000 note to Mitchell. And the principle announced in that case is sound, and peculiarly pertinent to this case. The Ittel deed of trust covered lot 3 and the east half of lot 2, owned by her husband, as well as the west half of lot 2 and the whole of lot 1, owned by her. As surety for her husband's debt, she was entitled, if sued, or without suit, to pay the debt, and proceed at once against the principal, and be subrogated to the creditor's right, under the Ittel deed of trust, to hold her husband's property for the debt. This right, at least so far as the immediate right to proceed against her husband's property was concerned, was cut off by the agreement of July 22, 1899. True, that agreement does not in terms extend the time for the payment of the debt, and, so far as the words employed go, postpones the right of the creditor to foreclosure of the deed of trust to a time definite; but its effect is the same, for it pro tanto changes the rights of the surety, and postpones the right to resort to the mortgage if the surety paid the debt. There can be no doubt that, if the creditor had released the husband's property from the operation of the deed of trust, without relinquishing or postponing his right to sue on the note, the surety and her property would be discharged and released. 24 Am. & Eng. Enc. Law (1st Ed.) p. 851, and the many cases cited in note 2. And the principle is the same if, instead of releasing the lien or mortgage on the husband's

land, the creditor simply postpones the right to proceed against it. For in both cases the contract with the principal is changed without the consent of the surety, and is no longer the contract for whose performance the surety became responsible, and therefore the surety is released. The difference between an absolute release of the lien and a postponing of a right under it, is only a difference of degree, and not of legal effect, so far as the surety is concerned. It follows that Mrs. White and the Ittel deed of trust in lot 1 and the west half of lot 2, being her separate property, were released by the contract of July 22, 1899.

This being true, the trustee under that deed of trust was not entitled to recover possession of her property, as he did in the ejectment suit on March 26, 1900, and, as Mrs. White did not know of the contract of July 22, 1899, until after the conclusion of the trial of the ejectment case, she could not interpose that contract as a defense in that suit, but may avail herself of it in this action, which was begun as soon as she learned of that contract, which was within a few days after that judgment was rendered. For these reasons the trial court was right in canceling the Ittel deed of trust on Mrs. White's property, and in enjoining the enforcement of the judgment in ejectment, and in quashing the execution issued thereon.

It also follows from the premises that the surplus arising from the sale of lots 1, 2, and 3 under the Penn Insurance Company judgment of foreclosure belong of right to Mrs. White.

The rents collected by the trustee, Ittel, from lots 3 and the east half of lot 2 after he was put into possession under the contract of July 22, 1899, cannot be taken into account in this case, because they were collected from the husband's property, and were properly applied to the payment of the husband's debt. The rent collected by Ittel from the west half of lot 2, that belonged to Mrs. White, between the date on which the tenant attorned to Ittel under the contract of July 22, 1899, and the date of the sale under the Penn Insurance Company's judgment, must be regarded as collected by him as trustee for the plaintiff, and, if he has turned it over to the defendants, that amount should be added to the surplus aforesaid, and the plaintiff be given a judgment therefor.

The judgment of the circuit court is reversed, and the cause remanded to that court, with directions to ascertain the amount of rent that was collected by Ittel from the west half of lot 2 between the date of the attornment aforesaid and the sale aforesaid, and add that sum so ascertained to the surplus resulting from the sale under the Penn Insurance Company judgment, and to enter a judgment for the plaintiff for the total amount so found, and to also return to the plaintiff the sum of \$399.15, with any ac-

cumulated interest thereon, heretofore paid into court under the decree of the circuit court as a condition to the right to redeem, and to adjudge all the costs in the circuit court against the defendants. All concur.

CLARK v. THIAS, Pub. Adm'r, et al.
(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

ALLOWANCE BY PROBATE—COLLATERAL ATTACK—WITNESS—TRANSACTION WITH DECEDENT—AGENTS—HOMESTEAD—PRIOR ACQUIRED ESTATES—INTEREST IN COMMON—POSSESSION—RECORDING DEED—FRAUDULENT CONVEYANCE—BURDEN OF PROOF.

1. The allowance by the probate court of a note against intestate's estate has the effect of a judgment, which cannot be collaterally attacked by evidence that the note had no consideration, in a suit to set aside as fraudulent a conveyance by intestate, and to subject the property to payment of the allowance.

2. One who makes a contract as agent is not a party in interest, so as to be disqualified as a witness after the death of the other party.

3. Under Gen. St. 1865, p. 450, § 7, providing that the homestead shall be subject to attachment and execution on causes of action existing at the time of acquiring the homestead, which shall be the date of filing for record the deed of the homestead, and shall not be subject to attachment or execution on any liability "hereafter created," the homestead exemption attached to estates existing when the law went into effect, as against after-contracted debts.

4. One may acquire a homestead right in property in which she has only an interest in common.

5. One's occupancy of land in which she has only an interest in common draws to it contiguous land, owned exclusively by her, so as to make it all a homestead; its extent and value being within the limit.

6. Under Gen. St. 1865, p. 450, § 7, providing that the time of acquiring a homestead shall be the date of filing for record the deed thereof, property is not exempt, as a homestead, against debts contracted after a deed therefor was obtained and it was occupied, but before the deed was recorded.

7. A voluntary conveyance is not fraudulent per se as to existing debtors, but, in a suit by creditors to set it aside, the grantee has the burden of establishing the circumstances which repel the presumption of a fraudulent intent.

Appeal from Circuit Court, Franklin County; R. Hirzel, Judge.

Action by J. R. Clark against F. H. Thias, public administrator, and others. Judgment for plaintiff. Defendants appeal. Reversed.

John W. Booth and Jesse H. Schaper, for appellants. James Booth and W. H. Clark, for respondent.

FOX, J. The plaintiff commenced this action against the defendants, F. H. Thias, as administrator of the estate of Mary Larkin, deceased, Adella Walz, and Sarah Lucy, in the circuit court of Franklin county, Mo., February 28, 1899, by filing his petition to set aside a certain deed of conveyance of real estate from Mary Larkin to defendant Adella Walz in trust to herself and her codefendant Sarah Lucy, alleged to have been made vol-

untarily and without any consideration, with intent to hinder, delay, and defraud the creditors of said Mary Larkin. Writs of summons issued, duly executed March 22, 1899, and made returnable to the April term of said circuit court, 1899; and, the parties having joined issues, the cause came on for trial at the following September term, to wit, October 27, 1899. The court found the issues for the plaintiff, and rendered judgment accordingly, and thereupon at the same term of court, to wit, October 28, 1899, the defendants filed a motion for a new trial, which was sustained and a new trial granted by the court at its December term, 1899. And thereafter, at the April term of said court, the plaintiff filed his amended petition, which, in substance, alleged: "That F. H. Thias is the public administrator of Franklin county aforesaid, and as such has in charge, under the order of the probate court of the said county of Franklin, made and entered on the — day of — of the year 189—, and is administering on, the estate of said Mary Larkin, deceased. That on the — day of — of the year 1894 the said Mary Larkin and one James Larkin, for a valuable consideration, executed and delivered to the firm of Clark & Martin their certain promissory note, by which, for value received, they promised to pay to said Clark & Martin, one day after date, the sum of \$180, with interest thereon from date at the rate of 6% per annum, compounded annually, and that on the — day of November, 1894, said note was accidentally destroyed by fire. And that on the 19th day of August, 1895, the said Mary Larkin and James Larkin, well knowing that said note had been destroyed, executed and delivered to said Clark & Martin their certain promissory note, by which, for value received, they promised to pay said Clark & Martin, one day after date, the sum of \$180, with interest from date at the rate of six per cent. per annum. That said last note was so executed and delivered to said firm in re-execution and in renewal of the said note so destroyed by fire. That thereafter said firm of Clark & Martin, for a valuable consideration, assigned and delivered said note to this plaintiff. That said Mary Larkin died intestate about the — day of — of the year —. Plaintiff states: That on the 6th day of February, 1899, he presented said note for allowance against the estate of said Mary Larkin to the probate court of said county, and, the said administrator having waived notice of the presentment of same, the amount due on said note, to wit, the sum of \$219.47, was duly allowed by said court, and classified as a demand of the fifth class against said estate, with interest thereon from date of said allowance at the rate of 6 per cent. per annum. That said allowance, together with the interest thereon, is still due plaintiff, and no part of the same has ever been paid. That at the time of the execution and delivery of said

last-mentioned note said Mary Larkin was the owner in fee of the following described real estate in the aforesaid Franklin county, to wit: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 5 in township number 41, range 2 W., and the undivided one-half of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the fractional part, containing 25 acres, being the south part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$; all being in section 5 in the township and range aforesaid. That on the 23d day of September, 1895, said Mary Larkin made and executed and delivered to defendant Adella Walz her certain warranty deed, by which, for a purported consideration of \$1, and for love and affection, she purported to convey said premises to said Adella for the uses and purposes following; that is to say, to said Mary Larkin's own use during her natural life, and after her decease to the use of her beloved daughter, Sarah Lucy (one of the defendants herein), all of the benefits and profits derived from the above-described lands, after paying all necessary expenses in keeping the farm in good running order, and the taxes that may be levied on the same, which said deed is of record in the office of the recorder of deeds within and for said county of Franklin, in Deed Book, volume 44, at page 525. That, as a matter of fact, there was no consideration for the making of said deed, but that the said deed was a voluntary deed made by said Mary Larkin for the purposes and with the intent to hinder, delay, and defraud the creditors of her, the said Mary, and that said grantees in said deed at the time of the execution and delivery thereof had full and complete notice of the said intent of the said Mary. That the said James Larkin is now, and was at, all and singular, the times referred to in this petition, insolvent, and that the said Mary at the time of her death owned no property other than the real estate herein described. Wherefore plaintiff prays that the title to said premises be divested from defendants Adella F. Walz and Sarah Lucy, and revested in the estate of said Mary Larkin, and that the same be subjected to the lien and payment of plaintiff's said allowance, and for such other and further relief as to the court may seem just and equitable."

To the above amended petition the defendants filed their joint answer. Admit the death of Mary Larkin, and that F. H. Thias is the administrator of the estate of said decedent; that said Mary on the 19th day of August, 1895, executed and delivered to the firm of Clark & Martin her promissory note of that date, on its face expressed to be for value received, and thereby promised to pay to the order of said Clark & Martin, one day after date, the sum of \$180, with interest from date at the rate of 6% per annum, and that said note was presented and allowed against the estate of said Mary Larkin as alleged in said petition, and that at the time of the execution and delivery of said note said Mary Larkin was the owner in fee of

the real estate described in said petition, and that said Mary Larkin, at the times in said petition alleged, executed and delivered the deed of conveyance in said petition referred to; and that said deed was recorded and is of record as alleged in said petition. But defendants deny that the said deed of conveyance was made with intent to hinder, delay, or defraud creditors of said Mary. And defendants deny each and every allegation in said petition made, not heretofore admitted, and aver that the said note so executed and delivered on the 15th day of August, 1895, was by the said Mary Larkin so executed and delivered without any consideration whatever. And having fully answered, defendants ask to be discharged with their costs.

Motion to strike out: Thereafter, on the same day, to wit, on April 16, 1900, during said April term of court, 1900, plaintiff filed his motion "to strike out all that part of the answer of defendants to the amended petition of plaintiff which pleads that the said note so executed and delivered on the 15th day of August, 1895, was by said Mary Larkin so executed and delivered without any consideration whatever, for the reason that the consideration is conclusively shown by the allowance of said note by the probate court of this county, and that the said action of the probate court is *res adjudicata*."

Motion sustained: Thereafter, on the same day, the court sustained the above motion, and struck out of the said answer the words, "and aver that the said note so executed and delivered on the 15th day of August, 1895, was by said Mary Larkin so executed and delivered without any consideration whatever." To which ruling and action of the court defendants then and there at the time duly except.

Thereafter at the trial of said cause during the April term of said court, 1900, to sustain the issues on his part, plaintiff offered the following evidence:

"J. F. S. Martin, being called on the part of plaintiff, testified: I live at Sullivan, Missouri. I was clerking in a general merchandise store for Clark & Martin in '93 and '94 at Spring Bluff, Missouri. In that capacity I had business transactions for that firm with Mary Larkin and James Larkin. They both traded there at different times all the time I was in business there. Q. I will ask you to look at that, Mr. Martin. (Handing witness paper.) Did you act for Clark & Martin in taking that note? A. I did. Q. Will you state under what circumstances that note was given? (Objected to by defendants because the petition in this case shows that Mary Larkin is dead, and it appears from this gentleman's testimony that he acted as agent for Clark & Martin. Mrs. Larkin being dead, he is not a competent witness to testify to such matters. The objection was overruled by the court, to which action and ruling of the court defendants then and there duly except-

ed, and at the time saved their exceptions.) A. I don't think I know how to answer that question. Q. Tell us how you got it? A. I went to Mrs. Larkin's house, and took himself with me, or he went with me. I made this note, and they both signed it in my presence. They signed a note for a like amount as this about a year, I think, previous to the date of this note. That first note was for the same amount as this, \$180, given in the year previous to this—some time in August or September, '94, I think. We made this note as the other one was—for a like amount—in every way like the original note, with the exception of the date. The first note was payable to Clark & Martin, signed by Mary Larkin and James Larkin. I took that note to Sullivan with the papers belonging to the Spring Bluff business, and it was destroyed in the fire when the store burned, some time in the fall of '94. I know that the note I have here was given in lieu of the note that was destroyed by the fire."

Plaintiff then read in evidence the note thus described by the witness, and the allowance indorsed on the back, being as follows:

"\$180.00. Sullivan, Mo., Aug. 19th, 1895. One day after date, we, or either of us, promise to pay to the order of Clark & Martin one hundred and eighty dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 6 per cent. per annum, and if the interest be not paid annually to become as principal, and the same rate of interest.

James T. Larkin.
her
"Mary X Larkin.
mark.

"Witness for mark: F. S. Martin."

Said note indorsed as follows:

"Clark and Martin,

"Allowed Feby. 6th, 1899,

"\$219.47, 6 per cent, 5th class.

"Chas. F. Gallenkamp,
"Judge of Probate."

Thereupon plaintiff read in evidence stipulation of the parties, in substance, as follows: "That defendant Thias is administrator of the estate of Mary Larkin, deceased, as alleged by plaintiff. That Mary Larkin died intestate, as alleged by plaintiff. That the records of the probate court of Franklin county, Mo., will show that the note mentioned in plaintiff's petition was presented to said court, and allowed as a demand against said estate, as alleged by plaintiff. That at the date of the execution of said note the said Mary Larkin was the owner in fee simple and was in possession of the real estate in the plaintiff's petition described, and that she continued to reside thereon to her death. That said real estate does not exceed 160 acres in extent, nor \$1,500 in value. That said Mary Larkin made, executed, and delivered to the defendant Adella F. Walz the deed in plaintiff's petition described. That said Mary Larkin did not leave any personal

estate or other real estate out of which her creditors could realize their claims. That James Larkin, the other signer of the aforesaid note, is wholly insolvent, of whom nothing can be recovered at law. That the evidence, if admissible, would show: That it was the fixed and well-cherished intention of Mary Larkin, deceased, for many years before the date of the deed here sought to be set aside, to deed and convey the premises to defendant Adella F. Walz; reserving to herself a life estate therein, and thereafter a life estate to her daughter Sarah Lucy, who at all times was the wife of one Mathew Lucy until after the execution of said deed. That at the time of making said deed, and long prior thereto, it was the fixed intention of the said Mary Larkin, in making said deed, to exclude the vesting of any marital rights of said Mathew Lucy as the husband of Sarah Lucy aforesaid, or the interference on his part with the rights of the said Sarah Lucy. That there was a valuable consideration, greater than \$1, but less than the true value of said real estate, moving from said Adella F. Walz to said Mary Larkin, which said valuable consideration was to include the payment of the said Adella F. Walz of the funeral expenses of the said Mary Larkin at her death."

Plaintiff rested.

The defendants, to sustain the issues on their part, offered and read in evidence: First. A patent deed from the United States, dated November 1, 1851, granted to James Larkin, of Franklin county, Mo., the southwest quarter of the southwest quarter of section 5 in township 41, range 2 west, in the district of lands subject to sale at St. Louis, Mo., containing 40 acres. Second. A patent deed from the United States, dated August 2, 1852, granting to James Larkin, of Franklin county, Missouri, the northeast quarter of the southwest quarter of section 5 of township 41, of range 2 west, in the district of lands subject to sale at St. Louis, Mo., containing 40 acres. Third. A deed of conveyance from Lewis B. Parsons and Elizabeth D. Parsons, his wife, dated December 10, 1877, filed for record in Franklin county, Mo., November 12, 1881, conveying to Mary Larkin the southeast quarter of the southwest quarter of section 5 in township 41, range 2 west, containing 40 acres, more or less, in Franklin county, Mo. Said deed contains covenants of general warranty, reserving all mineral ores. Fourth. A quitclaim deed from James T. Larkin, dated June 14, 1892, filed for record in the recorder's office of Franklin county, Mo., January 25, 1895, purporting to remise, release, and forever quitclaim unto Mary Larkin the southeast quarter of the southwest quarter, also the southwest quarter of the southwest quarter and the south fractional part of the northeast quarter of the southwest quarter, all in section 5, township 41, range 2 west, containing in all 105 acres, more or less. Fifth. A deed

from Mary Larkin, dated September 23, 1895, filed for record in the recorder's office of Franklin county, Mo., November 7, 1895, conveying to Adella F. Walz the following described real estate, situate in Franklin county, Mo., to wit: The southeast quarter of the southwest quarter of section 5, township 41, range 2 west, containing 40 acres, more or less; and the undivided one-half or one-third, as the case may be, of the following described lands: The southwest quarter of the southwest quarter, containing 40 acres, more or less, and the fractional part, containing 25 acres, being the south part of the northeast quarter of the southwest quarter, all in section 5, township 41, range 2 west—for the uses and purposes of grantor during her natural life, and after her decease to the use of her beloved daughter, Sarah Lucy. Said deed contains covenants of general warranty.

It is unnecessary to set forth in detail the testimony introduced by defendants upon the issue presented as to Mary Larkin being the head of a family, and her occupancy of the premises as a homestead. It will suffice to say that numerous witnesses were introduced on this issue, whose testimony strongly tended to establish the position taken by defendants upon that disputed question.

This cause was submitted to the court upon all the evidence introduced, and it announced the conclusions reached in a written opinion. That we may fully comprehend the theory upon which the learned trial judge disposed of this case, we here quote the opinion:

Opinion of the Court.

"J. R. Clark, plaintiff, v. F. H. Thias et al., defendants.

"The motion for new trial was sustained in this case heretofore on the ground that Mrs. Larkin had a homestead in the land, and, if she had such homestead, she could sell or dispose of the same in any manner she desired. The latter proposition is unquestionably the law in this state. But did she have homestead? There is no dispute that Mrs. Larkin had her dower in the lands of her husband, and also her quarantine until dower was assigned, which was never done during her lifetime. The homestead consists of the dwelling house and appurtenances, or lands surrounding the dwelling, and such lands need not be even contiguous. If Mrs. Larkin had a homestead in her husband's lands, then the lands she bought from Parson in 1877 became part and parcel of her homestead; but, if she never had a homestead in her husband's lands, then the Parson tract never became a homestead, for she never lived on it, but simply used the same in conjunction with the Larkin lands. When James Larkin, the husband of Mary Larkin, died, in 1852-53, there was no homestead law in existence in this state. Larkin had simply obtained certificates of entry, and these were never filed for record up to this date. Hence

Mary Larkin never obtained any homestead from her husband, nor did she have any homestead when she bought the Parson tract. In 1880 she inherited one-ninth interest in the land from her son, Mike, but at that time no homestead could be obtained by inheritance, descent, or devise. In 1892 she purchased four-ninths interest in the land from her grandson James Larkin, but she did not record the deed until 1895, so that her homestead rights, if she acquired such by that purchase, which I do not concede at all, would not begin until 1895, and would be subject to payment of plaintiff's claim, which accrued, undoubtedly, in August, 1894, when the first note was signed by Mrs. Larkin, so that in fact all her lands were subject to the payment of this debt in 1894, as are so now.

"In Massachusetts it is held that a homestead does not exist in lands held in common or by undivided interests. See *Holmes v. Winchester*, 138 Mass. 542. The right of homestead does not depend on the title of the owner, whether in fee or for life; but the owner must have a good title and deed, and have a home on the land, before he can claim homestead. *Remis v. Driscoll*, 101 Mass. 421. Though a widow is entitled to homestead against both heirs and creditors, she cannot create a homestead in the lands of her deceased husband. It must have become his right during his life, so that she can succeed to it. *Brown v. Watson*, 41 Ark. 309; *Patrick v. Baxter*, 42 Ark. 175; and *Harblson v. Vaughan*, 42 Ark. 539. In the case at bar the title to the Larkin lands vested at once in the Larkin children, subject to dower and quarantine of their mother, and she could not by ex post facto laws become the owner of a homestead in said lands, and divest the Larkin children of their title already acquired, or claim such homestead as against her creditors, and hence could not sell or dispose of such homestead. I shall therefore readopt the first opinion herein rendered, as correct, and render a decree for plaintiff accordingly.

"R. Hirtzel, Judge."

The first contention of the appellants is that the court committed error in striking out that portion of the answer which alleged that the note executed by Mary Larkin was executed without any consideration whatever. This proceeding is not an action upon the note, to the end of reducing it to a judgment, but the suit is to cancel and set aside a certain conveyance executed by Mary Larkin; and it is alleged in the petition and it is admitted that this note was duly allowed in the probate court of Franklin county. If the position taken by appellants is to be maintained, the effect of this answer is to go behind this judgment, and show that the note was without any consideration, and thereby destroy the force and power of the judgment rendered. This contention must be ruled against appellants. The allowance of this

note by the probate court has the force and effect of a judgment. The only necessary parties were before the court. It had jurisdiction of the subject-matter and of the persons. If it was improperly allowed, then an appropriate proceeding, as contemplated by section 214, Rev. St. 1899, must be sought for that purpose. It cannot be attacked in this collateral proceeding.

It is next insisted, and very earnestly urged, that the court committed error in permitting witness Martin, who was acting as clerk or agent for Clark & Martin at the time this note was taken, to testify in regard to transactions between himself and Mary Larkin. It will be observed that the witness Martin had no interest in the note, nor has he any interest in this suit. In the case of *Stanton v. Ryan*, 41 Mo. 510, this court clearly announced the rule that an agent in making a contract is a competent witness, notwithstanding the party with whom the contract was made was dead. In that case the wife was introduced in pursuance of the provisions of the statute which makes her competent in cases where she is acting as the agent of the husband. The party with whom the wife had contracted was dead. The court held she was competent, and placed her in the same position as any other agent. The court said: "It cannot be gainsaid that, if the defendant had given a full delegation of power to an ordinary agent to make a contract for and superintend the building, such agent would have been competent to prove the contract when a dispute arose concerning the same, whether the person with whom he contracted was dead or not. The statute expressly authorizes the wife to give testimony in all transactions where she acted in the matter as agent for her husband, whether she is joined with him as a party to the record or not. There is no distinction recognizable between her and any other agent, as regards capacity to be a witness." To the same effect is the case of *Leahy v. Simpson's Adm'r*, 60 Mo. App. 83. The court in that case very tersely announces the rule: "The fact that the agent of an individual makes a contract on behalf of his principal with a third party, who subsequently dies, does not render the agent incompetent to testify in a suit brought by his principal to enforce such contract against the administrator of the deceased. *Baer v. Pfaff*, 44 Mo. App. 35." In the case of *Baer v. Pfaff*, 44 Mo. App. 35, the question, identical with the one urged in this contention, is very fully and ably discussed. The court in that case very aptly and appropriately applied the rule. It said: "It is insisted that the plaintiff's clerks were incompetent witnesses, in so far as they had personal transactions with the deceased in the sale of goods. We think that the case of *Stanton v. Ryan*, 41 Mo. 510, settles this question adversely to the defendants. It was there decided that, where a contract was made by an agent, the

latter was a competent witness to prove the contract, whether the other contracting party was dead or not. The doctrine of this case was substantially reaffirmed in the case of *Leeper v. McGuire*, 57 Mo. 360. The subsequent case of *Williams v. Edwards*, 94 Mo. 447 [7 S. W. 429], only decided that where a contract is made by a corporation, and its contracting agent dies, this renders the other contracting party an incompetent witness. In construing and applying the statute to that case, the court makes the 'agent' take the place of the corporation, upon the ground that a corporation can only act and speak through its agents and officers. In the case of *Robertson v. Reed*, 38 Mo. App. 32, the Kansas City Court of Appeals applied the same rule, and the plaintiff was held disqualified to testify where it appeared that the contract on trial had been made with him by the defendant's deceased agent. But those cases are unlike this. The test to be applied is, would the plaintiff's clerks have been competent witnesses at common law? They certainly would. They had no interest in the suit, and there is no rule that we are aware of that would disqualify them. Our statute was only intended to modify the common law so as to permit a party in interest to testify in his own behalf provided the other party to the contract in issue and on trial is alive, or is not shown to be insane. If either party to the contract is dead or shown to be insane, the statute has no application, and the common-law rule must govern." The case of *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 818, relied upon by appellants, is not in conflict with the cases herein referred to. On the contrary, the case of *Stanton v. Ryan*, supra, is quoted approvingly by nearly all the cases upon the questions involved in this particular contention. Martin was not a party in interest, either in the note or suit; hence we are of the opinion that he was a competent witness.

This leads us to the discussion of the opinion of the esteemed and learned trial judge. It is announced in this opinion that James Larkin, husband of Mary Larkin, having died in 1852 or 1853, there was no homestead law in existence in this state; hence the widow, Mary Larkin, did not succeed to any homestead right in the land of which her husband died seised. It was said by this court in the case of *Miller v. Tally*, 48 Mo. 503, that the quarantine right of the widow "can hardly be called an estate, though it is somewhat analogous to an estate at will." To the same effect is the case of *Gentry v. Gentry*, 122 Mo. 202, 26 S. W. 1090, where the court says that the widow "has but a 'right,' a privilege; an interest temporary, evanescent, and fugitive in its nature; akin to a tenancy at will; determinable at the option of the heir." With the views we entertain in this case, it is unnecessary to determine the character and nature of the quarantine right of the widow. It is sufficient to say that the an-

time of the death of the husband, James Larkin, the homestead right could not subsequently attach to the land in behalf of the widow," is not a proper interpretation of the law upon that subject. If the quarantine right of the widow in respect to this land was in fact an estate in land, and she occupied it and was the head of a family, that was an existing estate when the homestead law went into effect, and such existing estate clearly falls within the protection of the homestead statute. The very terms of the statute clearly indicate its application to existing estates when the homestead law first went into effect. Section 7, Gen. St. 1885, p. 450, provides: "Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and, for this purpose, such time shall be the date of the filing in the proper office for the records of deeds, the deed of such homestead, and (in case of existing estates) such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created." It is clear from this statute that the homestead right does not depend upon the fact that the homestead was acquired after the enactment of the law, but, as before stated, its terms clearly make it operative upon existing estates at the time of the enactment of the law. To hold otherwise would simply render the homes of a large class, who happened to acquire their homesteads prior to the taking effect of the homestead statute, subject to attachment and execution. The use of the terms "existing estates" was intended by the act itself to protect such persons, who prior to its enactment had secured homes.

Again, the trial judge reaches the conclusion in his opinion that as there was no law in force in 1880, when Mary Larkin took by descent from her son Mike Larkin the one-ninth interest in fee of the lands she was then occupying, for that reason no homestead could be claimed in said one-ninth interest. In answer to this conclusion announced in the opinion, will say that the homestead law of 1879 was amended in 1887, and went into effect June 19, 1887. By this amendment the omission in the former statute was supplied, and estates by devise or descent were included within the protection of the statute. The same views as herein expressed as to the application of the statute as to existing estates are equally applicable to estates secured by devise or descent. As to the application of the amended statute of 1887 to the one-ninth interest held by Mary Larkin by descent from her son Mike, the case of *Spratt v. Early* (Mo. Sup.) 69 S. W., loc. cit. 16, is decisive of this contention. Gantt, J., in a very able and exhaustive review of this question, says: "This presents

son lot from her mother, Mrs. Carr, in the year 1872, and had lived on it and occupied it as her homestead continuously from 1872 until she rented it by the month to O'Connor in the summer of 1894. Prior to the amendment of the homestead act (section 2695, c. 39, Rev. St. 1879) by the act of March 24, 1887 (Laws Mo. 1887, p. 198), homesteads acquired by descent or devise were not exempt from attachment and levy under execution, as were homesteads acquired by deed. *Loring v. Groomer*, 142 Mo. 1 [43 S. W. 647]. But by the express provisions of said last-mentioned act, homesteads held by descent or devise fell within the protection of the statute 'from the time the owner becomes invested with the title thereto, and in case of existing estates such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created.' In *Loring v. Groomer*, 142 Mo., loc. cit. 12 [43 S. W. 647], it was further said such existing homestead occupied by a head of a family, not exceeding the amount and value prescribed by statute, became exempt, after the act of 1887, from attachment and execution on all causes of action accruing thereafter, and it made no difference how it was acquired, or whether the title thereto was in him or his wife. *Peake v. Cameron*, 102 Mo. 568-574 [15 S. W. 70]. Mrs. Duffy, after the act of 1887 became the law of this state, owned a homestead in fee simple in the lot in suit, and was such owner when she married her codefendant Daniel Duffy, her present husband, in 1879. By her marriage to Duffy, who continued to occupy said homestead with her, she did not forfeit her homestead exemption. *West v. McMullen*, 112 Mo. 410 [20 S. W. 628]; *Hufschmidt v. Gross*, 112 Mo. 649 [20 S. W. 679]." This one-ninth interest inherited from Mike Larkin was an interest in the lands of which James Larkin died seised, and the widow at the time of this inheritance was occupying the premises. We take it that it is clear that as to the one-ninth interest the quarantine right of the widow, being the lesser estate, was merged in the fee she inherited from her son.

We have carefully considered all the evidence in respect to Mary Larkin being the head of a family at the time of the execution of the deed to the codefendants Lucy and Walz, and as to her occupancy of the premises, and have reached the conclusion that the testimony indicates clearly that she was the head of a family, in contemplation of the homestead law in force at the time. Having reached this conclusion, she had a homestead right in the one-ninth interest inherited from her son when the statute went into effect, in 1887, long prior to the execution of the deed sought to be set aside. It is said by the trial court in its opinion that she did not have

any homestead in the Parsons land, because she never occupied it. This conclusion might be correct if she had never inherited the one-ninth interest. But in 1887 she was occupying the premises in which the one-ninth interest was included. This occupancy of this interest drew to it—being contiguous and used in connection with it—the Parsons land, and the whole of it, not exceeding 160 acres, or the value of \$1,500.

We think the trial court erred in its conclusion that, this land being held in common, no homestead right could be claimed. The authorities upon this proposition are somewhat in conflict; but this court, in numerous cases, has announced the rule that the homestead laws should be liberally construed, to the end of accomplishing the beneficent purposes for which they were enacted. With these views, we fully approve what is very aptly and appropriately said in Thompson on Homesteads & Exemptions, § 181, p. 181, in which the author approvingly quotes from Freeman on Co-tenancy & Partition. It is said: "A careful and judicious writer, who has given to this subject an attentive consideration, after examining the cases, expresses his own views as follows: 'We see no sufficient reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as his interests are respected, or so nearly respected that he finds no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own, and not for a co-tenant's, gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor and his equally unfortunate, but more helpless, family the shelter and influence of home. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them not merely for cultivation, or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner he may, and in fact frequently does, obtain all the advantages of a home. These advantages are

none the less worthy of being secured to him and his family in adversity because other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and very inhumane reason for depriving him of that which he has.'"

This leads us to the claim of homestead by Mary Larkin in the four-ninths interest obtained by deed to her by James Larkin in 1892. It will be observed that this deed was not filed for record until January 25, 1895. The statute in relation to homesteads, heretofore mentioned, provides that such homestead shall be subject to levy of execution on all causes of action existing at the time of acquiring the homestead; and it further expressly declares that "the time of acquiring the homestead, shall be the date of the filing of the deed in the recorder's office." The original debt, of which the note allowed was simply a renewal, according to the testimony of Martin, was an existing debt in August, 1894, long prior to the filing of the deed to the four-ninths interest obtained from James Larkin. We have reached the conclusion as to this four-ninths interest that Mary Larkin was not entitled to a claim of homestead against the debt evidenced by the judgment in this suit. The statute must control. It clearly fixes the date, and, if Mary Larkin failed to have her deed filed for record, it was her misfortune. The law must be followed.

This brings us to the last question involved in this controversy. It is insisted by appellants that the petition fails to state a cause of action, in that it does not state that Mary Larkin did not have at the time of the execution of the deed other property subject to execution, and that plaintiff failed to introduce any proof in that respect. Upon this contention, will say that it is apparent from the record in this cause that the learned counsel on either side did not try this case with that subject in view. The petition in this case seeks to set aside this deed on the ground that it was executed with the intent to hinder and delay creditors. It was not necessary, in order to constitute a cause of action, to make the averments as to the other property, as contended by appellants. It is true, even as to a voluntary conveyance, that the mere fact of its being voluntary does not render it absolutely void. That is a question of fact to be determined from the conditions surrounding the party at the time of making the conveyance. The true rule seems to be that if the conveyance is voluntary the burden rests upon the party accepting the conveyance to establish the circumstances which will repel the presumption of a fraudulent intent. "The conveyance stands condemned as fraudulent unless the facts which may give it validity are proved by the donee in such conveyance." *Walsh v. Ketchum*, 84 Mo., loc. cit. 430. The court in that case says: "It has never been held in this state,

when the point was involved in the decision, that a voluntary conveyance, as to existing creditors, is void, but the contrary has been affirmed in the case of *Bird v. Bolduc*, 1 Mo. 702, and *Lane v. Kingsberry*, 11 Mo. 402. In the latter case it is said that 'the doctrine that a voluntary conveyance is not fraudulent per se, as to existing creditors, though opposed by some, is established by a great weight of authority. The bona fides of every such conveyance is a question of fact to be ascertained by a jury under all the circumstances attending it.' The rule as laid down by Mr. Bump has been recognized by this court in the case of *Potter v. McDowell*, 81 Mo. 62, and *Patten v. Casey et al.*, 57 Mo. 118, in the latter of which cases it is said that a voluntary conveyance made by a debtor in embarrassment or doubtful circumstances, without ample means, outside of the particular property conveyed, for the satisfaction of his then existing debts, though made without any specific intent to defraud, is fraudulent in law as to all who were creditors at the time of the execution of the conveyance, and whose debts remain unpaid and incapable of collection in the ordinary course of proceedings. As asserting a different doctrine, our attention has been called by counsel to the case of *Hurley v. Taylor*, 78 Mo. 238, where in the report of the commissioner it is said: 'Their deeds, being without consideration, were void as to existing creditors.' It will be sufficient to say of this case that the question as to whether the voluntary conveyances referred to were or were not void was not the point in judgment on the appeal, and the remark there made is mere obiter, and if it is to be understood as announcing the principle that a voluntary conveyance, as to existing creditors, is absolutely void, does not meet with our sanction."

Upon the question of how much property Mary Larkin had, other than that in the conveyance, at the time of the execution of it, the testimony is very slight. As heretofore stated, it is clear that this case was not tried upon that theory. Two or three witnesses do testify about some mules, horses, and hogs on the farm; but as to their value nothing is said; or whether such personal property was exclusive of property she could claim as exempt, it is not disclosed. The evidence on this subject, so far as the record discloses, was not sufficient to warrant the court in finding that the conveyance was not executed with intent to hinder and delay creditors.

The judge of the circuit court tried this case, as indicated by his opinion, upon an erroneous theory; and to the end that the parties to this suit may not be deprived of any of their rights, and to afford an opportunity to them of introducing all the evidence obtainable as to the financial condition of Mary Larkin at the time she executed the conveyance to the four-ninths interest, to which she had no claim of homestead, this

cause is reversed, and remanded for a new trial in accordance with the views herein expressed. All concur.

STATE ex rel. CROW, Atty. Gen., v. CITY OF ST. LOUIS et al.

(Supreme Court of Missouri, Division No. 1.

April 1, 1903.)

POLICEMEN — REMOVING NUISANCE FROM STREET—REIMBURSEMENT FOR EXPENSE—CONSTITUTIONAL LAW—CONSTRUCTION OF CHARTER.

1. Where a policeman, pursuant to orders, and in discharge of his duty to prevent and remove nuisances in the streets (Acts 1860-61, p. 448, § 5), shoots at a mad steer in the street, but, though using due care hits a child, for which judgment is recovered against him, the city may reimburse him, in the absence of provisions to the contrary.

2. Charter of St. Louis 1876, art. 3, § 30 (Rev. St. 1899, p. 2489), containing no punctuation marks except commas, provides the assembly shall not have power (1) to release any citizen from the payment of a lawful tax, (2) to exempt him from any burden imposed on him by law, (3) to ordain the payment of any demand not authorized and audited according to law, (4) nor to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein except as provided in the contract therefor, (5) to ordain the payment of any damages claimed for alleged injuries to person or property, "except by ordinance," etc. This was made up by adding to Charter of 1870, art. 3, § 5 (Acts 1870, p. 467), which contained the first two subdivisions, the other three and the proviso. *Held*, that the proviso applied to all the subdivisions, and not merely to the one immediately preceding it.

3. An ordinance appropriating the expenses that a police officer incurred and paid, while in the discharge of his duty as such officer, in removing a nuisance from a highway, as expressly required by law, does not make a donation of public money to an individual in contravention of Const. art. 4, §§ 46, 47.

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Injunction suit, on the relation of Edward C. Crow, attorney general, against the city of St. Louis and others. From an adverse judgment, defendants appeal. Reversed.

This is a proceeding by injunction to enjoin the city of St. Louis, its auditor and treasurer, from paying to the defendant William Desmond the sum of \$971.30, pursuant to an ordinance of the city of St. Louis, numbered 19,716, entitled "An ordinance for the relief of William Desmond," approved March 10, 1899. Said ordinance is as follows:

"19,716.

"An Ordinance for the Relief of William Desmond:

"Whereas, on the 6th day of July, eighteen hundred and ninety-two, a wild steer had escaped from the people who had charge of said animal, and was running loose upon the streets of the city of St. Louis, at or near the Four Courts building in said city; and said wild steer was charging upon the

people of said streets; and there was danger that some one would be hurt thereby, and a number of persons were shooting at said animal in an endeavor to kill same and prevent accident to persons on said streets; among said persons firing shots at said animal being William Desmond, then and now acting as Chief of Detectives of the Metropolitan Police Force of the City of St. Louis, who fired such shots at the instance and under the orders of his superior officer, Chief of Police L. Harrigan; that while said Desmond was leaning out of a window of the Four Courts building, firing a shot or shots at said animal, under said directions of his chief, a shot struck one Albert Tolch, a minor, who was standing on the north side of Clark Avenue, opposite the said Four Courts building, and between Eleventh and Twelfth Streets, which said shot may or may not have been fired by the said William Desmond, who was acting under orders from said Chief Harrigan, and was acting to the best of his ability in the discharge of his duty as a city officer at the time of firing such shot or shots; and,

"Whereas, afterwards, by his next friend, the said Albert Tolch brought a suit against said Desmond in the Circuit Court of the City of St. Louis, claiming damages for being so injured, which suit was tried before a jury, which said jury rendered a verdict against said William Desmond, which resulted in a judgment against him for fifteen hundred dollars, which judgment he afterwards compromised for the sum of seven hundred and fifty dollars and costs, in all amounting to the sum of eight hundred and seventy-one dollars and thirty cents, and he also became liable for attorney's fees in the sum of one hundred dollars, making a total expended by him of nine hundred and seventy-one dollars and thirty cents; therefore,

"Be it Ordained by the Municipal Assembly of the City of St. Louis, as follows:

"Section 1. The Auditor is hereby authorized and directed to draw his warrant on the City Treasurer, in favor of William Desmond, for the sum of nine hundred and seventy-one dollars and thirty cents, and take his receipt in full of all claims against the City of St. Louis. Said warrant to be charged to appropriation for relief of William Desmond.

"Sec. 2. There is hereby appropriated and set apart out of municipal revenue the sum of nine hundred and seventy-one dollars and thirty cents to fund for the relief of William Desmond.

"Approved March 10, 1899."

The petition charges that the ordinance "is contrary to the provisions of the charter of said city, and in excess of the powers of said assembly, and is null and void."

The answer admits the passage of the ordinance, and that the city and its officers intend to carry it into effect, sets up the facts substantially as recited in the preamble to

the ordinance, and asserts the power and authority of the city to pass the ordinance. The plaintiff demurred generally to the answer. The court sustained the demurrer. The defendants refused to plead over. Final judgment was entered upon demurrer for the plaintiff, and the defendants appealed.

Johnson & Richards and Chas. C. Allen, for appellant Desmond. Chas. W. Bates and Wm. F. Woerner, for appellant city of St. Louis. Chas. S. Reber, for respondent.

MARSHALL, J. (after stating the facts). William Desmond is, and at the times herein-after mentioned was, an officer of the metropolitan police force of the city of St. Louis, being the chief of detectives. The board of police commissioners of St. Louis was created by the act of March 27, 1861. Acts 1860-61, p. 446. The original act was amended by the act of 1867 (Acts 1867, p. 179), and by section 11 of that act the members of the police force were expressly declared to be officers of the city and also officers of the state. This dual capacity was recognized as lawful, under the laws as they existed, by this court, in *Carrington v. St. Louis*, 89 Mo., 1 loc. cit. 214, 1 S. W. 240, 58 Am. Rep. 108. Section 11 of the act of 1867 was re-enacted as section 25 of the act of 1899. Acts 1899, p. 60. By the terms of all the acts creating the board, the city of St. Louis is required to pay all the salaries and expenses of the police (except from 1864 to 1876, when the county of St. Louis was required to pay one-fourth thereof. *State ex rel. Police Commrs. v. County Court*, 34 Mo. 546. But upon the separation of the city and county, in 1876, this obligation ceased).

Thus the predicates are established that the police of St. Louis are both state and city officers, and that the city is under obligation to pay the expenses of the force. The preamble to the ordinance recites, and the answer avers, and the demurrer admits, the fact to be that a mad steer was running wild in the city of St. Louis, and the people and their property were in imminent danger, when the chief of police ordered the defendant Desmond to shoot it, and thus prevent such threatened injuries; that such order came from said defendant's superior officer; that, in obedience to said order, he leaned out of the window, and with due care shot at the steer; that other persons were also shooting at the steer; that a shot struck a boy, who was on the opposite side of the street; and that suit was brought by said boy against the defendant Desmond, and a judgment rendered against him, and that the ordinance in question is intended to reimburse said defendant for the judgment and costs which he was thus obliged to pay.

This establishes the further predicate that the liability which the defendant Desmond incurred and paid, and which the ordinance is intended to relieve him from, was a liability

ity incurred by him in the bona fide discharge of his duties as a police officer, as those duties are defined in the acts creating said police force. The act of 1861 (Acts 1860-61, § 5, p. 448) made it the duty of the police to "preserve the public peace, * * * protect the rights of persons and property, guard the public health, * * * prevent and remove nuisances in all streets, highways, water and other places." A mad steer running wild on the streets of a populous city, and threatening the lives of the people, is a nuisance on such streets. There was, apparently, on hand no gaily attired matadore, with red shawl and keen-edged sword, to remove the animal with neatness and dispatch, nor was there a Bossie Mulhall to lasso and tie the steer with speed and grace. Under the circumstances, and under the act aforesaid, it was clearly the duty of the police to remove the nuisance. It does not appear from the record how it fell out that Desmond could hit a boy on the opposite side of the street while leaning out of a window and shooting at a steer in the street below him. It would not be contended that he made a "bull's-eye" on that shot. In fact, such a remarkable exhibition of marksmanship could not even be explained upon the theory that

"Many an arrow at random sent,
Hits mark the archer little meant."

It rather depends for solution upon the precedent recorded in the nursery rhyme, "He shot at the goose, and hit the gander." In short, but for the fact that the verdict of the jury in the damage suit so declared, the idea that such a thing could have happened would not have been tolerated. But, however it came about, it goes to show the state of discipline that existed in the force, and speaks volumes of praise to the spirit of obedience to orders that actuated Desmond; which in some degree, at least, compensates for the poor marksmanship displayed. The incident also goes to prove most conclusively that brains, and not bullets, are necessary to make a successful detective, and that Desmond earned his position and enviable reputation by the possession of a cool head, rather than by superior ability with a gun; and that, even if he could not hit a mad steer, he could "make a hit" as the head of so efficient a detective force. What he did, however, was done in the discharge of official duty, and was necessary to the protection of life and to the removal of a nuisance. It was done by him as an officer, and not as an individual, nor for his individual profit. He incurred a liability while in the performance of his duty, and while in the legitimate scope and discharge of his duty. The general rule of law is that under such circumstances the municipal or other public corporation has a right to indemnify an officer against loss, upon the ground that the officer was acting for the town or corporation when he became liable. Tiedeman on Municipal Corporations, § 115. The true test in all such cases is, did the act

done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights or property, or the rights or property of the citizens, which the officer was charged with a duty to protect or defend? If it did, the city had a right to employ counsel to defend the officer, and to appropriate funds to pay a judgment rendered against the officer. The cases illustrative of this rule are collated in the notes to section 115 of Tiedeman on Municipal Corporations. To the same effect are also Beach on Public Corporations, § 647; 1 Dillon on Munc. Corp. (4th Ed.) § 147; Throop on Public Officers, § 495; Mechem's Public Offices and Officers, § 877. A few illustrations, furnished by the many cases cited by the text-writers, will suffice to point the rule. Appropriations of public funds to indemnify officers have been upheld in the following cases: In favor of village trustees, when sued for acts done in the discharge of their public duties, *Powell v. Newburgh*, 19 Johns. 284; in favor of an Indian agent for freight paid by him on supplies in a sudden emergency, *U. S. v. Stowe* (D. C.) 19 Fed. 807; in case of a suit for libel growing out of an officer's official report, *Fuller v. Groton*, 11 Gray, 340; in a suit for false imprisonment on account of an arrest made by a town marshal, *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504. Many other cases are collated by Dixon, J., in *State v. Hammonton*, 38 N. J. Law, 430, 20 Am. Rep. 404. The power to pass the ordinance in question was, therefore, fully vested in the city under the general law, and the ordinance is a valid ordinance, unless there is some special provision in the charter of St. Louis or in the Constitution of the state that takes away that power from the city of St. Louis.

The plaintiff contends that such prohibition is found in section 30 of article 3 of the charter of St. Louis (Rev. St. 1899, p. 2489), and in sections 46 and 47 of article 4 of the state Constitution. Section 30 of article 3 of the city charter is as follows: "The assembly shall not have power to relieve any citizen from the payment of any lawful tax, or to exempt him from any burden imposed upon him by law, or ordain the payment of any demand not authorized and audited according to law, nor shall the assembly have power to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor, or the payment of any damages claimed for alleged injuries to person or property, except by ordinance and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays." Section 46 of article 4 of the Constitution is as follows: "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: provided, that this shall not be

so construed as to prevent the grant of aid in case of public calamity." And so much of section 47 of article 4 of the Constitution as is material to the contention is as follows: "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the state now existing, or that may hereafter be established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company," etc.

It will be observed that section 30 of article 3 of the city charter covers five classes of subjects, which, for the sake of convenience and perspicacity, may be numbered and stated separately as follows: The assembly shall not have power (1) to release any citizen from the payment of any lawful tax; (2) to exempt him from any burden imposed upon him by law; (3) to ordain the payment of any demand not authorized and audited according to law; (4) nor to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor; (5) to ordain the payment of any damages claimed for alleged injuries to person or property. The section quoted, after specifying these five prohibitions, then concludes with these words: "Except by ordinance, and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays." It will be observed that all these matters are contained in the same section, and that there are no punctuation marks except commas employed. The contention of the plaintiff is that the assembly is absolutely prohibited to do any of the things specified in the first, second, third, and fourth classes, but that the prohibition is not absolute as to the fifth class above specified, and that as to such matters the assembly is given power to act, provided two-thirds of the members of each house vote in favor of such an ordinance. In other words, the plaintiff contends that the words, "except by ordinance and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays," apply only to the fifth class of subjects, and not to the other four classes of subjects; or, otherwise stated, that it applies only to its immediate antecedent, and not to the whole section. Unless this contention is sound, the section quoted cannot be construed as a prohibition against the power of the municipal assembly to pass the ordinance in question, but, on the contrary, the converse of the contention must be true, to wit, that the section quoted confers the power to pass the ordinance if two-thirds of the members voted therefor, and in the absence of allegation and proof that two-thirds of such members did not vote to pass this ordinance it will be assumed that the assembly did its duty, and that the

requisite two-thirds voted for the ordinance. *State ex rel. Atty. Gen. v. St. Louis* (Mo. Sup.), 68 S. W. 900.

The history of the evolution of section 30 of article 3 of the charter of St. Louis will serve to throw light upon the true meaning of the section. Section 5 of article 3 of the charter of St. Louis of 1870 (Acts 1870, p. 467) provided as follows: "The city council shall not have power to relieve any citizen from the payment of any tax, or to exempt him from any burden imposed upon him by law." There could be no room for doubt that as to these two subjects there was a clear and absolute denial of power in the city council under that section of the charter of 1870. It is commonly believed that the cases of *Hitchcock v. St. Louis*, 49 Mo. 484, and *Campbell v. St. Louis*, 71 Mo. 106, were decided on the faith of, or at least were in some manner affected by, the provision of the charter of St. Louis of 1870, above quoted. It is not clear, however, that such is the fact. It does not clearly appear from the report of the case of *Hitchcock v. St. Louis*, *supra*, whether it arose under the charter of 1870 or that of 1867 (Acts 1867, p. 56). An examination of the original transcript in that case shows that the ordinance in question was passed on February 8, 1870, and the suit was filed on the 10th of February, 1870. The charter of St. Louis of 1870 was not approved until March 4, 1870. So that case arose before that charter went into effect. But the charter of 1867, under which that case arose, contained substantially the same prohibitions as the charter of 1870. Section 17 of article 2 of the charter of 1867 provided: "The city council shall have no power to exempt persons or property from license or taxation, or from the payment of burdens imposed upon them by law." Laws 1867, p. 61. It is to be observed that this section was not referred to or relied on by either counsel or court in the *Hitchcock Case*. That was a suit "to test the validity of an ordinance passed by the city council of the city of St. Louis, by which the sum of \$1,500 was appropriated out of the general revenue, and ordered to be paid to the mother superior of St. Ann's Orphan Asylum and Widow's Home, as a donation from the city toward the maintenance and support of that institution." It was held that: "The donee is a mere private institution, not under the control of the city, and having no connection with it. If the taxpayers' money can be taken and given to it, it may be also to any other private corporation, or it may be distributed gratuitously to individuals." There can be no difference between legal minds that this case was properly decided, but it has no application to the case at bar, and throws no light whatever upon the true meaning of section 30 of article 3 of the present charter, nor upon its ancestral sections of the charters of 1867 or 1870. The case of *Campbell v. St. Louis*, 71 Mo. 106

arose under the charter of 1870, but the provision of the charter above quoted was not referred to or relied on at all. The facts in that case were that the Times Company had a contract to do the city printing. The company and the city disagreed as to the amount due the company for printing done under the contract. The essential difference was that the company claimed that it was entitled to charge double the contract price per line for rule and figure or tabular work. The administrative officers refused to allow it, and treated all lines alike, and applied the contract price to all alike. The city council first adopted a resolution that the "said company be allowed payment in full for printing on their scale of prices for tabular matter." The city officers still refused to allow the claim, and thereafter the city council passed an ordinance for the relief of the company, directing the auditor to draw his warrant in favor of the company for the amount claimed. Thereupon the plaintiff, as a citizen, instituted a suit for an injunction to restrain the city from carrying the ordinance into effect. The defendants demurred to the petition. The circuit court sustained the demurrer, and the plaintiff appealed. The St. Louis Court of Appeals reversed the judgment of the circuit court. The reasoning employed by the Court of Appeals was that it was decided in *Hitchcock v. St. Louis*, 49 Mo. 484, that the city could not make a donation of public money as a gratuity; that the charter required the party having the contract for the public printing to do all the job work required, and that it should not be lawful to cause any printing to be done or paid for except as provided for by the article of the charter relating to public printing; that said article required that the contract for public printing should be let by the comptroller, by competitive bidding, to the lowest and best bidder; and that the power to let the contract being given to the comptroller the city council had no power in the matter except to make an appropriation to pay for the work. The opinion does not state who was vested with the power to determine the amount of work that had been done under the contract, but inferentially it might be said that the opinion regarded that power as vested in the comptroller. It was argued in that case that, as "a dispute had arisen between the city and the company as to the amount due the company growing out of a lawful contract, to settle which the parties might have recourse to a court of justice, therefore the city had a right to settle and adjust it by compromise out of court." But the Court of Appeals answered that contention by saying: "The plain duty of the council would be to refer the subject to the courts of the state; and where it attempts, in place of this, to determine the validity of the claim, and to provide for its payment, it is guilty of a plain usurpation of power, and a wanton waste of the money of the city."

The defendants appealed from this decision of the St. Louis Court of Appeals to this court (*Campbell v. City of St. Louis*, 71 Mo. 106), where by a "per curiam" opinion the opinion of the Court of Appeals was affirmed and adopted.

It will be observed that the prohibitions of section 5 of article 3 of the charter of 1870 were not referred to or relied on. Manifestly, they were not applicable to that case. These cases have been thus fully analyzed to show that they did not depend for their decision upon the provisions of the city charter which formed a part of the evolution of section 30 of article 3 of the present charter. The present charter of St. Louis was framed by a board of freeholders in 1876, and was adopted by the people at an election held on August 22, 1876. Section 30 of article 3 was made up by taking section 5 of article 3 of the charter of 1870, and inserting the word "lawful" before the word "tax," and adding three classes of subjects thereto, and then adding the last clause as to the two-thirds vote being necessary. Thus the first two classes of subjects treated of in section 30 of article 3 of the charter of 1876 are the same as the two prohibitions of the charter of 1870; that is, they prescribe that the assembly shall not have power (1) to release any citizen from the payment of any lawful tax, or (2) to exempt him from any burden imposed upon him by law. With this as a foundation, the framers of the charter of 1876 build section 30 by adding thereto: (3) or to ordain the payment of any demand not authorized and audited according to law; (4) nor to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor; (5) or the payment of any damages claimed for alleged injuries to persons or property. And then were added the words, "except by ordinance, and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays." Thus it will be observed that the first and second classes relate to excusing a citizen from paying money into the city treasury. The third class relates to paying money out of the treasury. The fourth class might result in the payment of money into or out of the treasury. The fifth class relates wholly to the payment of money out of the treasury.

Now, the contention is that by the qualifying clause at the end of the section it was intended to give the assembly power, by the prescribed vote, to sit as a quasi court, and award and pay damages to a citizen for injuries done by the city to his person or property, but that the assembly had no power whatever to compromise a disputed claim, or to order the payment of any demand not authorized and audited according to law, or to exempt a citizen from any burden imposed upon him by law, or to relieve a citizen from the payment of any lawful tax. Or, otherwise stated, that the wisdom and integrity

of the assembly could be trusted to pay out money for damages for injuries to persons or property, and thus relieve the city of the expense incident to forcing every such matter into court, but that the assembly could not be trusted to compromise a disputed demand, which might result in the city paying or receiving more or less than its administrative officers claimed was right, and that, as decided in *Campbell v. St. Louis*, "the plain duty of the council [assembly] would be to refer the subject to the courts of the state," notwithstanding the costs in the case might exceed the difference in dispute. And, further, that the assembly could not be trusted to deal with the other three classes of subjects covered by the section in question. This contention necessarily means that the assembly could be trusted to pay out money for one class of municipal liabilities, but could not be trusted to pay out money for any other class of such liability, and could not be trusted at all to deal with a citizen when it came to the question of the payment of money into the treasury, or the settlement of any question of a tax or burden due from or resting upon the citizen. No reason is attempted to be given for this inexplicable difference of power in the assembly. The contention is based solely upon the cold words of the section, which it is said precludes all debate as to the meaning or reason of the law. As to the first two classes of subjects it is said that the charter of 1870 absolutely denied power to the assembly to deal with them, and, as they were brought forward into the charter of 1876, they must be still construed as absolute prohibitions. But, if this be conceded to be the correct meaning of that part of the section, it will not solve the problem; for neither the charter of 1870 nor any previous charter contained any prohibition against the assembly ordaining the payment of any demand not authorized and audited according to law, nor any prohibition against the assembly authorizing the compromise of a disputed demand. So the argument that the section intended that there should be an absolute prohibition against the assembly doing any of these acts could not be drawn from any prior laws, and hence that reason for excluding the qualifying clause at the end of the section from those classes of subjects would not apply. There is, therefore, no reason for thus restricting the qualifying clause to the fifth class of subjects, and not applying it to the other four classes; and "the reason of the law is the life of the law."

But it is said that the general rule of law is that, in the absence of punctuation showing a different intent, an exception or proviso in a statute applies only to its immediate antecedent in the statute, and therefore the exception in this section applies only to the fifth class of subjects. *Sutherland on Statutory Construction*, § 267, thus states the rule: "Relative and qualifying words and phrases, grammatically and legally, where no contrary

intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision or clause immediately preceding." But, after referring to the cases illustrative of the general rule, the author, in the same section, adds: "This principle is of no great force. It is only operative when there is nothing in the statute indicating that a relative word or qualifying provision is intended to have a different effect. And a very slight indication of legislative purpose, or a parity of reason, or the natural and common-sense reading of the statute may overturn it, and give it a more extended application. * * * Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it. * * * Where the intention is manifest, a proviso or qualifying words or clauses found in the middle of a sentence may be placed at the end; or, when inserted in one section, they may be applied to the matter of another section." The many cases cited in the notes to the text afford ample illustration of the many instances in which the general rule has found exceptions. In fact, the exceptions have been applied oftener than the rule. *Dwarris' Treatise on Statutes* (2d Ed.) p. 600, says: "When words are at the beginning of a sentence, they may govern the whole. * * * When words are at the end of a sentence, they may refer to the whole. Thus the words, 'per legem terrae,' in Cap. 29 of Magna Charta, being towards the end of the chapter, have been always held to refer to all the precedent matter. But if words are in the middle of a sentence, and sensibly apply to a particular branch of it, can they be extended to that which follows? Agreeably to reason, and in grammatical construction, it would seem not; but, as statutes are read without breaks and stops, it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the context to what they relate; and they are often, as will be seen, to be read distributively—'reddendo singula singulis.'" *Sedgwick on the Construction of Stats.* (2d Ed.) p. 226, says: "A limiting clause is generally to be restrained to the last preceding antecedent." The author cites in support of this statement the case of *Cushing v. Worrick*, 9 Gray, 382, but omits the very important words of that decision which complete the part of the sentence wherein the rule stated is laid down, which are, "unless there is something in the subject-matter which requires a different construction." *Id.* p. 385. But the same author (page 225) says: "Common sense should prevail over strict grammatical rules, and punctuation should not control. *Gyger's Estate*, 65 Pa. 311. The punctuation of a statute is not to be considered. *Cushing v. Warrick*, 9 Gray, 382; *Hamilton v. Steamboat Hamilton*, 16 Ohio St. 428."

A few illustrations from the many cases collated by the text-writers will point to the

rule and its exceptions. Thus, a proviso in the first section of an act was held to apply to the second section of the act also. *Mechanics*, etc., Bank Appeal, 31 Conn. 63. A proviso at the end of one section was held to extend to the whole act. *United States v. Babbitt*, 1 Black, 55, 17 L. Ed. 94; *Mayor of Cumberland v. Magruder*, 34 Md. 381; *Great Western Railway Co. v. Swindon & C. Extension Ry. Co.*, Law Rep. 9 App. Cas., loc. cit. 808; *Eby's Appeal*, 70 Pa. 311; *Coxson v. Doland*, 2 Daly, 66; *Hart v. Kennedy*, 15 Abb. Prac. 290; *Gyger's Estate*, 65 Pa. 311; *State ex rel. Davis v. Forney*, 21 Neb. 223, 31 N. W. 802; *State ex rel. v. Turnpike Co.*, 16 Ohio St., loc. cit. 319; *Fisher v. Connard*, 100 Pa., loc. cit. 69. In *Hart v. Kennedy*, 15 Abb. Prac. 290, and in *Coxson v. Doland*, 2 Daly, 66, a provision of the metropolitan police act of New York was involved. It provided that no member of the police force "shall be liable to military or jury duty, or to arrest on civil process, nor to service of subpoenas from civil courts, whilst on actual duty." It was contended that the words "whilst on actual duty" referred only to its immediate antecedent "nor to service of subpoenas from civil courts," and did not apply to the other precedents in the section. But the court said: "Whatever may have been the object of this alteration, it is very plain that the substitution of the word 'or' for 'nor,' and of 'nor' for 'or,' has made no change in the meaning of the section, and the decision in the case of *Hart v. Kennedy* is as applicable to it now as it was before. 'Or' is a conjunction, marking distribution, an alternative, or opposition; and the conjunction 'nor' performs the same office in negative propositions. The first is properly used in connection with 'either,' and the latter with 'neither.' The use of both in this case was inadmissible, and, as the negative 'shall not' was placed at the beginning of the sentence, the transposition of 'or' for 'nor' from one predicate to another could in no way affect the meaning." Accordingly, it was held that the words "whilst on actual duty" applied to all the precedents in the section, and was not limited to the immediate antecedent. In *Matthews v. Commonwealth*, 18 Grat. 989, two clauses in a section were transposed to make the section constitutional. The *American & English Enc. Law* (1st Ed.) p. 435, thus tersely defines the office of provisos, exceptions, and saving clauses: "A proviso is something ingrafted upon an enactment, and is used for the purpose of taking special cases out of the general act, and providing specially for them. An exception is a clause similar to the proviso, exempting from the operation of an enactment that which, but for it, would have been included. A saving clause is an exception of a special thing out of general things mentioned in the statute. It is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result

from unrestricted repeal. The particular intent expressed in a proviso or exception will control the general intent of the enactment. The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears, and should be construed with the section with which it is connected. This rule is not, however, absolute, and, if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment." The cases cited in support or illustration of the text are too numerous to be reviewed or analyzed here.

It is in the light of these cases and these rules of law that section 30 of article 3 of the city charter must be read. Neither grammatical construction, punctuation, nor relative arrangement of the several parts of the section must be allowed to absolutely control. A common-sense interpretation is the safest and surest to apply, bearing always in mind the mischiefs to be remedied and the benefits to be secured by the law.

There is nothing upon the face of the section which gives support to the theory that the framers of the charter intended to absolutely prohibit the assembly from legislating as to the first, second, third, and fourth classes of subjects covered by the section, but intended to give the assembly power as to the fifth class, if two-thirds agreed to the ordinance. The character and nature of the subjects embraced in the section is not such as would suggest the denying of such power as to four of the classes and conferring it as to the fifth class. The mischiefs to be remedied did not require or suggest such a difference of power. In fact, the mischief apparent from the history of the evolution of the section, that needed specifically to be remedied, from the standpoint of the city, was that created by the decision in *Campbell v. St. Louis*, 71 Mo. 106, which denied to the city the power to compromise a disputed demand, and made it obligatory upon the city to agree with its adversary on its adversary's terms, or else to throw the matter into court. The other mischiefs to be remedied were such as principally affected the rights of the citizen in his dealings or relation with the city, and as to which no tribunal had any power to relieve the citizen, however gross the wrong suffered. The lawmakers knew that under the prior charters the city had no power to relieve a citizen from the payment of a lawful tax, nor to exempt him from any burden imposed upon him by law. If the framers of the charter of 1876 had been satisfied with the working of the old rule on this subject, it is only reasonable to believe that they would have left these prohibitions just as they were under the charter of 1870, in a section by themselves, and would not have placed them in a section with other matters, and would not have placed them in a section which concluded with the words, "except by

ordinance and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays." The fact that those matters are so placed in the same section of the charter with the other three classes, and that the section concludes with the words quoted, is most conclusive evidence of the intention of the framers of the charter to change the inexorable character of the old law, and to provide for a more humane, reasonable, flexible, and just method for the city and its citizens to meet and adjust their differences, and correct the mischief which always follow from any set of harsh and immutable rules.

This results in holding that the words "except by ordinance," etc., at the end of section 30 of article 3 of the city charter, apply to all five classes of subjects covered by that section, and not simply to the fifth class, and that the ordinance in question is not prohibited by section 30 of article 3 of the charter.

This leaves for consideration only the contention that the ordinance in question violates the provisions of sections 46 and 47 of article 4 of the Constitution, which prohibit the general assembly to grant, or to authorize any city to grant, any public money or thing of value to an individual. Of this but little need be said. If the ordinance in question made a donation of public money to an individual, it would be void, as was well said in *Hitchcock v. St. Louis*, 49 Mo. 484. But such is not the fact here. The ordinance only appropriates the expense that a public officer incurred and paid, while in the discharge of his duty as such officer, in removing a nuisance from the public highway, which the law expressly required him to do, and which the city was under obligation to its citizens to do in the discharge of its police power and its health and safety duty. Such expense was as much public expense as if a leper or person afflicted with smallpox or a violently insane person, with homicidal tendency, was found on a populous street, or in a public park or public building, and it had become necessary to hire a carriage or ambulance to remove him. No one would deny that such an expense was properly a public expense, and that, if any officer whose duty it was to remove such a person had paid such expense, it would be not only competent, but proper, for the public to reimburse him. An act or ordinance appropriating money to pay such expense would not be a donation of public money to an individual.

The Am. & Eng. Enc. Law (1st Ed.) p. 540, sums up the law on this subject as follows: "Public officers acting faithfully and without fault, and pursuant to authority, are entitled to be reimbursed for anything reasonably and necessarily disbursed by them in executing the duties of their offices, and the public or a public corporation has power to indemnify their officers and agents against any charge or liability they may incur in the bona fide discharge of their duty, even though

their acts were illegal, or they had mistaken their legal rights and authority. But where the corporation has no duty to perform, no rights to defend, no interests to protect, and no pecuniary or corporate concern with the discharge of the duties of the officer, it has no power to indemnify him." Numerous and apposite cases are cited in support of the text. Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper.

It follows that the circuit court erred in sustaining the demurrer to the answer, and that the petition states no cause of action.

The judgment of the circuit court is reversed. All concur.

SNOW v. BASS et al.

(Supreme Court of Missouri, Division No. 2
April 1, 1903.)

TRUST DEED—CONSTRUCTION—PAYMENT BEFORE MATURITY—PENALTY FOR REFUSING TO SATISFY MORTGAGE.

1. A deed of trust provided that the grantors might sell any portion of the property, and have the same released by paying the price on the debt secured, and that all interest on the sums so paid should cease after the next semi-annual interest payment, but that no such sale should be completed unless the cestui que trust was first consulted, and the price was satisfactory to it. *Held*, that the grantors could pay the debt before maturity with money obtained by placing a second mortgage on the land.

2. Rev. St. 1899, § 4363, provides that any person receiving satisfaction of a mortgage or deed of trust who shall not, within 30 days after request and tender of cost, acknowledge satisfaction on the record, or deliver a sufficient deed of release, shall be liable to a penalty. *Held* not enforceable against a mortgagee who in good faith believed that the debt secured by deed of trust was not due when tender was made, and who refused on that ground to accept the money tendered.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by F. O. Snow against Sampson Bass and another. Judgment for defendants, and plaintiff appeals. Modified.

This action was begun by plaintiff filing his petition in four counts upon four coupon notes of the aggregate amount of \$560, for which sum, with interest thereon, he asked judgment. To plaintiff's petition defendants filed the following answer:

"Come the defendants, and make now their appearance to this cause of action, and, answering plaintiff's petition, say:

"(1) In answer to the first and third counts of said petition, these defendants admit that they executed the coupons, or interest notes, or instruments of writing, as set out in said first and third counts of said petition, and attached as exhibits thereto, and admit that

they are indebted to the plaintiff, by reason of the execution of said instruments, in the sum of \$280—that is, by reason of the said coupon or instrument of writing declared on in the first count of said petition in the sum of \$200, and by reason of the coupon or instrument of writing declared on in the third count of said petition in the sum of \$80; but defendants deny that they are indebted to said plaintiff by reason of any interest on said instruments of writing, or either of them, or for any further or other sums on the instruments declared on in the first and third counts of said petition, than in the aggregate sum of \$280, and which said sum of \$280 the defendants here tender in open court to the plaintiff, and ask to be discharged from the action declared on in said counts, with their costs.

“(2) Defendants admit that they executed the instruments declared on in the second and fourth counts of said petition, copies of which instruments are attached thereto; but defendants say that they are not indebted to the plaintiff by reason of the execution of said instruments, and were not at the time of the institution of this suit; that said coupons or interest notes declared on in said second and fourth counts of said petition, copies of which are attached to said petition, were at the time of the institution of this suit duly paid off and discharged. Wherefore defendants pray to be discharged with their costs.

“(3) Defendants, for another and further defense to said cause of action set out in all the counts of said petition, say: That prior to the 1st day of October, 1897, the said Sampson Bass, one of the defendants herein, was in litigation with the said Brinkerhoff-Faris Trust and Savings Company (hereinafter designated ‘Savings Company’), an organization duly incorporated under the laws of the state of Missouri, and located and having its place of business in the city of Clinton, in the state of Missouri. That at that time an adjustment and agreement of all matters in litigation was reached between said parties, the defendant Sampson Bass and the said Savings Company, whereby the said Sampson Bass admitted an indebtedness of \$7,000 to said savings company, but not then being able to pay said amount, and having no property out of which to pay said debt than the real estate hereinafter mentioned, defendants agreed that they would execute to said savings company their certain promissory notes for the said sum of \$7,000, provided they should be permitted to pay said notes from proceeds of sale of real estate from time to time as said real estate should be sold; and in pursuance of said agreement, and for the consideration aforesaid, defendants, on the 1st day of October, 1897, made, executed, and delivered to the said savings company their two certain promissory notes in words and figures as follows:

“‘No. 3573A. \$2,000.00

“‘United States of America.

“‘State of Missouri. Real Estate Bond.

“‘Know all men by these Presents, That we, Sampson Bass and Eliza Bass, of Greene County, in the State of Missouri, for value received, are justly indebted to the Brinkerhoff-Faris Trust and Savings Company of Clinton, Missouri, in the sum of Two Thousand Dollars, which sum of money in New York Exchange we hereby promise to pay to the said Brinkerhoff-Faris Trust and Savings Company, or order, on the first day of October, A. D. Nineteen Hundred and Two, at the office of the said Brinkerhoff-Faris Trust and Savings Company, at Clinton, Missouri, with interest at the rate of eight per cent. per annum from this date until due or default be made, and if not paid when due, or if a default occur in the payment of any of the interest Coupons hereto attached, then this bond to bear interest at the rate of eight per cent. per annum thereafter, said interest until the maturity of this bond being payable semi-annually on the first day of April and October in each year according to the terms of ten coupons of even date herewith attached to the bond and numbered from one to ten inclusive.

“‘This bond is secured by a deed of trust of even date herewith being the only lien upon certain real estate situated in Greene County and State of Missouri, which deed of trust is duly recorded, and is payable according to the conditions in said Deed of Trust expressed.

“‘[Signed] Sampson Bass.

“‘[Signed] Eliza Bass.

“‘Dated at Clinton, in the County of Henry and State of Missouri, on the First Day of October, 1897.’

“‘That the instruments sued on as set out in the second and fourth counts of said petition are two of the ten coupons mentioned in the note just above described, and are Nos. 4 and 5 of said coupons.

“‘No. 3573B. \$5,000.00

“‘United States of America.

“‘State of Missouri. Real Estate Bond.

“‘Know all men by these presents, That we, Sampson Bass and Eliza Bass, of Greene County, in the State of Missouri, for value received are justly indebted to the Brinkerhoff-Faris Trust and Savings Company of Clinton, Missouri, in the sum of Five Thousand Dollars, which sum of money in New York Exchange we hereby promise to pay to said Brinkerhoff-Faris Trust and Savings Company, or order, on the first day of October, A. D. Nineteen Hundred and Two, at the office of the said Brinkerhoff-Faris Trust and Savings Company, at Clinton, Missouri, with interest at the rate of eight per cent. per annum from this date until due or default be made, and if not paid when due,

or if a default occur in the payment of any of the interest coupons hereto attached, then this bond to bear interest at the rate of eight per cent. per annum thereafter, said interest until the maturity of this bond being payable semi-annually on the first day of April and October of each year, according to the terms of ten coupons of even date herewith attached to the bond and numbered from one to ten inclusive.

"This bond is secured by a deed of trust of even date herewith being the only lien upon certain real estate situated in Greene County and State of Missouri, which deed of trust is duly recorded, and is payable according to the conditions of said deed of trust expressed.

"[Signed] Sampson Bass.

"[Signed] Eliza Bass.

"Dated at Clinton, in the County of Henry and State of Missouri, the First day of October, 1897."

"That the instruments sued on and set out in the first and third counts of said petition are two of the coupons mentioned in the second note just above described are Nos. 4 and 5 of said coupons. That for the purpose of securing the payment of both said notes herein set out, and all the coupons thereto to each note attached, defendants, on the 1st day of October, 1897, made, executed, and delivered to John H. Lucas and Herman P. Faris, as trustees, their certain deed of trust conveying to said trustees the real estate therein described, and in which are set out the terms and conditions upon which said notes might be paid, which said deed of trust is in words and figures as follows. * * *

In lieu of the deed of trust here called for and copied in full in defendants' answer, we will insert, to save space, only these two provisions thereof, out of the ordinary in such instruments, and of peculiar significance in this controversy, to wit:

First. "It being expressly agreed that first parties may sell any portion of the above described property at its fair and reasonable value and have the same released from the lien of this incumbrance by paying the full purchase price and value thereof on the indebtedness hereby secured, and all interest on such sums so paid shall cease and determine from the next semiannual interest payment thereafter, but no such sale shall be completed or this agreement be binding unless the third party is first consulted and the purchase price of such proposed sale is satisfactory to it."

Second: "Or if said first party shall give notice of intention to make payment before due, as hereinbefore provided, and payment in accordance with said notice is not made, then it is hereby specifically agreed that the whole debt shall, at the option of the legal holder of said bond and unpaid coupons, become due and payable and this deed shall remain in force."

"That by the terms and conditions of said deed of trust it was expressly agreed that the payees of said notes, the first parties in said deed of trust and the defendants in this suit, might sell any portion of the above-described property mentioned in said deed of trust at its fair and reasonable value, and have said real estate so sold released from this incumbrance by paying the full purchase price and value received therefor on the indebtedness secured by said deed of trust; and it is further provided that said notes hereinbefore mentioned and set out in said petition might be paid or partially paid from the sale of said mortgaged property, or any portion thereof, as in said deed of trust set out, and that such payment of said notes, or partial payments thereon, might be made at any interest-paying time mentioned in said notes; or such payments might be made at any time by paying the principal and all interest accruing thereon up to the time of the next semiannual interest-paying period next occurring after said payment. That said notes herein set out, each and both of them, are payable, principal and interest thereon, in New York exchange, as evidenced by said principal notes and coupon notes attached to said principal notes, at the office of said savings company at Clinton, Missouri. The said interest is payable semiannually on the 1st day of April and October in each year in New York exchange. That by the terms and conditions aforesaid, as so set out in said deed of trust and in said notes, the defendants were given the option or privilege of paying said notes and interest thereon at the office of said savings company in said city of Clinton, Missouri, at any interest-paying time as mentioned in said notes and coupons, or at any other time, upon condition that the interest up to the next occurring interest-paying period should be tendered, together with the principal, at the time of making such payment or tender. That, exercising such privilege and option, these defendants sold a portion of the real estate in said deed of trust described, and on the 29th day of September, 1899, tendered at the office of said savings company in the city of Clinton, Missouri, the sum of \$7,280 to Herman P. Faris, the secretary and treasurer of said savings company, and one of the trustees mentioned in said deed of trust, and the agent of plaintiff to receive the payment of said notes, at the office of said savings company in the city of Clinton, Missouri; the said sum of \$7,280 being the amount of principal and interest due on the two principal notes herein mentioned on the 1st day of October, 1899, he (the said Faris) then and there having in his possession, as agent of said plaintiff, the said notes for \$5,000 and \$2,000, together with the coupons here sued on and the other coupons attached to said notes; and the said defendants then and there tendered to him, the said Faris, agent and trustee as aforesaid, in New York exchange, the sum of \$7,280, be-

ing the amount of the principal of said notes and all the interest on both and each of them up to the 1st day of October, 1899, which said 1st day of October, 1899, was the first semiannual interest-paying period next after said tender, and demanded the surrender of said notes, with all coupons thereto attached, including the coupons here sued on. That the said Faris refused to accept said \$7,280 in New York exchange, and refused to deliver up to defendants said principal notes and coupons, because, as he, the said Faris, claimed and asserted, the said notes had been assigned, and were not then the property of said savings company. And now again come the defendants herein in court, and tender for the use of the plaintiff, the said sum of \$7,280 in payment of said principal notes of \$5,000 and \$2,000 and all interest due thereon up to the 1st day of October, 1899, and pray that said deed of trust be canceled, and said notes be delivered up to defendants, and that they (the defendants) be discharged, with their costs.

"(4) And defendants now, as a counterclaim against said indebtedness of defendants to plaintiff, as in the third defense of this answer set out, and adopting all of the allegations of said third defense of this answer as part of their statement of counterclaim, further say: That about the 1st day of August, 1899, defendants notified said Faris, one of the trustees in said deed of trust, and the secretary and treasurer of said savings company, that they, the said defendants, desired to pay off all of said notes and all interest due thereon up to the 1st day of October, 1899. That thereupon the said Faris informed the plaintiff, who had at that time become and was the owner and holder of said notes, that application was made by the defendants herein to pay same, and said notes were sent by the said plaintiff, who was then and now is a nonresident of this state (his exact place of residence is not known to these defendants), to said Faris, and the said Faris thereupon notified said defendants that said notes would be at the office of said savings company in Clinton, Missouri, for payment. That thereupon these defendants arranged and got money from the proceeds of the sale of their land so described in said deed of trust, and on the 29th day of September, 1899, purchased New York exchange to the amount of \$7,280, as aforesaid, and then and there went to the office of said savings company at the said city of Clinton, Missouri, and there tendered to the said Faris, who at that time, as the agent of the plaintiff, had said notes and said deed of trust in his possession, the said notes being then and there in writing duly indorsed by the plaintiff, so that they might then and there be transferred to these defendants, or to their order, so that they might be presented to the recorder of deeds of Greene county, Missouri, where said deed of trust was recorded, and said deed of trust

then and there might be released and satisfied on the margin of the record thereof in the manner provided by law for the satisfaction of deeds of trust, the said sum of \$7,280 in New York exchange in the manner and place as in said third defense set out, and at the time of making such tender these defendants further tendered to him, the said Faris, the additional sum of \$1 to pay the expenses of executing a sufficient deed of release of said deed of trust, and demanded of the said Faris that the owner and holder of said notes make a good and sufficient deed of release of said deed of trust, or enter satisfaction upon the margin of the record of said deed of trust, or that said notes be delivered to the defendants, so that they, said defendants, might present same to the recorder of deeds of Greene county, Missouri, for cancellation and release; and he, the said Faris, refused to accept said money at said time, refused to deliver to said defendants said notes and deed of trust, and refused to enter satisfaction of said notes upon the margin of the record of the deed of trust, although he, the said Faris, held said notes in his possession, duly indorsed by plaintiff, so that he, the said Faris, was empowered and authorized to enter such satisfaction upon the margin of the record of the deed of trust, and refused to obtain a good and sufficient deed of release from said plaintiff of said deed of trust, and refused to make, as assignee and holder of said notes, a deed of release of said deed of trust, and although he, the said Faris, agent of plaintiff as aforesaid, has frequently been requested to enter such satisfaction or to procure a sufficient deed of release of said deed of trust, said plaintiff refused then to execute the release of said deed of trust in any of the ways above set out, and has continued to refuse, and has not within thirty days after such request and has not yet acknowledged satisfaction on the margin of the record of said deed of trust, or caused to be delivered to these defendants, the persons tendering the payment of said notes, a sufficient deed of release of said deed of trust to the owners or holders of said notes.

"Wherefore these defendants say that under and by virtue of the provisions of section 4363 of the Revised Statutes of 1899 of Missouri the plaintiff has become liable to these defendants in the sum of 10 per cent. of the amount of said notes in said deed of trust described absolutely—that is to say, the sum of \$728—for which sum of \$728 these defendants pray judgment, and ask that the same be allowed as a counterclaim against said sum of \$7,280, here rendered to plaintiff by these said defendants."

To defendants' answer plaintiff replied, denying the allegations thereof, and upon the issues thus joined the case was heard and determined by the trial court, resulting in a decree in substantial compliance with the prayer of defendants' answer. At the

trial there was but little controversy over the facts, and, so far as concerns this appeal, they may be said to be conceded. The defendants, without consulting plaintiff, procured \$500 from third parties by the placing of a second deed of trust upon the property named in the deed of trust given to secure the notes in controversy, and with the money thus obtained, on the 28th of September, 1899, tendered to the trust company, then holding the notes in question, as the agent of plaintiff, the sum of \$7,280, this being the amount of the principal and the interest due on plaintiff's notes to October 1, 1899, the approaching semiannual interest-payment dates provided in the notes, and \$1 additional to pay the expense of having their deed of trust satisfied of record, and demanded that the deed of trust be satisfied upon the records of Greene county. This tender the plaintiff refused, and afterwards, on the 6th day of April, 1900, began this suit on the four coupon notes above set out, asking only for a money judgment thereon, etc.

The judgment of the trial court was that defendants were indebted to plaintiff in the sum of \$7,280 on account of the notes in question and the interest thereon to October 1, 1899, and that defendants were entitled to recover of plaintiff on their counterclaim in the sum of \$728. It was then ordered and adjudged that, upon the payment by defendants of the sum of \$6,552 to the clerk of the court for the benefit of plaintiff, said clerk being appointed receiver to take and hold said sum for payment to plaintiff if he will receive same, and, if not, then to be subject to the further order of the court, that the deed of trust made by defendants to secure said notes and held by plaintiff be ordered and decreed satisfied, and the real estate described therein be discharged and released from the lien incumbrance of said deed of trust, and that defendants pay cost of said suit.

Johnson & Lucas, for appellant. Benj. U. Massey, for respondents.

ROBINSON, J. (after stating the facts). But two questions are presented on this appeal, the first being whether, under the provisions of the deed of trust above quoted, and upon the conceded facts shown, the defendants had the right to pay off their notes before the maturity thereof, as expressed upon their face, when the money tendered to pay same had not been obtained from an absolute sale of the real estate named in the deed of trust, with the consent and approval of the plaintiff; and, second, whether the statutory penalty of section 4363, Rev. St. 1899, for nonsatisfaction of record, can be enforced against a mortgagee, who in good faith believed the debt secured by his mortgage or deed of trust is not due when the tender is made, and when no actual acceptance of the money tendered occurs.

No question is made by appellant that the recitations in the deed of trust in relation to the manner and time of payment of the notes in suit are not properly considered as incorporated into and as forming a part thereof for the purpose of determining when a payment may be made thereof at a time other than at their face maturity; but his contention is that the face of the notes must determine the time of their maturity for payment, unless it is shown that defendants have complied strictly with all the requirements of the terms of the deed of trust maturing the notes at an earlier or different period; and that, as defendants have shown, by their own testimony, that they did not ask to have these notes paid off by money arising from the sale of a part or all of the land named in the deed of trust securing them at the time the tender was made to him, but that in fact they asked to pay off said notes with money obtained by placing upon said land a second deed of trust to other parties, they could not then mature their notes for the reception of the money tendered, and that the right of respondents to pay the notes in question before their maturity, as expressed upon their face, depended strictly upon the fact that the money tendered must have been derived from the sale of the mortgaged property, and not otherwise. Plaintiff's contention in this regard is based upon his construction of the meaning of this paragraph of the deed of trust in question:

"It being expressly agreed that first parties may sell any portion of the above described property at its fair and reasonable value and have the same released from the lien of this encumbrance by paying the full purchase price and value thereof on the indebtedness hereby secured, and all interest on such sums so paid shall cease and determine from the next semi-annual interest payment thereafter, but no such sale shall be completed or this agreement be binding unless the third party is first consulted and the purchase price of such proposed sale is satisfactory to it."

As applied to the question of when, and under what circumstances, the notes secured by that instrument may become payable, what means the paragraph of the deed of trust above quoted? As said, appellant contends that by its terms he is not bound to accept any money on the principal notes held by him until their maturity as expressed on their face, except such sums as defendants might obtain and offer to apply on the notes from an absolute sale of a part or all of the real estate named therein; while, upon the other hand, respondents insist that the question from what source came the money to make a payment, partial or in full, on plaintiff's notes at any interest-payment date, is a matter of concern to him only in so far and to the extent that, if obtained from the sale of the real estate in-

cluded in his deed of trust, he might know that he should receive on his notes the full value of the land sold, which he would be required to release from the operation of his deed of trust when a sale was made of the land in part or in whole with appellant's consent and approval; that, in so far as concerned plaintiff, the second mortgage placed upon the land by defendants to raise the money to pay off their obligation to plaintiff is, in effect, a sale of the land. If we cast aside the undisputed testimony of defendants as to what was said and talked between the parties to the deed of trust at the time it was being made as to the manner of and the time when the note secured thereby might and were expected to be paid, it would still be difficult to read the paragraph of the deed of trust above quoted and fail to be impressed with the thought that both the maker and the payee of the notes secured thereby were contemplating their payment, if possible, before their face maturity, and that such was the privilege attempted to be conferred upon defendants if they could in any way raise the money for that purpose; and we fail to see why the restrictions and conditions contained in said paragraph of the deed of trust first above quoted, as to the circumstances under which the sale of the land named may be made, and the direction as to how the money to be derived therefrom is to be applied, should be considered as a curtailment of defendant's rights to pay off this secured indebtedness from other sources than that particularly specified in said paragraph, as appellant asserts.

It is not always correct, in determining one's right under a contract, to say that, because in one part thereof a particular way is designated in which a right may be exercised or a particular act may be done, all other ways of doing that act or exercising that right are excluded. Thus it is not necessarily true, as appellant seems to assume in this case, that, because defendants were given the right, by the provisions of the paragraph above quoted from the deed of trust, to sell any part of the mortgaged real estate on plaintiff being satisfied with the price to be received therefor, and by applying the money so received on plaintiff's secured indebtedness, and stopping all interest on the amount so paid, that said indebtedness could not be paid off by defendants with money received in any other way or derived from any other source. The provision for defendants paying off the secured indebtedness before its face maturity, if possible, was unmistakably contemplated by the parties to the deed of trust, and as a means to accomplish that end defendants were given the right to sell the mortgaged real estate upon the terms and conditions prescribed in the paragraph in question. We think, as did the trial court to whom this case was first presented, that the question from what source

came the money to make the payment upon the notice in suit was a matter of concern to plaintiff only in so far and to the extent that, if defendant obtained the money from the sale of the mortgaged real estate, plaintiff had the right to know that he would receive the full value of the land sold on his secured indebtedness.

The right to pay off the notes at any semi-annual interest-payment period was one of the privileges given to defendants by the provisions of the deed of trust in question. The right to sell a part or the whole of the mortgaged real estate to assist in the accomplishment of that act was another. The qualification and restriction in said paragraph of the deed of trust containing that privilege to defendants apply naturally, necessarily, and logically to the exercise by defendant of the latter right, but not to the former. If the right to sell all or any part of the mortgaged real estate was to be exercised by defendants, every notion of business propriety would at once suggest that the mortgagee holder of the secured notes should have some authority in determining its fair value, else his security might be frittered away by an unwise or fraudulent sale on part of the mortgagors; and, after the right of sale had been exercised, and the land was released from the operation of the deed of trust securing plaintiff's notes, nothing is more reasonable, natural, or necessary than that a condition should be found inserted, as there was in the paragraph in question, to the effect that there should be an application of the funds realized from the sale of the mortgaged real estate to the payment of the mortgagor's indebtedness. Defendants' right to sell the mortgaged real estate very properly may be said to be affected by these conditions of the paragraph in question, but not so of their right to pay off their indebtedness at any semiannual interest-payment period provided. When this latter right has been exercised by defendants, plaintiff could have no further interest in or concern with any conditions of the deed of trust. To him, when his secured indebtedness had been met and discharged, or when a full and proper tender thereof had been made, the deed of trust became a lifeless instrument.

Though we do not agree with appellant that defendants' right to pay off in part or in whole their notes before the maturity thereof as expressed upon their face is conditioned by the terms of the deed of trust upon the fact that the money used in such payment must have arisen from a sale of the mortgaged property, yet, if the right of payment by defendants at any semiannual interest-payment period contemplated by the deed of trust was thus clearly conditioned, we would still be disposed to hold that the money tendered by the defendants to plaintiff under the facts of this case came under that requirement. And, though the second

deed of trust placed on the property by defendants to procure the money with which to pay off plaintiff's notes was not a sale of the property in the sense that defendants' entire right and interest therein was passed absolutely to the grantee in that second deed of trust, as appellant defines a sale of property to be, yet there is, by the very terms employed in that instrument, a grant, bargain, sale, and conveyance of the property named for the purpose specified in said instrument, and, so far as concerned the plaintiff, or any or all outside parties, it is a disposition of the property named therein. The right of redemption in defendants, and the condition upon which the conveyance to the grantee may be defeated, are matters in which the plaintiff, as the satisfied holder of the first set of secured notes, had no interest. We therefore hold that the judgment of the trial court upon the first count of defendants' answer was correct, and that the effect of the tender by defendants to plaintiff was to discharge the real estate of plaintiff's lien.

2. Upon the question of defendants' right to recover upon their counterclaim, however, we think the trial court was in error. Defendants' counterclaim was predicated solely upon their right to recover the 10 per cent. penalty provided in section 4363, Rev. St. 1899. No other damages are alleged, nor was there proof of any actual damage sustained by defendants on account of plaintiff's failure to acknowledge satisfaction on the margin of the deed of trust record of Greene county, or on account of his refusal to deliver a sufficient deed of release after request made by defendants so to do. The proof was simply that defendants tendered to the plaintiff the satisfaction fee of \$1, along with the tender to him of the amount of the principal and interest due on all of their secured notes to October 1, 1899, and that they requested him to acknowledge satisfaction on the margin of the deed of trust record of Greene county, or that he deliver to them a deed of release of said mortgaged property, and that plaintiff refused to accept any of the money so tendered, or to comply with their request in any particular.

Section 4358, Rev. St. 1899, provides: "If any mortgagee, cestui que trust or assignee, or any executor or administrator of the mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satis-

faction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record, or any deed of release to be placed on file or record, shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representative, to make oath, in writing, stating that the notes or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof or his representative; and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same; which said affidavit shall be attached to the record of the mortgage or deed of trust to be satisfied."

By section 4363, supra, is provided the penalty the party receiving satisfaction on his mortgage demanded must pay to the party aggrieved (the owner of the mortgaged premises) for failing to acknowledge satisfaction thereof on the records of the county in which the land is situate, which reads as follows: "If any such person thus receiving satisfaction, do not, within thirty days after request and tender of cost, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent., upon the amount of the mortgage or deed of trust money absolutely, and such other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction." Under the facts of this case the appellant clearly does not fall within the designation of those on whom the 10 per cent. penalty provided by section 4363, supra, is meant to be imposed. Appellant never received satisfaction on his mortgage debt held against respondents, but, on the contrary, refused absolutely to receive the money tendered him by respondents on the ground that the amount tendered was not sufficient to cover his claim, with the interest he was entitled to thereon as expressed upon the face of said obligations, and because respondents had not complied with the provision of the deed of trust securing said obligation and author-

izing their payment at an earlier or different date than that named on their face. Statutes imposing penalties such as that provided in section 4360, supra, must be strictly construed; and, when one proceeded against falls not within the letter of its terms, the penalty is not enforceable.

It follows, therefore, that the judgment of the trial court will be reversed in so far as it gives to defendants a judgment on their counterclaim for \$728, and that the cause should be remanded to the circuit court, with directions that it modify its order and judgment in accordance herewith; and it is so ordered.

BRACE, P. J., absent. MARSHALL and VALLIANT, JJ., concur.

KOENIG et ux. v. UNION DEPOT RY. CO.
(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

STREET RAILWAYS — PERSONAL INJURIES — CARE REQUIRED — DUTY TO KEEP LOOKOUT — STREET CROSSINGS — RINGING BELL — RES GESTÆ — EXPERT EVIDENCE — TESTIMONY OF INTERESTED PARTY — FINANCIAL INTEREST — INSTRUCTIONS.

1. Whether the fact that a car ran about 125 feet before coming to a stop after striking a child would indicate that it had been moving faster than 10 or 12 miles an hour, or that the motorman did not apply the brakes or reverse power properly, was a question for the jury, and not for expert witnesses.

2. Evidence that immediately after the stopping of a car which ran over a child the motorman came back to where the child was, and in answer to the question, "Are you blind, to run over a child like that?" replied, "I didn't see the child; I was looking at the car coming east," was not part of the res gestæ.

3. Rev. St. 1899, § 4652, provides that "no person shall be disqualified as a witness in a civil suit by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility." *Held*, that the court erred in not requiring an attorney, who had testified as a witness for his client, to testify as to what financial interest he had in the suit.

4. If injury to a child results from failure of those in charge of an electric car to sound a bell or give other warning of the approach of the car to a crossing, or to keep a proper lookout for persons at that point, the company is liable, and it is immaterial that the petition does not allege negligence of such employes after becoming aware, or after they ought to have known, of the child's danger.

5. An allegation "that the servants in charge of the car failed to keep a proper lookout for persons crossing" the tracks at a certain crossing does not present the issue that such servants were negligent in failing to see, when by reasonable care they might have seen, the person injured.

6. Where there is no law directing those in charge of a street car to ring a bell on approaching a crossing, failure to do so becomes negligence only when the circumstances render the ringing of the bell necessary, and is a question for the jury.

7. The motorman of an electric car approaching a crossing is bound only to use such care as a person of ordinary prudence and caution,

according to the usual and general experience of mankind would exercise in the same situation and circumstances, in respect to keeping a lookout for persons crossing the track.

Appeal from Circuit Court, St. Louis County; R. Hirtzel, Judge.

Action by Charles A. Koenig and wife against the Union Depot Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

This is an action by plaintiffs, husband and wife, for damages for the negligent killing of their minor child, Amelia Koenig.

The petition alleges that on the 8th day of May, 1899, Amelia Koenig was struck and killed by one of defendant's street railway cars at the intersection of Arsenal street and Compton avenue, in the city of St. Louis; the incorporation of the defendant, and its operation as a street car line; that said Amelia was about six years old, and that the plaintiffs were respectively father and mother of said Amelia. The actionable negligence charged is: (1) That the defendant was running its car at a rate of speed in excess of that permitted by the ordinance of the city of St. Louis. (2) That it ran said car so rapidly that it lost control so it was beyond the power of the brakes to stop the same at the crossing of Compton avenue. (3) That the servants of defendant in charge of said car failed to sound the bell or give other warning of the approach of the car. (4) That the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal at Compton avenue. (5) That the servants in charge of the car failed to lower the fender until after the deceased was struck. (6) That the servants in charge of the car failed to apply the brake until the deceased was struck. The answer is a general denial.

The facts, briefly stated, are that Amelia Koenig, who was about six years of age at the time, was killed by the defendant, a street railway corporation, at the intersection of Arsenal street and Compton avenue, in the city of St. Louis, on the 8th day of May, 1899, by being run over by the cars of defendant company. At that time defendant's car, proceeding westward on Arsenal street, run upon Amelia Koenig at the crossing of the west line of Compton avenue, and struck her with such force that she died from the effects thereof in an hour or so thereafter. From Michigan avenue—the first street east of Compton avenue—to Compton avenue is a steep grade, down which defendant ran its cars which caused the death of the child with such rapidity, as plaintiff claims, as to lose control, and place it beyond the power of the brakes to stop the car at crossing of Compton avenue. It is also claimed by plaintiff that while running down said grade defendant failed to sound the bell, or give other warning of the coming of the car, and neglected to keep a proper lookout for persons crossing at Compton, and neg-

lected to lower the fender, and neglected to apply the brake until Amelia had been struck. From Michigan west to Virginia, beyond Compton, there was nothing to obstruct the view, so that persons approaching Arsenal street at Compton avenue could be seen more than a block away.

Mrs. Lizzie Koenig, the mother of the child, testified that the child was born on the 12th day of March, 1893; that she was killed about two blocks away from home; that she had been from home about half an hour; that she was sent for, and saw the little girl at the place of the accident. When the mother arrived, the child was unconscious, and died an hour or two afterwards.

The little girl who met with the accident was ordinarily bright for her age, and had been often sent out before, and nothing had ever happened to her. She was not sent out on this occasion, but was bringing something to her grandmother. She wore at the time a blue calico sunbonnet, and was going to her grandmother's, who was living on Virginia and Arsenal, about two blocks away.

Joseph C. Dashman, a witness for plaintiff, testified that he witnessed the accident to this child; that he was at the corner of the old Holy Ghost Cemetery, where there was a hole under the fence, about 20 feet west of Compton on Arsenal. The witness was standing on the south side of Arsenal, and the child was on the north side, walking east on the sidewalk towards Compton avenue, 75 or 100 feet from Compton avenue. He first saw the car that came in collision with the child about a block and a half east of where he was, on Arsenal street. When he first saw the child, the car was a block away. He saw the child walking down the sidewalk. She came down the sidewalk, and in place of walking direct to the crossing—"there is six feet of sidewalk left about three feet above the grade of the street, and there is a little slant there, and she was walking down there, and I didn't pay any attention to her, and she went up in the air." She was five or six feet from the corner when she started to walk across the street. When she stepped off of the sidewalk, the car was just the other side of the east crossing of Compton avenue; the witness judged about the width of the street, 75 or 100 feet—he estimated about 75 or 100 feet—east of the child, and on being pressed by counsel for the plaintiff extended it to 110 feet. The witness heard no signal by the motorman, no shouting or anything. He saw the car when it struck the little girl and knocked her 10 or 12 feet, and then he could not see any more. The car was between him and the child, and he saw no more of the child until the car crossed over it, and the little foot was all crushed up, and the blood was there. The witness then walked over there. The car ran about 100 or 125 feet, and came to a stop, and the motorman and conductor came back. They left the child there for a few minutes

on the sidewalk. Then some man picked it up, and tried to stand it up on the street and put it by the telegraph pole, and some lady came out of a house, and said bring it into the house and put it in bed. That was the house on the north side of Arsenal street, and the first house west of Compton, next to the vacant block on the corner. The car stopped, with reference to this house, right in front of the house, with the rear or east end of the car about parallel with the door of the first house. He didn't see the fender dropped. Just before the child was struck, the motorman had his face turned to the south, looking towards where the witness was standing. Witness did not see him drop the fender, and did not notice the fender after the car came to a stop.

Mrs. Amelia Purcell was also a witness. At the time of the accident this witness was living with her mother at 3004 S. Compton avenue, about 100 or 125 feet from where the little girl was injured. She was coming along Compton avenue, intending to board the east-bound car. She was either running or walking fast, and she saw both cars coming, and didn't cross over because the west-bound car was coming on at a very high rate of speed, and she was afraid to cross, so she didn't see the west-bound car strike the little girl, and heard no warning or signal given. She was about 30 feet from the corner of Compton avenue and Arsenal street when the little girl was struck, and on the east side of Compton. There was at least the width of the street between them, because the child was struck on the west side of Compton. The car came to a very sudden jerk after it struck the child, but this witness did not notice any slackening before the child was struck. The car stopped before the first house that they took the child into. She didn't see the little girl until after she was struck. She didn't pay much attention to the car until it came to a sudden stop, and from her position could not see the motorman, or what he was doing.

The plaintiffs next introduced Henry Slevin, who was working in the Cemetery of the Holy Ghost, and did not see the accident. He saw the car after it struck the child. He was about 100 feet in the cemetery from Arsenal street, and says that the car, after striking the child, went about 125 feet. The front end of it was nearly past the west side of the house into which the child was taken. He noticed the car before it reached Compton avenue up as far as Michigan, a whole block to the east, and did not hear any alarm given by the gong, or any other kind of alarm by that car. On cross-examination he said he was not 100 feet from Arsenal, but was 100 feet from Compton, and but 50 feet from Arsenal, and that he was on the west side from Compton. He was 100 feet west of Compton, and 50 feet south of Arsenal. The way he came to notice the car from Michigan avenue up was that he was looking up that way. He was cleaning a lot in the cem-

etery and taking a "blow" (rest). There was nothing to draw this witness' attention to the fact as to whether the bell was sounded or not. The only time he noticed the witness Dashman there, was about an hour or so after the accident.

The next witness introduced was Mr. Minor Meriwether, who stated that he had made certain measurements on the corner of Arsenal and Compton avenue with reference to the width of Compton avenue and the width of Arsenal street, and the distance from the north side of Arsenal street to the street railway tracks. Compton avenue is 60 feet wide. From the sidewalk on the north side of Arsenal to the north rail of the track is 16 feet; that is, from the granitoid walk to the nearest rail. From the west crossing on Compton avenue to the point on the granitoid walk where there is a slant that starts down to the middle of the street, it is 5 feet. It is 125 feet to the east side of the first house west of Compton avenue on the north side of Arsenal street. That house is between 20 and 25 feet front. The distance from where Dashman said he first observed the car was 250 feet. There was no obstruction from Michigan to Virginia avenue. He did not measure the width of Arsenal street. The north sidewalk was elevated $2\frac{1}{2}$ feet, and, when he said that the slant began 5 feet to the west, he meant west of the west building line of Compton. He thought Arsenal was about 60 feet in width from curb to curb.

Joseph C. Dashman, recalled, said that it was a minute or two after the child was struck before the car came to a stop, and the motorman returned to where the child was picked up. The motorman came back immediately after his car had stopped. The weather was clear the day of the accident, and the tracks were dry. There was a heavy grade, which ceased right at Compton avenue and began about three blocks east of that. Dashman estimated the speed of the car at 10 or 12 miles an hour.

Plaintiffs next introduced Harvey C. Montgomery, who testified that he was a conductor on the Lindell Railway for a few months. Besides working as conductor, had noticed the operation of and operated cars, but not as an employé. He acted as motorman on the St. Louis & Suburban, and thought that his experience as a motorman and conductor enabled him to speak as an expert in reference to the methods in which cars can be stopped, and in what distances they can be stopped. He only operated the car as a motorman about a month and 10 days on the Suburban, and that was the extent of his experience in stopping cars as a paid motorman. He then testified as to the general style of motors used upon St. Louis cars, and that at the end of his short service as a motorman on the Suburban he had his leg broken in an accident, and has not been able to run a car since. On the hypothesis of a dry track, a grade of $3\frac{1}{2}$ feet in 3 blocks, the car empty,

running 10 or 12 miles an hour, this witness thought the car could be stopped in about 60 feet, perhaps even in 50 feet, and that, if it had 20 or 30 passengers added to it, it would not make a great deal of difference. He then said that it could have been stopped, going at that rate, by using the reverse, in about 40 feet. Among others, this question was asked of this witness: "Q. Supposing a car moving at the rate of ten miles or twelve miles an hour, on a dry track, just as has been described to you, and on a grade such as Judge Hirzel has suggested to you—about three and a half feet in three blocks—supposing such a car, moving at such a rate of speed, should strike a six year old child, and should then proceed a hundred and twenty-five feet before coming to a stop, what would the fact that it had proceeded that distance indicate, with reference to the manner in which the motorman of that car had brought it to a stop? Mr. Robert: We object to that on the ground that it is a question for the jury, and not the witness. Court: You may answer it. (To which action and ruling of the court the defendant, by counsel, then and there duly excepted, and at the time saved exceptions.) A. I think it would indicate that the car was then moving at a higher rate of speed than 10 or 12 miles an hour, or the motorman didn't apply the brakes or reverse power promptly, at the time the accident occurred. Q. Exclude the latter hypothesis about not applying the brakes properly—supposing that had been done—what rate of speed would it require to carry the car a hundred and twenty-five feet if the brake was applied properly? A. I should judge twenty or twenty-five miles an hour."

Mr. Minor Meriwether was recalled, and testified that a car running at the rate of 10 miles an hour would go 14 feet and 8 inches in a second, and a child walking at the rate of 3 miles an hour would go 4.4 feet in one second. If the car was moving at the rate of 12 miles an hour it would go 17.6 in one second, and if a child was walking at the rate of 4 miles an hour it would go 5.87 of a foot in one second.

This was all of the evidence for plaintiffs in chief.

The defendant then introduced John Belrne, the motorman in charge of the car which struck the little girl. He first saw her on the granitoid sidewalk on the north side of Arsenal street. She was walking east at the time, and when she left the sidewalk his car was about 14 feet from her, as near as he could estimate it. His car was then pretty near to the west crossing. The little girl rushed from the sidewalk to cross the street. The motorman had rung his gong on approaching Compton avenue, and as soon as he saw her start out from the sidewalk he started to apply the brakes, reversed the power, and hollered at her. She didn't seem to notice him, but rushed from the sidewalk, and struck against the corner of the dash-

board. The corner of the platform struck her in the side, and she fell in the street, and he stopped the car about 60 feet past the crossing. The dashboard struck her head after the platform struck her in the side. He said that he could not stop the car any sooner. He cried out to her as soon as he saw her making a motion to leave the sidewalk, and she was six or eight feet west of the crossing. She stood first and faced west. She had a bucket in her hand, and looked west. She wore a sunbonnet on her head; and an east-bound car attracted her attention, and as the east-bound car passed her she rushed across the street—made an attempt to cross—she dashed off of the sidewalk. This witness picked up the little child, and took her on the sidewalk, and held her in his arms. He was the first person there. He picked her up as soon as he could get back to her. He held her in his arms a little while, "and I asked— The conductor said, 'What will we do?' and I said, 'Get a doctor,' and a lady coming west on Arsenal street came over and took her in her arms, and asked another lady standing by if she wouldn't take her into the house, and they took her into the house. My conductor went after a doctor." When the car reached Compton avenue the motorman was looking ahead of him west. He never saw Mr. Dashman at all.

Hugh Farrelly was the conductor upon the car that struck the little girl. He stated that the motorman rang his gong as he approached Compton; that at the time of the accident he was walking towards the front of his car on the inside, preparing to issue transfers. When he first saw the little girl, she was coming towards the track from the north side of Arsenal street, and a little west of the west crossing; that is, where the crossing ought to be, a few feet west of that. He described her dress, and said she was running, and that she ran right into the car—into the front corner of it; the front part of the car, about the bumpers on the outside; the bumper that projects out in front of the dashboard; the corner of the dashboard. Her body, he thought, struck the car, and she didn't get to the track at all, and when he got to her she was lying outside the track on the north side of the track, about 8 feet from the west crossing, as near as he could estimate it, and about 25 feet behind where the car had stopped. The motorman picked her up. He heard the motorman holler, but did not pay any particular attention to anyone else.

Defendant next introduced Mrs. Sarah Lynch, the wife of James Lynch, who is employed by the Cupples Woodenware Company, who said that she was on the car that struck the little girl, and occupied the front seat on the side the little girl was struck on—the north side. When she first saw the little girl she was standing still on the pavement on the north side of Arsenal, and had

on a sunbonnet, and was swinging a little bucket, and when she moved it was south across Arsenal, and she ran right into the car—into the front part of the car. She didn't exactly see her. She got up when she saw her coming so close, and screamed as loud as she could, and she never looked up at all. She heard the motorman holler, and he was ringing his bell so you could not hardly hear anything in the car. The child never got to the track or the fender. It didn't strike her. Witness was positive it was the side of the car that struck the child. "The motorman rang his gong as he approached Compton. At the time the little girl was running towards the car the motorman seemed to be watching the child, and I heard the noise of the fender drop, and heard him scream at the time, and he worked his hands; that is, turned his brake. He tried to stop the car at the same time he was hollering. He done that in a very quick way, and the car slowed up before the child struck it, and was in the act of stopping when the child struck it."

Defendant next read the deposition of Miss Josephine Lack, who was on the car which injured Amelia Koenig in May, 1899. She was sitting in the south second seat near the front, in the middle of the car, next to the window. The motorman rang his gong as he approached Compton avenue. The car was running at the usual rate of speed. She estimated at 8 or 10 miles an hour. She saw Amelia on the pavement before she was struck—on the north pavement of Arsenal street. She was a little ways from the crossing. When witness first saw her, she was about 25 feet west of the west crossing. She had a little sunbonnet on, and a tin bucket on her arm, and she was standing still, and looking north. When she started to cross Arsenal street, she made a very quick move, and paid no attention to the ringing of the bell, and the shouting, and the car was going, of course, and he could not stop it any quicker than he did. The little girl was running as she crossed. The witness did not see her strike the car. She don't think the little girl got in front of the car, because, if she got in front of same, she could have seen her; but did not see her in front of the car. Prior to the accident this witness heard the bell rung, heard them shut off the brakes—that is, power—and felt the jar of the sudden applying of the brakes. She heard the lady in the front part of the car shout, and the conductor shouted at the same time. She afterwards explained that by the conductor she meant the motorman. The child did not get over the north rail.

Edward Woodson testified on behalf of the defendant that he was driving a garbage wagon, and was about 50 feet from Compton avenue, on Arsenal, on the south side of the street, driving east. When he first saw the little girl, she was on the sidewalk on the north side of Arsenal. She was going

slowly towards the south across Arsenal, and all at once she kind of started in a hurry; that is, a half run and a half walk, as the witness called it. She had on a little sunbonnet, and she was undertaking to cross five or ten feet west of the west crossing. This witness saw her as she struck the car. The motorman rang his bell on the car that hit her, and the motorman he hollered, and the witness hollered also, but it seemed like the little girl did not notice that car. It seemed like she was going ahead and didn't notice it. The motorman rang his bell before the little girl rushed to the car. He could not tell exactly what part of the front of the car the little girl collided with, because when the collision came the car was somewhat between the witness and the little girl; but he was positive that she did not reach the track, and he did not know whether it was the dashboard or the fender. By the fender he meant the side of the fender.

The defendant next introduced Thomas W. Cogan, who testified that he was a motorman, and was a passenger on the car in question, occupying the last seat on the south side of the car. He heard the gong as he was approaching Compton avenue ringing extra loud, and that was what drew his attention to it. He didn't see the child until after the accident, and didn't notice what the motorman in charge of the car was doing as he crossed Compton, but heard "extra loud ringing as we were crossing Compton avenue." The motorman of the car had picked up the child. He thought the ringing was about the middle of the street. He thought the child was picked up from 12 to 16 feet east of the rear platform of the car. When he looked out at the window, he saw a wagon standing in the street, and he knows that the house and wagon were farther west than the front of the car.

Otto E. Miller, a witness for defendant, testified that he was a letter carrier for the United States, and had been for several years, and that he was on this car about the fourth seat from the rear, on the south side of the car. He remembered hearing the sounding of a bell as the car approached Compton avenue, but could not say on what car it was. He was positive he heard the gong rung. When he first saw the child she was about 12 feet from the front end of the car, and it seemed to the witness that she was in the act of turning around, and then made a sudden plunge for the car. He could not see where the child struck the car. She did not get on the track in front of the car. It seemed to the witness that she was about to fly under the front trucks. He thought the fender had passed her. This witness did not notice what the motorman did, but thought that he did his duty from the way the car shook. When the witness saw the child leave the sidewalk, he attempted to get up, and the sudden stopping of the car jerked

him back, and that is what caused him to think that the motorman was bringing his car to a stop. The motorman picked the child up. This witness did not see Mr. Dashman there. There was no one near her when the motorman picked her up afterwards. When he first felt the shock of the car being stopped, the car was about 12 feet from the child. His judgment was that the rear end of the car, when it stopped, was about 25 feet west of the west crossing. He further testified that he showed the spot where the car struck to Mr. Meriwether.

Defendant then recalled Mr. Beirne, who stated that the accident happened about five minutes after two. The defendant here rested.

Plaintiffs then offered in rebuttal witness Dashman: "Q. Mr. Dashman, is it true or not true that immediately after the car came to a stop the motorman came back to where the child was, and that you asked the motorman this question: 'Are you blind, to run over a child like that?' and that he replied: 'I didn't see the child. I was looking at the car coming east?' Mr. Roberts: We renew our objections. (The objection had been made to anything the motorman may have said to this witness after the accident, when he was first upon the stand.) The Court: You may answer it. (To which action and ruling of the court defendant then and there excepted, and at the time saved exceptions.) A. Yes, sir; he did."

Mr. H. C. Montgomery was recalled, and testified as to the measurements he made at the point designated by Mr. Miller as the point where the rear end of the car came to a stop, and said that it was 27 pretty fair length paces or steps.

Mr. Minor Meriwether was recalled, and testified that, if the car was going at the rate of 11 miles per hour, it could go 16.18 feet in one second.

Mr. Lee Meriwether was then called by the plaintiffs and testified that at his request Mr. Montgomery accompanied him to the scene of the accident, and showed him the grade, and while there they met Mr. Miller, the letter carrier, and asked him the spot at which the rear end of the car stopped after the accident when the car had been brought to a full stop. "Mr. Miller showed me a spot which he told me was the right place, and I also paced it off, and found that it was twenty-seven good, long paces, and I am five feet eleven and three-quarter inches high." On cross of Mr. Lee Meriwether this question was asked him: "Q. What is your interest in this case, Mr. Meriwether? A. How do you mean? Q. To what extent are you financially interested in this case? Mr. Meriwether: I object to answering that. Mr. Robert: I insist. He has offered himself as a witness. Court: You are interested as an attorney? A. As an attorney I am interested in the case, and in having justice done to my client. Mr. Robert: Has your honor

passed on the question? Court: I don't think he has to testify. Mr. Robert: We are entitled to know what Mr. Meriwether's interest is here, if he offers himself as a witness to facts in the case. Mr. Meriwether: Suppose, now, as an attorney, in that connection I would be privileged to call Mr. Robert to the stand. Court: I don't think it is necessary. I don't think he has to answer that. Mr. Robert: Save our exceptions. (To which action and ruling of the court defendant then and there duly excepted, and at the time saved exceptions.)"

The court at the instance of plaintiffs, and over the objection and exception of defendant, instructed the jury as follows:

"The court instructs the jury that it is the duty of defendant to keep a lookout in approaching all street crossings, and to use reasonable care to avoid injury to persons approaching or crossing the tracks at such points. If, therefore, you find from the evidence that defendant saw, or by reasonable care might have seen, a child of the age of the deceased, Amelia Koenig, approaching Compton avenue at the intersection of Arsenal avenue, where the defendant's tracks, while defendant's car was yet far enough away to have enabled the motorman to stop it, or to check its speed before coming to the crossing, and that he had reason to anticipate that the child would attempt to cross the tracks, then it was defendant's duty to have so managed and controlled the car as to be able to stop it in time to avoid striking the child, should the child start to cross the track. And if you find such reasonable care and control was not exercised by defendant's servants, and that, in consequence, defendant's car struck and killed the child, Amelia Koenig, then your verdict should be for the plaintiffs.

"(2) The court instructs the jury that it was the duty of defendant's motoneer to sound his gong or bell when approaching Compton avenue, so as to give notice to persons desiring to cross said avenue of the approach of the car. And if you find from the evidence that said motoneer failed to sound his gong or bell or give any other warning when approaching said avenue, and that, but for his failure to sound his gong or bell or give some other warning, the accident complained of would not have happened, your verdict should be for the plaintiffs.

"(3) The court instructs you that the law requires defendant's servants to keep a lookout in approaching all street crossings, and to exercise reasonable care to avoid injuring persons approaching or crossing defendant's tracks at street crossings; and that, where they have reason to anticipate the sudden and unexpected appearance of a child upon or approaching the track, they should so manage the car as to be able to stop the car quickly and readily, should occasion require. If, therefore, under all the circumstances detailed in the evidence, you find that there

was reason to anticipate the sudden and unexpected appearance of the deceased, little Amelia Koenig, upon or approaching at the intersection of Arsenal and Compton avenues, and you further find that the defendant's servants in charge of its car were not managing the car so as to be able to stop said car readily and quickly, should occasion require, and you further find that the death of plaintiffs' daughter was caused by the failure of defendant's servants so to manage said car, then your verdict must be for the plaintiffs."

"(5) The court instructs the jury that the demand for ordinary or reasonable care requires of a man the full performance of his duty under the particular circumstances; some circumstances being such as to demand a very high degree of vigilance under the requirements of ordinary or reasonable care. It is for you to determine from the evidence whether the defendant's motoneer exercised the care demanded by the circumstances. If you find from the evidence that he was not exercising such care, and that the deceased, Amelia Koenig, would have been seen by the said motoneer in a position of danger in time to have avoided running over and killing her had he exercised such ordinary or reasonable care, then your verdict should be for the plaintiffs."

The court, at the request of the defendant, gave to the jury the following instructions:

"(1) The court instructs the jury that the negligence with which the plaintiffs charge the defendant, and which negligence the defendant denies, is as follows: First. That the defendant was running its car at a rate of speed in excess of that permitted by the ordinance of the city of St. Louis. Second. That it ran said car so rapidly that it lost control, so that it was beyond the power of the brakes to stop the same at the crossing of Compton avenue. Third. That the servants in charge of said car failed to sound the bell or give other warning of the approach of the car. Fourth. That the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal street at Compton avenue. Fifth. That the servants in charge of the car failed to lower the fender until after the deceased was struck. Sixth. That the servants in charge of the car failed to apply the brake until after the deceased was struck. You are instructed that you must ignore the first, second, fifth, and sixth charges of negligence, and if you believe from the evidence the motorman did sound the bell and give warning of the approach of the car, and that he did keep a proper lookout for persons crossing Arsenal street and Compton avenue, your verdict must be for the defendant.

"(2) The court instructs the jury that if Amelia Koenig was walking or on the north sidewalk of Arsenal street, and there was nothing in her conduct to indicate that she

intended crossing the street, and that then when she started south across Arsenal street the car was so near as to make it impossible to prevent the collision, that then the plaintiffs cannot recover, and the verdict must be for the defendant.

"(3) The court instructs the jury that they cannot infer negligence from the fact that the plaintiffs' child was injured by the defendant's car, but that negligence is a fact which must be proved, and the burden of proving the same by the greater weight of the evidence is upon the plaintiffs."

"(5) The court instructs the jury that if they believe that any witness has willfully sworn falsely to any material fact, they are at liberty to disregard all or any part of the testimony of such witness."

The court, of its own motion, also gave the following instructions to the jury:

"(4) If you believe and find from the evidence that plaintiffs' child was killed by and through an unavoidable accident, your verdict should be for defendant."

"(6) You are instructed that if you believe from the evidence that the motorman saw the deceased child walking or standing on the north sidewalk of Arsenal street, west of Compton avenue, then there was nothing in that to warn him of danger, until she jumped or stepped off of the sidewalk, if you believe from the evidence she did so, and started south across Arsenal street, and in such case as long as the child remained on such sidewalk west of Compton avenue, and did not in any manner indicate that she desired or attempted to cross Arsenal street, the motorman had no reason to anticipate that she would attempt to cross Arsenal street, or to stop the car, or attempt to stop it, but had the right to run the car at its regular speed.

"(7) If you believe from the evidence that, as soon as the danger to the deceased became apparent, or by the exercise of ordinary care would have become apparent, the motorman exercised ordinary care to set the brakes before striking her, and made every effort with the means on hand to stop the car in the shortest time and space possible, and you further believe from the evidence that the gong was rung as the car approached Compton avenue, or the deceased was otherwise warned of the approach of the car, then your verdict must be for the defendant."

"(8a) If you believe and find from the evidence that Chas. A. Koenig and Lizzie Koenig, his wife, are the parents of Amelia Koenig, deceased, and that the said Amelia Koenig was run over and killed by a street car of the defendant by and through the carelessness and negligence of the defendant's employes, as explained and set forth in these instructions, then you will find the issues for the plaintiffs, and assess their damages at the sum of five thousand dollars."

To the giving of which instructions the defendant then and there excepted at the time.

Under the instruction of the court, the jury found a verdict for the plaintiffs in the sum of \$5,000. Defendant in due time filed its motion for a new trial, which being overruled it appeals.

Geo. W. Easley and Boyle, Priest & Lehmann, for appellant. Lee Meriwether, for respondents.

BURGESS, J. (after stating the facts). It is said for defendant that the court erred in permitting the witness Montgomery to testify that certain facts assumed by him to be true "would indicate that the car was then moving at a higher rate of speed than 10 or 12 miles an hour, or that the motorman did not apply the brakes or reverse power properly at the time the accident occurred." The objection to this testimony should have been sustained, because it was not a question to be determined by expert testimony, but by the jury, who were just as capable to draw conclusions from the facts proven as the witness; and it is only when the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw conclusions from the facts proven, that the evidence of expert witnesses is permissible. In *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, it is said: "In the class of cases where the opinion of a witness is competent evidence it becomes so not because the witness may be supposed, when compared with the jury, to possess superior powers of perception, intuition, and judgment, or superior ability to draw correct inferences from proved facts, but because the nature of the question at issue is such that men of ordinary experience and intelligence must be supposed to be incapable of drawing conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge in the premises." So, in *Benjamin v. Street Ry. Co.*, 133 Mo. 274, 34 S. W. 590, it is said: "An expert witness in a manner discharges the functions of a juror, and his evidence should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw conclusions from the facts proved."

Plaintiffs were permitted to prove by the witness Dashman, over the objection of defendant, that immediately after the car came to a stop the motorman came back to where the child was, and, in answer to this question by Dashman, "Are you blind, to run over a child like that?" that he replied, "I didn't see the child; I was looking at the car coming east." This ruling is assigned for error. What the motorman said was a narration of a past event, with respect to which he was not authorized to speak for his employer or master. His business was to control and

manage the cars of which he had care, and for whose actions, within the scope of his employment, his employer was answerable, but for nothing he said which did not accompany or form part of the accident; in other words, the *res gestæ*. *Barker v. St. L., I. M. & S. Ry. Co.*, 126 Mo. 143, 28 S. W. 886, 26 L. R. A. 843, 47 Am. St. Rep. 646; *Price v. Thornton*, 10 Mo. 135; *Rogers v. McCune*, 19 Mo. 558; *McDermott v. Railroad*, 73 Mo. 516, 39 Am. Rep. 526; *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333; *Aldridge's Adm'r v. Midland, etc., Co.*, 78 Mo. 559; *Devlin v. Railroad*, 87 Mo. 545; *State v. Hendricks* (not yet officially reported) 73 S. W. 194. This evidence was not offered for the purpose of contradicting the motorman; hence inadmissible for any purpose.

It is claimed by defendant that the court erred in not permitting the witness Lee Meriwether to testify as to what financial interest he had in the suit. Mr. Meriwether testified as a witness for his client for the purpose of contradicting the evidence of Otto E. Miller, a witness for defendant as to where the car stopped after striking the child. Section 4652, Rev. St. 1899, provides that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility." That this provision of the statute applies to any and all persons who testify as witnesses to anything other than mere formal matters in the trial of any proceeding in law or equity is too plain for argument. But, aside from the statute, the interest of a witness in the result of a suit may be shown as affecting his credit (*Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075), "but the extent to which a witness may be examined touching his interest in the suit rests in the discretion of the trial court." *Stillwell v. Patton*, supra. The same rule, however, as to the extent to which a witness may be examined applies in a large measure to all witnesses. Our conclusion is that the court erred in not requiring this witness to answer the question.

It is insisted that the first instruction given for the plaintiffs is erroneous in that it is not based upon any allegation of the petition; that the first instruction given for defendant defined the issues, and eliminated all allegations of negligence except the third and fourth; that the third alleges a failure to sound the gong or bell; and the fourth that the defendant's servants in charge of the car failed to keep a proper lookout; and that it nowhere alleges any negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger of the little girl. If it be true, as alleged in the petition, that the servants in charge of the car failed to sound the bell or give other warning of the approach of the

car at the crossing of Arsenal street and Compton avenue, and it was their duty to do so, or they failed to keep a proper lookout for persons crossing Arsenal street at that point, and by reason thereof the injury occurred, it was entirely unnecessary that the petition allege negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger of the child, for the negligence consisted, if at all, in the failure of those in charge of the car to sound the bell or give other warning of its approach, or in failing to keep a proper lookout for persons crossing the street at Compton avenue. Therefore, if defendant's position be correct, it may run its cars at any time or place in utter disregard of the rights of persons on the streets, without being responsible for injuries sustained by reason thereof, provided that it was not negligent after becoming aware, or after it ought to have known, of the danger, as in this case, of the little child, who, on account of her age and want of knowledge of the danger, could not be guilty of contributory negligence. The alleged negligence consisted in the failure of defendant's servants in charge of the cars to sound the bell or to give other warning of its approach, and a failure to keep a proper lookout for persons crossing Arsenal street at Compton avenue, and not in the negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger to the little girl. It would be a strange doctrine if, by defendant's neglect of duty in the first place, the life of the child was endangered, that it could not be held liable unless it was further shown that those in charge of the car were guilty of negligence in failing to stop the car after becoming aware, or after they ought to have known, of the danger of the child. It is clear from the evidence that defendant's motorman did not become aware of the danger of the child until about the time of or after she had been run over by the cars and fatally injured, which might, in this instance, have been avoided by the keeping a proper lookout for persons crossing the street where the collision occurred, as to which the evidence was conflicting.

But this instruction is vicious because of the fact of its not being in accord with the allegations of the petition upon which the case was submitted to the jury. It is bottomed upon the theory of defendant's negligence in failing to see, when by the exercise of reasonable care it might have seen, a child of the age of the deceased, Amelia Koenig, approaching Compton avenue at the intersection of Arsenal street, when no such issue is presented by the pleadings, unless it be by the fourth allegation of negligence "that the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal at Compton avenue"; and we are of the opinion that it does not do so. Moreover, it authorized the jury to find for plain-

west crossing of that avenue sue might turn south to cross the track.

The second instruction given on the part of plaintiffs is complained of on the ground that it declares as a matter of law "that it was the duty of defendant's motorman to sound his gong or bell when approaching Compton avenue." As the law imposed no duty upon defendant's motorman to sound the gong or bell at the approach of a street crossing, and there is no law making a failure to do so negligence per se, "such failure becomes negligence only when the circumstances render the ringing of the bell necessary, and, if the circumstances are in dispute, whether the occasion is such as calls for the sounding of the bell is a question of fact for the jury." *Schmidt v. St. Louis Ry. Co.*, 163 Mo. 645, 63 S. W. 834. In the case at bar it is not clear from the circumstances that the ringing of the bell or sounding the gong were such as to require the motorman to do one or the other on approaching Compton avenue, therefore that question should have been submitted to the jury. That there are many similar crossings in the city of St. Louis which are much used by pedestrians and vehicles, at the crossings of which by street cars without the bell being rung or the gong sounded by the motorman in charge on approaching them would be negligence per se, must be admitted, but it is not at every crossing that a failure to do so would amount to such negligence, much depending upon the use of the street at the time.

Plaintiffs' third instruction is challenged upon the same grounds as their first, and is open to the same criticisms that were passed upon that instruction.

The fifth instruction given on the part of plaintiffs is bad for the reason that it incorrectly defines the degree of care required of defendant as "being such care as to demand a very high degree of vigilance," when the law only exacted of defendant the exercise of ordinary care; that is, in this case, such care as a person of ordinary prudence and caution according to the usual and general experience of mankind would exercise in the same situation and circumstances as those of the motorman in charge of the car. *Reardon v. Mo. Pac. R. R. Co.*, 114 Mo. 384, 21 S. W. 731; *Stanley v. Union Depot R. R. Co.*, 114 Mo. 606, 21 S. W. 832; *Lloyd v. St. Louis, I. M. & S. R. R. Co.*, 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; *Tetherow v. St. J. & Des M. R. Co.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; *Cohn v. Kansas City*, 106 Mo. 387, 18 S. W. 973; *Kelley v. U. R. & T. Co.*, 18 Mo. App. 151.

In order that this case may be properly presented to a jury, the judgment of the circuit court is reversed, and the cause remanded. All of this Division concur.

COMBINATION BY PACKING HOUSES—REGULATING PRICE—EVIDENCE—STATEMENTS OF AGENTS—PUNISHMENT.

1. To show a combination of packing houses to regulate or fix prices of meats to retail dealers, in violation of Rev. St. 1899, §§ 8965, 8966, all the selling by the packers in the state being done from "coolers," and the managers thereof and the solicitors thereof being the persons who were employed by the packers to transact and who did transact all their business of selling in the state, their statements made while so engaged, and relating to the business transacted, are admissible.

2. Evidence on quo warranto proceeding against packing house corporations held sufficient to show a combination to regulate or fix prices of meats, in violation of Rev. St. 1899, §§ 8965, 8966.

3. To constitute the offense of entering into a combination to regulate or fix prices in violation of Rev. St. 1899, §§ 8965, 8966, it is not necessary that there be a complete monopoly, or that injury to the public be shown.

4. Under Rev. St. 1899, § 8971, punishing corporations for the offense of entering into a combination to fix or regulate prices by forfeiture of corporate rights and right to do business in the state, punishment need not be by a general judgment of ouster, but, if the combination be abandoned, it may be by a simple fine.

In Banc. Quo warranto on the relation of Edward C. Crow, attorney general, against the Armour Packing Company and others. Fine imposed.

This is a proceeding by quo warranto, instituted by the Attorney General ex officio, to oust the defendant corporations from their franchise to do business in this state because of alleged violations by them of their powers and privileges. The information charges that between August 22, 1899, and May 9, 1902, they "entered into an agreement, confederation, combination, pool, and understanding among themselves and with each other and Nelson, Morris & Co. and Schwartzschild & Sulzberger, and other corporations and persons, to regulate, fix, and control the price to be paid by retail butchers and others for all dressed pork, beef, and cured meats and lard slaughtered, manufactured, and prepared and offered for sale or to be sold in the state of Missouri; and to maintain and control said prices for said products in this state when so regulated and fixed; and to prevent competition in said business in preparing, marketing, and selling said products in this state between themselves and others engaged in like business; and that respondents and those others above named have maintained the said prices of dressed beef and pork, and fresh meat, cured meat, and lard so prepared, sold, and offered for sale by them in this state by and through their officers, managers, agents, salesmen, servants, and employees acting for and behalf of said corporations, and that by acts and conduct of said corporations through their officers, salesmen, managers, and

servants, and employes competition in the sale of dressed beef, dressed pork, fresh beef, and cured meats of all kinds and lard in the markets of Missouri, has been unlawfully prevented and destroyed, to the great detriment of the public. The information charges that respondents and those who have combined with them own, control, and supply to the general public 90 per cent. of the dressed pork, beef, and meats, and all smoked and cured pork, beef, and meats and lard, and all fresh beef and pork and meats slaughtered, manufactured, and cured and prepared and offered for sale or sold for general consumption in the state of Missouri, and that the object and purpose of said combination and agreement is to fix, regulate, and maintain the price to be paid by the consuming public for said products above mentioned, and to control said price when so fixed, maintained, and regulated, and to destroy competition among themselves and others engaged in like business. It is charged that the officers, managers, agents, servants, and employes of the respondents, legally and fully authorized by each of said several respondents to act for them and in their behalf in matters relating to the sale and price to be charged for the products above mentioned, have since the 21st day of August, 1899, met, and continuously from time to time since said day continued to meet, when they have deemed it necessary, and unlawfully agreed and combined to fix and maintain from week to week and day to day an agreed price on the different grades, classes, and kinds of dressed beef, fresh beef, dressed pork, hams, bacon, cured meats, and lard, which should be sold or offered for sale to the retail butchers and others and the consuming public in Missouri; that at said meetings the officers, managers, employes, and agents of respondents would and did agree upon and fix the price at which the respondent corporations, through their officers, agents, and employes, would sell in Missouri from week to week and day to day the products above mentioned to the consuming public; that said meetings were held by the said officers, agents, and representatives of the respondents for the purpose of fixing and maintaining the agreed price to be charged in St. Louis, Kansas City, St. Joseph, and elsewhere in Missouri for the products manufactured, prepared, and sold by the respondents; that at said meeting so held from time to time as aforesaid, and for the purpose of controlling and monopolizing the market and preventing competition in the sale of dressed meat, cured meat, pork, and lard, and in order that a common uniform price should be charged the retail butchers and the consuming public and all others in the state of Missouri by the agents of all the respondents for the same or similar grades of dressed beef, pork, cured meats, and lard, said officers, managers, and agents would at said meetings agree upon the

prices at which all the different classes and kinds of the products above mentioned should be sold in the state of Missouri.

The information then charges that the said prices which should be so charged in Missouri for the said different commodities, which had been agreed upon as aforesaid at the said meetings, all the officers, managers, agents, and servants of respondents charged and intrusted with the sale to butchers and others of said products throughout Missouri were notified of, and the prices agreed upon for the period of time during which it had been agreed said prices should be charged, and that the officers, managers, agents, and employes of respondents intrusted and charged with the sale to retail butchers, meat dealers, and all others of said products in Missouri were directed and required to sell said products for said period theretofore agreed upon at the prices fixed, and not below the said prices agreed upon at said meeting so held as aforesaid. The information then alleges that, after the prices to be charged had been fixed and agreed upon as aforesaid, the said officers, managers, agents, and employes of respondents did not sell and have not sold any of the kinds, classes, and grades of the products above mentioned in this state to retail butchers, meat dealers, and the consuming public except at the prices fixed and agreed upon. It is then charged that the agreement and combination so made in the manner as aforesaid has prevented and does prevent competition in Missouri among respondents and others engaged in the same line or lines of business in this state, and that said acts of respondents have deprived and do deprive the public of free, full, and wholesome competition in the sale of the commodities above mentioned, to the great damage and detriment of the public.

Informant then charges that the general nature and object of the said combination, pool, agreement, and confederation so made as aforesaid by the said respondent corporations by the means and in the manner aforesaid is: First, to fix, regulate, maintain, and control by the respondents the price and prices to be paid for all classes, kinds, brands, and grades of dressed beef, dressed pork, hams, bacon, and all kinds of cured meats and lard, sold to the retail butchers and dealers in all kinds of fresh and cured meat and the consuming public in the cities of St. Joseph, Kansas City, St. Louis, and throughout the state of Missouri; second, to maintain the said price or prices, when so fixed as aforesaid, to be paid for all classes, kinds, and brands of dressed beef, dressed pork, hams, bacon, and all other cured meats and lard by the retail butchers, dealers in meat, and the consuming public in the cities of St. Joseph, Kansas City, St. Louis, and throughout the state of Missouri; and, third, that it is one of the objects of said combination, agreement, pool, and confeder-

ation so made as aforesaid by the respondent corporations by the means and in the manner aforesaid to prevent, prohibit, and avoid competition among themselves and others in the sale in Missouri of the said commodities dealt in and handled by the said respondents. The information then charges that the respondents, by the means and manner aforesaid, have obtained control of, and monopolized to the exclusion of all others, the business of selling all classes and kinds and grades and brands of dressed beef, dressed pork, hams and bacon, and cured meats and lard, to the retail butchers, dealers in meat, and the consuming public in the state of Missouri, to the great detriment of the public. It is then charged that by reason of the monopoly and control and exclusion of competition in the sale of said commodities aforesaid in the manner and means aforesaid the respondents and their agents, officers, and managers, have been enabled and now are selling to the butchers and dealers in meat and the consuming public in Missouri certain grades of dressed beef, pork, hams, bacon, cured meats, and lard of an unwholesome and inferior quality, to the great detriment of the public. It is then charged that the purpose and intention of respondents has been and now is to willfully and unlawfully combine and confederate as aforesaid with each other to monopolize and control absolutely and prevent competition in the business of dressed beef and meats as aforesaid in the state of Missouri, and that said respondents are now willfully and unlawfully maintaining said illegal agreement, and unlawfully and illegally fixing and controlling prices in the manner aforesaid for said commodities, and which said price for the aforesaid commodities so fixed by the respondent and others acting with them as aforesaid is the minimum price to be charged by respondents throughout the state of Missouri for the different classes, kinds, grades, and brands of dressed meat and pork, hams, bacon, and cured meats and lard, and that said prices so fixed as aforesaid are the minimum prices at which agents, employes, and officers of respondents are allowed to sell said products throughout Missouri. It is then charged that by reason of the premises and facts aforesaid since the 21st of August, 1890, and up to the present time, respondent corporations have grossly offended against the laws of this state, and willfully and flagrantly and grossly abused and misused their corporate authority and franchises and privileges, and have willfully and unlawfully assumed and willfully usurped authority and privileges not granted said corporations by the laws of Missouri by entering into and becoming a member of and a party to said trust, combination, confederation, and pool, as aforesaid, to monopolize and control the business of selling dressed beef, dressed pork, ham, bacon, and all cured meats and lard in the state of Missouri, and by means of said com-

bination aforesaid to prevent competition in said business, and to regulate, fix, and maintain the price or prices to be charged retail butchers, dealers in meat, and the consuming public for the aforesaid products, and that in pursuance of the aforesaid agreement so made respondents are now unlawfully and willfully monopolizing and regulating, fixing, maintaining, and controlling the prices to be paid by retail butchers, dealers in meat, and the consuming public for the products above mentioned, and that the action of the respondent corporations as hereinabove set out is a willful and malicious perversion of the franchises granted to said corporations by the state of Missouri, and an illegal, willful usurpation of privileges not granted to them, and is a great and permanent injury to the public. The prayer of the petition is that "respondent corporations, each and all of them, severally be excluded from all corporate rights and franchises under the laws of the state, and that their rights, authority, license, and certificate to do business under the laws of Missouri be declared forfeited, and that each of them and every one of them be ousted from their several franchises, corporate rights, and privileges."

The Krug Packing Company answered separately, denying generally the allegations of the information. The other respondents answered jointly, setting up many specific defenses. On motion of the Attorney General the court struck out all of the defenses except the sixth paragraph of the second defense pleaded, which "first alleged the corporate organization of each of the above-named Armour, Hammond, and Cudahy and Swift Packing Companies as corporations, and their right to do business in Missouri, and then respondents denied that they ever made or entered into an agreement, confederation, combination, pool, or understanding by and among either of them or any other person or corporation to regulate, fix, and control the price to be paid by retail butchers, or any one else, for any kind of pork, beef, cured meats, or lard, slaughtered or manufactured, prepared or offered for sale, or to be sold in the state of Missouri and elsewhere, or to maintain or control the prices thereof in this state, or to prevent competition in business between respondents and others engaged in like business; nor did respondents ever take any part in maintaining any such agreement, combination, pool, or understanding; that none of the officers, managers, agents, servants, or employes of this respondent at any time, with the consent of the respondent or otherwise, agreed and combined to fix or maintain an agreed price of the products handled by respondents which should by respondents be sold or offered for sale to the retail butchers or others or to the consuming public in Missouri, and that respondents never did agree upon or fix the prices at which they would sell in Missouri such products. Respondents then

denied generally each and every allegation in the information contained except as in this paragraph 6 of the second defense admitted. Respondents then denied that they ever agreed, entered into, or became a member of or a party to any pool, trust, agreement, or understanding with any other person or persons or association of persons to regulate and fix the price of any article or commodity whatsoever, or the price to be paid therefor. Respondents then deny that they were ever parties to any contract, agreement, or combination designed or made with a view to lessen, or which tended to lessen, full and free competition in the importation, manufacture, or sale of any article, product, or commodity in this state. Respondents then also denied that they had ever sold to any one any kind of dressed beef, dressed pork, ham, bacon, cured meats, and lard which is or was unwholesome, and of an inferior quality, and which was a detriment to the public.

It will be seen that this paragraph is in substance a general denial, and raised a general issue upon the pleadings. All of the respondents, except the Krug Packing Company, which is a Missouri corporation, are corporations organized under the laws of sister states, and have complied with the laws of this state with respect to foreign corporations, and have been licensed to do business in this state. Armour & Co. has never done any business in this state, and never was a member of any pool, or guilty of any of the acts charged. The Krug Packing Company is not shown ever to have been guilty of the acts charged. This proceeding is therefore quashed as to them, and in speaking of the respondents hereinafter reference is had only to the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company, and Swift & Co. Of these the Hammond Packing Company and Swift & Co. have extensive packing plants at St. Joseph, Mo. The Armour Packing Company and the Cudahy Packing Company have extensive plants in Kansas City, Kan. Swift & Co., the Cudahy Company, the Armour Packing Company, have "coolers" in St. Joseph and St. Louis, and the Hammond Packing Company has a "cooler" in St. Joseph. The Armour Packing Company, the Cudahy Packing Company, and Swift & Co. have no "coolers" in Kansas City, Mo., but they sell their meats at their plants in Kansas City, Kan., to the butchers and their customers in Kansas City, Mo., and deliver them to said butchers and customers in Kansas City, Mo. Of the other corporations and persons alleged to have been with the respondents in the combination, Schwartzschild & Sulzberger Company had its plant in Kansas City, Kan., and had "coolers" in Kansas City, Mo., and St. Joseph; and Nelson, Morris & Co. had their plant in East St. Louis, Ill., and had "coolers" in St. Louis, Kansas City, and St. Joseph.

The case was referred to Hon. I. H. Kinley,

a member of the Kansas City bar, as special commissioner to take the testimony, and make and report a finding of facts, and with leave to the parties to file exceptions thereto. The report of the special commissioner covers 25 printed pages, and is too voluminous to be embodied herein. In brief, he finds:

(1) That the respondents, together with Nelson, Morris & Co., between August 21, 1899, and May 9, 1902, entered into "agreements, confederations, combinations, and understandings between themselves, to fix, regulate, and control the prices of dressed beef and fresh pork slaughtered, manufactured, prepared, and offered for sale or to be sold by respondents to the retail butchers and others at St. Joseph, Missouri, and that respondents, with Nelson, Morris & Co., agreed among themselves and with each other to maintain and control the prices of such dressed beef and fresh pork, and that, in pursuance of said agreements to fix, maintain, and regulate the prices for which said dressed beef and fresh pork should be sold, said respondents above named, during said time between August 21, 1899, and May 9, 1902, have sold to the butchers at St. Joseph, Missouri, said dressed beef and fresh pork at the prices so fixed, regulated, and maintained, except where such respondents gave rebates in money or in pounds of meat to their customers."

(2) The commissioner makes a similar finding of fact as to dressed beef in St. Louis, except that he finds that the Hammond Packing Company did do business in that city, and was not in the combination, but that the St. Louis Dressed Beef Company was in the combination in that city with the respondents.

(3) The commissioner finds that the respondents and others, in St. Louis, "about 1899 or 1900, formed a voluntary association for the purpose of meeting once a week at some hotel or place designated, and discussing and fixing the list prices to be charged the butchers for fresh pork, and at these meetings these representatives agreed among themselves and with each other to maintain these prices as fixed under a penalty of paying a fine of \$5 for each sale under such fixed price. They employed a secretary at \$10 per week, and paid the same by assessments on the members of the organization. These fines were expended for incidental expenses of the meetings and cigars. This organization, these meetings and agreements, were testified to by several who were parties thereto and participated in the agreements and fixed prices for which each should sell fresh pork to the butchers in St. Louis, Missouri, and that in pursuance of said combination, agreement, and conspiracy said respondents maintained the prices so fixed in selling such fresh pork to the butchers at St. Louis, Missouri, except where the prices were cut as aforesaid; and those testifying stated they did not keep such agreements, and did not

intend to when they were made, and the most of the witnesses testified that the prices agreed on were reasonable."

(4) The commissioner finds that respondents at St. Joseph, St. Louis, and Kansas City sell to the trade from 65 to 80 per cent. of all the dressed beef and from 50 to 60 per cent. of all the dressed pork that is handled in those cities, but that such sales amount to "comparatively a very small portion of their business in selling fresh beef, fresh pork, and provisions throughout this and foreign countries."

(5) The commissioner finds that as soon as the Attorney General began the initiatory steps in this case all of the respondents abandoned all of the said combinations.

(6) The commissioner finds that at St. Joseph and St. Louis, after meat had been in the coolers a certain length of time, the owners were allowed to sell it at a price less than the price fixed, and this is what is termed "concession meat."

(7) The commissioner excluded evidence showing that, if a butcher did not pay his bills to the respondent with whom he dealt by Wednesday of each week, he was put on the C. O. D. list of all the respondents and persons in the combine, and that the members of the combine had a meeting every Wednesday night to hear such reports and make such order.

(8) Over objection of the Attorney General, the commissioner permitted the respondents to show how the cattle business in Kansas City had increased from \$4,210,805 in 1890 to \$1,655,966,699 in 1901, but afterwards excluded all except what related to the years 1899, 1900, and 1901. The commissioner also allowed the respondents to show the number of animals the respondents killed, the number of persons they employ, and the amount they pay for salary and expenses. He refused to allow the respondents to show by various cattle raisers that the cattle-raising business has become more profitable since the respondents have been engaged in business, and that it would be injured if the respondents were ousted from doing business in this state.

Both sides have filed voluminous exceptions to the findings of fact by the commissioner. The case has been argued orally at length, and exhaustive briefs have been filed. The evidence has been printed in full, covering two volumes, aggregating 949 pages, while the brief of the informant covers 106 printed pages, and the two briefs of the respondents cover 200 pages.

The Attorney General, for informant. Karnes, New & Krauthoff and Frank Hagerman, for respondents.

MARSHALL, J. (after stating the facts). The statute of this state (Rev. St. 1899, § 8905) relating to "pools, trusts, and conspiracies" makes it unlawful for any per-

sons, associations, partnerships, or corporations to become a member of or a party to "any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, and product of mining or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated, or fixed," or to enter into any such pool to fix or limit the amount or quantity of any such articles. Section 8906 prohibits any combinations that are designed or tend "to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state." And section 8971 punishes the violation of the law by a forfeiture of the corporate rights and franchises if it be a home corporation, or a forfeiture of its right to do business in this state if it be a foreign corporation. Other penalties and forfeitures are imposed by section 8968, but are not involved in nor sought to be enforced in this proceeding.

The commissioner reported that over the objections of the respondents he had admitted "the statements and admissions of the managers of these coolers and solicitors of respondents showing that such combinations and agreements to fix and regulate prices as aforesaid had been made and entered into by respondents. Without such testimony it is doubtful if the existence of such combination could be found, but, if such statements and admissions be admissible—as I have ruled them to be—then" he found that the respondents were guilty. To appreciate the force of what is thus said it is necessary to understand how the respondents did business in this state. Great care has been taken to show that the business done by the respondents in this state is but an "infinitesimal" portion of the total business it does all over the world. The business done in this state is not done from the slaughtering or packing plants of the respondents, nor is it conducted or personally managed by any of the higher officers or agents of the respondents, but it is all done through "coolers," and the agents of the respondents who manage the "coolers" and transact the business. The commissioner finds the facts in this regard, and the conceded facts show the finding is correct, to be as follows: "A 'cooler,' as shown by the testimony, consists of two or more rooms, at least one of which is refrigerated, the temperature being kept down from about 34 to 40 degrees Fahrenheit. Fresh meat is taken from the packing house, and placed in this refrigerating room for sale to the butchers in the city where the cooler is located. As a rule, the packers only sell to the butchers who sell to the

public from their shops. At each cooler is a 'cooler manager' in charge thereof, one or more city solicitors, who solicit trade of the butchers, and a driver, who, from a wagon driven by him, delivers the meat to the butcher who has purchased it. As a rule, the butcher goes to the 'cooler,' inspects the carcass he wishes to buy, and, if it suits him, he purchases it, and it is delivered to him at his shop, and he pays therefor at the cooler." In other words, the purchasers deal exclusively with either the solicitors, who urge them to buy, or the manager of the cooler. The drivers, of course, only deliver the goods. There is also a bookkeeper or cashier and an auditor at each cooler, who are subordinate to the manager, but in referring to the statements and admissions of the agents of the respondents these subordinate agents are not intended, but the managers of the coolers and the solicitors or salesmen are alone referred to.

The statements and admissions referred to were made by the solicitors when engaged in the business of soliciting orders from the retail butchers, and related to the price at which sales could be made, and the reasons for such prices, and to schemes and subterfuges for billing the goods at a price stated or as of certain quantities, and afterwards giving a rebate of the price or for sending more meat than the bills called for; or, as it is termed by the witnesses, of allowing a rebate in cash or in pounds of meat, or they were made by the managers of the coolers when engaged in making sales or when allowing such rebates. They were, therefore, statements made by these persons who were employed by the respondents and who transacted all of the respondents' business of selling in this state, were made while so engaged, and related to the business being transacted. They were, therefore, statements of agents touching the business of the principal then being transacted by such agents, and such agents were the only representatives of the respondents that the buying public ever saw or dealt with. They quoted the prices to the public. They made and carried out the arrangements for rebates. They delivered the goods and collected the bills. They were, therefore, statements made by authorized representatives of the respondents while in the transaction of their business and touching the business. They were, therefore, admissible in evidence, and were just as binding upon the respondents as if those statements had been made by the highest officer of the company, or had been solemnly adapted by the directors or stockholders of the company and entered on the minutes of their meeting. *Northrup v. Ins. Co.*, 47 Mo. 442, 4 Am. Rep. 337; *Benevolent Ass'n v. Kribben*, 48 Mo., loc. cit. 41; *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333; *Boogher v. Life Association of America*, 75 Mo., loc. cit. 324; *State v. Ins. Co.*, 150 Mo., loc. cit. 133, 134, 51 S.

W. 413; *Nickell v. Ins. Co.*, 144 Mo. 420, 46 S. W. 435; *State ex inf. v. Ins. Co.*, 152 Mo., loc. cit. 38, 52 S. W. 595, 45 L. R. A. 363.

The testimony introduced by the state was abundant to show that the respondents were members of a combination or pool to fix and maintain prices. The state called as witnesses nine butchers who did business with the respondents in St. Joseph, whose testimony showed that they all got rebates in money or pounds of meat from respondents, and that in every instance they were given by the solicitors or the cooler managers, who said they could not sell the meat for less than a certain price because all of the respondents had an agreement as to prices which was fixed every Wednesday by the head man of the packing plants, and the prices given by them to the cooler managers on Thursday and by the cooler managers and solicitors were given to the trade; and that, if any one cut the price, he would be fined, so they circumvented their fellow conspirators by giving rebates as herein described. That such a combination existed at the time charged in this case is further shown by facts and circumstances outside of any admissions and statements of the agents of the respondents. The witnesses testified that they had tested the various respondents by going to the several coolers of the different respondents on the same day, and trying to buy cheaper from one than was offered them by another, and in every instance they found the prices to be exactly the same at all of the coolers. It further appeared that on various occasions a manager or solicitor ascertained that a purchaser had gotten a rebate from one of the other companies, and he would immediately secure from the customer the papers showing the rebate, and take them away with him, and afterwards the agent of the company that had granted the rebate complained that the purchaser had gotten him into trouble by allowing the fact to become known. In fact, it appears that in every instance when a rebate was granted secrecy was strictly enjoined upon the customer. It further appeared that on various occasions the cooler managers or solicitors would tell the butchers they had better lay in a supply of meat before a certain day, as the prices would go up on that day, and that in every instance the prices did go up uniformly at the time specified at all of the coolers of all the respondents. It further appeared that at all of the coolers "concession meat," as it is called, was sold. By "concession meat" is meant meat that has remained so long on hand in the cooler that it has become discolored or moldy, or not exactly what would be termed as first-class, but, as some of the witnesses called it, unfit for sale, but not exactly unfit for use after it had been trimmed up. When any cooler had such meat on hand, the manager of another or of other

coolers would be called in, and they would examine it, and, if they believed it to be of such a character, they would "concede" to the manager of the cooler having such meat the right or privilege to sell it for a price less than the agreed price. The manager who had obtained such concession would then sell it, or try to sell it, to the trade at such price as he could get for it. It further appeared that no butcher could buy meat from any packer that did not do business in St. Joseph, because packers located elsewhere refused to sell to them, stating as a reason that St. Joseph was the respondents' territory, and such outside packers were afraid to invade their territory. It further appeared that when the Attorney General took the initiatory steps in this case the respondents immediately dissolved, discontinued, and stopped the pool and combination arrangements.

The state called 11 witnesses in St. Louis, butchers, city meat inspectors, and former managers of the respondents' coolers, who testified to the same facts, circumstances, and conditions in St. Louis as to dressed beef in St. Louis. As to dressed pork the state called five witnesses, who were themselves members of such a pool, trust, or combination, who testified that the respondents (except the Hammond Packing Company) were also members of the pool; that the representatives of the pool, trust, or combination met every week at either the Southern or Lindell Hotels; that the prices were fixed by an arbitrator, named McCall, who was paid a salary of \$10 a week, raised by assessments on all of the members, and, if any one cut the prices, he was fined \$5; that the combination ran for two or three years, and until the institution of this suit, when it was abandoned. As to the existence of a combination as to dressed pork, therefore, the facts and circumstances show it as plainly as they do in regard to dressed beef, and, in addition, five of the conspirators testified directly to it.

It is quite too plain for doubt that persons or companies who are engaged in the same line of business in the same place do not bill goods at one price and give rebates in money or goods or weights, and do not give notice of a uniform advance of rates at a certain date, always followed by such a rise, and do not maintain a uniform selling price, and do not call in their competitors and get them to "concede" to them a right to sell shopworn or old goods at a price less than such uniform price, and do not gather up papers or bills of their competitors showing that they have been selling below a certain price, and do not abandon, dissolve, and discontinue their understandings or combinations as soon as the legality thereof is called in question by the state's officers, unless there has been an unlawful pool, trust, or combination to fix and maintain prices. Such acts and circumstances and practices speak as

loudly, as directly, and as certainly, and tell as strong and conclusive a tale of wrongdoing in those regards, as any witness could possibly testify to it or any resolution formally adopted by the directors or stockholders could prove it. Independent, therefore, of any admissions or statements of the managers of the coolers or of the solicitors, which, however, were clearly admissible, the state has made out a case against the respondents under the facts and circumstances of the case. The Commissioner, therefore, reached the right conclusion, and properly followed the rules of law as to the admissions and statements of the managers of the coolers and solicitors, as laid down in the cases hereinbefore cited; but he was in error in saying that, outside of such admissions and statements, it is doubtful if the charges against the respondents could be sustained. As against all such direct testimony, admissions, and statements the respondents offer no proofs, call no witnesses, and remain absolutely mute. They do not even do, as was done in *State ex inf. Atty. Gen. v. Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363, call the chief officers of the conspirators, and show that they never knew of nor authorized any such arrangements or combinations by their agents. They do not show or pretend that they have not reaped the benefits of such arrangements or combinations for all the years they existed. They simply let the state's showing stand uncontradicted, and content themselves with claiming that the admissions and statements were not made at the time the agents were engaged in transacting the business they were given power to transact, but were made before or after the said time, which an analysis of the evidence shows is not the fact; and with further showing how their business has increased in the last 10 years, how many persons they employ, how much wages they pay, how the cattle raising business has increased since they began business, and how it would be injured if they are ousted of their right to do business in this state, how they regulate their prices by the price of cattle, how much loss the resident companies would suffer by reason of not being allowed to operate their plants, how the butchers in St. Joseph are as bad as they are, and worse, because, while they sell concession beef to the butchers at reduced prices, and give butchers rebates to get their trade from each other or to retain their trade, the butchers do not sell concession meat any cheaper to the public, nor do they give the public the benefit of any rebates; and that the butchers belong to a union, which fixes the price of meat for the consumers, and keeps newcomers out of the trade, and prohibits or tries to prohibit the packers from selling directly to the trade; and that, as to the dressed pork combine in St. Louis, it never was lived up to, and never was intended to be lived up to, and the members were false to their trust

agreements so often that they could not make the combination effective. None of these matters constitute any defense or bar to this action. The commissioner admitted the testimony bearing on most of these matters for the purpose of enabling the court to be fully advised as to all the conditions when it came to fixing the punishment to be imposed.

"Competition is the life of trade." Pools, trusts, and conspiracies to fix or maintain the prices of the necessities of life strike at the foundations of government; instill a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate, and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them breadwinners while they are yet almost infants, because the head of the house cannot earn enough to feed and clothe his family. The people are helpless to protect themselves. The powers that be must protect them, or, as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken, and its perpetuity threatened. Missouri (State ex inf. Atty. General v. Insurance Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363); New York (People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690); Pennsylvania (Coal Co. v. Coal Co., 68 Pa. 173, 8 Am. Rep. 159); Ohio (Salt Co. v. Guthrie, 85 Ohio St. 666); Kentucky (Anderson v. Jett, 89 Ky. 875, 12 S. W. 870, 6 L. R. A. 390); Iowa (Chapin v. Brown, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297); Illinois (Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171, and More v. Bennett, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216); Wisconsin (Builders' Ass'n. v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 87 L. R. A. 127, 60 Am. St. Rep. 97); California (Vulcan Powder Co. v. Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242); Texas (Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274, 15 L. R. A. 598, 29 Am. St. Rep. 690); Louisiana (India Bagging Ass'n v. Kock, 14 La. Ann. 168); and the Supreme Court of the United States (U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007)—have held statutes which prohibited such combinations or trusts to be constitutional, and, further, that all such combinations or agreements are against public policy, and void at common law and as a matter of American common law, irrespective of whether there is any statute on the subject or not.

The rule is well stated in the syllabus to *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690: "A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity [the combination was to fix and maintain the price of coal] is, in the contemplation of law, an act inimical to trade and commerce, without regard to what may be done under and in pursuance of it; and, although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices, where it appears that the parties acted under the agreement, an indictment for conspiracy is sustainable." The court further aptly says: "But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation. It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the 'exchange' was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified in case of persistent default by the member that 'he is not entitled to the privilege of membership in the exchange.' No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court in those cases held that the agreements were

vold on the ground that they were agreements to prevent competition, and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See, also, *People v. Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot v. P. & E. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190. The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants."

In *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843, it was held, as stated in syllabus, that, "as corporate grants are always assumed to have been made for public benefit, any conduct which destroys their functions, maims or cripples their separate activity, and takes away free and independent action, affects unfavorably the public interests." Accordingly, where a number of persons, including the defendant in that case, entered into an agreement the purposes of which were declared to be "(1) to promote economy of administration, and

to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit; (2) to give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar; (3) to furnish protection against unlawful combinations of labor; (4) to protect against inducements to lower the standard of refined sugars; (5) generally to promote the interests of the parties hereto in all lawful and suitable ways"—and each of the parties transferred all its shares of stock to a board, and the board managed the whole business, it was held to be against public policy, in restraint of trade and void. It is not essential that the combination or trust shall constitute a complete monopoly; for, as was said by Mr. Chief Justice Fuller in *U. S. v. E. C. Knight Co.*, 156 U. S., loc. cit. 16, 15 Sup. Ct. 255, 39 L. Ed. 325: "Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." As was well said by Best, C. J., in *Homer v. Ashford*, 8 Bing. 328: "The law will not permit any one to restrain a person from doing what his own interests and the public welfare require he should do." If it be true that a combination or trust among the respondents has increased the cattle business in this state, and has encouraged the stock-raising business, and its prohibition hereafter will injure or destroy such business, or if such trust arrangements have given employment to so many people and put in circulation so many millions of dollars of money in this state, or if it be that the home corporations would lose their plants entirely if their franchises were taken away from them, such considerations would not amount to a defense or excuse for the offense charged. They are matters that should have been thought of before the offense was committed. So long as the law puts the stamp of condemnation on all arrangements, agreements, pools, trusts, and conspiracies to fix and maintain the prices of articles of prime necessity, the courts have no option but to enforce the law. The wisdom and experience of all ages and all people has demonstrated the necessity for such laws, and for the rigid enforcement of them. And, even after so many years of unfailing enforcement of such laws, the terrors and consequences thereof have not been sufficient to deter people from violating them. The conclusion is irresistible that the defendants are guilty of being members of a trust, pool, or conspiracy to fix and maintain the prices of dressed beef and dressed pork in this state at the times charged in the petition, except, as before stated, *Armour & Co.* and the *Henry Krug Packing Company*, as to whom the writ must be quashed.

2. This leaves only the question of punishment. The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of (State ex rel. v. Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593; State ex rel. v. Gas Co., 153 Ind. 483, 53 N. E. 1089, 58 L. R. A. 413, 74 Am. St. Rep. 814; State v. Railroad, 47 Ohio St. 130, 23 N. E. 928; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 84 Am. St. Rep. 541; Yore v. Superior Court, 108 Cal. 481, 41 Pac. 477; State v. Turnpike Co., 10 Conn. 167; State v. Topeka, 30 Kan. 653, 2 Pac. 587; People v. Railroad, 15 Wend. 113, 30 Am. Dec. 33; Commonwealth v. Canal Co., 43 Pa. 301); or it may be a suspensive judgment of ouster with a fine accompaniment (State ex inf. v. Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363); or it may be a simple fine, if it appears that the trust, pool, or conspiracy complained of and proved has been abandoned. In short, the character of the judgment rests in the discretion of the court. 5 Thompson on Corp. § 6812; Weston v. Lane, 40 Kan. 479, 20 Pac. 260, 10 Am. St. Rep. 224; State ex rel. v. Railroad, etc., Co., 91 Iowa, 517, 60 N. W. 121; State v. Bernoudy, 86 Mo., loc. cit. 281.

Under all the circumstances, a judgment of absolute ouster is not necessary, but the ends of justice will be satisfied by the imposition of a fine and the payment of all the costs in the case. It is accordingly ordered that the respondents the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company, and Swift & Company, each pay to the clerk of this court, within 30 days from this date, the sum of \$5,000 as a fine, and that they also pay the costs in this case. And it is further ordered that if the respondents, or any of them, fail to pay said fine and costs within said time, then they or those so failing be ousted of all rights, privileges, and franchises of every nature and kind conferred upon them by the laws of this state, and be forever prohibited from doing business in this state. All concur.

GEISMANN v. MISSOURI EDISON ELECTRIC CO.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

ELECTRICITY—NEGLIGENCE CAUSING DEATH—UNINSULATED WIRES—DUTY OF COMPANY—CONTRIBUTORY NEGLIGENCE—FAILURE TO TAKE PRECAUTIONS—KNOWLEDGE OF DANGER—SUFFICIENCY OF PETITION—MEASURE OF DAMAGES—INSTRUCTIONS—EXCESSIVE DAMAGES.

1. A petition for negligent death, averring that deceased, while in the line of his duty and in the exercise of due care, came in contact with one of defendant's electric wires, upon which the insulation had, through defendant's negligence, been permitted to become out of repair, so that the current had become exposed, in consequence of which deceased received

a shock, etc.; that the wire had been out of repair and the current exposed a long time prior to the date of the accident, which fact defendant knew, or by the exercise of ordinary care might have known, etc.—states a cause of action.

2. Whether a laborer engaged in taking down a sign from a building was guilty of contributory negligence in coming in contact with an electric wire was a question for the jury.

3. It is the duty of an electric lighting company to use every accessible precaution to insulate its wires at all points where people have the right to go, and to use the utmost care to keep them so insulated.

4. The fact of death from contact with electric wires at a place where deceased had a right to be and might be expected to be is conclusive proof of defective insulation and of the negligence of defendant.

5. A petition averring that death was caused by contact with one of defendant's electric wires, upon which the insulation had, through defendant's negligence, become worn off, and the current exposed, and that the defect had existed for a long time prior to the date of the accident, which defendant knew or might have known, was sufficiently broad to justify an instruction that it was incumbent on defendant to keep its wires reasonably safe.

6. It is the duty of an electric light company to keep its wires safe. It is not enough that they be kept reasonably safe.

7. An instruction that, if electric wires where deceased was standing had the appearance of being properly insulated, it was an inducement to risk contact with them, though it simply announced an abstract proposition of law, and did not purport to cover the whole case, was not prejudicial.

8. An instruction on the measure of damages for negligent death, that the jury might assess such damages as they deemed fair and just, not exceeding \$5,000, on which point defendant asked for no instructions or modification, was not error.

9. In an action for death resulting from contact with a defectively insulated electric wire, an instruction on the negligence of decedent in failing to wear a rubber coat, boots, or gloves was properly limited by a qualification as to their practicability in his situation as a sign hanger.

10. Defendant requested an instruction that if decedent knew or ought to have known of the danger resulting from contact with an uninsulated wire, and the wire was seen or should have been seen by him, and he negligently came in contact therewith, the verdict should be for defendant. The instruction was given with the modification, "and knew that defendant's wire was at some point not properly insulated." *Held*, that the modification was not misleading or prejudicial.

11. In an action for negligent death, where the evidence was that deceased was a man 37 years of age, earning \$9 a week, and left a wife and four children, a verdict of \$5,000 was not excessive.

12. In an action for negligent death, resulting from contact with an electric wire, it was not necessary for plaintiff to prove, in order to recover, that at the exact point of contact the insulation was off the wire.

Appeal from Circuit Court, St. Louis County; Rudolph Hirtzel, Judge.

Action by Emma Geismann against the Missouri Edison Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by plaintiff, who is the widow of Bernard Geismann, against defend-

¶ 3. See Electricity, vol. 18, Cent. Dig. §§ 7, 8.

ant company, to recover \$5,000 damages for the negligent killing of her husband in the city of St. Louis on the 24th day of January, 1898. At the time of the accident the deceased was a laborer, engaged in hanging and removing signs. The defendant at that time was a lighting corporation, engaged in supplying electric light and electric power to consumers in the city of St. Louis. The deceased was an employé of a concern known as Schurk General Ironworks, in the capacity of laborer, and as such it was his duty to hang or remove signs in different parts of said city. He was sent by his employers, with other workmen, to remove a sign which was hanging in front of the store numbered 111 North Broadway, in said city, which was occupied by a tailor doing business under the name of "Brooks, the Tailor." The petition sets out several ordinances of the city of St. Louis regulating the placing of electric wires, etc., and then alleges their violation by defendant; but, as they were eliminated from the case by the ruling of the court, it is unnecessary to say more with respect to them. The case therefore rests on the subsequent averments of the petition of the defendant's negligence, which are that while the deceased, without negligence on his part, was, on the day mentioned, engaged, in the line of his duty, in removing the sign, "one of the loosened wires with which the sign had been attached to the building immediately over the front of said store came in contact with one of the said wires of defendant, upon which said wire the insulation had, through negligence and carelessness of the defendant, and in violation of the said ordinances and provisions aforesaid, been permitted to become out of repair and worn off to an extent that the dangerous and deadly electric current passing through the same had become exposed and dangerous to those required to be thereabout, and in consequence thereof the said Bernard Geismann received an electric shock from said exposed current, which caused him to lose consciousness, thereby precipitating him upon his head to the stone pavement, some fifteen feet below, and inflicting injuries by reason whereof he died on the 3d day of February, 1898; that said wire had, through the negligence of defendant, been permitted to become out of repair, and the insulation thereof to be worn off, and the dangerous current passing through the same to be exposed, for a long time prior to said 24th day of January, 1898, which facts defendant knew, or by the exercise of ordinary care on his part might have known, but that the said Bernard Geismann, owing to his inexperience with electric wires and currents, did not know, and by the exercise of ordinary care on his part could not have discovered." The answer admitted the defendant's corporate existence, and put in issue all the other allegations of the petition, and further stated (1) that the deceased did not receive a shock from an electric

wire that caused him to fall; (2) that he was negligent in approaching the wires mentioned in the petition, because they were strung far above the reach of persons passing along the sidewalk, and, if said wires were bare of insulation, the deceased, by the exercise of ordinary care, could have known that fact, and he was therefore negligent in approaching the wires, for the purpose he did, without first assuring himself that the insulation thereof was in good condition; and (3) that he was guilty of negligence in approaching defendant's said wires, they being of the size and appearance of those usually employed to conduct electric currents of high tension and of dangerous character, and then handling other wire, without first providing himself with a coat, gloves, and foot gear of rubber. All the new matter of the answer was denied by the reply.

The facts as disclosed by the evidence are about as follows: Deceased was at the time of his injury 37 years of age, and was earning \$9 per week in putting up and taking down signs. He had a wife and four children who were dependent upon him for support. On the day of the accident, deceased and two other men were sent by his employer to take down a wooden-frame, canvas-covered sign, about 3 feet in width and 10 feet in length, and weighing 25 to 35 pounds. The sign was suspended about 22 feet from the sidewalk, and at the top of the first story of a building abutting on the public street. The back or lower part of the sign was nailed to the tailor's sign, and the front or upper side was supported by guy wires 15 to 18 feet long, which were attached to the building in the recesses on either side of the bay window. The front of the building was 26 feet in length, on a north and south line with a bay window about 8 feet wide, extending out about 2 feet 8 inches from the second story line. The sign in question had been taken off the building and replaced three or four times, and it had been up only four to six weeks when the deceased and his companions were sent to take it down. There was evidence that Schurk, deceased's employer, had repeatedly cautioned his men (among them, the deceased) to "take care of electric wires about their work," and that the deceased had worked about electric wires, in putting up and taking down signs, once or twice a week during the time he was in that employ. Corrigan, with whom the deceased had worked, did not know whether he knew the danger of electricity. They had never talked about the danger of electricity. It was a bright, dry day. Defendant introduced evidence tending to show that rubber gloves, coats, and boots were a safeguard to persons working about electric wires, and that the deceased had not provided himself with such clothing. The plaintiff's witnesses testified that sign hangers could hardly wear rubber coats, gloves, and boots at

their work, and that such clothing was never worn by men engaged in their occupation. The defendant's high voltage electric lighting wires were strung along the iron cornice, above, behind, and beneath the sign which was to be removed, and the tailor's sign just below it. But the evidence tends to prove that when the deceased and his companions, Corrigan and Meyer, arrived at the building, Corrigan put a ladder against the front wall, about 8 feet from its south line, and "when the ladder touched the [tailor's] sign there was a little flash of electricity," and they moved it north eight or ten inches, "so the wire wouldn't ground." Corrigan called his fellow workmen's attention to that flash—told them to be careful. Then he and the deceased went up the ladder and loosened the south end of the sign. Meyer remained on the pavement to act as they lowered it to him. Meyer received the south end of the sign as it was let down on his shoulder, and Geismann and Corrigan went to the north side of the bay window to cut the guy wire—the remaining attachment of the sign. Each looked at the electric light wires on that side of and about the bay window, and "they appeared to be all right." Corrigan testified "that apparently the wires looked all right," and he said to Geismann, relative to the wire, "It appears to be all right." There was a recess on the cornice just north of the bay window, in which Corrigan and the deceased stood. It was two or three feet deep, and three men could stand there. Corrigan cut the guy wires north of the bay window, and handed them instantly to the deceased, while Meyer held the sign below. Geismann had almost no weight to support—only to keep the sign from toppling till Corrigan could go down the ladder to the sidewalk. As Corrigan turned to go down the ladder, deceased cried, "Oh!" which attracted his attention, and he turned back toward Geismann and saw a little spark, and Geismann was falling. Corrigan saw the flash, and thought the loose end of the wire in Geismann's hand came in contact with the defendant's electric wire. Meyer saw the spark as Geismann cried, and he thought it came from the loose end of Geismann's wire touching defendant's electric wire. The deceased fell to the pavement, alongside of and eight inches from the ladder, and he could have caught it by reaching out his hand as he went down. He made no effort, whatever, to catch anything to save himself. He was about ten feet from the north line of the building when he fell, and he had stopped slightly, and back about two feet from the cornice, holding the north guy rope, one end of which was attached to the disconnected sign, and about seven or eight feet of the loose end of which was above his hands. The deceased fell to the sidewalk, and sustained a severe fracture of the skull. A clot of blood formed on his brain, and he died nine days later without regaining con-

sciousness. It appears that he had an abundance of room, and did not need to hold to the building to retain his balance, and he had nothing in his hands except the guy wire. This guy wire held by Geismann could not have touched the defendant's wire at the point where the ladder was first put up, and the sparks flashed from the wire. That was about 15 feet from where Geismann stood when he was shocked, and it was around on the opposite side of the bay window. Besides, the loose wire extended only about 7 or 8 feet beyond his hands. The hands of the deceased were very hard and they were contracted—drawn up and clenched—after the accident, as if he were trying to hold something, and he had a wire scar on the inside base of the fingers of his left hand. An electric shock would cause contraction of the muscles, and the burn would show a white, charred appearance. "The skin would be dry and white. A white line would be such as I would expect to find on the hand from grasping a wire carrying electricity." The evidence is conflicting as to the number of defendant's wires that were on and about this first story cornice on January, 24, 1898. Schurk and Corrigan both testified that they examined the place after Geismann's death, and that there was an electric wire back of the sign, and extending to the building north, that the model used in evidence did not show. It was also conflicting as to the condition of the wires, and the amount of repairing that was done on them immediately after the shock to Geismann. Corrigan testified for plaintiff that "the electric wire behind the sign looked like a secondhand wire to me. Q. You have seen enough electric light wires to be able to tell? A. I have seen enough to know the wires." O'Reilly, supervisor of city lighting, called by the defendant, testified as follows as to the placing of the wires on top of and behind the signs in question: "The whole general plan of bringing wires into buildings and bringing them behind signs at all is improper construction. That it not the proper way to construct wires of that character." And he further stated as to his examination of those wires: "I say I found the electric wires in fairly good condition for wires that are placed on signs. You know they are not put in in the manner usual for constructing electric wires. They were placed behind this sign on the tailor shop. For wires of that kind they were in fairly good condition. It is very difficult to keep wires of that kind in good condition." The wires had been up for some time.

It appears that when Corrigan and Geismann went up on the cornice the insulation was off the wire in two places near the south line of the building, but the wires appeared all right on the north side—north of the bay window. It also appeared that the wires were in such condition four months prior to

where the insulation was off these wires, and he received a shock caused by the wire supporting the sign getting around the electric light wire on the north side of the bay window—the side on which Geismann was shocked. He described the character of construction of that wire as follows: "Mr. Scherd, will you point out to the jury where the insulation was off that you saw? A. Right here. This is the iron here. That holds the back of the [tailor's] sign up. There are three of them, one at each end—about three or four feet from the end—and one in the center. This wire has been a kind of slack, loose, and has been rubbing on this iron here. The wind made it rub on this wire, and that is how the insulation came off."

Just after the accident to Geismann, six or seven electric light men appeared, and they worked along the defendant's wires and tapped two places in front of the building. J. F. Evans testified to the tapping of two places.

At the request of plaintiff, and over the objection of defendant, the court instructed the jury as follows:

"(1) The court instructs the jury that if they find from the evidence that on the 24th day of January, 1898, the deceased, Bernard Geismann, was, in the line of his duty as a laborer or sign hanger, engaged in removing a sign at premises No. 111 North Broadway, in the city of St. Louis; and if you further find that while so engaged, and without fault or negligence on his part, the wires with which said sign had been attached, if any, came in contact with the wires of defendant through which an electric current was then passing; and if you further find that the insulation, if any, on said wire, had become out of repair and worn off to an extent to expose the electric current, if any, passing through the same; and if you further find that the defendant knew, or by the exercise of ordinary care on its part could have known, that said insulation, if any, had become out of repair and worn off, if you find that it was out of repair and worn off, and that the said deceased did not know, or by the exercise of ordinary care could not have discovered, it; and if you further find that because of the exposure, if any, of the electric current passing through said wire, the said deceased received an electric shock and lost his consciousness; and if you further find that by reason thereof he was precipitated upon his head to the stone pavement below, and sustained such injuries, if any, that as a direct result thereof he died on the 3d day of February following—then you will find a verdict for the plaintiff.

"(2) The court instructs the jury that it was the duty of the defendant to so insulate or protect the wire in question as to make it reasonably safe to those who may be brought

in contact with said wire of the defendant, and if you find that defendant failed to so insulate or protect the said wire as to make it reasonably safe to those who may be brought in contact with it; and if you further find that by reason of the failure, if any, to insulate said wire, the said deceased received an electric shock, without any negligence on his part; and if you further find that by reason of such shock, if any, the said deceased lost consciousness, and fell to the ground below and was injured; and if you find that he died as the direct result of such injuries, if any—then you will find a verdict for the plaintiff.

"(3) The court instructs the jury that if they believe from the evidence that the said wire at the place where deceased was standing at the time he received his injuries, if any, had all the appearances of having been properly insulated, that this was then an invitation or inducement to said deceased to risk the consequences of contact with the same in the performance of his work in lowering the sign in question.

"(4) The court instructs the jury that if at the time of and immediately preceding the injury, if any, to the deceased, Bernard Geismann, he was in the exercise of such care as ordinarily careful and prudent persons usually exercise under the same or similar circumstances, then he was not guilty of contributory negligence.

"(5) The court instructs the jury that, if you find for the plaintiff, you may, in your verdict, give her such damages, not exceeding five thousand dollars, as you may deem fair and just, under the evidence in the case with reference to the necessary injury resulting to her from the death of her husband."

The defendant, upon its part, prayed the court to instruct the jury as follows:

"(2) If the jury believe from the evidence that plaintiff's deceased husband and the defendant were both guilty of negligence which directly contributed to the injury, then the verdict should be for the defendant.

"(3) If the jury believe from the evidence that the injuries to plaintiff's husband resulted from an accident, the true cause of which the jury cannot determine from the evidence, then the verdict should be for the defendant."

"(9) The court instructs the jury that there is no evidence before them in regard to the ordinances pleaded, or the acceptance thereof, and the jury will disregard them entirely."

Which request the court granted, and gave the instructions.

Defendant further asked the court to give the following instructions:

"(4) The jury are instructed that the charge of negligence made by plaintiff against defendant by this action must be

proved to the satisfaction of the jury by plaintiff, by a preponderance of the evidence. The jury have no right to presume negligence, and, if the evidence does not preponderate in favor of plaintiff, then the verdict should be for the defendant.

"(5) The jury are instructed that if they believe from the evidence that plaintiff's husband was an experienced sign hanger, and experienced in taking down signs in St. Louis, and knew of the danger of coming in contact with electric light and other wires in the city of St. Louis, and that he either saw an electric flash from defendant's wire some time before he went upon the cornice from which he fell, or was told thereof by his fellow worker, and cautioned against the danger therefrom, and thereafter, from his own carelessness in handling uninsulated wires, permitted them, or either of them, to come in contact with defendant's wire, then the verdict should be for the defendant.

"(6) The court instructs the jury that it was the duty of Bernard Geismann, plaintiff's deceased husband, to exercise ordinary care upon his own part to avoid injury from any wire he was handling coming into contact with defendant's wire; and if the jury believe from the evidence that he knew, or if in the exercise of ordinary care in his vocation he would have known, his liability to injury from defendant's wire, and that the wearing of rubber coat, boots, and gloves, or either of them, would have lessened his peril; and if the jury believe from the evidence that the wearing of some or all of these articles would have been a reasonable and proper precaution for him to take for his own safety, and the failure of said Geismann to wear some or all of those articles contributed to his injury—then the jury will find for the defendant.

"(7) The court instructs the jury if they believe from the evidence that plaintiff's husband, Bernard Geismann, knew, or by the exercise of ordinary care could have discovered, his liability to injury from defendant's wire, it was his duty to use what would be reasonable care under the circumstances to avoid injury therefrom; and if the jury believe from the evidence that he failed to exercise reasonable care under the circumstances, and that his failure to use reasonable care contributed to his injury, then the verdict should be for the defendant.

"(8) The jury are instructed that if they believe from the evidence that plaintiff's husband was a man of ordinary intelligence, and experience in putting up and taking down signs in the city of St. Louis, and knew, or by the exercise of ordinary care would have known, of the danger resulting from contact of uninsulated wire with a wire of high electric power, and that defendant's wire was in plain sight, and was seen by plaintiff's husband, or that he would have seen it if he had been exercising ordinary care for his own safety, and that he, under those circum-

stances, negligently allowed an uninsulated wire in his own hands to be drawn across or come in contact with defendant's said wire, then the verdict should be for the defendant."

"(10) The court instructs the jury that, under the pleadings and the evidence in this case, they should find for the defendant."

Which instructions the court refused, to which refusal of the instructions thus prayed the defendant, by its counsel, then and there duly excepted.

The court of its own motion gave the following instructions, having modified instructions offered by defendant so as to read as follows:

"(4) The jury are instructed that, to entitle plaintiff to recover, the charge of negligence made by plaintiff against defendant by this action must be proved to the satisfaction of the jury by plaintiff by a preponderance of the evidence. The jury have no right to presume negligence, and, if the evidence does not preponderate in favor of plaintiff, then the verdict should be for the defendant. By the term 'preponderance of evidence' is meant the greater weight of the evidence; and, in determining the greater weight of the evidence, the jury should not simply consider the number of witnesses adduced by either side, but should also consider the credibility of the witnesses, and all the facts and circumstances proven in the case.

"(5) The jury are instructed that if they believe from the evidence that plaintiff's husband was an experienced sign hanger, and experienced in taking down signs in St. Louis, and knew of the danger of coming in contact with electric light and other wires in the city of St. Louis, and that he either saw an electric flash from defendant's wire some time before he went upon the cornice from which he fell, or was told thereof by his fellow worker, and cautioned against the danger therefrom, and thereafter, from his own carelessness in handling uninsulated wires, permitted them, or either of them, to come in contact with defendant's wire, whereby the alleged shock resulted, then the verdict should be for the defendant.

"(6) The court instructs the jury that it was the duty of Bernard Geismann, plaintiff's deceased husband, to exercise ordinary care upon his own part to avoid injury from any wire he was handling coming into contact with defendant's wire, and if the jury believe from the evidence that he knew, or if in the exercise of ordinary care in his vocation he would have known, his liability to injury from defendant's wire, and that the wearing of rubber coat, boots, and gloves, or either of them, would have lessened his peril; and if the jury believe from the evidence that the wearing of some or all of these articles would have been a reasonable and proper precaution for him to take for his own safety under the circumstances, and in his situation as sign hanger, and that the failure by

said Geismann to wear some or all of those articles directly contributed to his injury—then the jury will find for the defendant.

"(7) The court instructs the jury if they believe from the evidence that plaintiff's husband, Bernard Geismann, knew, or by the exercise of ordinary care could have discovered, his liability to injury from defendant's wire, it was his duty to use what would be reasonable care under the circumstances to avoid injury therefrom; and if the jury believe from the evidence that he failed to exercise reasonable care under the circumstances, and that his failure to use reasonable care contributed directly to his injury, then the verdict should be for the defendant.

"(8) The jury are instructed that if they believe from the evidence that plaintiff's husband was a man of ordinary intelligence, and experience in putting up and taking down signs in the city of St. Louis, and knew, or by the exercise of ordinary care would have known, of the danger resulting from contact of uninsulated wire with a defective or noninsulated wire of high electric power, and that defendant's wire was at some point or points not properly insulated, and was in plain sight, and was seen by plaintiff's husband, or that he would have seen it if he had been exercising ordinary care for his own safety, and that he, under those circumstances, negligently allowed an uninsulated wire in his own hands to be drawn across or come in contact with defendant's said wire, then the verdict should be for the defendant."

To the giving of which instructions the defendant duly excepted at the time.

Under the instructions of the court, the jury rendered a verdict for the plaintiff for the sum of \$5,000. In due time defendant moved to set the verdict aside and for a new trial, which being overruled, the company brings the case to this court by appeal for review.

Albert Blair and Gilliam & Smith, for appellant. L. Frank Ottoby and Jesse A. McDonald, for respondent.

BURGESS, J. (after stating the facts). The petition upon which the case was tried is bottomed upon common-law negligence, setting forth specifically the acts constituting such negligence, and clearly states a cause of action. Defendant says that the evidence shows clearly that the deceased was guilty of contributory negligence, and for that reason its demurrer to the evidence should have been sustained; but we are of the opinion that the evidence as disclosed by the record, without again stating the facts in detail, was sufficient to take the case to the jury, and that the demurrer thereto was properly overruled.

The first instruction given in behalf of plaintiff is criticised upon the ground that "it is too general, in that it does not specify that the defendant was negligent in not rem-

edying the defect after it had notice, or a reasonable time had elapsed after the insulation became out of repair and worn off to notice, but the mere fact of its being out of repair and worn off makes the defendant liable, and does not restrict the injury of deceased to a wire in his hand coming in contact with defendant's wire where insulation was out of repair and worn off; nor does it consider the defense that it was by the act of Geismann and his associates that the wire had been burned, the insulation deteriorated and burnt off." Electricity is one of the most dangerous agencies ever discovered by human science, and, owing to that fact, it was the duty of the electric light company to use every protection which was accessible to insulate its wires at all points where people have the right to go, and to use the utmost care to keep them so; and for personal injuries to a person in a place where he has a right to be, without negligence upon his part contributing directly thereto, it is liable in damages. *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. The deceased was, at the time he received the shock which caused his death, in a place where his duty required him to be; and it was the duty of the defendant, in the exercise of even ordinary care and foresight, to know that sign hangers, painters, carpenters, and other mechanics would be required, as occasion might require of them in the pursuit of their respective occupations, to come in proximity to its wires constructed and maintained on the signs and cornice in front of the building where the accident occurred. As was said in *Overall v. Louisville Electric Light Company (Ky.)* 47 S. W. 442: "Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be; and it was the duty of the electric light company to know that linemen of the telephone company would have to come in close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages."

The duty of defendant in the maintenance of its wires under circumstances very similar is well presented in *Clements v. Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348: "The wire of defendant was spliced, and was not insulated as required by the ordinance. It passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who by their occupation were brought in close proximity to

them. In this respect and in this particular case we are of the opinion that the defendant's negligence caused the death of Clements. But notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, he cannot recover. The question is whether the act of the party injured has a necessary tendency to expose him directly to the danger which resulted in the injury complained of. If the plaintiff could, by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury. When the action of both parties must have concurred to have produced the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. This proof need not be direct, but may be inferred from the circumstances of the case. The deceased (Clements) was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and, to all appearance, were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact, there was an invitation or inducement held out to Clements to risk the consequences of contact. He had the right to believe they were safe, and that the company had complied with its duty specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. * * * Clements' attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admonition to him was only of a danger which he knew to exist * * * before he advised him to be cautious of going near the wires or to keep away from them. * * * The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment

brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence for coming in contact with it, unless he does it unnecessarily and without proper precautions for his safety. It cannot be said that, when Clements went on the roof to repair it, he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless." So in *Griffin v. Electric Co.*, 184 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477, a tinsmith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric light wire running along the side of a building, about 12 feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire where the insulating material had been worn off; and it was held that the question of defendant's negligence and the due care on the part of the plaintiff were for the jury, and that it could not be said, as a matter of law, that the condition of the wire was so apparent that the plaintiff must or ought to have seen it, although the accident happened in the forenoon, and that, while an expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury.

Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in cases referred to the actions were grounded in negligence in using improper insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be. The same principle governs here. Although the wires of the defendant company were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great as, if not greater than, if the danger had been from insufficiency or want of insulation. The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact therewith. The law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury. As announcing the same doctrine, we refer to *Newark Electric Light & Power Co.*

Mass. 583, 37 N. E. 778, 25 L. R. A. 552; Ennis v. Gray, 87 Hun, 355, 34 N. Y. Supp. 379; Perham v. Portland General Electric Light Co., 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; Giraudi v. Improvement Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 780.

It follows from these authorities that it was defendant's duty, in the first place, to use every protection which was reasonably accessible to insulate its wires at the point of contact or injury in this case, and to use the utmost care to keep them so; and the fact of the death of Geismann is conclusive proof of the defect of the insulation, and negligence of the defendant; and as to whether he was guilty of contributory negligence, or not, was a question for the jury.

Instruction No. 2 given in behalf of plaintiff is said to be erroneous "because it 'ejects' a duty in the case for the defendant to protect the wire"—a duty not alleged in the pleadings—and makes it incumbent on defendant to keep it reasonably safe. The allegations of the petition are broad enough to justify the instruction, which is in accordance with what we have said, with the exception of the duty of defendant to keep its wire insulated so that those in the discharge of their duties might not be injured by coming in contact with it, and in this respect more favorable to defendant than the law authorizes, in that it only requires that its wire be kept reasonably safe.

Plaintiff's third instruction is also said to be erroneous, in that it tells the jury that, if the wire where deceased was standing had all the appearance of being properly insulated, this was an invitation or inducement to him to risk contact with it. While this instruction simply announces an abstract proposition of law, it is in accordance with what is said *arguendo* in Clements v. Electric Light Co.; Newark Electric Light Company v. Garden, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725; Perham v. Portland Electric Co., 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; and McLaughlin v. Louisville Electric Light Company, *supra*. But as it does not purport to cover the entire case and authorize a recovery, the judgment should not be reversed upon that ground alone, for, when considered in connection with all the instructions in the case, as it should be, it is, we think, nonprejudicial.

The fifth instruction given on the part of plaintiff is said to be erroneous upon the ground that it falls to state to the jury the proper grounds on which to base plaintiff's damages. No instruction was asked by defendant on this feature of the case. An in-

Browning v. Railroad, 124 Mo. 55, 27 S. W. 644, with respect to which it was said: "The defendant asked no instruction on the measure of damages, whatever. No attempt was made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope; and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations, in an instruction embodying its view. The court is not required, in a civil case, to instruct on all questions, whether suggested or not; and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal." So in Barth v. K. C. Elevated Ry. Co., 142 Mo. 535, 44 S. W. 778, following the Browning Case, an instruction in almost exactly the same language as the one given in this case was approved; the court holding that the generality of the instruction would not constitute reversible error, as the right was reserved to defendant to point out the elements limiting the damages in its own instructions.

No error was committed in modifying the sixth and eighth instructions asked by defendant, as by so doing the jury could not have been misled, or defendant prejudiced thereby.

Nor is there merit in the contention that the verdict is excessive or the result of passion or prejudice. There is nothing disclosed by the record indicative of either. The verdict met with the approval of the court before whom the case was tried, and will not, under the circumstances, be disturbed by us upon either of these grounds.

The weight of the evidence was for the consideration of the jury under the instructions of the court, which covered every phase of the case, and are free from objection.

It was not necessary, in order to plaintiff's recovery, to prove that at the exact point where the contact occurred the insulation was off the wire. If the defective insulation caused the injury without fault on the part of plaintiff, as he had the right to be where he was at the time of the injury, that was sufficient. There were two wires—one behind the sign and below the top of it, while the one that caused the injury was strung in the space between the sign and cornice, along the top of the sign, and level with the cornice.

The verdict is well supported by the evidence, and the record free from substantial error. The judgment should be affirmed. It is so ordered. All of this division concur.

ROBERTS et al. v. CRUME et al.
(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

WILL—CONSTRUCTION OF WILL—LIMITATION OF ESTATE—FORFEITURE—WORDS OF LIMITATION—WORDS OF PURCHASE—CONDITION—COVENANT—INTENT OF TESTATOR.

1. In construing a will, the word "heirs" will be considered as a word of limitation, and not of purchase, unless the will clearly shows that it is used to designate a new class of beneficiaries.

2. An estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate.

3. Testator devised land to his daughter and to her heirs, subject to the condition that they should provide for testator's son during his natural life, he to be furnished at all times with proper accommodations, support, and clothing. A subsequent clause provided that, upon a failure of the daughter to comply with the condition, part of the land should be taken charge of by testator's executor, and the rents used for the support of the son, the surplus to go to the daughter. *Held* that, as the will did not provide that a failure to comply with the condition should operate as a forfeiture of her interest in the land, the daughter took the fee.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by Maud Roberts and another against A. E. Crume and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Rechow & Pufahl, for appellants. O. M. Townsend and C. H. Skinner, for respondents.

BURGESS, J. This is an action of ejectment for the possession of a tract of land in Polk county. The petition is in the usual form. Ouster laid December 2, 1898. The trial resulted in a judgment for defendants, from which plaintiffs appeal.

Both plaintiffs and defendants claim under the will of Alpheus Leonard signed by him at Panora, Iowa, on the 6th day of July, 1893, at which time he resided in that state. He owned a farm in that state, part of which was in Dallas and part in Guthrie county. He was a widower, and had two children, both of whom lived with him—one, a son named John N. Leonard; the other, a daughter Mary, who had intermarried with one J. W. Roberts. The son was feeble-minded. J. W. Roberts was a spendthrift.

At the time of the execution of his will, the Iowa land was all the land he owned, but, shortly after the execution of the will, he sold that land and purchased the land in controversy from one Ben. T. Periman, who executed a deed to him for it. When Alpheus Leonard purchased the land in controversy, he moved to Missouri, and with him came his son, John N. Leonard, and his daughter, Mary I. Roberts, and her husband and family, all of whom lived together on the land until Alpheus Leonard's death, which occurred on the 26th day of June, 1895. J.

W. Roberts immediately had himself appointed administrator of the estate, and secured the will, which was still in Iowa, and had it probated, Alpheus Leonard having left it with the attorney who drew the same. Some time after the death of Alpheus Leonard, Mary I. Roberts and her husband exchanged the land in controversy with defendants for a tract of land. Defendants knew of the conditions in the will, and also of the mental condition of John N. Leonard. After moving onto the land obtained from defendants, J. W. Roberts induced his wife to join him in executing a mortgage on it, received the money, spent it, abandoned his family, and she died in absolute poverty, leaving a family of small children. Her grown children (some of whom lived in Iowa), upon learning of the condition of affairs, came to Missouri, bought possession from those occupying the farm, and supported the minor children and their feeble-minded uncle, John N. Leonard. The farm was afterwards sold under a mortgage executed by Mary I. Roberts and her husband, and these adult children leased it from the purchaser at the sale. At the time of the sale of this place, these plaintiffs had already instituted suit for the land in controversy. After the death of Mary I. Roberts, her children, in connection with John N. Leonard, brought suit for the premises in controversy, claiming that the will gave Mary I. Roberts only a life estate. The will was duly recorded in the probate office of Polk county. It reads as follows:

"Be it remembered that I, Alpheus Leonard, of Guthrie County, State of Iowa, being of sound mind, do hereby make, publish and declare, this my last will and testament in manner following, to-wit:

"First: I desire that all my debts, including the expenses of my last sickness and my funeral expenses, be paid by my executor out of the proceeds of my personal estate.

"Second: I give and bequeath to my daughter Mary I. Roberts who is intermarried with J. W. Roberts of said county, and to her heirs, all my personal estate of every kind soever remaining after the payment of my said debts and the amount necessary to defray the expenses of the administration hereof.

"Third: I give and devise to my said daughter, Mary I. Roberts and to her heirs, all the real estate I now own, to-wit: The southwest quarter of the northwest fractional quarter and the northwest quarter of the southwest fractional quarter of section nineteen (19) in township seventy-nine (79) north of range twenty-nine (29) west of the fifth principal meridian in Dallas county, Iowa, also the west half of the southeast quarter and lot two (2) of the northeast quarter of the southeast quarter of section twenty-four (24) in township seventy-nine (79) north of range thirty (30) west of the fifth principal meridian in Guthrie county, Iowa, together with all other real estate I may own at the time of

or her heirs, must care and provide for my son John N. Leonard during the period of his natural life, he to live with her and she to furnish him at all times with such proper and reasonable accommodations, support and clothing as is suitable to his condition in life, and whenever necessary such medical attendance and medicines as may be required by him.

"Fourth: Should my daughter Mary at any time fall in the performance of the conditions above mentioned, then and in that case I direct that the rents and profits of all the land above described lying in Dallas county, Iowa, be set apart to the use of my said son John N. Leonard for his support and maintenance during the remainder of his natural life, and I hereby direct my executor, or such person as may be appointed for that purpose by the District Court of Guthrie county, Iowa, to collect the said rents and profits and apply them to the objects and uses aforesaid, anything remaining of said rents and profits after my said son's death and the payment of his funeral expenses, to go to my said daughter Mary, or to her heirs if she be dead.

"Fifth: I hereby constitute and appoint John E. Wagner of said Guthrie county, Iowa, my sole executor of this my last will and testament.

"In witness whereof I have hereunto set my hand at Panora, Iowa, on this 6th day of July A. D. 1893. Alpheus Leonard."

The case was tried before the court sitting as a jury. The plaintiffs asked the court to give the following declarations of law: "(1) The court declares the law to be that, when lands are charged with conditions in a will, then such will does not pass an estate in fee simple. (2) The court declares the law to be that the will of Alpheus Leonard, in evidence, vested an estate for life in Mary I. Roberts, subject to the charge that she would take care and provide for John N. Leonard, and the remainder, after her death, is vested in her heirs, subject to the same charge. (3) If the court finds that the real estate in controversy was charged with the support and maintenance of John N. Leonard, and that there was no personal liability on Mary I. Roberts upon her failure to support him, then, under the law, the said Mary I. Roberts took only a life estate, and plaintiffs are entitled to recover. (4) If it appears from the evidence that the plaintiffs are the heirs of Mary I. Roberts, and that plaintiff John N. Leonard is the person mentioned in the will, then the plaintiffs are entitled to recover the lands, with such damages as may have been proven." The court gave declaration No. 1, and refused to give declarations Nos. 2, 3, and 4, asked by plaintiffs, to which action of the court in refusing to give declarations of law Nos. 2, 3, and 4 asked by plaintiffs, they then and there duly excepted at the time.

ture of a demurrer to all the evidence, as follows: "Under the pleadings and evidence, the issues must be found for the defendants." Which said declaration was given by the court, over plaintiffs' objection.

The court found for defendants. Plaintiffs appeal.

In the construction of a will, the testator's intention must be gathered from the terms of the will itself, and extrinsic evidence is not admissible for the purpose of showing his intention, unless some provision or clause of the will is so ambiguous in the language used as to make the intention of the testator doubtful; then his situation, the objects of his bounty, and all surrounding facts may be considered in arriving at his true intention. *Hall v. Stephens*, 65 Mo. 677, 27 Am. Rep. 302; *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238. There is no ambiguity in the language used in the will under consideration. By its express terms it gave to Mary I. Roberts and her heirs all the real estate which the testator then owned, and vested the fee in her absolutely upon his death. The same rule with respect to the construction of deeds applies to the construction of wills, and it will not be contended that if the testator had conveyed by deed to his daughter, Mary I. Roberts, and her heirs, the land involved in this litigation, she would not have taken the fee. In speaking of the rules for the interpretation of wills, in *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395, it was said: "We may here mention, as guides, some of the established rules of construction. The first, and to which the others are aids, is that effect should be given to the intention of the testator, and the words used are to be understood in the sense indicated by the whole instrument. The word 'heirs' will be considered as a word of limitation, and not of purchase, unless the will shows clearly that it is used to designate a new class of beneficiaries. 2 Washb. Real Prop. (5th Ed.) 654; *Landon v. Moore*, 45 Conn. 422; *Thurber v. Chambers*, 66 N. Y. 42; *Linton v. Laycock*, 33 Ohio St. 136. So the word 'heirs' will be held to mean child or children, when necessary to carry out the clear intention of the testator. *Haverstick's Appeal*, 103 Pa. 394. Indeed, these rules apply as well to deeds as to wills. *Rines v. Mansfield*, 96 Mo. 394 [9 S. W. 798]; *Waddell v. Waddell*, 99 Mo. 338 [12 S. W. 349, 17 Am. St. Rep. 575]. Again, an estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate. *Yocum v. Siler*, 160 Mo. 281 [61 S. W. 208]; *Freeman v. Coit*, 96 N. Y. 63; *Byrnes v. Stilwell*, 103 N. Y. 453 [9 N. E. 241, 57 Am. Rep. 760]; *Landon v. Moore*, supra."

It is clear to our minds that the w "heirs," as used in the will, was not intended by the testator to mean children, but b

use of the word "heirs" he meant such persons as would take the land, by operation of law, upon the death of Mrs. Roberts, if she did not dispose of it during her lifetime. That she took the fee under the will is not only apparent from the will itself, but that she so understood it appears from the fact that she disposed of it by deed. *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319, 41 N. E. 441, 29 L. R. A. 500. It is true that the will provides that "she, the said Mary I. Roberts, or her heirs, must care and provide for my son, John N. Leonard, during the period of his natural life, he to live with her, and she to furnish him at all times with such proper and reasonable accommodations, support, and clothing as is suitable to his condition in life, and, whenever necessary, such medical attendance and medicines as may be required by him." It does not, however, provide that a failure to comply should operate as a forfeiture of her interest in the land which she took under the will, but, on the other hand, in the next following clause of the will, it is provided that, upon a failure of Mrs. Roberts to comply with this provision of the will, his land in Dallas county, Iowa, should be taken charge of by his executor, or a trustee appointed for that purpose, the rents used for the support of his son John N. Leonard, and the surplus paid to Mrs. Roberts. It is therefore clear that the passage of the title to the land in fee to her under the will in no way depended upon her compliance with the conditions of the will with respect to the support by her and her heirs of John N. Leonard, unless the condition was a subsequent condition, as contradistinguished from a covenant, to take care of John N. Leonard. "It is a familiar rule, often asserted in the books, that conditions subsequent are not favored in the law, because they have the effect, in case of breach, to defeat vested estates; and, when relied upon to work a forfeiture, they must be created in express terms or by clear implication." 2 Wash. on Real Prop. (5th Ed.) 7; *Morrill v. Railroad*, 96 Mo. 174, 9 S. W. 657. "And courts will construe clauses in deeds as covenants rather than conditions, if they can reasonably do so." 2 Wash. on Real Property (5th Ed.) 4. It is also true that the question whether a clause in a deed is a condition or covenant is one of intent, to be gathered from the whole instrument by following out the object and spirit of the deed or contract. *St. Louis v. Wiggins Ferry Company*, 88 Mo. 618; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201. Now, that the testator did not intend that the clause in the will providing for the support and maintenance by Mrs. Roberts and her heirs of John N. Leonard during his lifetime was to operate as a forfeiture of her interest in the land, in the event of her or their failure to comply with that provision of the will, is shown by the whole will, and especially is it clearly indicated by the clause which provides for his support in the event of their failure in the performance of the condi-

tions of the will in that respect. Where conditions subsequent are relied upon to operate a forfeiture of an estate in land, if not complied with, it is usual to insert a clause, in the instrument conveying the property, of re-entry or reverter, but there is nothing of that kind in the will in question, which seems to be another argument in favor of the position which we have taken with respect to the intention of the testator.

Our conclusion is that the court did not err in refusing instructions asked by plaintiffs, nor in giving the one asked by defendants in the nature of a demurrer to the evidence.

The judgment is affirmed. All of this Division concur.

ROTH et al. v. RAUSCHENBUSCH et al.
(Supreme Court of Missouri, Division No. 2.
March 31, 1903.)

WILL—CONSTRUCTION—DEVISE OF FEE-SIMPLE ESTATE—SUBSEQUENT DISPOSITION OVER—EFFECT.

1. Testator, by the second paragraph of his will, gave his whole estate to his wife "absolutely and forever." In the following paragraph he provided that it was his will that, if any of the property remained undisposed of after her death, it should go to his blood relations. *Held*, that the wife took a fee simple, and that hence the attempted disposition over was void, and the blood relations took nothing thereby.

Appeal from Circuit Court, Ste. Genevieve County; Jas. D. Fox, Judge.

Suit by Wendell Roth, Jr., and others against August Rauschenbusch and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Plaintiffs, who claim to be the nearest "blood relations" of Jacob Roth, deceased, bring this suit to set aside two deeds executed by Bridget Roth, his widow—one to defendant August Rauschenbusch, dated August 3, 1876, and a subsequent one to defendant Huck, dated April 10, 1894, conveying certain real estate, which belonged to said Jacob Roth, at the time of his death.

The rights of the parties litigant depend upon the construction of the will of the said Jacob Roth, deceased, which was executed on the 12th day of August, 1845, and probated on the 9th day of April, 1875. The second and third paragraphs of said will, which are set out in the petition, are as follows:

"Second. I give, devise and bequeath to my beloved wife Bridget Roth, formerly Bridget Hook, the whole of my estate, real, personal and mixed, absolutely and forever.

"Third. It is my will, however, that after the decease of my said wife, if any of said property shall remain undisposed of by her, then such property, that is to say, such of the property herein bequeathed to her as may not have been disposed of by her at the

according to the rules of descents and distributions in the state of Missouri now in force."

Jacob Roth left no descendants. His widow died on the 24th day of May, 1895. This suit was instituted in October, 1898.

The petition is divided into two counts, or, at least, there are two separate prayers for relief. It is charged in the first that Bridget Roth was induced by defendant Rauschenbusch, a prominent minister of the church to which she belonged, to convey to him the real estate described in the petition, for a nominal consideration of \$1; that he represented to her that he desired said property to assist him in building up and fostering the interest of his and her church, and particularly for the purpose of building some kind of an asylum. Plaintiffs claim to be remaindermen, and charge that said defendant induced Bridget Roth to enter into a conspiracy to cheat and defraud them out of said real estate, and thereby procured from her a warranty deed conveying the said property to him without any consideration therefor. The second count alleges that defendant Huck subsequently obtained a deed from her conveying to him said real estate, and charges that said Bridget Roth was induced to execute the same by undue and improper influences, and without consideration.

Each of the defendants filed a separate demurrer to the petition, assigning: First. A misjoinder of parties and causes of action. Second. That the petition fails to state facts sufficient to constitute a cause of action, as it appears from the face of the petition that the parties plaintiff have no interest in the property sued for.

These demurrers were sustained, and, plaintiffs declining to plead further, final judgment was rendered in favor of the defendants, and the case has been brought to this court by appeal.

Wm. Carter, J. N. Burks, and Jerry B. Burks, for appellants. Peter H. Huck and W. M. Williams, for respondents.

GANTT, J. (after stating the facts). 1. This record presents the ever recurring difficulty of construing the language of a last will. The rules of construction are so well defined and so frequently invoked that they need only to be mentioned. Indeed, in this state they are largely statutory. Thus section 4650, Rev. St. 1899, requires "all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them." Obeying this behest, this court on many occasions has announced that "the cardinal rule in the interpretation of a will is that the intention of the testator, as gathered from the whole instrument, shall control, and, in arriving at such intention, the

rounding him at the time of its execution, may be taken into consideration." *McMillan v. Farrow*, 141 Mo. 62, 41 S. W. 890, and cases cited. Another canon for the construction of the words of a will is that, when the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised, absolutely, to the first donee, that estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. It is well settled that in wills the words "heirs and assigns" are not necessary to devise a fee simple. With these principles for our guides, we must inquire what was the intention of Jacob Roth in making his last will. In the second item he "gives, devises, and bequeaths to his beloved wife, Bridget Roth, formerly Bridget Hook, the whole of his estate, real, personal, and mixed, absolutely and forever." As was said in *Yocum v. Siler*, 160 Mo., loc. cit. 289, 61 S. W. 212: "By the words 'bequeath absolutely' he unquestionably intended to devise to his son [in this case his wife] his whole estate in said lands. These words are ample for that purpose in a will, and it is unnecessary to cite precedents to establish that it has been often so held." In *Yocum v. Siler*, *supra*, the word "absolutely" was held to indicate the testator's purpose to give a fee simple, but in this will other words—"the whole of my estate, real, personal and mixed"—are added, and it would be difficult indeed to find language which would more clearly indicate an intention to give his wife an absolute fee simple in his lands and a perfect title to his personal estate. Had he stopped here, counsel for appellants frankly concede no doubt could be entertained that by his will he intended to, and did, give his wife the fee simple to the lands in suit. But their insistence is that by the third item or paragraph the intention of the testator is made apparent, notwithstanding the emphatic words of the second paragraph, to give his wife a life estate, with a remainder over to his blood relations. That paragraph, as already noted in the statement, is: "Third. It is my will, however, that after the decease of my said wife, if any of said property shall remain undisposed of by her, then such property, that is to say, such of the property herein bequeathed to her as may not have been disposed of by her at the time of her death, shall go and descend to and be divided among my blood relations, according to the rules of descents and distributions in the state of Missouri now in force."

Jacob Roth left no issue of his body or their descendants. Mrs. Roth died without issue. While plaintiffs allege they are the sole surviving blood relations, there is allegation of what that particular relationship is, whether near or remote. It is that outside of his wife he had no part

person in his mind to whom he desired to give any portion of his property, or to whom he bore any special relation which would suggest him as a special object of his bounty. Reading the two paragraphs together, we think it is apparent that the one person for whom he was providing was his wife. Not only is the grant of his estate absolute in the second paragraph, but it is plain by the third paragraph he intended she should have an untrammelled power of alienation. There are no words of restraint upon her power of disposal. Nowhere in the four corners of this instrument are to be found any words limiting her right to sell or dispose of the property "for her necessary support" and maintenance. These words cannot by any fair inference be interpolated into the will. *Atty. Gen. v. Hall, Fitz. 314; McClellan v. Larchar, 45 N. J. Eq., loc. cit. 23, 16 Atl. 269; Howard v. Carusi, 109 U. S. 725-730, 3 Sup. Ct. 575, 27 L. Ed. 1089.*

The language of one will is rarely exactly like another, and frequently a very slight change in the verbiage calls for a different construction of two wills much alike in other respects.

In *Halliday v. Stickler, 78 Iowa, 388, 43 N. W. 228*, the will contained the following devise: "I give, devise, and bequeath unto my beloved husband, B., all the real and residue of both my real and personal estate of every name and nature whatsoever, and whatever of the same should be left at his decease I direct should be equally divided between the children of the said B. and their heirs and assigns forever." The construction of this will came before the Supreme Court. It was contended that the husband took merely a life estate, with remainder to his children, but the court said: "It is a devise of the real estate in general terms. It neither by words nor by any fair implication limits the devise to a life estate. On the contrary, and in addition to the general devise without words of limitation, by plain implication it authorizes the devisee to sell and convey the land. There is no devise over, unless some of said estate should be left at the death of the devisee. If a life estate was intended to be devised, the whole of the real estate would be left at the decease of George Baer."

2 *Underhill on Wills, § 689*, collates the authorities, and deduces the rule announced by this court in *banc* in *Cornwell v. Wulff, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53*, that where by will or deed a fee simple is granted to the first taker, with the absolute power of disposal superadded, the first taker takes a fee simple absolute, and any attempt to limit an estate thereafter to another, either by remainder or executory devise, will be unavailing. After all the discussion in *Cornwell v. Wulff*, and *Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233*, in which the construction placed by this court upon the deed in *Cornwell v. Wulff* was discredited, the

law remained just as it had been announced by this court in that case and the courts generally throughout the land. The difference was in applying it to the given instrument. Judge Marshall, who wrote the views of the majority in condemning the judgment in *Cornwell v. Wulff*, says: "We all agree, and all the modern adjudications agree, that a conveyance which confers an absolute power of disposal creates a fee in the grantee. * * * We also agree that a fee cannot be limited upon a fee." He further says that "we disagree only as to the proper method of so limiting or qualifying the estate of the first taker."

The writer again most respectfully insists, however, that his learned brother misconceived the majority opinion in *Cornwell v. Wulff*, when he states that "the majority opinion required that intention (the intention to create a life estate merely) to be evidenced by the express term 'for life,' while the minority opinion held that 'the intention must be gathered from the four corners of the instrument,' and might be evidenced by any words that clearly conveyed it." The writer hereof disclaimed that *Cornwell v. Wulff, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53*, announced the rule that the life estate must have been created by express words, and then and now concedes and agrees that the life estate need not be created by express words, but, if it is the clear intention from the whole instrument that the first taker is to have but a life estate, the added power of disposition will not convert it into an absolute ownership.

Bowing, as I should and do, to the views of the majority of my brethren, I take it that, if another deed be found in the same terms of the *Cornwell* deed, it should be ruled that it created a life estate merely in the first taker; but as every member of the court conceded in the two opinions that, if land be granted by will or deed to the first taker without words which expressly or by fair implication indicate he is to have a life estate merely, and an absolute power of alienation is coupled with such grant, then no remainder can be limited thereafter, because "a remainder cannot be limited after a fee," nor could an executory devise thereafter be sustained, because such a limitation is inconsistent with the absolute estate and power of disposition expressly given or necessarily implied from the will, and, as each instrument is to be construed and measured by the law, when words are employed in an instrument, different from those used in the decided case just mentioned, it is and will continue to be in every case the duty of the courts to search out the intention of the testator in his will. If we find he only intended to create a life estate in the first taker, then his disposition of his property after the termination of the life estate by way of executory devise will and must be sustained. If, on the contrary, the

testator devises a fee simple or generally to the first taker, with an absolute power of disposal in him, and there is neither by express words nor implication a mere life estate created in the first taker, all subsequent grants in the will must fail, because repugnant to the first grant, and because it conflicts with a settled rule of law. This will of Jacob Roth gives his wife not only "the whole of his estate," "absolutely and forever," by words amply sufficient to create in her a fee simple, but in the third paragraph the absolute power of alienation is superadded by necessary implication. What, then, becomes of the further devise "if any of said property shall remain undisposed of," "the property herein bequeathed to her as may not have been disposed of by her at the time of her death, shall go and descend to and be divided among my blood relations," etc.? We are clearly of the opinion that this attempted disposition over was void and repugnant to the prior devise to his wife, and the blood relations took nothing thereby.

This was the view of the circuit court. We are, however, cited to the case of *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890. In that case, however, it will be observed that Judge Burgess, speaking for the court, emphasizes the fact that the testator treats of the property as "his." In that case the testator devised the property to his wife, to hold and enjoy by her, with power and authority to sell, but if she died before he did, or if she survived him, whatever of "his" property remained undisposed of should go to Joseph McKinney and his heirs absolutely and in fee simple. Said the learned judge: "The testator speaks of the property in both the second and third clauses of the will remaining undisposed of by his wife as 'his property' which clearly shows he did not intend to give it to his wife absolutely, but only to give her a life estate, with power of disposal." Whereas Jacob Roth, in this will, after using the most emphatic language conveying "the whole of his estate, absolutely and forever," to his wife, speaks of it, not as "my" property, but "the property herein bequeathed to her." We think the intention of the two testators is plainly different. In the one, the testator indicates a desire for his wife to "hold and enjoy," and then plainly expresses his will that a special object of his bounty shall have the fee simple. In the other—the will before us—he plainly designated his wife as the special object of his bounty. To her he gives, absolutely, everything he has, with an absolute power of disposal, and seems to think that if, at her death, any of it remains undisposed of, he could direct its further devolution—something which the rules of law do not permit. *McClellan v. Larchar*, 45 N. J. Eq. loc. cit. 20, 16 Atl. 269; *Wolfer v. Hemmer*, 144 Ill. 554, 83 N. E. 751. But, again, the law is that, when the words of the will clearly indicate an intention to give

the entire estate absolutely to the first donee, his estate will not be cut down to a less estate by subsequent or ambiguous words. *Yocum v. Siler*, 160 Mo. 280, 61 S. W. 208. Thus in *Cook v. Couch*, 100 Mo. 34, 13 S. W. 81, the testator gave his wife and five children all of his estate, share and share alike, and then preserved to her her dower also, and then added, "and [she shall] be privileged to will to whom she may see proper her portion of my real estate." The contention was that she took a life estate only, with power to dispose of the one-sixth by will only. But this court, speaking through Judge Black, said there were no words expressly limiting the wife to a life estate in the one-sixth, and the words saying that she should be privileged to will to whom she might see proper did not indicate an intention to devise an estate for life only. The learned judge then adds: "The most that can be said in behalf of the theory advanced by the plaintiff is that there is here a devise generally of the one-sixth, with a superadded power to dispose of the same by will. The general rule is that a devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Gregory v. Cowgill*, 19 Mo. 416; *Green v. Sutton*, 50 Mo. 186.

A distinction must be made between those cases where there is a devise generally or indefinitely with a power of disposition, and those cases where there is a devise for life with a power of disposition. In the former, the devisee takes the property in fee. *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802.

In *Small v. Field*, 102 Mo. 127, 128, 14 S. W. 820, Judge Sherwood, speaking for the court, discussing section 4004, Rev. St. 1879, now section 4646, Rev. St. 1899, said: "Under this statute it is obvious that the absolute estate in fee granted to Mrs. Kate Green could not be impaired, cut down, or qualified, except by words as affirmatively strong as those which conveyed the estate to her." To the same effect is the recent case of *Roberts v. Crume* (in this Division; not yet officially reported) 73 S. W. 662. We look in vain in the will of Jacob Roth for any words "as affirmatively strong" or even approximating those which he used in devising the fee simple of his estate to his wife. Our conclusion is that Mrs. Roth took a fee simple, with a superadded power of disposal, and that the plaintiffs, therefore, took no interest by the will of Jacob Roth, and hence have no standing in a court of equity to question her disposition of her estate. Her heirs alone can be heard to challenge the validity of her deeds to defendants on account of the alleged undue influence exerted upon her to procure their execution.

The judgment of the circuit court is affirmed. All concur, except FOX, J., not sitting, he having presided on circuit.

MINTER et al. v. BRADSTREET CO.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

LIBEL — COMMERCIAL AGENCY — REPORT ON MERCHANT — MALICE — ACTS OF AGENT — LIABILITY — INSTRUCTIONS — DAMAGES — MITIGATING CIRCUMSTANCES — VERDICT — STATUTES.

1. In an action against a commercial agency for having circulated a report that plaintiffs had secured a bank for its claim, the fact that plaintiffs' firm had given a bank note, secured by the individual signatures of the plaintiffs, did not warrant an instruction that plaintiffs could not recover because of defendant's statement as to the security, since such security could not have been that meant by defendant's statement.

2. The fact that defendant's agent from whom it received such information may have believed that it was true afforded no defense, unless made without malice.

3. Where a commercial agency, with express malice, circulates a false report that a merchant is not in a sound financial condition, the merchant, in an action for damages, is entitled to punitive damages.

4. Where, in an action against a commercial agency owing to its having circulated a report that plaintiffs were said to have "secured" a bank, but there was no evidence that any bank had been given security, an instruction submitting to the jury the question whether security had been given could not prejudice defendant, though such question was one of law.

5. The burden was on defendant to show plaintiffs' insolvency by a preponderance of the evidence.

6. The defense being truth of the report, the evidence examined, and *held* sufficient to render the question of solvency for the jury.

7. Act 1895, p. 165 (Rev. St. 1899, § 595), provides that, in all actions where exemplary damages are recoverable and are allowed by the jury, the amount thereof shall be separately stated in the verdict. *Held*, that the statute has no application to an action pending at the time of its passage.

8. Rev. St. 1889, § 2081, enacts that, in actions for libel, defendant may give evidence of any mitigating circumstances to reduce the amount of damages. *Held*, that where, in an action for libel, defendant gives evidence of circumstances in mitigation of damages, it is not the duty of the trial court to instruct on the same where defendant fails to request any such instruction.

9. In an action by a merchant against a commercial agency owing to defendant's having circulated a report that plaintiff was not in a sound financial condition, the court charged that the damages were to be estimated under all the instructions, and that they might be such as the jury should think proper under the evidence, not to exceed \$100,000; that the damages might be punitive and compensatory; that compensatory damages are to be given when plaintiffs have sustained substantial injury, and that punitive damages are awarded in order to punish defendant, but are not allowed unless defendant was actuated by ill will or reckless disregard of the consequences of his act; and that, in assessing damages for plaintiff, they were not restricted to the pecuniary loss, but might inflict exemplary damages. *Held*, that the instructions were not open to the objection that the court had given "a roving commission to the jury as to damages."

10. The court having refused to allow the jury to pass on a sentence in defendants' report, "they are behind, and cannot meet current indebtedness," refusal to instruct that plaintiff

could not recover because of such clause was not prejudicial to defendant.

11. The court charged that plaintiffs' right to recover depended on the falsity and publication "as elsewhere explained of." *Held*, that the instruction was not erroneous in that it made no mention of defendant's privilege, and had no reference to another instruction, the court having by its second instruction fully covered defendant's rights under the defense of privilege.

12. The court having charged that the publication was libelous, defendant could not complain that it took from the jury the question whether the publication was libelous, in the absence of a request on its part on such phase of the case, and the absence of any such question in the motion for a new trial, inasmuch as such conduct amounted to a waiver.

13. An objection to an instruction, not raised on the motion for a new trial, cannot be raised on appeal.

14. An instruction that actual malice meant that the report circulated by defendant was prepared and published, not in good faith, but with an intent to injure plaintiff, or with a willful and wanton neglect of the rights and interest of plaintiff, was not error.

15. It appearing from the evidence that, after defendant had received notice from its correspondent that it was reported plaintiffs had given a mortgage to a bank, plaintiffs contradicted the report, and called at defendant's office with the cashier of the bank, who denied the report, but that defendant continued to circulate such report, the conduct of the officers of defendant was such as to render them subject to the charge of malice.

16. A commercial agency is responsible in libel for acts of its agents done in the course of its business.

17. On the trial, plaintiff's counsel stated that he had noticed in a magazine some remarks concerning commercial agencies which expressed his views, and that as he had not committed them to memory he would read them from the magazine, and he read to the jury an article criticising the conduct of such agencies and stating that they should exercise care in making their reports. *Held* that, as the article was used solely for argument, and was not offered as law, and was not in conflict with the law of the case as presented by the instructions, there was no prejudicial error, though the practice was not one to be commended.

18. It appearing from the evidence that at the time of the publication of the libel plaintiffs were merchants in good standing and credit, doing a large and prosperous business, and that as a result of the libelous reports their credit and standing were ruined and they were driven out of business, and that the statements were conceived by one of defendant's agents in malice, a verdict for \$30,000 in favor of plaintiffs would not be disturbed as excessive and the result of prejudice.

Appeal from Circuit Court, Johnson County; Jas. H. Lay, Judge.

Action by Charles D. Minter and others against the Bradstreet Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jno. W. Noble, A. B. Logan, and Geo. R. Lockwood, for appellant. J. W. Suddath, O. L. Houts, and Geo. P. B. Jackson, for respondents.

BURGESS, J. This is an action for damages for libel by the plaintiffs, merchants, against the defendant, on account of a false report, circulated in December, 1890, by the defendant concerning the plaintiffs' business

¶ 3. See Libel and Slander, vol. 32, Cent. Dig. § 351.

standing, claiming to have been prompted by actual malice, for the purpose of injuring plaintiffs in their business. Upon application of defendant, the venue of the cause was changed from Pettis to Johnson county, where, on a trial had in December, 1893, plaintiffs recovered a verdict for \$30,000. On defendant's motion a new trial was granted, upon the grounds that the court had erroneously instructed the jury, and that the damages allowed by the jury were excessive. Thereafter in February, 1898, another trial was had, and plaintiffs recovered a verdict and judgment for \$27,000, from which defendant, after filing motion for a new trial, and the same being overruled, appeals.

The petition alleges: "That said defendant is engaged in the business of conducting a mercantile agency, the general nature of which is to obtain information as to the financial standing, responsibility, and credit of merchants generally throughout the United States, and to furnish such information to other merchants in the various states of the United States and Canada. And plaintiffs state that on or about the 22d day of December, 1890, the defendant falsely, wrongfully, and maliciously published concerning the plaintiffs and their said business the following false, malicious, and libelous language and matter, to wit: 'They [meaning the plaintiffs] are behind, and cannot meet current indebtedness.' 'The opinion is expressed that a local bank has been secured,' thereby meaning that the defendant and its agents, servants, and employes and representatives entertained the opinion and belief that security had been given to a bank in the city of Sedalia, Mo. 'Their present condition [meaning the then financial and business condition of plaintiffs] is not regarded as particularly flattering, and seems to suggest cash dealings' [thereby meaning that the plaintiffs were threatened with insolvency, that they were about to fail, and that they were unworthy of credit]. By reason of which publication of said false, malicious, and libelous language and matter concerning these plaintiffs and their business, the plaintiffs have been damaged in the sum of one hundred thousand dollars."

The answer, after denying generally all of the allegations in the petition, alleges: "That it is a corporation organized for and engaged in the business of conducting a mercantile agency, and is now, and was at all times mentioned in said petition, employed by a number of merchants and manufacturers in the state of Missouri and elsewhere, as their representative and agent, to collect, procure, preserve, and report to them, said patrons or employers of defendant, reports and informations as to the business, estate, property, credit, conduct, character, and truthworthiness of persons and corporations engaged in trade or commerce in the state of Missouri and elsewhere, so that defend-

ant's said employers, who are commonly known as "subscribers" to defendant's agency, may have the knowledge and information necessary to enable them to safely and properly conduct business with strangers or distant customers; and it is expressly agreed between defendant and its said employers that all information, whether written, printed, or verbal, furnished by defendant, its agents, or servants, shall be held in strict confidence, and used exclusively for the benefit of such subscribers; and if defendant published of and concerning plaintiffs the words set out and complained of in plaintiffs' petition, or any of them, defendant had good reason to believe, and did believe, at the time of the alleged publication, that the same were true; and defendant further says that the publication of said words, or any of them, if made, was made innocently, without malice, and in the usual course of business, and only to subscribers of defendant who were creditors of plaintiffs, or otherwise directly interested in the financial condition of plaintiffs, or in answer to inquiries by subscribers whom defendant believed to be creditors of plaintiffs, or otherwise directly interested in the financial condition of plaintiffs. And for a further answer to said petition, defendant says: That at and prior to the time of said alleged publication, to wit, December 22, 1890, plaintiffs were indebted to the First National Bank of Sedalia in the sum of \$12,000; that at said time they owned real estate of a value not exceeding \$40,000, and that said real estate at said time was mortgaged for sums aggregating a large amount, to wit, \$27,000; that at said time plaintiffs' merchandise on hand was less than \$20,000; and plaintiffs were indebted to various merchants and manufacturers from whom they had purchased goods in the sum of \$20,000 upon notes and open accounts, and a large portion thereof was past due, and some of said notes or accounts were then in the hands of attorneys for collection by suit or otherwise; that on, to wit, November 15, 1890, a note of plaintiffs for the sum of \$1,750, due and payable on said day, was protested for nonpayment. Defendant further says that during the month of December, and prior to the 22d day thereof, plaintiffs were reducing their stock of merchandise, and selling the same for less than cost and at a sacrifice. Wherefore defendant says it is true that at said time plaintiffs were behind, and could not meet their current indebtedness; that they were seriously involved; that claims against them were in the hands of attorneys; that they had secured a local bank; that their condition was not regarded as flattering, and seemed to suggest cash dealings; that they had borrowed all they could; that they had been reducing their stock and selling at a sacrifice or loss; that they had borrowed all they could on their real estate. As a further answer to

said petition, and to each count thereof, defendant says, in mitigation of damages, that, at and prior to the time of the alleged publications complained of, plaintiffs were extensively advertising in the newspapers of Sedalia that they were selling at forced sale for cash their entire stock at cost, and at manufacturers' cost, and at said times plaintiffs were largely indebted to one of the banks of Sedalia, and to the merchants and manufacturers from whom they had purchased goods, and had their real estate heavily mortgaged to secure other large indebtedness; that on, to wit, November 15, 1890, a note of plaintiffs for \$1,750, due and payable on said day, was protested for non-payment; that a portion of their indebtedness to merchants and manufacturers from whom they had purchased goods was past due and unpaid, and claims against plaintiffs were then in the hands of attorneys for collection, and plaintiffs' stock did not at the time of the alleged publication equal, as defendant believed and now alleges, \$20,000 in value. All of which defendant well knew at and prior to the time of the alleged publications complained of by the plaintiffs; and defendant says that, if it published the words complained of, it believed them to be true, and published them in good faith in the usual course of its business as a mercantile agency, without malice towards plaintiffs, and in confidence to its subscribers or employers. Having fully answered said petition, defendant asks to be hence dismissed, with costs."

The reply was merely a general denial.

The evidence on behalf of the plaintiffs tended to show the following state of facts:

The matter complained of as being libelous was written and printed on two pieces of paper, as follows:

"Minter Bros. Joe Minter, C. D. Minter. W. & R. D. G. Sedalia, Mo. Have been in business as above for some years, and were heretofore quoted in fair credit without definite estimate of means, but it is now reported that they are behind, and cannot meet current indebtedness, and that claims are in the hands of attorneys, but so far have been paid. The opinion is expressed that a local bank has been secured. Their present condition is not regarded particularly flattering, and seems to suggest cash dealings. December 22, 1890."

On the same side of the sheet of said report above set forth are the following indorsements, printed in red ink:

"The subscriber is hereby notified that he will be held directly responsible under subscription terms for all costs and damages which may accrue to this company, if he communicates this information, or shows this letter, to the person or persons hereby reported. Charles F. Clark, President."

"The correctness of this report is not guaranteed, but, having been obtained by us in good faith from authorities deemed reliable,

it is transmitted to you in strict confidence, for your exclusive use and benefit, and in accordance with the terms of the contract existing between us. Respectfully, The Bradstreet Company."

"(54). Minter Bros. W. & R. Dry Goods. Sedalia, Mo., Pettis Co. Upon further investigation, we learn their condition is about as follows:

Assets:	
Value of stock on hand.....	\$20,000 00
Good accounts and notes.....	4,000 00
Bad accounts and notes.....	6,000 00
Real estate valued at.....	30,000 00
	\$60,000 00

Liabilities:	
Real estate mortgages.....	\$23,000 00
Owe First National Bank, this city	12,000 00
Other indebtedness, mostly not due,	
about	13,000 00

"They are said to have been reducing their stock and selling at a sacrifice. It is thought that they have borrowed all they can on their real estate. December 22, 1890."

On the reverse side, printed in red ink, is an indorsement, to wit:

"The correctness of this report is not guaranteed, but having been obtained by us in good faith from authorities deemed reliable, it is transmitted to you in strict confidence for your exclusive use and benefit, and in accordance with the terms of the contract existing between us. Respectfully, The Bradstreet Company."

This report was prepared by the defendant, and sent out under the circumstances and in the manner mentioned hereafter. The defendant, as a corporation, was organized with a full corps of officers, having its headquarters in the city of New York, with other chief officers for districts in various other cities in the United States, one being in St. Louis and another in Chicago. In the various towns and cities of the country it had what was designated as a "correspondent," who was a person employed by the defendant for the purpose of inquiring into the affairs of the merchants in his particular locality, and making daily reports concerning the same to the chief officer for the district in which he was located. Such reports, when received, were taken charge of by other employes of the defendant in that office, and tabulated for use in communicating with subscribers, and were also forwarded to the head office in New York City. Sometimes, if requests had been previously made, or the defendant company had any reason to think that a particular firm desired immediate information concerning a merchant in any part of the country, they would send a copy of the report without any special request by the subscriber. Again, if their local correspondent had sent any information which was considered important for their subscribers to know, a note would be sent to the subscribers in that line of business, or supposed to be interested, suggesting that important information had been received concerning the

party named, and for the subscribers, if interested in that party, to call, or in some other form which suggested to the subscriber the advisability of his securing the information concerning the party mentioned. Then there was a form provided, by the use of which a subscriber requested information concerning the party therein named, and which would be sent to the defendant company's office for the proper district, and thereupon the information would be sent in the form of a report similar to that heretofore set forth, and under the conditions mentioned. For these reports the defendant charged its subscribers at specified prices, varying according to the number of reports furnished in a given time. The entire method of conducting the business of the defendant was detailed at length in the evidence given on the trial.

It was testified by the party in charge of the St. Louis office of defendant, to which the report from the local correspondent at Sedalia was sent, that it was customary, before sending out a report, to verify the information sent by the local correspondent by inquiries from local banks and other sources considered reliable, but no such verification was attempted in the case at bar.

In May, 1887, plaintiffs, in connection with one Rhodes as their partner, purchased the stock of goods and business of what was known as the "Campbell Mercantile Company" in Sedalia, and the plaintiffs came to Sedalia to run the business there, until the 1st of January, 1888, when they bought out Mr. Rhodes' interest in a store at Kansas City, which they as partners with him then owned, and moved the Kansas City store to Sedalia, and from that time on did a prosperous business both as retail and jobbing merchants. Subsequently they established a branch store in Lamonte, in Pettis county. They carried a large stock of dry goods, carpets, cloaks, and general notions, and had their store arranged with departments for each of these lines of goods. In addition to the money they had invested in their business they also owned a large amount of real estate, consisting partly of a farm in Henry county, of lands near Sedalia, and the property where they did business, which was formerly known as the "Methodist Church property," on Ohio street. After having purchased this property, they remodeled the building so as to make it a first-class business house with all modern appointments. With the exception of a small piece of swamp land in southeast Missouri, which Joe Minter had acquired in some outside transaction, and which was not regarded of sufficient value to be treated as an asset of the firm, and the 47 acres on which C. D. Minter lived, they owned everything as partners. There was a difference in the testimony of the witnesses as to the value of the stock of goods and of the real estate owned by the plaintiffs, and also as to the amount of their

indebtedness which was presented to the jury. The great weight of the evidence, and especially that of the plaintiffs themselves, and the men employed in their store, and who were familiar with their stock of goods, tended to establish that the plaintiffs were entirely solvent, and that their assets were worth largely in excess of their liabilities. The plaintiffs bought more or less on credit, discounting their bills when it was convenient and profitable to do so, and also selling on credit. It was shown by a number of witnesses that under the business methods prevailing in this country, and especially in the West, it is necessary, in order to succeed in merchandising, to keep up the stock of goods in all lines, and that an active merchant must be constantly buying to replenish some parts of his stock, while he may have an abundance of other kinds on hand, and that he must be able to supply these different lines of goods promptly and without delay, otherwise his trade will become seriously impaired; and that the effect of derogatory statements concerning the financial condition of a merchant will prevent his carrying on business in the customary way, and keeping his stock up to the proper standard, and the effect upon his business is that, though he may have a large amount of goods on hand representing a very large capital, yet it soon becomes much deteriorated, and in some respects totally worthless, unless the business is kept up in the manner suggested. Some of the defendant's witnesses, who were examined for the express purpose of showing what construction would be put upon the statements contained in the publication made by the defendant, stated, in effect, that to make the statements which were made would be ruinous to any man engaged in mercantile business.

After engaging in business in Sedalia, the plaintiffs established a large and profitable jobbing trade in the district tributary to Sedalia, and had several men on the road selling goods for them. Their business had attained very considerable proportions, and, as is frequently the case in such business, there were some parties owing them who were slow to pay, and sometimes circumstances arose which required the services of an attorney to assist in collecting claims owing to the plaintiffs. For this purpose the plaintiffs had at different times employed a lawyer by the name of William Parmerlee, located in Sedalia, who was an active, energetic young man, and whom they desired to assist. This same Parmerlee was the person whom the defendant had employed at Sedalia to procure information concerning the merchants there, and to send the same to the defendant's other agents, as the basis for reports to be formulated and circulated by the defendant. In the summer or fall of 1890 the plaintiffs had seen fit, for reasons satisfactory to themselves, to employ another attorney, in connection with other persons,

to secure the payment of claims against a party in Benton county. Parmerlee took exception to this action on the part of the plaintiffs, and thereupon, as announced by him to several members of the bar in Sedalia, he proposed to get even with the Minter Bros., and that he would cause their ruin, or, as he expressed it once, that, in a business sense, he would "have them under the ground inside of 90 days." About the middle of November a note for \$1,750, due by plaintiffs to H. B. Clafin & Co., of New York, was protested. The note was payable at the First National Bank of Sedalia. Instead of being sent to that bank for collection, it was sent to the Citizens' National Bank. Just when it was sent there the evidence does not indicate; but there was no notice sent to the plaintiffs that the Citizens' Bank held the note, and late on the last day of grace the Citizens' Bank, without any notice or intimation to the plaintiffs, presented the note at the counter of the First National Bank, and, as it was not paid instantly, the Citizens' Bank immediately protested the note, and mailed the notice to the several indorsers, and returned the note to the party from whom it got it. In a few hours C. D. Minter received word from the First National Bank that such note had been presented, and he repaired immediately to the Citizens' Bank, and found that the note and protests had been mailed. On that day he wrote to Clafin & Co., giving his reasons for not paying the note, in which he says, "We were delayed 30 days longer on building than contract called for, causing a little too close figuring." He, however, sent to Clafin & Co., on November 19th, a check in payment of this note, and in course of a few days received acknowledgment, with return of note. This, together with the fact that the plaintiffs, as was their custom, just prior to the close of the year, advertised in the Sedalia papers in such manner as to attract the attention of the public, and stated in some of their advertisements that they were selling for less than cost, and sometimes for less than manufacturers' cost, and various other forms of statements which were attractive to the public, defendant relied upon in mitigation of damages. Shortly after the threats made by Parmerlee, some sort of reports were sent by some one to the discredit of the plaintiffs, but just what they were, or positively who sent them, was not known. At all events, Farwell & Co., of Chicago, who were the largest creditors of the plaintiffs, sent their representative Musgrave to Sedalia to inquire into the matter, which he did, making a thorough investigation of their stock of goods, their books, and their standing in the bank with which they did business, and of their affairs in general, and he made a report to his firm, after which they continued to sell plaintiffs goods on credit as before. In consequence of these reports, some creditors of the firm commenc-

ed to send in their claims, even though some of them were not due, and also to make inquiries of the plaintiffs as to the meaning of these reports. Thereupon Charles Minter immediately went to interview the local representatives of the reporting agencies. He first met Guy Cope, who represented the Dun Agency at Sedalia, and learned from him that he had sent no reports concerning them. Thereupon he called upon Parmerlee, and told him that he understood that injurious reports had been sent out, and that Guy Cope had denied sending any, and therefore Parmerlee must be the man who did it, which was denied in a qualified way. Along about the same time, either late in November or early in December, the defendant's representative at Sedalia, Parmerlee, pretended that he knew of circumstances which indicated that the plaintiffs had given a chattel mortgage upon their stock of goods to the First National Bank of Sedalia. He talked about this to Jas. T. Montgomery, who assured him that there was no foundation for any such statement, and Parmerlee also consulted with Guy Cope, who was the representative of the Dun Agency at Sedalia at that time, and with whom Parmerlee talked frequently about what was going on in Sedalia, and asked him what he thought of Minter Bros. Cope told him that he understood that, unjustly, some unfavorable reports had been circulated about them, and that he thought that, unless the creditors were lenient, it might cause trouble. Thereupon Parmerlee said he had an impression that the plaintiffs had given the bank a mortgage on their stock of goods, and that it was being held off the record. Cope told him that that was wholly improbable. He thought he had afterwards said to him that he had investigated the matter; but, at all events, he told him that he was satisfied that there was no such mortgage. H. T. Williams, a member of the Sedalia bar, also testified that on November 24, 1890, he made a trip with Parmerlee to Benton county. Joe Minter was also on the same train, representing his firm—a number of Sedalia houses being interested in claims which they had against some firm in Benton county. Parmerlee referred to the fact of Minter being there in the interest of his own firm, and stated that those fellows (Minter Bros.) didn't like his (Parmerlee's) way of doing business, but that they could not afford to act that way towards "us, as attorneys"; that they (the attorneys) might be capable of doing them a great deal of good or a great deal of harm; and frequently, from time to time, Parmerlee inquired of Williams if he knew anything about the plaintiffs, and predicted that they were on their last legs, and in a failing condition; and, some time in the early part of December, Parmerlee went to Williams' office, and said, "Have you heard anything lately about the Minter Brothers?" and, when Williams said that he had not, then Parmerlee stated,

"I have heard that the First National Bank holds a mortgage on their stock, and will put it on record at the proper time, and outside creditors will be left," and he asked Williams if he knew anything about that. Williams told him that he did not, and they proceeded to discuss the Minter Bros., and Parmerlee stated that they only had a stock of \$20,000, and were very much involved, and that he had learned of the mortgage from a firm that knew of its existence, and said that he would send a report of the mortgage to the Bradstreet Company in that way in his report; and Williams told him that, if he sent in that sort of a report, it would be the end of the Minter Bros. in business. After talking some considerable time with Mr. Williams, Parmerlee got up to leave, and as he went out he said, "I am going to send a report in anyway, God damn them, and they will be under the ground in 90 days, and you will see it." On another occasion, when Williams and Parmerlee were in the town of Lamonte, near Sedalia, on some business, they had another conversation, in which Parmerlee said, "It will be a big old failure, and we will have some claims for collection."

By the testimony of the plaintiffs and of the cashier of the First National Bank it was shown that there never had been any mortgage given by the plaintiffs to the First National Bank or to any other bank in Sedalia. C. D. Minter testified that early in December, after hearing that some one had started a report concerning him, he had an interview with Parmerlee, and Parmerlee said that he did not have anything to do with sending out the reports. Thereupon Minter asked him if he would send a telegram to the Bradstreet Company stating that the reports were false, and he promised to do so. That was along about the 9th of December, and he showed Parmerlee several telegrams that he had received from several firms, saying they had gotten some reports concerning Minter Bros. Among others was a telegram from the firm of Hilton, Hughes & Denning, dated December 9th, to Minter Bros., saying, "You are reported here as in trouble. Wire us the facts," which was followed by a letter written the same day. Minter promptly wired them a statement of their affairs, and denying any ground for unfavorable reports, and in due course received a reply as follows: "New York, Dec. 10, 1890. Messrs. Minter Bros., Sedalia, Mo.—Gentlemen: We herewith confirm our telegram to you advising that you were reported as in trouble, and we have your reply, announcing your solvency, which we anticipated was the case. We have reported your wire to the various agencies, and trust the erroneous report will do you no injury. Yours truly, Hilton, Hughes & Denning, per J. T. Chapman." Chapman testified that he had received this telegram, and that he had showed it to the Bradstreet Company, to correct their reports, and that he not

only got a telegram directly from Minter Bros. concerning their condition, and showed it to defendant, but also received a copy of a telegram that Minter Bros. had sent direct to the Bradstreet Company. Minter also testified that when he heard of these reports about the 9th of December, in addition to telegraphing to Hilton, Hughes & Denning, he had telegraphed to the Bradstreet Company to the same effect, as previously stated, and also made a detailed statement of their affairs to Parmerlee along during December, when he interviewed Parmerlee with reference to some accounts that had been sent to Parmerlee for collection on account of the reports that had gone out, some of which claims were taken out of Parmerlee's hands when the parties learned how he had gotten them. The statement of the affairs of Minter Bros., as prepared by themselves and Musgrave, attorney for J. V. Farwell & Co. of Chicago, showed assets largely in excess, and an indebtedness much less, than contained in the statement of December 22, 1890, issued by the defendant in connection with the statement to the effect that a local bank had been secured, etc. At first the plaintiffs thought the error had been corrected, but they soon learned that the damaging reports were being repeated, and they were neither able to buy goods on the usual terms to replenish their stock, nor to secure any accommodation in regard to existing indebtedness; that the same was frequently being presented from day to day, some long in advance of its maturity. Plaintiffs continued to pay the claims as they were presented, although some of them were not due, and finally, in order to realize the money for that purpose, they sold a part of their goods at a great sacrifice, rather than to let any claim go back unpaid. This state of affairs continuing through the balance of December and into January, and plaintiffs desiring to fill up their stock for the spring trade, Charles Minter went to New York, by way of Chicago. When he stopped at Chicago he took a letter of introduction to the manager of the Bradstreet Company there, and, having secured an interview, made a full and complete statement of the financial condition of their firm, and concerning their relations with Parmerlee, and fully advised him of the threats that Parmerlee had made, and showed him a letter written by Parmerlee with reference to the claim of a New York house, which Parmerlee had secured for collection, although not yet due; and Minter also showed to the Chicago representative of the defendant the letters of this New York house previously mentioned, and also the correspondence with Hilton, Hughes & Denning. Thereupon the Chicago representative promised to correct the reports which had been sent out, and to take the matter up with the New York office at once. He promised to straighten the matter through the St. Louis office. Minter then proceeded to New York, where he spent several days among the business

houses in his line of business, and was much surprised and mortified to learn that no correction had been made, but, on the contrary, the same sort of reports as before seemed to be pursuing him. Accidentally he met with Thompson, the cashier of the bank which was said to have taken a mortgage on the stock of goods, who was in New York on some other business, and at Minter's request Thompson went with the former to the head office of the Bradstreet Company in New York, and explained fully to the manager of that company the relation between Minter Bros. and his bank, and assured them that the bank did not then have, and never had had, any mortgage or anything of that nature from Minter Bros. He also informed the defendant at that time generally concerning the financial condition and situation of Minter Bros., to the effect that they were entirely solvent. Minter supplemented this statement with information concerning the threats that Parmerlee had made, and thereupon the assurance was given by the defendant's officers that they would hasten to rectify the wrong that had been done, and that Mr. Minter would find that he would have no farther trouble, and that he could approach the merchants in New York with the understanding that he would be put right before them. A few days later, when proposing to buy a bill of goods from a merchant named Wallis, he was again surprised to find that no correction had been made; and thereupon he stated to Wallis what had occurred in the office of the Bradstreet Company, and asked him to procure a new report, which he was satisfied would be all right. Wallis made a request for a report from the Bradstreet Company, and along about the 20th of February received a report, dated December 22, 1890, being a duplicate of the one which he had previously received in December, and being the same in all respects as the one heretofore set forth as the basis of this action. The three requests for information concerning Minter Bros. which were made by John Wallis & Co. upon the defendant were dated, respectively, December 9, 1890, December 17, 1890, and February 20, 1891. The requests made in December were in pursuance of a suggestion from the Bradstreet Company that, if Wallis & Co. wanted to know anything about Minter Bros., they had better call. The evidence of the requests for information, and the fact that information was sent to Wallis & Co. in December, as well as the fact that requests were made by the various merchants who appear among the witnesses, and the fact that the defendant company sent reports in response to these requests, were all brought out by the defendant.

After the occurrence of the events in New York, which occurred in February, 1891, and about the 1st of March, the defendant issued a new statement, which it called "Substitute for Previous," concerning Minter Bros. (plaintiffs), as engaged in the business

of wholesale and retail dry goods, carpets, etc., in Sedalia, Mo., and in Lamonte, Mo. (where they had a branch house at the time). This report was dated March 2, 1891, and was followed by another, called "Additional," dated March 6, 1891. These reports were presented as a part of the testimony of Jesse G. King, the superintendent of the Chicago office of the defendant company, and were furnished by Bird, of counsel for defendant. From these reports of March 2 and March 6, 1891, it appears that notwithstanding the statements previously made by the defendant in the report of December 22, 1890, and that in consequence thereof the plaintiffs had sacrificed a large amount of their assets in order to preserve their credit by taking up their paper as it was presented, the defendant, by its statement of March 2d, presents a detailed statement of the assets and liabilities of the plaintiffs, which at that time showed a net worth of \$78,410.56; and in the report of March 6th stated that "they pay promptly, and we regard them favorably; that they stated to us a few months ago that they were worth about \$60,000.00"; while the report issued by defendant under date of December 22d only credited the plaintiffs with a net worth of \$12,000.

Parmerlee was introduced as a witness on behalf of the defendant, and, while he denied using the language and saying some of the things ascribed to him by plaintiffs' witnesses, yet admitted the substantial part of it, and that he was unfriendly towards the plaintiffs.

Nearly every point and question in the case was controverted.

The evidence on the part of defendant tended to show the following:

In 1880, plaintiffs bought for their place of business the Ohio Street Methodist Church property in Sedalia, which had been converted into business property, and in August, 1890, they undertook to change its front from brick to stone, and make other improvements, at a cost of about \$9,000. These changes seriously interfered with their business. On the 15th of November, 1890, a note of plaintiffs for \$1,750, which they had given H. B. Claffin & Co. for goods purchased, was protested for nonpayment. On December 9, 1890, inquiries by telegraph concerning plaintiffs' financial condition reached them. At this time plaintiffs owed Farwell & Co., of Chicago, between \$10,000 and \$12,000, and this firm sent their attorney, Musgrave, to Sedalia, and he took from plaintiffs a written statement of their condition. This statement is dated December 9th. In December, 1890, Wm. Parmerlee, an attorney at law, was a correspondent of defendant's at Sedalia, but defendant had no office there. The Dun Mercantile Agency then had a regularly organized office at that place under the management of Mr. Guy Cope. When Musgrave reached Sedalia he

went to Dun's office. On the same day (December 9th) Hilton, Hughes & Denning, New York creditors of plaintiffs, wired them: "You are reported here as in trouble. Wire us the facts."

Geo. A. Shelley, an adjuster for H. B. Claflin & Co., of New York, also went to Sedalia about this time to look into the condition of plaintiffs. The statement of this firm's account which he took with him was dated at New York, December 10, 1890, and showed over \$4,000 in notes to be past due December 14th or 15th, the earliest date at which Shelley could have received it in Kansas City, and then taken it to Sedalia.

C. D. Minter, on information, as he states, from Guy Cope, went to Parmelee's office and accused him of having sent out false reports. This Parmelee denied, but admitted that he had sent to defendant a report of the protested note.

These inquiries and activity on the part of Minter Bros.' creditors disturbed them, and they consulted with Jas. C. Thompson, cashier of the First National Bank, and Messrs. Jackson & Montgomery, the bank's attorneys. They also began at once to advertise their goods for sale at manufacturers' cost, and on December 21st their advertisement read: "Our forced sale for cash will continue until further notice. Dry goods, cloaks, notions, and carpets at cost. No goods will be charged." Other advertisements to the same effect followed on December 2d, 19th, 26th, 27th, and 28th. There was no adverse action on the part of Minter Bros.' creditors after December 22d, except the refusal of J. T. Wallace & Co., of New York, to sell them a small bill of goods except for cash. Everything done by their creditors was done between December 8th and 10th. At this time plaintiffs owed the First National Bank, for money borrowed, about \$10,000; to merchants for merchandise, some \$30,000, of which at least \$7,000 was past due; and their three pieces of real estate were mortgaged for \$26,000, or more than half their aggregate purchase price. This real estate consisted of the building in which plaintiffs did business, 47 acres adjoining Sedalia, on which C. D. Minter lived, and a farm of 237 acres in Henry county.

In 1891 plaintiffs incorporated their business. In January, 1893, this corporation made an assignment for benefit of creditors, after securing by chattel mortgage the First National Bank. Other creditors only got 10 cents on the dollar. The court below refused to allow plaintiffs to go to the jury on the clause, "They are behind and cannot meet current indebtedness."

The statement of Musgrave, attorney for Farwell & Co., made December 9, 1890, showed that plaintiffs then owed on their real estate mortgages \$26,000—\$15,000 on their store building, \$8,000 on the 47 acres near Sedalia, and \$3,000 on the 237-acre farm in Henry county. For merchandise they

owed \$25,550.68, not then due, and \$5,388.78, past due. It is admitted by plaintiffs that they owed the First National Bank of Sedalia \$8,000 or \$10,000 on unmatured paper, though this statement does not show it. Possibly one of the \$10,000 items put down as due Farwell & Co. should have been entered as due this bank. The total liabilities as shown by this statement would then be \$86,939.46. In a statement of December 17th, made to Griswold, Palmer & Co., of Chicago, plaintiffs put their past-due debts at \$3,500, with no money on hand. In his letter to Claflin & Co., November 15th, concerning the protest on that day of their note for \$1,750, C. O. Minter explains their inability to take care of the note on the ground of unseasonable weather and a delay of 80 days in completing the alterations of their store. The notations or indorsements on this letter show that plaintiffs at that time owed Claflin & Co. alone on past-due notes, \$5,997.99, and that these notes, and one due the same firm December 1st, would aggregate \$7,747.99. That these notations prove this appears from the statement of the account between plaintiffs and Claflin & Co., presented to plaintiffs about December 14th, by Mr. Shelley, and dated at New York, December 10th. This account showed, as did the notations on the letter just referred to, that two notes aggregating \$2,483.68, falling due in October, were still unpaid, and that by December 17th plaintiffs would still owe this firm alone on past-due notes \$5,497.12. It also showed nearly \$500 as past due on open account, and Shelley testified, and was not contradicted by plaintiffs, that they never paid about \$2,000 of the indebtedness shown by this account. That plaintiffs in December, 1890, owed at least \$5,000 or \$6,000, and probably \$7,000 or \$8,000, of past-due mercantile debts out of an aggregate of \$30,000.

Parmelee, defendant's correspondent at Sedalia in 1890, admitted that he believed plaintiffs had given some sort of security to that bank, and expressed that opinion to defendant. And he gave as reasons for believing that the First National Bank had taken security his knowledge of plaintiffs' condition, and the fact that Farwell's attorney had been there, and because he saw Thompson going with C. D. Minter to Jackson & Montgomery's office, and his conviction that if plaintiffs got into trouble they would take care of that bank. He also acknowledged that he wrote the substance of the report complained of. He also stated that this report was written on the day of its date, December 22, 1890, or the day before, and then sent to the St. Louis office of defendant. King, superintendent of defendant's Chicago office, and whose deposition, which plaintiffs took and read in evidence, explained that the date on the lower right-hand corner of a report (as, for example, December 22, 1890, on the report in question) indicated the date at which the information was obtained

or the report formulated, and that the report, whenever issued to a subscriber, would carry this date on the lower right-hand corner, and the date of its issue on some other part. Parmerlee also stated that he believed plaintiffs had given a mortgage to the First National Bank, but he never reported to defendant that they had done so. Witness testified that, if he had reported plaintiffs as having given a chattel mortgage, he would have had to make the report on a special blank form. This form would have required him to give, amongst other things, the amount of the debt, when payable, description of the property mortgaged, and date of the filing thereof. The notes held by the First National Bank were for the firm's indebtedness, and yet were signed by the several partners by their individual names, as well as by the firm name of "Minter Bros." They were signed by Minter Bros. first, and then by C. D. and Joe Minter individually.

Defendant also introduced evidence tending to show that the report complained of was only issued to its subscribers who were interested in the financial condition of plaintiffs, and in response to requests therefor, and for the exclusive information of such persons.

The court, over the objection and exception of defendant, instructed the jury as follows:

"(1) The court instructs the jury that the plaintiffs' right to recover in this case depends upon, and is limited to, the falsity and publication, as elsewhere explained, of the following clauses of the report dated December 22, 1890, mentioned in the evidence, to wit: 'The opinion is expressed that a local bank has been secured.' 'Their present condition is not regarded as particularly flattering, and seems to suggest cash dealings.' While you should take into consideration the whole of said report, in order to ascertain the meaning and significance of said part of it, still the fact that the other parts of said report may be true does not prevent the plaintiffs from recovering on said part, quoted above, if you find from the evidence that it was untrue; on the other hand, the plaintiffs are not entitled to recover on account of the falsity of any part of said report other than the clauses above set forth. Therefore, if you find from the evidence that the above-mentioned part was false, and imputed to the plaintiffs insolvency, or conduct which would prejudice them in their business or trade, or be injurious to their standing and credit as merchants or business men, and was published as elsewhere explained, then the plaintiffs are entitled to recover damages, to be estimated under all the instructions in the case.

"(2) The court instructs the jury that the matter set forth and quoted in the preceding instruction, and contained in the report mentioned in the evidence as bearing date December 22, 1890, and headed, 'Minter Brothers,

W. & R. D. G. Sedalia, Mo.,' was libelous in its nature, if it was untrue, and charged upon and imputed to the plaintiffs insolvency, or conduct that would prejudice them in their business or trade, or be injurious to their standing and credit as merchants or business men; and it constitutes a cause of action if it was published, unless it is shown to have been within the protection of the privilege set up by the defendant. Therefore, if you believe from the evidence that the defendant did, on or about December 22, 1890, publish of and concerning the plaintiffs, as merchants in Sedalia, Mo., the said report, and that the matter before specified was false, and calculated to have the effect as explained above, then the defendant is liable to the plaintiffs for damages, unless you believe from the evidence in the case that said report was privileged. 'Publication,' as here spoken of, is the preparation and delivery of a copy of the alleged libelous matter to some third person. To entitle the plaintiffs to recover, it is not necessary to prove the issue or publication of numerous copies of said report, and if you believe from the evidence that, at a date prior to the institution of this suit, the defendant prepared and delivered a copy of said report to any firm, person, or corporation other than the plaintiffs themselves, then there was complete publication thereof in contemplation of law. The privilege claimed by the defendant is not absolute, but qualified, and, to entitle the defendant to the benefit of the same, you must find from the evidence that defendant only issued and delivered said report to such persons, firms, or corporations as were interested in knowing the financial condition of the plaintiffs at the time by reason of having had, or being about to have, business transactions with plaintiffs, or who were subscribers of the defendant company, and had made requests upon defendant for information concerning plaintiffs, and that for such reasons, or any of them, defendant made and furnished said report in good faith, and, unless you do so find, then said publication was not privileged; and the court further instructs you that, even if said report was only furnished to such persons above explained, still the same was not privileged if you believe from the evidence that the same was prompted and accompanied by actual malice upon the part of defendant. 'Actual malice,' as used in this connection, means that the report in question was prepared and published, not in good faith, but with intent to injure plaintiffs, or with a willful and wanton neglect of the rights and interests of the plaintiffs, and, if you believe from the evidence that there was such actual malice in the furnishing of the said reports, then the same was not privileged, as claimed by the defendant. If for any reason, as before explained, you find that the said report was not privileged, and

If you also find it was published concerning the plaintiffs as merchants, and the part above specified was false, and was calculated to have the effect above explained, and was published by defendant as before explained, then you should find the issues for the plaintiffs, and assess their damages at such sum as you think proper and just under the evidence and instructions in the case, not to exceed, however, the sum of one hundred thousand dollars.

"(3) The court also instructs you that the defendant, being a corporation, can only act through its officers and agents, and is responsible for the willful, wanton, reckless, or malicious acts of its officers or agents, done within the scope of their employment; and if you believe from the evidence that one of more of the agents and officers of the defendant who were engaged in furnishing said report of December 22, 1890, or in collecting or compiling the information for the same, were actuated by express or actual malice, or ill will towards plaintiffs, or acted with willful or wanton neglect of the rights of plaintiffs, or with a reckless disregard of the consequences of their acts and conduct, in the performance of the services imposed upon them by the defendant in relation to said report, then the acts, conduct, and motives of such officers or agents in that regard were the acts, conduct, and motives of the defendant, and the defendant is chargeable with actual or express malice in respect to said report."

"(5) In reaching a conclusion as to whether or not the defendant, through its agents, furnished as true reports the statements set forth in the other instructions, knowing them to be false, or furnished the same in order to injure the plaintiffs, or with a willful neglect of the rights and interests of the plaintiffs, or with a reckless disregard of the consequences of the act, you may take into consideration all the facts and circumstances detailed in evidence, giving to each part thereof such weight as you think it is entitled to.

"(6) If you find for the plaintiffs under other instructions, the damages may be compensatory, or punitive and compensatory. Compensatory damages are to be given when the evidence satisfies the jury that the plaintiffs have sustained material or substantial injury, and that such injury was the result of the wrongful act of the defendant, and compensatory damages should be a sum sufficient to compensate the plaintiffs for such injury. Punitive damages are awarded for the purpose of punishing the defendant for the wrongful act, and setting an example before the community, but are not allowed unless the evidence is sufficient to satisfy the jury that in doing the thing complained of the defendant was actuated by feelings of ill will or hatred towards the plaintiffs, or reckless disregard of the consequences of the act.

"(7) If you find for the plaintiffs, then, in assessing the damages, you are not restricted to the mere pecuniary loss, if any, which plaintiffs may have sustained by reason of the report complained of, but, in addition thereto, you may inflict damages for example's sake, and by way of punishment of the defendant, and, in estimating the same, you will take into consideration all the facts and circumstances detailed in evidence, and award such damages as will be a compensation and adequate recompense for the injuries sustained, and such as may serve for a wholesome example to others in like cases, not exceeding, however, the sum of one hundred thousand dollars."

Before giving instruction No. 1, the court struck from it all reference to the clause: "They are behind, and cannot meet current indebtedness."

At the instance of defendant, the court instructed the jury as follows:

"(5) The court instructs the jury that plaintiffs complain that defendant published of and concerning them the following libelous things: First. The opinion is expressed that a local bank has been secured. Second. Their present condition is not regarded as particularly flattering, and seems to suggest cash dealings. Which they claim were each of them false, malicious, and defamatory. The publication complained of consists in defendant giving out to others papers containing said charges. Now, if you find from the evidence that defendant only gave out such papers to such persons or firms or corporations as were interested in knowing the financial condition of plaintiffs at the time, by reason of having had, or being about to have, business transactions with plaintiffs, or who were subscribers of defendant, and had made request upon defendant for information concerning plaintiffs, and that for such reasons, or any of them, defendant made and furnished such papers in good faith, then such publications were privileged, and do not sustain the allegations of plaintiffs' petition, and your finding must be for defendant, unless plaintiffs have proven by the greater weight of all the evidence in this case that defendant was actuated in making such publications by malice toward plaintiffs, as said term 'malice' has been defined in other instructions.

"(6) Although one may publish of another defamatory and malicious matter, yet the truth of the matter published forms a complete defense to any action for damage for such publication; and in this case, even if the jury should believe from the evidence that defendant published of the plaintiffs any or all of the matters charged as libelous, yet if they further find from the evidence that the matters so published were true as published, then the defense has been made complete, and in that case it is immaterial whether the party composing, or the party publishing, was or was not actuated by mal-

ice against plaintiffs, and you must find for the defendant. And if the jury find from the evidence that any one of the two allegations or charges are true, then, in arriving at the assessment of damages, they must not allow any damages on account of such charge so proven to be true."

"(11) Even if the jury should believe from the evidence in this case that William Parmerlee, who was at the time a correspondent of defendant company at Sedalia, Mo., wrote any letters containing any damaging reports of plaintiffs to Sweetzer, Pembroke & Co., of New York, yet this defendant is not liable in this cause for such act of said Parmerlee, or for any damages plaintiffs may have sustained thereby."

"(14) The court further instructs the jury that the defendant is in no wise liable in this action for any misfortune that the Minter Dry Goods Company may have sustained, nor is defendant liable for any loss or damage that plaintiffs sustained, if any, by failure of that corporation, if it in fact failed."

"(18) The court instructs the jury that, if their finding makes it necessary for them to consider the question of damages, they must determine them, not arbitrarily, but by the sound, temperate, deliberate, and reasonable exercise of the functions vested in them by law, and they cannot allow any damages sustained by plaintiffs on account of any derogatory reports put in circulation or published by any one other than defendant."

"(19) If the jury believe from the evidence that any witness has willfully, that is, intentionally, sworn falsely as to any material fact at issue in the case, then they are authorized to reject any portion or all of the testimony of such witness."

The following instructions were asked by defendant and refused, to which said refusal defendant duly excepted:

"(1) The court instructs the jury that, under the pleadings and all the evidence in the case, plaintiffs cannot recover, and their finding should be for the defendant."

"(2) The court instructs the jury that the plaintiffs cannot recover in this action on account of the charge: 'They [meaning plaintiffs] are behind, and cannot meet current indebtedness.'"

"(3) The court instructs the jury that plaintiffs cannot recover in this action on account of the charge: 'The opinion is expressed that a local bank has been secured.'"

"(4) The court instructs the jury that plaintiffs cannot recover in this action on account of the charge: 'Their present condition is not regarded as particularly flattering, and seems to suggest cash dealings.'"

"(7) The court instructs the jury that, if they believe from the evidence in this case that any of the matters charged against the defendant were true at the time they were alleged to be published, then the jury will find for the defendant on the whole case."

"(8) The court instructs the jury that, if they believe from the evidence that the words 'they are behind' meant, in the report complained of, that plaintiffs owed past-due debts, they cannot recover because of such words in said report."

"(9) The court instructs the jury that, if they believe from the evidence that the words 'cannot meet current indebtedness' meant, in the report complained of, that plaintiffs could not pay, as it matured in the usual course of business, indebtedness then maturing, then plaintiffs cannot recover because of such words in the said report."

"(10) The term 'malice,' as used in this case, does not mean mere spite or ill will, as commonly used and understood, but is a state or condition of the mind that shows one to be void of all social duty, and fatally bent on mischief, and is shown by the willful doing of a wrongful act without just cause or excuse therefor."

"(12) The court instructs the jury that, if they believe from the evidence that the words 'they are behind, and cannot meet current indebtedness' meant, in the report complained of, that plaintiffs owed past-due debts, then plaintiffs cannot recover damages for such words in said report."

"(13) This defendant cannot be held liable in this case for any damages that plaintiffs suffered, if they find they have suffered any, unless the same were the direct and immediate result of defendant company formulating, in its St. Louis office, the matters here sued for as libelous, and publishing the same to others."

"(15) The court instructs the jury that if they find for plaintiffs in this action, and allow them both compensatory and exemplary damages, as those terms are defined in instructions given, they must state the amount of such damages separately."

"(16) The court instructs the jury that in this action plaintiffs are not entitled to recover exemplary or punitive damages."

"(17) The court instructs the jury that the plaintiffs are not entitled to recover in this action as compensatory damages more than nominal damages, that is to say, if the jury find for plaintiffs, they must not allow as compensatory damages more than \$1."

"(20) The court instructs the jury that a repetition or republication of the report complained of in this case, if it was repeated or republished, is not evidence in this case that any of the publications of said report were maliciously made."

It is insisted that the court committed error in refusing to instruct the jury that plaintiffs could not recover upon the ground of the allegation in the petition that "the opinion is expressed that a local bank has been secured," whether that allegation is to be taken as meaning that plaintiffs had given security to a bank, or merely that defendant's correspondent thought they had. We are of the opinion that the instruction was properly re-

fused, for reasons hereafter stated. Certainly there was no evidence whatever that plaintiffs had secured the bank by chattel mortgage. J. C. Thompson, cashier of the bank, testified, and there was no evidence to the contrary, that plaintiffs were indebted to the bank in the months of November and December, 1890, by the way of loans, in about \$10,000, which were evidenced by several notes and secured by the individual signatures of Minter Bros.; that the bank had no other security, directly or indirectly; that the paper was signed first by Minter Bros., and also by C. D. Minter and Joe Minter, the members of the firm, individually; that there was no arrangement by which the deposits of the firm were to be applied in satisfaction of those loans, or understanding, either directly or indirectly, by which they were, under any circumstances, to give other security, or make other arrangements to better secure them; that none of the notes were due at the time the Claffin & Co. note was protested, but they became due thereafter, and were renewed with the same security as before. It is too plain for argument that Parmerlee did not have reference to notes secured by personal security when the loans were made, but that he had reference alone, and intended to convey the impression that the indebtedness of Minter Bros. to the bank had been secured by the execution of a chattel mortgage on their personal property after the notes, or some of them, were executed. Indeed, he testified as a witness that he believed the bank had been secured by chattel mortgage. Nor is it any defense to this action that he thought they had done so. We agree with counsel for defendant that when the firm of Minter Bros. borrowed money from the bank for the use and benefit of the firm, and executed notes to secure the payment thereof in the firm name, when they added their individual names to such paper they became sureties on such paper, but that such was not the kind of security to which Parmerlee had reference, nor could it have been so understood, for such occurrences are but common, everyday business transactions in which all merchants and business men as a rule indulge, and, if published, would create no unfavorable impression of financial standing; but to publish of such person, as was done of the plaintiffs in this case, that "the opinion is expressed that a local bank has been secured," is quite a different thing, and imputed to them a want of credit or responsibility, or insolvency, which necessarily and presumptively could but have caused them pecuniary loss, and therefore actionable per se.

In the case of *Weiss v. Whittemore*, 28 Mich. 366, the Supreme Court of that state say: "The definition of a libel, as given by Mr. Townshend upon a review of the authorities, is that it is a wrong done by writing or effigy; and if false and malicious certainly, and for the purpose of injuring another in

reputation, trade, employment, or property, every publication of language concerning a man or his affairs, which, as a necessary or natural and proximate consequence, occasions pecuniary loss to another, is prima facie a libel, if the publication be by writing."

A definition of libel, as quoted and approved by this court in *Nelson v. Musgrave*, 10 Mo. 648, is: "A malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of the dead, or the reputation of the one who is alive, and expose him to public hatred, contempt, or ridicule." This definition has been cited with approval in *Price v. Whitely*, 50 Mo. 439, and *Legg v. Dunleavy*, 80 Mo. 563, 50 Am. Rep. 512. "Any printed publication that tends to bring a man into disrepute, ridicule, or contempt is a libel in a legal sense."

In the case of *Hermann v. Bradstreet Company*, 19 Mo. App. 227, it was held that the following words: "Joseph Hermann, brick-maker, is in the hands of the sheriff," which were published of and concerning Hermann, who was engaged in the business of brick-making, were libelous and actionable per se. Words written or spoken of one's trade are actionable, when they might not be so if spoken of the individual simply. *Townshend on Slander and Libel*, §§ 132-179.

Every willful and unauthorized publication, written or printed, which imputed to a merchant or other business man conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice. *Locke v. Bradstreet Co. (C. C.)* 22 Fed. 771.

So it was held, in the case of *Newell v. How*, 31 Minn. 235, 17 N. W. 383, that in those trades or professions in which, ordinarily, credit is essential to their successful prosecution, as, for example, that of merchant, language is actionable per se which imputes to one in such trade or profession a want of credit or responsibility, or insolvency, past, present, or future. Such language necessarily, or naturally and presumptively, causes pecuniary loss to the person of whom it is published." See, also, *McGinnis v. Knapp*, 109 Mo. 137, 18 S. W. 1134; *Mitchell v. Bradstreet*, 116 Mo. 226, 22 S. W. 358, 20 L. R. A. 138, 38 Am. St. Rep. 592.

This case is bottomed upon express malice in the publication of the libelous matter, which the evidence tends to prove, and which, if true, entitles them to punitive or exemplary damages. 18 Am. & Eng. Ency. Law (2d Ed.) 999. But, in "order for such a recovery to be proper, there must be some proof of actual or express malice, or, at least, of such recklessness or carelessness on the part of the defendant as is equivalent to an actual intent to violate the rights of others." 18 Am. & Eng. Ency. of Law (2d Ed.) 1093.

In case the publication is only a qualified privilege, as in the case at bar, the "party

defamed may recover notwithstanding the privilege, if he can prove the words used were not used in good faith, but that the party availed himself of the occasion, willfully and knowingly, for the purpose of defaming the plaintiff." *Newell on Libel and Slander* (2d Ed.) 475; *Finley v. Steel et al.*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852. Under such circumstances there can be no privilege, even though the libel may be true. *Wharton v. Wright*, 30 Ill. App. 341; *Hollenback v. Ristine*, 105 Iowa, 488, 75 N. W. 355, 67 Am. St. Rep. 306; *State v. Burnham*, 9 N. H. 30, 31 Am. Dec. 217; *Lowry v. Vedder*, 40 Minn. 476, 42 N. W. 542. And the fact that defendant's agent may have believed, at the time of making the report, that it was true, affords no defense to the action, unless made without malice. *State ex rel. v. Lonsdale*, 48 Wis. 348, 4 N. W. 390; *Locke v. Bradstreet Co.* (C. C.) 22 Fed. 771; *Erber and Stickler v. Dun Co.* (C. C.) 12 Fed. 526, 4 *McCrary*, 160.

It is also said that whether the bank had security or not was a question of law under the admitted facts, and the court erred in submitting that question to the jury. If we are correct in what we have said, that there was no evidence that the bank had a chattel mortgage, and that was the only security to which *Farmerlee* had reference when he made the report to defendant with respect thereto, there was no reversible error in submitting that question to the jury, although it may have been a question of law. Suppose the court had told the jury by an instruction in so many words, as it clearly had the right to do under the evidence, that there was no evidence before them that the bank had been secured by chattel mortgage, would it be contended that the instruction was erroneous? We apprehend not. The evidence being all one way upon this proposition, it is impossible to conceive how defendant was prejudiced by the submission of it to the jury.

The other allegation in the petition is that "their present condition is not regarded as particularly flattering, and seems to suggest cash dealings." Defendant says that the first question suggested by this clause is: What was plaintiffs' condition? Then proceeds to argue with much ability and ingenuity, and to cite authorities to show, that plaintiffs were insolvent at the time of its publication, and therefore the court should have instructed for a nonsuit.

Among the defenses of defendant, as shown by its answer, was that of justification, that is, that the imputations, alleged to have been cast against plaintiffs by this publication, that they were threatened with insolvency, were about to fail, and were unworthy of credit, were true, and the burden was thereby cast upon it to show, by a preponderance of the evidence, that plaintiffs were insolvent at the time of the publication. This question was not, however, submitted to the jury, but we are asked to review the

evidence and reverse the judgment upon the ground that there was no evidence to entitle plaintiffs to a recovery, or, in other words, to take the case to the jury. To this contention we cannot agree. Without again repeating in detail the facts disclosed by the evidence with respect to the assets of plaintiffs, their liabilities, and their ability to meet their debts as they become due, we are of opinion that it was sufficient to take the case to the jury upon the question of their insolvency, especially when we consider that the burden was upon defendant, after plaintiffs made proof of the publication of the libelous matter, under its plea of justification, to show that the publication was true.

The court refused to instruct the jury, at defendant's request, that if they found for plaintiffs, and allowed both compensatory and punitive damages, the amount of each should be separately stated in the verdict, and in this ruling, defendant contends, committed error. This contention is based upon the act of 1895, page 168, now sections 594 and 595, Rev. St. 1899. These read as follows:

"Sec. 594. In all actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered.

"Sec. 595. In all actions wherein such damages are recoverable and are allowed by the jury, the amount thereof shall be separately stated in the verdict."

This action was pending at the time the act was passed, and it is clear, we think, from the phraseology of the act, that it was not intended, and does not, in fact, apply to such actions, but only to actions thereafter instituted. It uses the word "shall" in both sections, which ordinarily applies to something to be done or take place in the future. In section 594, that the petition "shall" state, etc.; and in section 595, that the amount of the verdict, when exemplary or punitive damages are allowed by the jury, "shall" be separately stated in the verdict, and clearly has reference to actions thereafter to be brought, otherwise it would have used some manner of expression indicating that it was to apply to actions then pending. If the act was intended to apply to actions that were pending at the time of its passage in which exemplary or punitive damages are recoverable, and the petition should fail to state, as in the case at bar, the amount of such damages sought to be recovered, the plaintiff would be placed in the anomalous position of being compelled to ask instruction as to such damages when not in accordance with the averments with the petition, and thus, by his own action, invite error, which would be doing violence to the very spirit and purpose of the act. But when applied to actions brought after the passage of the act, and the petition is framed in accordance therewith, there can be no trouble in framing instructions in accordance with its purpose and in perfect harmony therewith.

Moreover, there is nothing in the act which indicates that it was intended by the Legislature to apply retrospectively, or, in other words, to actions then pending, and it has always been held by this court that a statute is to be construed prospectively, unless the intent that it is to be construed retrospectively is clearly expressed on its face. *Leete v. Bank*, 115 Mo. 184, 21 S. W. 788; *State ex rel. v. Auditor*, 41 Mo. 25; *State ex rel. v. Ferguson*, 62 Mo. 77; *Thompson v. Smith*, 8 Mo. 723; *State ex rel. v. Hays*, 52 Mo. 578; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Bartlett v. Ball*, 142 Mo. 28, 43 S. W. 783; *Shields v. Johnson County*, 144 Mo. 76, 47 S. W. 107. It was also held by the St. Louis Court of Appeals, in the case of *Lamberson v. Long*, 66 Mo. App. 253, that the statute in question does not govern a cause instituted before, though tried after, it went into effect; citing *State v. Ross*, 49 Mo. 416, *Thompson v. Lyon*, 33 Mo. 219, and *Powers v. Kierchoff*, 41 Mo. 425, 97 Am. Dec. 281. Defendant, however, relies upon, and cites, a number of acts of the Legislature and decisions of the appellate courts of this state as holding otherwise, but an examination of them will show that they are distinguishable from the case at bar in that they are in respect to matters of procedure not involving the necessity of the amendment of a petition in an action brought before the passage of the act in order to meet its requirements, and to enable the plaintiff to recover compensatory or punitive damages, when it was entirely unnecessary at the time the petition was filed, as in this case.

Another insistence is that the court erred in that it instructed the jury, at plaintiffs' request, for a recovery, and yet did not instruct on the issues made by the plea in mitigation of damages. It has been said that mitigating circumstances serve only to reduce the damages; they cannot, therefore, constitute a defense to the action. *Atterbury v. Powell*, 29 Mo. 429, 77 Am. Dec. 579. And the statute is to the same effect. Section 2081, Rev. St. 1889. And, defendant having pleaded certain facts for the purpose only of reducing the amount of recovery, if the instruction given at the instance of plaintiffs upon that phase of the case was not satisfactory, it should have asked such instructions as the facts and circumstances seemed to require. It is not the duty of the trial court to give instructions in any civil case unless requested to do so.

In *Tetherow v. R. R.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617, it was claimed that the defendant was entitled to a reduction of the damage by reason of mitigating circumstances. That was an action for the death of a party under section 2123 of the Revision of 1879, now section 2866, which provides that there may be a recovery of damages, not exceeding \$5,000, as the jury may deem fair and just, "having regard to the mitigating or aggravating circumstances." Necessarily, in

that case, the defendant had the right to plead and prove any circumstances in mitigation of damages. The plaintiff's instruction upon the measure of damages in that case read as follows: "The jury are instructed that, if you find for the plaintiff, you may, in your verdict, give her such damages, not exceeding five thousand dollars, as you may deem fair and just, under the evidence in the case, with reference to the necessary injury resulting to her from the death of her husband." The same point urged in this case was expressly made in that case, namely, that the instruction was defective because it did not direct the jury to consider the mitigating circumstances. The court, in disposing of that matter, said: "The instruction given by the court in regard to the measure of damages was correct as far as it went. Plaintiff was entitled (under our statute on the subject) to recover such damages as the jury might 'deem just, with reference to the necessary injury resulting from such death,' not exceeding five thousand dollars. Rev. St. 2123. If defendant's counsel thought, as is now claimed, that there were circumstances mitigating the damages, that question should have been presented to the trial court by an instruction embodying that idea. This was not done. The court is not required in a civil action to instruct the jury on questions of law not suggested at the time by the parties or counsel."

Browning v. Ry. Co., 124 Mo. 55, 27 S. W. 644, was an action under the same statute as in the previous case. The point was expressly made that the jury were not properly instructed as to the measure of damages. The court said: "Touching the measure of damages, the following expression of opinion, prepared by my learned Brother Gantt, is approved and adopted, namely: 'The instruction on the measure of damages is also assailed as error. The instruction was in these words: "If the jury find for the plaintiff they will assess her damages at such sum as in their judgment will be a fair and just compensation to her for the loss of her husband, not exceeding the sum of \$5,000." The defendant asked no instruction on the measure of damages whatever. No attempt was made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope, and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations in an instruction embodying its views. The court is not required in a civil case to instruct on all questions, whether suggested or not, and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal.'"

In *Barth v. Ry. Co.*, 142 Mo. 535, 44 S. W. 778, a similar objection to the one now urged

was made, and, in disposing of it, this Division, Judge Gantt, speaking for the court, said: "We are thus brought to the consideration of instruction 4, on the measure of damages, given at the instance of plaintiff, already reproduced at length in paragraph 4 of this opinion. The jury were instructed that, if they found for the plaintiff, they would award her 'such damage, not exceeding \$5,000.00, as you may deem fair and just, under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband.' This instruction was approved in *Browning v. R. R.*, 124 Mo. 55 [27 S. W. 644], and *Boettger v. Iron Works*, 124 Mo. 87 [27 S. W. 466]. *McGowan v. Steel Ore Co.*, 109 Mo. 518 [19 S. W. 199], is relied upon to convict the circuit court of error. The contention of the very able and learned counsel for defendants in that case was only for an instruction in the words of the instruction here complained of. Subsequently we ruled, in the *Browning Case*, where the essential elements of the damages were given to the jury for the plaintiff in the language of the statute, its generality would not constitute reversible error, reserving to the defendant the right to point out the elements limiting damages in its own instructions. Following that case, and the *Boettger Iron Works Case* in the same volume, this instruction must be held not to constitute error."

So, in *Robertson v. R. R.* 152 Mo. 382, 52 S. W. 1082, it was observed: "Plaintiff's third instruction is also criticised, on the ground that it furnished the jury no guide by which to estimate the damages plaintiff was entitled to recover in the event of their finding for her. Besides, there is a recovery for medical expenses when none were proven. We see no objection to the instruction, except that part of it which authorized a recovery for medical expenses, to which our observations with respect to the admission of evidence upon that question applies with equal force to the instruction. With this exception, the instruction is good as far as it goes, and, if defendant desired to restrict plaintiff's right to recover to more limited grounds than was done by the instruction, it should have asked an instruction to that effect. *Browning v. R. R.* 125 Mo. 55 [27 S. W. 644]; *Matthews v. R. R.*, 142 Mo. 645 [44 S. W. 802]; *Barth v. Street Ry.*, 142 Mo. 535 [44 S. W. 778]."

In the case of *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398, this court, in speaking upon a similar question, said: "The objection that the instruction did not allow the jury to take into consideration mitigating circumstances has no merit, for not a single circumstance was withdrawn from their consideration. Under it, they were obliged to consider all the circumstances, even in awarding exemplary damages."

It follows that, in so far as what we have said may appear to be in conflict with *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583, that case is disapproved.

What has already been said, and the cases already adverted to, really dispose of the specific contention to the effect that the court gave a "roving commission to the jury as to damages." The two cases relied upon by the appellant are *Hawes (not Harris) v. Stock Yards Co.*, 103 Mo. 60, 15 S. W. 751, and *McGowan v. Ore & Steel Co.*, 109 Mo. 518, 19 S. W. 199. The first of these cases was for personal injuries, and the jury were told that they could return a verdict in such sum as they believed would compensate the plaintiff for his injuries. There was nowhere in the case anything to indicate what were the proper elements of compensation, nor was the jury in any place bound to a consideration of the facts and circumstances established by the evidence. The court expressly pointed out wherein that particular instruction failed to come up to the standard of the instructions in *Waldhier v. R. R.*, 87 Mo. 37, and *Tetherow v. R. R.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; and we submit that the instructions approved in both of the last-mentioned cases were much less favorable to the defendant than are the instructions in the case at bar. Again, the case of *McGowan v. Ore & Steel Co.* was considered by this court in *Barth v. R. R.*, 142 Mo. 535, 44 S. W. 778, where it was denied the effect now claimed for it by appellant's counsel, the court stating that it was only claimed in that case that the instructions should have conformed to the standard afterwards said to be the correct one in the case of *Browning v. R. R.*, 124 Mo. 55, 27 S. W. 644.

The point is made that the court also erred in refusing to instruct the jury, as defendant requested, that plaintiffs could not recover because of the clause, "They are behind, and cannot meet current indebtedness." This alleged ground of action was eliminated from the case by the refusal of the court to let the jury pass upon it, and how defendant could have been prejudiced by this course we are unable to perceive. If either party was aggrieved by this ruling, it was the plaintiffs, not the defendant.

It is also contended that the court erred by assuming, in plaintiffs' instructions, the falsity of the report, and especially the clauses thereof complained of as libelous, and that defendant knew them to be false. But this contention we think without merit. Instruction No. 1, however, is challenged upon the further ground that it makes no mention of defendant's defense of privilege, and has no reference in itself to any other instruction upon this point, and that the only reference to other instructions is limited as to the publication, "as elsewhere explained," and to damages "to be estimated under all the instructions in the case." The argument is that the instruction directly requires the jury to find a verdict for the plaintiffs, and against the defendant, that the phrases of it were untrue, and imputed insolvency or conduct which would prejudice them as

stated in the instruction, and that it was published. It is not necessary that an instruction should refer to another, or that the issues involved in a case should be presented to the jury to be passed upon in one instruction, but if the instructions, taken as a whole, present the issues fairly, and are not calculated to mislead the jury, is all the law requires. *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315; *Henry v. Grand Ave. R. R. Co.*, 113 Mo. 525, 21 S. W. 214. Nor is it open to the objection that it assumes as true controverted facts. Besides, by the second instruction given for plaintiffs, defendant's rights and duties under its defense of qualified privilege are fully covered.

Plaintiffs' instruction numbered 2 is criticised upon the ground that it takes from the jury the question, of which, under the Constitution, they are made the judges, that is, whether the publication complained of was libelous. But defendant did not ask an instruction upon this phase of the case, nor is any such question raised in the motion for new trial, and it must therefore be considered as waived. This same question was before this court in *Mitchell v. Bradstreet*, 116 Mo. 226, 22 S. W. 358, 20 L. R. A. 138, 38 Am. St. Rep. 592, and it was held that, while section 14, art. 2, of the Constitution provides that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact, as "no instruction of this character or presenting this phase of the case to the jury was asked by the defendant," as the trial court is not required in civil cases to give instructions when none are asked by the parties, no error was committed in its failure to do so. That it is proper for the court to so instruct the jury in libel cases, when requested to do so, may be conceded (*Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614), but no such request was made in this case. Moreover, as the question was not raised in the motion for new trial, it cannot be raised here for the first time. The instruction is criticised upon the further ground that it incorrectly defines actual malice. It says: "Actual malice, as used in this connection, means that the report in question was prepared and published, not in good faith, but with an intent to injure plaintiffs, or with a willful and wanton neglect of the rights and interest of the plaintiffs." We see no substantial error in this definition. Malice, in legal understanding, implies no more than willfulness, that is, intentional. In *Buckley v. Knapp et al.*, 48 Mo. 152, it is said: "What malice, in common acceptance, means, is ill will toward some person. In its legal sense it is defined to be a wrongful act done intentionally, without legal justification or excuse; and, in ordinary actions for slander or libel, malice in law is sufficient, and it is to be inferred from the publication of the slander-

ous matter without such justification or excuse. In most instances where an injury is committed against the person or property of another, the actual intention of the author of the mischief is immaterial. The law considers every one whose neglect, carelessness, and want of due regard for the rights of others occasions injury to them equally culpable, and bound to make reparation to the extent of such injury, as one who willfully does the mischief. It can make no difference to the party injured whether the injury was occasioned by a willful act, or by negligence, or a careless disregard of his rights, and such a consideration ought not to affect the remedy."

Defendant insists that the instructions rendered it liable, without qualification, for the malice of its correspondent. This insistence is predicated on the idea that malice was restricted to the defendant's agent at Sedalia, Farmerlee, but this view is incorrect. While his was the initial or primary malice, yet the conduct of the managing officers of the company was such as renders each of them subject to the charge of malice; that is, either an actual, positive intention of injuring the plaintiffs, or acting when they knew, or had good reason to believe, that the statements they were making were untrue, and yet persisted in making and repeating them, regardless of the injurious effect which they knew such statements would have upon the plaintiffs and their business standing. That a corporation is responsible in its corporate capacity for acts done by its agents, either ex contractu or in delicto, in the course of its business and of their employment, is well-settled law. *Railroad v. Quigley*, 21 How. 207, 16 L. Ed. 73; *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Townshend on Slander and Libel*, pp. 470, 475.

Defendant complains of the action of the court in permitting plaintiffs' attorney, over the objection of defendant, to read to the jury in his closing argument what its counsel assert was an opinion of the Supreme Court of Michigan rendered in a libel case, entitled *Pollasky v. Menchener*, 46 N. W. 5. With respect to this contention, the record shows that the following occurred:

During the argument, Geo. P. B. Jackson, one of the plaintiffs' attorneys, before the jury, in connection with some general remarks upon the nature of the business of reporting agencies and its effect upon others, said, in substance: "I have noticed in the course of my reading some remarks in a magazine concerning commercial agencies which express my views better than I can do myself, and, as I have not attempted to commit those remarks to memory, I will read them from the publication." And thereupon he read from the pamphlet which he held in his hand the following portions:

"Consider for a moment the relation of the mercantile agency to its subscribers. It

undertakes to furnish them, for a consideration paid in advance, such information relative to the responsibility and credit of merchants and others as it obtains from its subagents, servants, and correspondents, without guarantying the accuracy, reliability, or correctness of such information, or being responsible for any loss caused by the neglect of its agents and servants, or for their want of verity. It expressly stipulates that it will not reveal to such subscribers the sources of its information nor the names of the persons from whom they received it, and requires a pledge from the subscribers that they will never, under any circumstances, communicate to the persons reported the information received concerning them from the mercantile agency. It also adopts measures to prevent the particular communities from ascertaining the name or identity of the person reporting the standing of business men in that community. These secret and inquisitorial agencies ramify every part of the United States and the Dominion of Canada, and possess the power of destroying with falsehood or calumny the credit of any business man in the country, and of bringing him to bankruptcy and ruin. To hold such vast inquisitions exempt from liability for false publications respecting the character and standing of a business man would be to sanction the highest injustice. The business man's integrity, his reputation for fair and honest dealings, his prosperity in the transaction of his business, are of the utmost importance to him, and are oftentimes his best capital with which to carry on his business. Commercial credit is based upon confidence, and all know upon how frail foundations commercial confidence is builded. A breath of suspicion may destroy it. Confidence is withdrawn, and the party is ruined. And so, in a broader field, a breath of suspicion is directed against the public credit, suspicion gives place to rumors of disaster, rumors disseminated undermine the general confidence, and panic is the result. On the other hand, these same commercial agencies, which always have their figures upon the business pulse of the country, are a potent factor in keeping up public confidence. They issue their manifestoes of encouragement, and scatter them broadcast over the land. They are read by the business men of the country. The newspapers assist the circulation among all classes of people, the public confidence is strengthened, or, at least, fears of disaster are allayed. In this they exert a strong influence for good, and are recognized institutions in carrying on the business of the country. But they are also potent for evil to the individual. They send out their notification sheets containing a false statement respecting a particular person, and he is undone—no one will trust him, and all claims are pressed for immediate payment. His business char-

acter is sullied, confidence is withdrawn, and his business career has received a blow which it will require a long time to repair."

"It is all very well to advance the interests of the wholesale dealers as a class, and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual. It would be a harsh and tyrannical rule that would protect one person from loss at the pecuniary ruin of another. The welfare of society does not require that a few great wholesale dealers shall thrive by the sacrifice of the many, or of any, small purchasers."

After he had read a portion of said matter, one of the counsel for defendant arose and stated, in the presence of the jury, that they objected to the attorney for plaintiffs reading law to the jury. Thereupon plaintiffs' said attorney stated to the court and to defendant's counsel, in the presence of the jury, that he did not claim to be reading from a lawbook, and had not so stated; that he understood that, under the Constitution of this state, the jury in a libel case were the judges of the law and the evidence. It would be entirely competent, *55, 44 S. W.* to do so, for him to read *direct* *now* *jury* from any lawbook, but that *they* not propose to read any law to the jury, and only intended to read some general comments upon the character and effect of the work of commercial agencies, because he could not remember the language used by the author from which he read, and that he only read it because he had not committed it to memory, just as he might read poetry which he could not memorize. No mention was made by any one concerning the nature or name of the publication from which the extract was read, nor the name of the author, or of the occasion upon which the matter was prepared or published. At that time the judge did not know what was being read from, nor was there anything to indicate that the jury knew, neither did the defendant's attorneys state the nature, author, or occasion of the publication read from, or give any intimation that they knew what it was, farther than the general statement that they objected to plaintiffs' attorney reading law to the jury. Whereupon the court remarked, in substance, that he would not go to the extent suggested by plaintiffs' attorney, and hold that it was permissible to read law to the jury; that so far it did not appear that he had done so, and the court assumed that the attorneys upon both sides knew what was proper in the argument of the case, and, in view of the statement of the plaintiffs' attorney, the court did not anticipate that the attorney would transcend the proper limit, and, if the defendant's attorneys thought that he did, they could bring the matter to the attention of

the court. Thereupon the attorney for plaintiffs concluded the reading of the extract above set forth.

It does not appear from the record that the attorney claimed or pretended that he was reading any law to the jury, nor was there any principle of law discussed in it, but simply criticisms upon the manner and methods of conducting the business of commercial agencies, and their effect upon merchants and business men who happened to be unfavorably reported by the agents of such institutions. It was not read from a book, nor was there anything about it that would indicate that it was a book. The attorney reading it did not call it a lawbook, but a magazine. The judge himself did not gather from what transpired that the attorney was reading law to the jury, and, when defendant objected to the further reading of it, ruled that it was not a lawbook.

Appellant relies upon the case of *Heller v. Pub. Co.*, 153 Mo. 205, 54 S. W. 457, as an authority for the statement that it was error to permit an attorney to read law to the jury. That was a case where defendant's attorney in a libel suit insisted that the jury read the law as well as of 226, 22 S. W. 2d that therefore he was entitled to read 592, of libel to the jury, and when he undertook to do so objection was made by the plaintiff, and the court refused to permit the defendant's attorney to read from the lawbook as he had proposed. The court said: "Whatever may be the practice in other states, it is not permissible in our state to read lawbooks to a jury in any kind of a case, and the trial court did not err in stopping counsel for defendant in this case when he attempted to do so."

That there are many cases in which it has been held that it is not reversible error to refuse to allow an attorney to read law to the jury may be conceded; upon the other hand, there are many instances where appellate courts have refused to reverse judgments because the trial court permitted law to be read. The general rule, as announced by the authorities, is that it is a matter resting largely within the discretion of the court, whose function it is "to instruct the jury upon the law, and, where counsel undertake to read the law to the jury, the judge may properly interpose to prevent it; but if the judge sees fit to permit this to be done, and the law is correctly laid down in the decision or book used by the counsel, it would not, we think, constitute legal error, or be ground of exception by the other party, although such a practice is not to be encouraged." *Williams v. Railroad*, 126 N. Y. 96, 26 N. E. 1048, 19 Am. & Eng. Ency. Law, 620, 624; 2 Elliott's General Practice, § 694; *Proffatt on Jury Trial*, § 251; *Legg v. Drake*, 1 Ohio St. 286; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Keyon v. Sutherland*, 3 Gilman, 99; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Regina v. Courvoisier*, 9

Carrington & Payne, 362; *Stefferson v. R. R.*, 48 Minn. 285, 51 N. W. 610; *R. R. v. La Mothe*, 76 Tex. 219, 13 S. W. 194; *Gregory v. R. R. Co.*, 37 W. Va. 606, 16 S. E. 819. In all of these cases, whatever was read to the jury was read as law by which they were to be guided in their deliberations, and, as the law announced in those cases was in harmony with that laid down by the court in each particular case, none of the judgments were reversed upon the ground of lawbooks having been improperly read to the jury, though the practice was generally disapproved of. But in the case at bar the extract which was read was not read as law, but, as preliminary to its reading, counsel said, "I have noticed in the course of my reading some remarks in a magazine concerning commercial agencies, which express my view better than I can do myself, and, as I have not attempted to commit those remarks to memory, I will read them from the publication," and then proceeded to read a considerable portion of it before an objection was interposed. Upon the interposition of the objection, the court said that he "would not go to the extent suggested by the plaintiffs' attorney, and hold that it was permissible to read law to the jury; that so far it did not appear that he had done so, and the court assumed that the attorneys upon both sides knew what was proper in the argument of the case, and in view of the statement of the plaintiffs' attorney, the court did not anticipate that the attorney would transcend the proper limit, and, if the defendant's attorneys thought that he did, they could bring the matter to the attention of the court." The reading of the extract was then continued without further objection. It cannot be said that counsel did not have a perfect right to have committed the article to memory, and then to repeat it to the jury as part of his argument, which would be just as objectionable, but for the fact that reading it in print might attach to it more significance in the minds of the jury. And, since it was used solely by way of argument and illustration, was not offered as presenting any statement of the law of the case, and in fact does not do so, and was in perfect accord with the law of the case as presented by the instructions, we are of the opinion that it was not prejudicial to the defendant, and that the judgment should not be reversed upon that ground alone, though we do not think the practice is to be commended or encouraged.

There is no merit in the contention that the verdict is against the evidence, and we deem it unnecessary to say more with respect to that matter. But it is insisted that the verdict is grossly excessive, and the result of passion and prejudice against the defendant. It is true the verdict is large, but it is the second one in the case. The evidence showed that plaintiffs were, at the time of the publication of the libelous statements, mer-

chants in good standing and credit, and doing a large and prosperous business, and as a result of these reports their credit and standing were ruined, their business wrecked, and they were driven out of business. It also showed that the statements were conceived in malice, and so continued to the end of plaintiffs' financial ruin. The verdict was approved by the court who heard the evidence. Under these circumstances, should it be disturbed by this court? We think not.

In *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265, there is quoted with approval from 1 *Graham and Waterman on New Trial* (2d Ed.) 451 (*452) the following to wit: "The reason for holding parties so tenaciously to the damages found by the jury in personal torts is that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury governed by a sense of justice. * * * To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury, and awarding compensation in damages. The law that confers on them this power, and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives, * * * and it is not until the result of the deliberation of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose." *Dowd v. Air Brake Co.*, 132 Mo. 379, 34 S. W. 493; *Woodson v. Scott*, 20 Mo. 272; *Chouquette v. Electric Ry. Co.*, 152 Mo. 257, 53 S. W. 897; *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. 22, 63 S. W. 99.

The instructions, taken all together, presented every phase of the case to the jury, and are free from substantial error.

Our conclusion is that the judgment should be affirmed. It is so ordered. All of this Division concur.

SAMS v. ST. LOUIS & M. R. CO.

(Supreme Court of Missouri. March 20, 1903.)

SERVANTS — INJURIES — FELLOW SERVANTS — NEGLIGENCE — STREET RAILROADS — FELLOW SERVANT ACT.

1. A car starter, having authority to direct motormen and conductors of electric cars to start from a terminus of a street railway, and whose authority to regulate the time space between cars extends all along the line, is a fellow servant of such employes.

2. An electric car stopped at a terminus, and the conductor stepped off to reverse the trolley. The company's car starter, seeing that the wheels had not cleared a switch, directed the motorman to move up. The latter set the apparatus, and as the car did not move, owing to the fact (which neither he nor the starter noticed) that the trolley was off, he started towards the other end of the car, where he was

to stand on the return trip, without closing the apparatus. When the conductor placed the trolley on the wire, the car shot forward and injured him. *Held*, that the negligence was in the act of the motorman in attempting to execute the order without looking to see what the conductor was doing, and in leaving the apparatus without closing it against the current.

3. If a corporation and its servants, who in fact are engaged only in operating a street railroad, are not covered by the fellow servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk line steam railroad will not bring them within the statute, or estop the corporation from showing the fact.

4. Rev. St. 1899, § 2873, which provides "that every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof," does not apply to street railroads.

Gantt, Brace, and Burgess, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by Robert L. Sams against the St. Louis & Missouri Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Suit for damages for personal injuries. The petition states that the defendant is a railroad corporation owning and operating a railroad from a point named in the city of St. Louis to a point named in St. Louis county, and is engaged in carrying passengers and freight by means of cars propelled by steam and electricity; that on each car the defendant has two employes—a motoneer, whose station is on the front platform, where he manipulates the machinery through which the electric power is applied, and a conductor, who has certain other duties to perform; that there was also at the time and place of the accident a third employe of the defendant, whom the plaintiff calls a "car dispatcher," whose station was at the eastern terminus of the road, who had authority to direct the movements of the car, and to command the motoneer and conductor in reference thereto; that upon the occasion in question the plaintiff was the conductor on one of these cars, one Horn was the motoneer, and Hogan the car dispatcher; that Horn was without skill or training; that on January 27, 1898, at the eastern terminus of the road, at Sixth and Locust streets, in St. Louis, while the plaintiff, in the due discharge of his duties as conductor, was on the ground, in front of the car, in the act of shifting the trolley to reverse the direction, the car, through the negligence and lack of skill of the motoneer and the negligence of the car dispatcher, was suddenly projected against the plaintiff, crushing him against another car which was standing on the track, and inflicting on him great bodily injuries. Specifications of the conduct of the motoneer and car dispatcher constituting the alleged

¶ 4. See *Master and Servant*, vol. 34, Cent. Dig. § 360.

negligence are set out in the petition, as likewise are the particulars of the injuries suffered by the plaintiff. The answer was a general denial, contributory negligence of the plaintiff, and a special plea that defendant was a street railroad corporation, organized for the purpose and engaged in the business only of conducting a street railroad, and the plaintiff, the motoneer, and the car dispatcher were fellow servants employed in operating the car, and therefore defendant was not liable to plaintiff for the negligence of his fellow servants. The reply was a general denial.

On the trial plaintiff introduced in evidence the charter of the defendant, by which it appeared that defendant was incorporated as an ordinary railroad company under article 2, c. 42, Rev. St. 1889 (now article 2, c. 12, Rev. St. 1899); also evidence showing that it had claimed and exercised the right of eminent domain to condemn private property for a part of its right of way outside of the city; that its road in the city was in the city streets, and of the same character as ordinary street railroads, whilst in the country it was partly of that character and partly of the character of the ordinary steam railroads; that the cars of defendant were moved by electricity under the ordinary trolley system, and for the carrying of passengers only, except that defendant had one car, propelled in like manner as its passenger cars, which was used to carry the United States mails, and one-half of it was arranged to carry freight or express packages, and was so used; that from its eastern terminus at Sixth street, west to Forty-First street, the road was used jointly for the same purpose by defendant and a street railway company called in the evidence the Suburban. The car on which the plaintiff was conductor was an ordinary street car, and was being used as such, like the cars of the Suburban Company operating over the same road, only the defendant's car was red, and the Suburban's yellow. There was evidence tending to show that Hogan, the car starter, had authority to direct the conductor and motoneer when to start, and that his authority to regulate the time space between cars applied not only to the starting at the eastern terminus, but extended all along the line, and that in that matter the conductors and motoneer were ordered to obey him; that if his orders were disobeyed he would report the offender, who was therefore liable to be suspended. There was no evidence to support the charge that the motoneer was inexperienced or deficient in skill. The evidence as to the accident tended to show as follows: The road was a double track, ending at Sixth street on Locust. The mode of operating was: The cars would come east on the south track. The machinery would be reversed without turning the cars, and they would be passed over a switch to the north track, on which they would return

west. This car came in a little late, and Hogan, the car starter, spoke angrily to the motoneer, asking him where he had been. The car stopped, and the conductor stepped off to reverse the trolley; passing on the south side, holding the cord. Hogan was standing on the north side, and, seeing that the rear trucks of the car had not cleared the switch, motioned or called to the motoneer to move up. The motoneer, as if in obedience to that direction, set the apparatus to receive the electric current, but the car did not move, owing to the fact (which neither the motoneer nor Hogan seemed to have noticed) that at that moment the conductor was in the act of reversing the trolley, and therefore the connection of the machinery with the wire overhead was broken. The motoneer, still seeming not to see what the conductor was doing, took off the controller, leaving the apparatus open to receive the current, and started to the other end of the car, where he was to stand when going west. His duty, under the circumstances, was to have closed the machine against the admission of the current until the conductor had readjusted the trolley; but this he neglected to do, and on the instant the trolley touched the wire the car shot forward and crushed the plaintiff against one of the Suburban cars which was standing on the track, and inflicted on him great injuries.

At the close of the plaintiff's evidence the court, at the request of the defendant, gave an instruction to the effect that the plaintiff was not entitled to recover. Thereupon he took a nonsuit, with leave, and, his motion to set the same aside having been overruled, brings this appeal.

C. A. Schnake and O. J. & R. Lee Mudd, for appellant. McKeighan & Watts and Robt. A. Holland, Jr., for respondent.

VALLIANT, J. (after stating the facts). 1. There is nothing in the case to justify a conclusion that the car starter was a vice principal of the defendant. He had certain duties to perform, and in that his word was the word of the master to his fellow servants; and if they refused to obey him in that particular they were, on being reported to the manager, liable to be suspended. But each of the other servants had his peculiar duty to perform, and in which his word was that of the master. The conductor, by word or signal to the motoneer, orders him to start or stop the car; and if he should refuse to obey, and the fact was reported to the manager, doubtless he would be disciplined. And there may be events in the operation of the car when the motoneer may be in duty bound to give orders to the conductor, which he is to obey. But it would never be contended that the conductor and motoneer were not fellow servants. And so is a car starter, who has no more authority than this man had, the fellow servant of the

conductor and motoneer. Although the motoneer, in seeming obedience to the order of the car starter, did a negligent act, yet the car starter did not order him to do what he did. The order was to move the car forward so as to clear the switch. That was a proper thing to do, and could have been done in a proper manner. The argument is made that the order should not have been given at the instant the conductor was in the act of readjusting the trolley. Assuming, as we should, that the car starter saw what the conductor was doing when he gave the order, still the order did not mean that the motoneer should move the car with the trolley off, which would have been impossible, but that he should do it in a proper way. The negligence was in the act of the motoneer attempting to execute the orders without looking to see what the conductor was doing, and in removing the controller and starting to the other end of the car without closing the apparatus against the current which he was bound to know would pass into the machinery as soon as the trolley should touch the wire. We do not perceive any negligence in the act of the car starter, but undoubtedly the act of the motoneer was negligence; and, if the defendant is liable to the plaintiff for the negligence of his fellow servant, the trial court erred in giving the instruction which forced the nonsuit. This brings us to the main question in the case.

2. The General Assembly passed an act which was approved February 9, 1897 (Acts 1897, p. 96), the first section of which (being now section 2873, Rev. St. 1899) is: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." The question is, does that statute apply to the defendant, which claims to be a corporation owning or operating a street railroad, and to its servants engaged in the work of operating such street railroad?

(a) Appellant's first point is that the defendant is not a street railroad corporation, but that it is a railroad corporation, in the fullest sense of the word, possessing all the corporate powers of such. The defendant's charter, in evidence, shows that to be the fact. To this point appellant's main argument is addressed. It is urged that not only has the defendant such corporate powers granted by its charter, but that it has asserted them in court, and has been permitted to exercise the right of eminent domain: that in a suit which reached this court it was heard to say that it was a railroad corporation of general powers and duties,

and, as such, that it could not be restricted, nor could it by contract restrict itself, to the carrying of passengers only. *St. L. & M. R. R. Co. v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300. And the argument is pressed that defendant cannot be heard to claim the rights, yet deny the liabilities, of a general railroad corporation. Referring to the case just cited (*St. L. & M. R. R. v. Kirkwood*), in which this defendant asserted its powers as a general railroad corporation, and resisted the effort of the city of Kirkwood to restrict it to the dimensions of a street railroad company, we find that this court did not sustain the company in its assertion; but, on the contrary, the court, per Gantt, J., said: "We think the facts in evidence constitute the plaintiff, so far as the city of Kirkwood is concerned, a street railway, with the right to transport passengers only." That essential differences exist between railroads and street railroads is recognized by the learned counsel for appellant in their briefs. They review the cases and texts cited in the briefs for respondent, and cite many in their own briefs, showing the recognized differences, and mark the points that distinguish the one kind from the other; but they answer all that those law writers say on that subject by saying that this is not a street railroad company, but it is a railroad company, in its broadest sense of the term, because its charter so declares, because it was incorporated under article 2 of chapter 42, Rev. St. 1889 (article 2, c. 12, Rev. St. 1899), and not under article 8 of the same chapter, under which street railroad companies at the date were usually incorporated; and they say, referring to a corporation organized under article 8: "When a corporation so organized, and actually confining itself to the technical street railway business, is sought to be held amenable to the fellow servant act, it will be time enough for this court to decide that question." The argument of the learned counsel for appellant proves this proposition, viz.: The defendant, having by its charter acquired and assumed all the rights and privileges appertaining to a general railroad corporation as such, is bound to assume, also, all the duties and burdens imposed by law on a general railroad corporation as such. If, therefore, our fellow servant statute imposes on every railroad corporation having the charter powers given in article 2, c. 12, Rev. St. 1899, liability for injury to any one of its servants through the negligence of his fellow servant, and if the statute, so construed, is constitutional, then this defendant is liable in this case. And so it would be, if that were the law, regardless of the particular business the corporation was engaged in at the time, or of the kind of work the injured servant and his fellow servant were doing. If the corporation, on its own account, was erecting a depot building, and a carpenter engaged in the work was injured through

the negligence of another carpenter in the same work, both being employes of the company, the company, on that theory, would be liable. In such case it would not avail the company, when sued, to say: "We were not at that time engaged in an operation peculiar to a general railroad corporation. We were building a house, conducting the work in manner like any other house builder would do, and our employes were not subject to any greater or different risk than other carpenters in like work." For to all that, on appellant's theory, the conclusive answer would be: "Your charter determines your character, and fixes your relation to the fellow servant statute." But that cannot be the law. Our fellow servant act itself draws a distinction which appellant's argument overlooks. It does not impose the liability on railroad corporations because they are railroad corporations, nor does it apply to them without reference to the business in which they are in fact engaged, nor to their employes in every capacity. The language of the statute is: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof engaged in the work of operating such railroad by reason," etc. Thus we see that by the very words of the statute the liability is not imposed on railroad corporations quia railroad corporations, but on concerns that own and operate railroads in this state; and the liability is not for damages sustained by any servant of the company, but only by a servant engaged in the work of operating such road. From this it is clear that the lawmakers had in mind the kind of work in which the men whom they aimed to protect were engaged. The peculiar character of the work of operating a railroad was, to the minds of the lawmakers, the reason for making a peculiar class of the men engaged in that work, and affording them relief not afforded to other hired servants, and imposing on their employers a liability not imposed on other masters. It is the peculiar character of the work that justifies the statute in the eyes of the Constitution, and it is upon that ground alone that its validity has been upheld. It is the condition, and not the theory, that justifies the law. This law applies to a master who, as a matter of fact, owns or operates a railroad, and to a servant who, as a matter of fact, is engaged in its work of operating that railroad. It applies to no other master, to no other servant.

The business in which the corporation was engaged may have been such as its charter did not authorize. Still, when the attempt is made to bring the act within the scope of this statute, the question is not what was the company authorized to do, but what in fact was it doing, and in what work was the injured servant engaged? The charter gives no answer to those questions. It is

conclusive evidence of what the company had a right to do, but it is no evidence of what in fact it was doing. Whether, under its charter, defendant could lawfully engage in the street railroad business, is a question between the state and the defendant. It is not in this case. If, therefore, a corporation and its servants, who, as a matter of fact, are engaged only in operating a street railroad, are not covered by the fellow servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk line steam railroad will not bring them within the statute, nor estop the corporation from showing the fact. The facts of this case afford an illustration of this principle. The evidence shows that from Sixth to Forty-First street, a distance perhaps of three miles, through a densely populated portion of the city, this defendant operated its cars over the same tracks over which the Suburban Company operated its cars, and the cars of both companies were operated in the same manner. The only means by which the cars of one company could be distinguished from those of the other was that the defendant's cars were red, while those of the Suburban Company were yellow. It was against a yellow car that this car of defendant's was crushed, inflicting the injuries on the plaintiff. It could just as well have been the yellow car that was crushed against the other, and the conductor of the yellow car injured by the negligence of that motoneer. And suppose that had been the case; could we say that the Suburban Company was not liable, because its charter called for a street railway, while the defendant, in like circumstances, was liable, because its charter called for a regular steam railroad? Where there are two concerns engaged in precisely the same business, and both conducting it in precisely the same manner, a statute which would undertake to impose a liability on the one, and not on the other, could not be sustained in the face of either our state or our federal Constitution. The defendant's charter is not decisive of this case.

(b) The question remaining to be considered is, does the fellow servant statute apply to concerns operating street railroads, and to their servants engaged in that work? In pursuing this inquiry, we must keep in mind the fact that we are dealing with an act of class legislation that marks off certain employers of men, and imposes on them a liability for injuries to their servants under certain circumstances which is not imposed on other masters; and we must remember that there is a reason that justifies that class discrimination, and that a case, to fall within the operation of the statute, must come within its reason.

It is conceded that the term "railroad," when used in a statute, does not always include in its meaning a street railroad. The learned counsel for appellant, in their brief,

say: "For some purposes the law recognizes several species of railroads and railroad companies, and recognizes a distinction between a railroad and a street railroad. Statutes using the general term 'railroad' may or may not apply to a street railroad." That is undoubtedly the law, and therefore, when the word "railroad" is used in a statute, if we want to know if it is intended to embrace in its meaning a street railroad, we must look at the connection in which it is used.

In support of the contention that street railroads are included in the scope of the fellow servant statute, we are referred to *St. Louis Bolt & Iron Co. v. Donahoe*, 3 Mo. App. 559, and *Koken Ironworks v. Ry. Co.*, 141 Mo. 228, 44 S. W. 269. Those two cases decide that the statute giving contractors and materialmen a mechanic's lien on the property of railroad companies for their labor and materials entering into the construction of the roads applies to street railroad companies. Although the mechanic's lien law is to some extent class legislation, yet the lines circumscribing the class or classes embraced within it are by no means as closely drawn as in the statute now in question. There was no reason seen in those cases for a legislative policy that would give a mechanic or materialman who should contribute to the building of a steam railroad a lien for the value of his work or materials, and not give a like remedy to men who should build or furnish materials to build a street railroad. In the first of those cases the court, per Bakewell, said: "It is also a fact that acts of the Legislature may be passed, and that sections of certain laws are to be found in which railroads are spoken of, and when it is quite clear, nevertheless, that street railroads are not meant." But after recognizing that such distinctions existed, the court, with reference to the mechanic's lien statute then in hand, said: "We can see no reason for giving the remedy provided in this act in the case of one railroad which would not equally apply to every other railroad." That is to say that the reason upon which that statute was founded was in every way as applicable to one kind of railroad as to another. In the second of those two cases (*Koken Ironworks v. Ry. Co.*), which was also a mechanic's lien case, this court referred to the first case with approval, and per Barclay, J., said: "When we bring into view the various statutes affording liens for materials or labor furnished for the improvement of land, and consider the broad objects sought by such legislation, it seems clear that street railroads were not intended to be exempt from liability to respond to such lien claims in a proper case." The first of those cases was decided a good many years ago, when the only street railroads in the city were horse railroads, and it was a horse railroad that the court was discussing. The court saw no difference between a horse

railroad and a steam railroad, so far as the mechanic's lien law was concerned, and we see none; but, if that case is authority for construing the fellow servant statute to include street railroads, it would be equivalent to saying that the reason upon which the fellow servant statute is founded applies as well to horse railroads as to steam railroads.

Appellant's cause in this court has not lacked for ability and industry of counsel. They have favored us with three separate briefs, showing zealous research and learning, yet they have given us on this point reference to only those two cases. They refer, also, to section 1163, Rev. St. 1899: "The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating or which may hereafter own or operate any railroad in this state." But that section of the statute does not reach this question. It is conceded that the defendant is a railroad corporation, and that it is operating a railroad, but the contention is that the kind of railroad it is operating is not the kind referred to in the fellow servant statute. The section just quoted throws no light on that subject. We have a statute (section 1953, Rev. St. 1899) making it a felony to place an obstruction upon or to tear up a railroad track with intent to obstruct the passage of a car or cars thereon, and under that statute men have been convicted, with the affirmance of this court, for attempting to blow up with dynamite a passenger car on a street railroad. *State v. Brennan*, 164 Mo. 487, 65 S. W. 325; *State v. Northway*, 164 Mo. 513, 65 S. W. 331. It is also made a misdemeanor (section 1956) to throw a stone or other missile into or at a train or car or locomotive, and our St. Louis Court of Appeals has held that the offense was committed by throwing a stone at a car on a street railroad. *State v. Lang*, 14 Mo. App. 247. Although those are penal statutes, and therefore to be strictly construed, yet, with the strictest construction, it is impossible to see any sound reason why they should not apply to persons maliciously threatening the lives and safety of passengers in a street car, as well as in a car on a steam railroad. The danger against which those statutes were aimed were not that which might result from mismanagement within, but from felonious assault without. The danger to the life of the passenger from such source in the street car is exactly of the same nature as that to the life of the passenger on the car of the steam railroad. The difference, if any, is only in degree, and such difference is not obvious. But neither the mechanic's lien law nor the penal statutes just quoted rest for their constitutionality on such narrow grounds as does the fellow servant act—grounds that were earnestly contested until the question was finally decided. The foregoing are the only Missouri decisions to which our attention has been drawn that

can be said to bear on the question at all, and they are clearly distinguishable from the case at bar.

Before persons or corporations can be marked out for class legislation, there must be in them, or in their business or property, some peculiar characteristic that, in the judgment of the lawmakers, justifies the distinction. *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. An act of class legislation, to stand in the face of the Constitution, must include all who belong to the class—not all who bear similarity in some characteristic to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class, for, if the Legislature must resort to the peculiarity of the business in which corporations operating steam railroads are engaged to find justification for the act in the eyes of the Constitution, it must limit the act to those in whose business is the same peculiarity found. When the validity of such an act is in question the courts will look into the nature of the class to see if it possesses peculiar features which might reasonably call for legislative action, but beyond that they will not interfere with the policy of the Legislature. In the statute we are now considering the Legislature has marked out railroad corporations owning or operating railroads, and their employees engaged in the operation of their railroads, and has made a law applicable to them as a class. We must look into the nature of the business thus distinguished, and ascertain what there is in it that justifies the act, and what object the Legislature had in view in making the law. Then if we find that the street railroad business is of the same nature, and the men engaged in that business are within the class intended by the Legislature, we must decide this case in appellant's favor.

In 1874 Kansas enacted a fellow servant law applicable to railroad corporations alone, and very similar to our act of 1897. The constitutionality of the act was contested upon the ground that it was class legislation, but the Supreme Court of the United States, in *Railway v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in deciding the question, said: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination." There was no question in that case as to the application of the statute to any other than a corporation operating a steam railroad. What is there said of the peculiar hazard of the business to justify the statute refers to steam railroads.

In 1887 Minnesota enacted a fellow servant statute, of which ours is almost a literal copy. The Supreme Court of that state in June, 1895, had for decision the very question now before us, in *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. As the decision of that court construing its statute was rendered nearly two years before our statute, in almost the same words, was enacted, we may presume that our legislature was aware of the interpretation that court put upon it. That court, in two able opinions in the case, held the statute did not include street railroads. The court, per Buck, J., said: "It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street cars are generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employees arises from operating freight trains. * * * Especially is the danger in coupling freight cars entirely absent." And in the same opinion it is said: "If we were to hold that the term 'railroad,' in the law of 1887 (Laws 1887, p. 69, c. 13), applied to street railways, because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in other legislation of this state." Then the court goes on to mention some of the requirements of other statutes in that state referring to railroads, which it is manifest were not designed to apply to street railroads. And the same is true of our statutes in general relating to railroads. In a separate concurring opinion by Mitchell, J., in that case, it is said: "The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the Legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary, popular sense, and in the sense in which they themselves had generally used it in other statutes." We have felt justified in quoting at length from the opinions in that case because they were dealing with precisely the same question that is now before us, and construing a statute of their own which we afterwards copied. That is the only case to which we have been referred where the question as to whether street railroads were included in a fellow servant act like ours

was decided; but there are many cases, referred to in the briefs of counsel, arising under other statutes, in which the distinction between railroads and street railroads is drawn and the general doctrine runs through them all that the term "railroad" does not include "street railroad," unless so expressed, or necessarily understood from the context; that, as a rule, the term means steam railroad only, and it is the exception when it means street railroad.

In Arkansas they have a statute authorizing a city to grant the right of way through its streets "to any railroad company," but the statute requires the railroad company to pay the property owners the damages they may sustain thereby. In *Williams v. City Electric Street Ry. Co.* (C. C.) 41 Fed. 556, it was decided that the provision of the statute requiring damages to the property to be paid did not apply to the owners of a street railroad. The court, per Caldwell, J., said: "The difference between street railroads and railroads for general traffic is well understood."

In Iowa a statute made a judgment against "any railway corporation" for injury to persons or property a lien superior to that of a mortgage. But it was held (*Manhattan Trust Co. v. Sloux City Cable Ry.* [C. C.] 68 Fed. 82) that it did not apply to a street railroad company. Mr. Justice Shiras delivered the opinion of the court, in which he said: "It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails laid down along the streets of a town or city, for the transportation of passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked difference and recognized distinction between street railway lines and those engaged in the general passenger and freight traffic of the country."

In Oregon a statute gave the right to condemn land to "all railway corporations," but it was held that that did not include street railway companies. *Thomson-Houston E. Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86.

Iowa adopted a fellow servant law applicable only to railroad companies in 1862, and the Iowa court has recognized the narrow constitutional ground on which the statute stands, and has been careful to keep it on that ground. In *Deppe v. Chicago, etc., Ry.*, 36 Iowa, 52, the court said: "The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. Extended further, it is unconstitutional." The peculiar hazardous business of operating railroad trains, distinguished from other kinds of business, as the ground upon which the statute is founded, is emphasized in other cases in the same court. *Schroeder v. Ry. Co.*, 41 Iowa, 344; *Stroble v. Ry. Co.*, 70 Iowa, 555, 31 N. W. 63, 59 Am. Rep. 456; *Butler v. Ry.*

Co., 87 Iowa, 206, 54 N. W. 208; *Larson v. R. Co.*, 91 Iowa, 81, 58 N. W. 1076; *Akeson v. R. Co.*, 106 Iowa, 54, 75 N. W. 676. Although the question of the applicability of the fellow servant statute to street railroads does not seem to have come before the Iowa court, yet what is said in those cases as to the purpose of the statute leaves us to infer that it would place men engaged in operating street cars outside of the pale of that statute.

It is not the mere fact that men engaged in operating railroads are subjected to hazard that has called forth the legislative action, for men to whom no such protection is afforded are engaged in other kinds of business that are hazardous to as great or greater degree—as, for example, some kinds of mining, tunneling, etc.; but it is the peculiar nature of the hazard incident to the railroad business that makes the foundation of this statute. Reference to this peculiarity runs through all the cases sustaining the validity of the fellow servant statutes. In *B. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, Mr. Justice Brewer said: "The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police powers, may require many things to be done by them in order to secure life and property. Fencing of railroad tracks, the use of safety couplers, and a multitude of other things, easily suggest themselves." In *Lavallee v. Ry. Co.*, 40 Minn. 249, 41 N. W. 974, the court said: "The frequency and magnitude of dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them, with any amount of care, when they are seen; the fact that a great number of men are employed, laboring in the same work, so that no one of them can know all the others, their competency, skill, and care, so that they may be said to voluntarily assume the risks arising from want of skill or care by any one of the number—are sufficient reasons for applying the rule of liability of the employer to employes so employed, different from that ordinarily applied between master and servant; but no just reason can be suggested why such difference should be founded, not on the character of the employment, nor the dangers to which those employed are exposed, but on the character only of the employer." In *Johnson v. R. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, the court was considering what employes were within the scope of the fellow servant statute, and said: "Therefore, after mature consideration, our conclusion is that if any limitation is to be placed by the courts upon the application of this statute (and, on constitutional grounds, there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

Men engaged in the operation of street railroads are exposed to hazards, but not to the peculiar hazards which distinguish men engaged in operating steam railroads, and which has made them a class for special legislation. In 1897, when this law was enacted, there were still some street railroads in this state operated by horse power. If the law applies to street railroads at all, it applies to street railroads of all kinds; and, if it applies to them now, it applied to them when it was first enacted, and, if so, then there was no difference in its application to the driver of a horse car and a brakeman on a freight train. There are employments attended with even greater hazard than the operating of a railroad, but men engaged in those employments are not included in this class, because the hazard is not of the same character. And there are men in the employ of railroad corporations who are not within the class because they are not engaged in operating the railroad. Thus the lines around the class are drawn, and men who do not fill the description are not within those lines.

Running through all our statutes on the subject there is an obvious distinction shown between railroads and street railroads. No one can read article 2 of chapter 12, Rev. St. 1899, and gather the idea that it has any reference to street railroads. Then follows article 3, which relates to street railroads only. The very fact of the frequent use of the term "railroad" in our statutes in such connection as to indicate that the Legislature understood that it would be taken, as a matter of course, to mean a steam railroad, shows that the usual use of the word is with that meaning, and when some other meaning is intended some additional word is used. Thus section 1180, Rev. St. 1899: "It shall be the duty of every street railway company or corporation operating a street railway across the tracks of a railroad company to bring its cars to a full stop at least ten and not more than twenty feet before reaching the tracks of the railroad company, and it shall be the duty of the conductor or some other employé of the street railway company, to go forward to the tracks of such railroad company for the purpose of ascertaining whether a train is approaching such crossing." In that connection the word "railroad" is brought into sharp contact with the words "street railway," and the Legislature took it for granted that any one reading the section would understand that "railroad" meant steam railroad, and therefore did not add any word of qualification or explanation. In the Session Acts of 1897, p. 96, is this fellow servant law, in which the term "every railroad corporation" is used, and immediately following on the same page is another act, in these words: "The railroads of this state are required to carry peddling cars of watermelons or cantaloupes, strawberries, blackberries and other perish-

able fruits," etc. The word "railroads," in the latter act, is used as unqualifiedly as the word "railroad" in the former, yet the lawmakers took it for granted that every one would know what the word "railroad" meant. Then on the next page of the same book there is an act having in view the construction of a street railway, and the term "street railway" is used. The title to article 2, c. 12, is "Railroad Companies." That to article 3 is "Street Railroads." Then comes article 4: "Railroad Classification. Charges—Commissioners." The first section of article 4 is: "All railroads in the state of Missouri are hereby divided into three classes, to be known as Class A, Class B and Class C." Then follow definitions of the classes, and regulations as to charges for passengers and freight, duties of railroad commissioners, etc. Although the words of that statute are "all railroad corporations in the state of Missouri," yet manifestly it does not include street railroads. Article 7 of the same chapter, which points out the procedure to be followed in condemning private property for public use, refers in general terms to "any road, railroad, telephone, telegraph or other corporation created under the laws of this state." There not only is the term "railroad corporation" used in unlimited form, but it is followed by the still more general and comprehensive term, "other corporation created under the laws of this state," yet no street railroad chartered under article 3 of that chapter has ever been accorded the right of eminent domain. The only right of way such corporation can obtain is by grant from the city over its streets, or by grant from private owners. Section 1187, Rev. St. 1899. There are many other sections of our statutes referred to in the briefs of the learned counsel in which the term "railroad" or "railroad corporation" is used without qualifying words, yet manifestly referring only to steam railroads, but we will not now discuss them, because this opinion is already too long. In almost every instance where street railroads are intended in our statutes, street railroads are named. In every instance where steam railroads are intended, the word "railroads" only is used. The fellow servant law of 1897 does not designate street railroads by name, nor by any words necessarily indicating an intention to include them; and, as such companies are neither within the letter nor reason of the law, it does not apply to them. This is the view the learned trial judge took of the law, and he was correct.

The judgment is affirmed.

ROBINSON, C. J., and MARSHALL and FOX, JJ., concur. BRACE, GANTT, and BURGESS, JJ., dissent.

GANTT, J. (dissenting). This is an action for damages growing out of personal injuries alleged to have been suffered by the plaintiff

through the negligence of defendant, a railroad company organized under the laws of this state, and operating a railroad from the corner of Sixth and Locust streets, in the city of St. Louis, to Meramec Highlands, a point on the Meramec river, in St. Louis county, in this state. The petition alleges that plaintiff was a conductor and employé of defendant on said railroad on the 27th day of January, 1898, and on said day one Jesse B. Horn was also an employé of said railroad company as motoneer of car No. 348, of which plaintiff was conductor; that said car was propelled by electricity; that in operating said car it was the custom, when a car reached the eastern terminus of said road, at Sixth and Locust streets, in St. Louis, to change the operating machinery so as to return said car westwardly over the tracks on which it had come; that the motoneer would bring his car to a standstill, and turn off the electric current from the machinery; the conductor then would release the rope which held the trolley pole to the wire, alight from his car, pull down the trolley pole from the overhead wire, and, by means of a rope which was attached to one end of the trolley pole, move the trolley pole around to the opposite end of the car, and again, by releasing the rope, raise the trolley pole to the overhead wire, and while the conductor was so engaged the motoneer was required to keep the power or electric current turned off, so that the car would remain stationary, but that at the time and on the day mentioned in the petition, while plaintiff, as conductor, was carrying the trolley pole around to the opposite or east end of said car, Horn, the motoneer, negligently failed to withhold the electric current from the machinery, but did, without the knowledge of plaintiff, and while plaintiff was reversing the trolley pole, so arrange the machinery as to admit of the entrance of the electric current from the overhead wire into the machinery of the car, and while the said car was thus arranged the plaintiff, unaware of this negligent act of Horn, raised the trolley pole to the overhead wire, thus connecting the car with the overhead wire, and immediately the electric current, by reason of the negligent act of Horn as aforesaid, entered the machinery of the car, and caused it to suddenly bound forward with great force and violence against and upon plaintiff, whereby plaintiff was knocked and forced upon and against the platform of another of defendant's cars, then and there standing upon the track in front of said car; that his right hand was crushed and mashed so that he has lost the use of it permanently; that his right leg was crushed and disabled forever—from all of which injuries he is permanently disabled, to his damage in the sum of \$23,000. The answer contains, first, a general denial; second, a plea of contributory negligence; and, third, the following special defense: "Said defendant, further answering said petition, states that it was on the occa-

sion in question, is now, and has been for a long time, a street railroad corporation only, organized and existing under the laws of the state of Missouri for the purpose only of operating, and it was, has been, and is only operating, a street railroad by electricity for the carriage of passengers, and said railroad company was neither organized nor incorporated for operating a railroad by steam, nor has it ever operated a railroad by steam, nor was it on the occasion in question, nor did it then nor has it at any time since operated any other than a street railroad for the carriage of passengers on its said line, beginning at or near Sixth and Locust streets, in said city of St. Louis, and running in a westerly direction over various streets in said city to the western boundary of said city; that on the occasion in question the agents and employés of defendant named in plaintiff's petition, and charged with negligence in the performance of their duties, to wit, James B. Horn, motorman, and ——— Hogan, were the fellow servants of the plaintiff in and about the operation of the car of which the said plaintiff was conductor, and which was one of the cars that the said defendant used in the operation of its said street railroad on its line of street railroad aforesaid, and said defendant further says that the said plaintiff, by virtue of his employment as fellow servant of said Horn and Hogan, assumed the risk on his part of any negligence on the part of said agents or employés of defendant, or either of them, as fellow servants of him, the said plaintiff, and that if, on the occasion in question, the plaintiff was injured in consequence of any negligence of either said Horn or said Hogan, the said plaintiff, by virtue of his said employment, and by virtue of the said Horn and Hogan being his fellow servants in the operation of said car at the place where he was injured, and on the occasion in question, assumed the risk of said negligence, by virtue of the nature and character of his, the said plaintiff's, employment by said defendant, and said defendant is not liable to said plaintiff for any injury caused on the occasion in question by any negligence, if any, which the said Horn or the said Hogan was guilty of, causing the injuries complained of by said plaintiff in his petition." Plaintiff replied, denying all the new matter set up in the answer. There was substantial evidence tending to prove the allegations of the petition as to the manner in which the injury to plaintiff occurred. Plaintiff also offered and read in evidence the articles of incorporation of defendant, showing it was organized under the general railroad law of this state, known as article 2, c. 42, Rev. St. Mo. 1889, and evidence showing its proceedings as such to condemn lands for a right of way in St. Louis county; also evidence of the extent and nature of his injuries. At the close of plaintiff's case the defendant prayed and the court gave an instruction that under the pleadings and evidence the verdict must be

for defendant, and thereupon plaintiff took a nonsuit, with leave to move to set the same aside, and afterwards, and within four days, moved the court to set aside said nonsuit, and, among other things, assigned as error the giving of said instruction, which motion the court overruled, and thereupon plaintiff perfected his appeal in due form to this court.

1. This record requires a construction by this court of the scope and effect to be given to an act of the Legislature of this state approved February 9, 1897 (Acts 1897, p. 96), and commonly known as the "Fellow Servant Act." It is entitled "An act to define the liabilities of railroad corporations in relation to damages sustained by their employees, and to define who are fellow-servants and who are not fellow-servants, and to prohibit contracts limiting liability under this act." The first section is as follows: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: provided, that it may be shown in defence that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

By sustaining the demurrer to plaintiff's evidence, the trial court obviously held that defendant was operating a street railroad, and that the above-quoted statute had no application to street railroads; in short, that the words "every railroad corporation owning or operating a railroad in this state" do not mean "every railroad," but those only which own or operate steam railroads, and the word "railroad" must be restricted to those only who operate their cars in trains, and by steam as the motive power. That the words of the act, "every railroad corporation," are broad enough in themselves to include street and electric railroads as well as steam railroads, will not be denied; that they are plain, unambiguous, and comprehensive enough to include all railroads, cannot be doubted. *Prima facie*, the act applies to street as well as any and all other railroads. *Bloxham v. St. Ry. Co.* (Fla.) 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44. The rule of construction is that where a law is clearly expressed it is the duty of the court to adhere to the literal expression, unless such construction would lead to a palpable absurdity. Thus in *Smith v. State*, 66 Md. 215, 7 Atl. 49, a married woman was sued jointly with her husband, and she pleaded specially her disability of coverture, to which plaintiff demurred. This brought the act of 1872 of that state before the court for construction, which provided that "any married woman may be sued jointly with her husband on any bond," etc. Laws 1872, p. 442, c. 270. The contention was that the act did not apply to official bonds, but said the court: "Whatever lat-

tude may at one time have been assumed by courts in the construction of statutes, the more recent cases have established the rule that, when the language of a legislative enactment is clear and unambiguous, a meaning different from that which the words plainly imply cannot be judicially sanctioned." Citing *Green v. Wood*, 7 Q. B. 185; *Woodbury v. Berry*, 18 Ohio St. 462; *U. S. v. Ragsdale*, 1 Hemp. 497, Fed. Cas. No. 16,113; *Bosley v. Mattingly*, 14 B. Mon. 89. "When the Legislature says she may be sued on any bond executed jointly with her husband, can the judicial department of the government undertake to say that the law-makers meant she shall not be sued on some bonds executed jointly with her husband? Such a determination could only be reached by a species of judicial legislation not sanctioned by any authority, and extremely dangerous if once established as a precedent." In *Woodbury v. Berry*, 18 Ohio St. 458, the Supreme Court came to the conclusion that certain words had by accident or oversight been omitted from an act, but notwithstanding this they say: "Ita lex scripta est. The language, as it stands, is clear, explicit, and unequivocal. It is our legitimate function to interpret legislation, but not to supply its omissions." Citing *Sedgwick on Stat. & Const. Law*, 231. In *Bradbury v. Wagenhorst*, 54 Pa. 180, the statute required a copy of the instrument sued on to be filed with the clerk before judgment should be entered. It was contended that there was no necessity for a copy of claims, since the mechanic's lien law required a bill of particulars to be filed in order to make a lien, but the court answered, "Whatever may have been the legislative thought, no ambiguity exists in what they have said; and, when the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." So in *Bennett v. Worthington*, 24 Ark. 487, it was urged that the statute of limitations ought not to run during the time the courts were closed on account of the war between the states; but the Supreme Court held that, as no such exception was included in the statute, the court could not enforce the equity in behalf of plaintiff, saying: "The correct rule to be extracted from the authorities is that, where the will of the Legislature is clearly expressed, the courts adhere to the literal expression of the enactment, without regard to consequences, and every construction derived from a consideration of its reason and spirit should be discarded."

At the time this law was enacted there was a general provision in our statutes defining the term "railroad corporations" as follows (section 1163, Rev. St. 1899): "The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state."

But it is plausibly and ably contended that in the various laws of this state governing railroad corporations the word "railroad" has a well-defined and clearly understood meaning, and is never confounded with "street railroad," and various sections of the general railroad law are cited to show that they have no reference to street railroads. That there are many provisions of the various acts in regard to railroads which do not apply to street railroads may be, and is, conceded; but the statement of counsel is entirely too broad, when they assume that those laws do not apply at all to street railroads, as an examination of the decisions of this court will clearly demonstrate. In *Koken Ironworks v. The Robertson Avenue Ry. Co.*, 141 Mo. 228, 44 S. W. 269, it was contended by the defendant, a street railway company, that sections 6743, 6744, 6747, 6754, 6756, Rev. St. 1889, giving a lien for work and material upon the roadbed, depots, rolling stock, station houses, etc., did not in terms, and were never intended by the Legislature to, embrace street railways; but this court held adversely to its contention, saying: "Undoubtedly much of the language of that law is applicable to railroads operated by steam. Those were the roads to which the act was chiefly designed to apply. But the general terms of the law are also susceptible of application to street railroads, and we find nothing in any part of the enactment to indicate that such application is not intended. * * * Laws of this nature should receive a fair and rational interpretation, and full effect be given to the remedial purpose that constitutes their spirit." The St. Louis Court of Appeals had previously given those sections the same interpretation in *St. Louis Bolt & Iron Co. v. Donahoe et al.*, 3 Mo. App. 559, in which Judge Bakewell, speaking for the court, says: "It is a fact that acts of the Legislature may be passed and that sections of certain laws are to be found in which railroads are spoken of, and where it is quite clear, nevertheless, that street railroads are not meant. But we do not see how these facts affect the question here. A street railroad or horse railroad is none the less a railroad because the Baltimore & Ohio Railroad is also a railroad; and, where the Legislature cites the term without limitation, it will be taken to use it in its broadest sense, unless it appears from the face of the enactment that it meant to restrict the word to one class of railroads or the other." But again, section 1953, Rev. St. 1899, makes it a crime to obstruct any railroad, and this court, in the cases of *State v. Brennan*, 164 Mo. 487, 65 S. W. 325, and *State v. Northway*, 164 Mo. 513, 65 S. W. 331, held that the term "railroad" was broad enough to include cable and electric street railroads. The same conclusion was reached by the Supreme Court of California upon an altogether similar criminal statute. *People v. Stites*, 75 Cal. 570,

17 Pac. 693. And the identical point was again affirmed in *Price v. State*, 74 Ga. 378, and *Com. v. McCaully et al.*, 2 Pa. Dist. Rep. 63; *Millvale Borough v. Ry. Co.*, 131 Pa. 1, 18 Atl. 993, 7 L. R. A. 369. In *Gyger v. Railway Co.*, 136 Pa. 104, 20 Atl. 399, the Supreme Court of Pennsylvania laid down a very satisfactory rule, to wit, that "railway" and "railroad" are synonymous, and in all ordinary circumstances are to be treated as without distinction, and when either of them is used in a statute, and the context requires that a particular kind of a road is intended, that kind will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road embraced within the general sense of the word used. In *Hestonville v. R. Co.*, 89 Pa. 210, it was held that the word "railroad" applied to street railways. Indeed, as pointed out by Judge Bakewell in *St. Louis Bolt & Iron Co. v. Donahoe*, the first street railroads constructed in the city of St. Louis were constructed under the then existing general railroad corporation laws of this state, and it was not until 1866 that the general act concerning corporations was passed, authorizing the formation of manufacturing and business companies for the purpose of constructing horse railroads. In Illinois an act passed in 1855 (Laws 1855, p. 304), whilst horse railroads were in existence in Illinois, giving certain powers to "railroads," was held to include horse as well as steam railroads. *Chicago v. Evans*, 24 Ill. 52. These cases sufficiently indicate that it is not accurate to state that the word "railroad" always refers to steam railroads, and that when street railways are to be included they are specifically named as such. On the contrary, the great weight of authority is that, if the context contains no such indication, a statute containing the word "railroad" will be held to include every species of railroad which is embraced within the general sense of that word.

Looking now more closely to the act, we find it is a short, remedial act, of four sections only, and not a word in it to indicate that it was the intention of the Legislature to restrict it to steam railroads operating long trains. Being remedial, the universal rule is that it should receive a liberal construction, to cure the evil which it was intended to remedy. "The old law, the mischief, and the remedy must be kept in mind." Prior to the enactment of this statute the course of decision was that a master, in this state, was not liable to his servant for injuries occasioned by the negligence of his fellow servant. For many years counsel endeavored to get this court to change this rule, but the answer was that this was a legislative function; that it was the duty of the court to declare, not to make, the law. It

is within the knowledge of all of us that this ruling occasioned the passage of this law. But counsel urge that the reason of the law would exclude its application to street railways, because they say in the operation of the car two persons only were employed—a conductor and a motorman—and the reason for changing the law was that steam railroads had a large number of employes operating freight and passenger cars in trains, and there resulted a consequent want of opportunity on the part of the employes to observe and watch their co-employes in the same service, and thus discover their negligence, and an opportunity to quit the service if these negligent co-employes were not discharged. Doubtless this was one of the reasons, but it cannot be that it was the only one, because, if it was, if an employe, as a fireman, closely associated in the same cab with an engineer, was injured by the negligence of the latter, it could be urged with the same plausibility that, being so closely associated, they did not fall within the reason which prompted the passage of the act, to wit, that they had no opportunity to watch the conduct of each other. There is no such exception written in the law. Under its terms an employe injured by the negligence of another servant of the same company would not be turned out of court because his employment brought him so closely in contact with him that he could observe his conduct. If a fireman or engineer, then, can recover for injuries occasioned by the other, whose duties call them together on the same cab, how can it be maintained that a motorman or conductor, operating at different ends of the same car, is not equally entitled to be protected from the negligence of the other? Moreover, since the application of electricity, and the operation of cars by cables, it is not true that only one car can be operated, but frequently it occurs that two and three cars are connected in the same train. Neither can it be said that the high rate of speed of steam cars makes it necessary to apply a different rule, as the modern electric car easily makes from 18 to 25 miles an hour. It is true that the Supreme Court of Minnesota, a tribunal whose opinions and judgments entitled it to our highest respect, attached great importance to these considerations in *Funk v. St. Paul City R. Co.*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. It is proper to remark, moreover, that the Minnesota court based its opinion upon an additional reason. On page 439 of the report, page 1101, 63 N. W., 29 L. R. A. 208, 52 Am. St. Rep. 608, it is said: "It is claimed by appellant's counsel, and not denied by the counsel for respondent, and such we believe to be the fact, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this state. If so, what was the legislative intent in using the word 'railroad' in the law of 1887, to be de-

duced from the whole and every part of the statute, taken together, upon the subject of railroads? 'When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view.' Potter's *Dwarr. St.* 194, note 13. What was the mischief felt which resulted in the passage of this law? Was it a danger known or unknown? We must assume that it was dealing with and acting upon existing facts within its knowledge. Of course, if the language used was entirely free from ambiguity, and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within and be subject to the evident meaning of the terms used." Much weight is given by both the learned judges who filed opinions in that case to the fact that in the previous legislation in that state the word "railroad" had not been applied to street railways. It must be apparent that the first reason given, to wit, that at the time the Minnesota fellow servant act was passed, to wit, in 1887, there was no such thing as a cable or electric car in Minnesota, could have no force in interpreting our act of 1897, which was enacted years after our cities and towns in Missouri were gridironed with both systems of street railroads, and therefore our Legislature could not be charged with legislating in ignorance of the character of such roads. Neither has our Legislature or courts made the distinction between "railroads" and "street railroads" that the learned justices discovered in Minnesota, as we have already shown; and, while the history of railroad legislation in that state may have justified the conclusion reached by that court, the facts upon which that adjudication was bottomed do not and did not exist in Missouri when the act of 1897 under consideration was passed.

The statute before us has been construed by the St. Louis Court of Appeals in the case of *Stocks v. St. Louis Transit Co.* (at the October term, 1902, of said court) 74 S. W. —, and held to apply to street railways; citing with approval *Rafferty v. Central Traction Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *City of Clinton v. Ry. Co.*, 37 Iowa, 61. *Bland, J.*, in *Stocks v. Transit Co.*, supra, referring to the contention that by using the word "railroad" this act must be construed with reference to our general railroad act, pertinently remarks: "The act of 1897 is not a railroad act, and is not in *pari materia* with any of the general laws of the state concerning railroads, and for this reason cannot be interpreted by them. It is a fellow servant act, intended for the benefit of the employes of railroad corporations, and designed to place them on the same footing as to the right to recover damages caused by the negligence of their co-employes. The act confers on a class of employes of railroad corporations a

right of action which they did not have before, and we can see no sound reason for confining the benefits of the act to but one class of railroad employes."

But it is earnestly insisted that in construing this act we must bear in mind that this is class legislation, and, to sustain the constitutionality of the act, we must be convinced, in applying it to street railways, that they fall within the reason of the statute; otherwise the act is unconstitutional. This is a grave contention, because, if sound, it must result in our holding not only that the language of this act does not include street railways, but that it would not be in the power of the Legislature, even by using the words "street railways," to make them amenable to its provisions. To sustain their position the learned counsel have recourse to the opinion of the Supreme Court of the United States, sustaining the constitutionality of the fellow servant act of Kansas, in *Railway v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in which it is said in justification of that law against the charge of unnatural and unreasonable classification that "the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination." The fellow servant act, applicable to railroads only, has been upheld by the same court, for a similar reason, in *R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 686, and in the various states adopting a like statute. *Lavallee v. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *Johnson v. R. R.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *Cambron v. Ry. Co.*, 165 Mo. 543, 65 S. W. 745; *Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109. Because the courts, in sustaining these acts, have pointed to the peculiar hazards to which railroad employes are exposed, to defend the statutes against the charge of unjust discrimination, it is assumed that a fellow servant act applicable to street railways would be unconstitutional, because the employes of such corporations are not subjected to all the hazards that beset employes of steam railroads. It is admitted that employes in the operation of street railroads—especially those engaged in operating cars on which electricity is the motive power—are exposed to great hazards; but it is said they are not the peculiar hazards which attend the operation of steam railroads, and therefore they do not, and, if the argument is sound, cannot, come within the same class as employes of steam railroads. We cannot sub-

scribe to this contention. In our opinion, it was entirely competent for the Legislature to have enacted a general fellow servant law, which would have applied to all masters and servants; and it was also within its power to enact this law governing the liability of railroads to their employes, and to include therein, as we hold they did do, the employes of all railroads—street and electric railroads as well as steam railroads.

It is not to be questioned that, in the exercise of its general remedial and police powers, the Legislature may enact laws for the health and safety of our citizens, and, when a given subject is within its power, the extent to which it is to be exercised is within the discretion of the Legislature. It is within the common knowledge of us all that at the time this act was passed nearly all the street railways in this state were being operated by electricity, and those that were not were rapidly being converted into electric roads; that this motive power was exceedingly hazardous and dangerous. It is not insisted that it would not be wise and humane legislation to throw around the employes operating these cars the same protection that is given an operative on a steam railroad, but only that the general words do not include them, and, if they did, they are not in the same class. To this we answer that, when it is conceded that their avocation subjects them to perils from the negligence of their fellow servants, it is not for this or any other court to say to the Legislature, "You shall not enlarge the class so as to include the employes of all railroads, but shall restrict it to steam railroads alone." In a word, we hold that an act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for doubt. *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *State v. Layton*, 160 Mo. 499, 61 S. W. 171, 83 Am. St. Rep. 487. As said by the Supreme Court of Ohio in *State v. Nelson*, 39 N. E. 24, 26 L. R. A. 317: "The appliances and construction of cars, and in fact all kinds of machinery, are continually changing; and it is within the exclusive authority of the General Assembly, in the exercise of its police power, to determine by general laws what, if any, regulations are required for the protection of the health, safety, and comfort of the operatives." Because the Supreme Court of the United States and this court and all other courts now hold the fellow servant acts applicable to railroads is not unconstitutional classification. Because the business is hazardous, it by no means follows that this class should not include all railroads. On the contrary, the classification would seem less objectionable when it includes in it all who are subjected by their employment to similar hazards, albeit not exactly the same. We hold that a construction of

the act before us which makes it applicable to the employes of street railways would not render it unconstitutional.

In view of the remedial character of this act, the absence of anything in any portion of the act indicating a purpose to restrict it to steam railroads, and the decisions in this state which have applied certain general provisions of our railroad laws alike to street railways and steam railroads, and because the plain, unambiguous words of the act are broad enough to include street railways, we hold that the act means what it says, and that street railroads are liable in the same manner as steam railroads to their employes for the negligence of their co-employes or fellow servants.

2. But were this not so, in our opinion, the defendant in this case would still be liable, for the reason that it is a railroad corporation organized under the general railroad laws of this state, with all the powers and subject to all the liabilities of any other railroad corporation. The evidence shows beyond question that it was incorporated under and by virtue of article 2, c. 42, Rev. St. Mo. 1889, for the purpose of constructing, maintaining, and operating a standard gauge railroad for public use in the carriage of persons and property, and "to be constructed from a point in the city of St. Louis in a general southwesterly direction through or near the towns of Maplewood, Old Orchard, Tuxedo Park, Webster Groves and Kirkwood to a point on or near the Meramec river within the limits of St. Louis county." It further appears that by virtue of its charter it exercised the right of eminent domain in condemning a right of way under and by virtue of the powers conferred upon steam railroads in this state. There was also evidence that it carried express and the United States mails between St. Louis and Kirkwood. It is true that the motive power employed by defendant is electricity, but all the cases agree that the motive power is not a determining feature in distinguishing a street railway from a general railroad which carries both freight and passengers. So that we have a case in which the corporation has elected to take its charter under the general railroad law of the state, and has voluntarily placed itself in the class of roads to which it concedes the act of 1897 properly and necessarily applies. But defendant argues that because it only carries passengers over that part of its road which lies along and in the streets of St. Louis, and by express permission in the streets of Kirkwood, it should to that extent be regarded only as a street railroad, but we do not think its contention is tenable. It is still a railroad, notwithstanding the city of St. Louis and other municipalities would not permit it to run its freight trains over their streets. These cities are empowered by the Constitution and general laws to exclude it from their streets; and, if it has entered into conventions with them whereby it denies itself in those locali-

ties the right to carry freight on condition that it may operate cars on their streets for passengers only, it has not thereby changed the charter, which alone authorizes it to exist as a corporation, and thus relieved itself of its obligation to state laws. It remains a railroad corporation operating a railroad in this state, and falls within both the language and spirit of the act of 1897. Can it be that, if this accident and injury had occurred to plaintiff on defendant's line out in St. Louis county, defendant would be heard to say, under its charter, that it was not a railroad, within the meaning of the act of 1897? Assuredly not. But it would in that case still be the same railroad that runs into and delivers its passengers in the city of St. Louis. It is one corporation, and operating one railroad, and it is not subject to a different liability in the city from what it is in the country. In our opinion, it is clearly within the provisions of the act of 1897, and the circuit court erred in holding otherwise. It is said, however, the liability is not imposed "on railroad corporations because railroad corporations, but on concerns that own and operate railroads," and that therefore the charter of this defendant does not determine its liability. But how can that affect the defendant's liability, when it is confessedly both a "railroad corporation," to which this act, in terms, applies, and at the same time owns and is operating a railroad, by every test known to the law? We fully agree that the servant who can avail himself of the protection of this statute must be one engaged in the work of operating such road. In *Callahan v. Merchants' Bridge Terminal Company Railroad* (decided at this term by the court in banc) 71 S. W. 208, we held that this right was not limited to those who are engaged in running trains, but extends to those employes, also, whose work is directly essential to enable trains to run; and in so doing we were fully supported by the decisions of the Supreme Court of Kansas in *R. Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739, and of the Supreme Court of the United States affirming that view. *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Stubbs v. R. R.*, 85 Mo. App. 192. It may be well to note that the Supreme Court of the United States, in enumerating the grounds upon which it sustained the Kansas law, noted that it applied "to all railroad corporations, without distinction," and so does the act of 1897. So that we have not a case where some corporation other than a railroad or some person is operating a railroad, but we have a case within the exact language of the act, to wit, "a railroad corporation owning and operating a railroad in this state," and the servant who is suing was a servant engaged in operating such railroad, and was hurt by another servant engaged in operating the said railroad; and the question is, shall the act of the Legislature, made for identically such a case, be

enforced, or shall we turn the plaintiff out of court simply because the car which said employes were operating was not operated by steam, and was not one of a long train, or that said railroad company was permitted to run only passenger cars in the streets of St. Louis and Kirkwood by the ordinances of said cities, the right having been conferred on said municipalities by our Constitution and General Statutes to allow said company to run its trains within the corporate limits, or to deny it that right? In the case supposed of the Suburban car crushed against the car on which plaintiff was employed, we have no doubt whatever that the conductor of the Suburban car could recover against the defendant for the negligent act of its servant; and we also agree, as already said, that the Suburban or any other street railway company, under the unrestricted terms of this act, is a railroad, and liable to one of its servants who is injured in the operation of its road by another servant of said company. In our opinion, the judgment should be reversed, and the cause remanded for a new trial in accordance with the views we have expressed.

BRACE and BURGESS, JJ., concur in my views.

SIMPSON v. STODDARD COUNTY.

I. & J. H. HIMMELBERGER v. SAME.

(Supreme Court of Missouri. March 20, 1903.)

SWAMP LANDS—GRANT—PATENT TO COUNTY—PRIVATE SALES BY COUNTY COURT—POWER—STATUTES—CONSTRUCTION—TRUSTS—APPLICATION TO PROCEEDS—DEFECTIVE ORDERS—BONA FIDE PURCHASER—NOTICE—RECORDS—COUNTIES—LACHES—CURATIVE ACTS—VESTED RIGHTS—APPLICATION TO PENDING CAUSE.

1. Act Cong. Sept. 28, 1850 (9 Stat. 519), granting public swamp lands to the several states in which they were situated, for the purpose of reclamation, etc., constituted a grant to such lands to the states in present, and did not require a formal conveyance to transfer the title to the states.

2. By Act Feb. 23, 1853 (Laws 1852-53, p. 108), the state donated swamp lands received from the federal government, located in S. county, to such county; and Act Nov. 4, 1857 (Laws 1857, p. 32), declared that such lands previously or thereafter patented to the state should vest in full title and belong to the counties in which they lie. The swamp-land laws were subsequently revised and included in Gen. St. 1865, c. 48, § 1, which provided that all such lands were donated to the counties in which they were respectively situated, and "should be the absolute property of such counties for the purposes designated," which consisted of the drainage and reclamation of such lands, and provided that after costs of reclaiming, draining, and selling such lands had been paid, the balance of the price should be paid to the school fund. By Act March 27, 1868 (Laws 1868, p. 68), such lands were directed to be sold by the sheriff at public sale for not less than \$1.25 per acre; but by Act March 10, 1869 (Sess. Laws 1869, p. 66), the register of lands was directed to prepare patents from the states to the several counties of such swamp lands, and section 6 gave to the

county courts full power to sell and dispose of the same in the same manner as other real estate belonging to the county. *Held*, that under the latter act the county court had full power to sell swamp lands granted to the county at private sale for less than \$1.25 per acre.

3. Act March 27, 1868, § 8 (Laws 1868, p. 68), providing for the sale of swamp lands, the title to which had previously vested in the counties in which the lands were located, declares that the net proceeds of sales of such lands, after defraying certain expenses, shall be paid into the county treasury for the benefit of the county school fund. Act March 10, 1869 (Sess. Laws 1869, p. 66), provided that the several county courts should have full power and control over such lands, with a right to sell and dispose of the same in the same manner and with like effect as conveyances of other county real estate. *Held*, that the trust in favor of the school fund with relation to the sale of such lands applied only to "the net proceeds of the sales," and did not run with the land, so as to charge a bona fide purchaser with the county's misapplication of such proceeds.

4. Where a county court, having power to sell swamp lands belonging to the county, appointed a commissioner to make the sales, and the commissioner's patent, which was the only paper relating to the conveyance entitled to registration in the land records of the county, was regular on its face, and there was nothing therein to indicate any insufficiency in the order appointing the commissioner and authorizing such sale, a subsequent bona fide purchaser of the land was not charged with notice of defects in such order for which the conveyance might have been set aside.

5. Where swamp lands granted to a county were conveyed by the county court under statutory authority, and thereafter passed to bona fide purchasers, who took without notice of defects in the order authorizing the sale, and occupied and paid taxes on the lands to the county for over 30 years, claiming to be the owners in fee, the county was barred by laches from subsequently claiming title to the lands on the ground that the conveyance was invalid.

6. Laws 1901, p. 202, provided that in all cases where county courts of the state prior to 1880 sold swamp lands in their respective counties, and caused patents to be issued therefor, and the patentees have been claiming such lands and paying county and state taxes for more than 20 years, the grant shall be deemed and held to be valid, and no action shall be maintained for the purpose of setting aside or calling in question such patents. *Held*, that since a county was a mere political division, in subordination to the state, from which the swamp lands were acquired, such act did not impair the county's vested right, but was a valid exercise of the state's power to validate the title to such lands as had been patented, and for which the full consideration had been paid.

7. Where an action was brought to quiet title to swamp lands conveyed by a county under defective proceedings, and while the cause was pending on appeal, but before decision, an act was passed curing such defects, and providing that such grants shall be held good and valid, and that no action should be maintained for the purpose of setting aside or calling in question such patent or patents, the appellate court had power to consider and enforce such statute in the determination of such appeal.

Robinson, C. J., and Brace and Marshall, JJ., dissenting.

In Banc. Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Separate actions by A. P. Simpson and by I. & J. H. Himmelberger against Stoddard county to quiet title to swamp lands. From

judgments in favor of plaintiffs, defendant appeals. Affirmed.

These cases originated in Stoddard county, Mo. The questions involved in both cases being practically the same, they were consolidated by agreement of the parties, with the consent of the court, and tried as one case.

The suits in these cases were instituted to quiet title to certain lands, set out in the petition, located in Stoddard county, Mo. The lands involved in this controversy are what is known as swamp or overflowed lands. The petitions in the two cases, as well as the answers, present practically the same questions; and, there being no point presented for review upon the pleadings, we will not burden this opinion by inserting them. There is no dispute as to the facts, other than upon the character of the claim of Ringer against Stoddard county. As to that, there is a conflict of testimony as to whether his cause of action was an ordinary claim against the county, or upon warrants upon the swamp-land fund. We regard this dispute as to the nature of the cause of action in the suit of Ringer against the county as being immaterial as to the vital questions involved. At least, we have concluded that a conclusion reached upon one side or the other upon this disputed question would shed but little light upon the main points of difference in this cause.

On the 13th day of March, 1868, Louis M. Ringer obtained a judgment against Stoddard county for \$1,136.90, and in August following caused an execution to be issued and levied upon 107,000 acres of land—the same being swamp and overflowed lands conveyed by the state of Missouri to Stoddard county for the purpose of reclamation and drainage, as set out in the act of conveyance—and had the land sold under the execution, and at said sale the plaintiff's grantors purchased the land in controversy in this suit. At a special term of the county court held in April, 1869, the court entered an order of record, compromising with the purchasers of said land at the sheriff's sale, which order of compromise made by the county court of Stoddard county is as follows, to wit (County Court Record, Book B, page 265):

"Whereas, at the March term, A. D. 1868, of the circuit court of Stoddard county, in the state of Missouri, Louis M. Ringer obtained a judgment against Stoddard county upon warrants on the swamp-land fund of said county, upon which said judgment an execution issued according to law, by virtue of which said execution the sheriff of Stoddard county did seize and levy upon all the swamp lands owned and possessed by said county, of which said lands so levied upon one hundred and seven thousand, or, ~~near~~ that amount of acres of said lands, ~~were sold~~ by said sheriff, in due accordance of law, at the September term of the circuit court of Stoddard county, A. D. 1868, to Louis M.

Ringer and others; and whereas, the county court of Stoddard county did at its February term, A. D. 1869, by an order of record, appoint William G. Phelan and David G. Hicks attorneys for and on behalf of said county, to institute suit for the recovery of the lands sold as aforesaid, granting to them the interest of the county to fifty thousand acres of the lands so sold, as their fee: Now, therefore, in consideration of the facts that said suit would be attended with much uncertainty in the recovery of said lands, and require years of litigation to terminate the same, it is therefore considered by the court that a compromise of the same would be for the benefit of the said county of Stoddard, if made with the parties who bought said lands at said sale, whose names are as follows, to wit: Louis M. Ringer, D. Starks Crumb, Erastus W. Hill, Thomas W. Johnson, Samuel J. Bartlett, I. Frank Starra, Robert W. Carter, M. E. Leach, William P. Knox, Clarissa M. O'Dell, H. H. Bedford, James Frazier, William W. Norman, J. Moore, J. E. Liles, and Jesse B. Leggett; and whereas, said purchasers agree and covenant and pay to the said county the sum of thirteen thousand five hundred dollars in Stoddard county warrants, which sum is to be paid into the county treasury on the following terms and in the following manner, to wit: Said parties either paying as aforesaid, or executing their promissory notes, bearing six per cent. interest. One-half of said sum shall be paid as aforesaid on or before the 1st day of January, A. D. 1870, and the remaining half on the 1st day of January, A. D. 1871. Each of said parties giving notes for their portion of said sum shall secure the same by mortgage on real estate to the satisfaction of the county court of the said county: Therefore it is considered, adjudged, ordered, and decreed that, in consideration of the premises aforesaid, the county court shall and will cause letters patent to be issued to the purchasers of said lands, and to their assigns, conveying, in fee simple, all the right, title, interest, and claim of said county of, in, and to the lands sold by virtue of said execution, to the parties who purchased the same, or to their assigns. And it is further ordered that for the purpose of carrying out this order in good faith towards the purchasers aforesaid, and their assigns, the county court of this county does hereby make, constitute, and appoint Alfred Fitzroth a special commissioner for and on behalf of said county of Stoddard, to make, execute, and deliver to said purchasers, or their assigns, letters patent for the lands aforesaid. Said commissioner to receive the usual fee for such services, to be paid by the parties to whom the patents shall be made, which said patents shall be delivered to the parties aforesaid, upon the execution, acceptance, and delivery of the mortgages aforesaid, on the production of the county treasurer's receipt for the pro rata of the aforesaid thirteen thousand five hundred

(13,500) dollars due upon the amount of lands for which patents are to be issued."

In pursuance of the order of compromise, and the appointment of Alfred Eltzroth special commissioner to execute the conveyance, the said commissioner conveyed the land in controversy by an instrument in writing in the following form:

"State of Missouri, County of Stoddard. To All to Whom These Presents shall Come—Greeting: Whereas, D. Starks Crumb, of the county of Stoddard, state of Missouri, made full payment to the said county of Stoddard for the following described lands: [The lands described in plaintiff's petition, containing, in the aggregate, 4,194.67 acres.] According to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General, which said tracts have been purchased by the said D. Starks Crumb. Now know ye that the said county of Stoddard, in consideration of the premises, and in conformity with the laws of said state of Missouri in such cases made and provided, have given, granted, bargained, sold, and conveyed, and by these presents do give, grant, bargain, sell, and convey, unto the said D. Starks Crumb, and to his heirs and assigns, forever, the above-described lands granted by the government of the United States to the state of Missouri, and by said state of Missouri to the said county of Stoddard, to have and to hold the above-described lands, with all the rights, privileges, immunities, and appurtenances thereto belonging, to the said D. Starks Crumb, and to his heirs and assigns, forever. In testimony whereof, I, Alfred Eltzroth, special commissioner, duly appointed by the county court of said Stoddard county to sell and dispose of the above-described lands belonging to the said county of Stoddard for and in behalf of said county, have caused these letters to be made patent. Given under my hand and seal as commissioner aforesaid at Bloomfield, in said county, this 1st day of May, 1869. Alfred Eltzroth, Special Commissioner.

"Properly acknowledged on the 1st day of May, 1869. Recorded on the 15th day of May, 1869. Adrian B. Owen, Clerk."

There were a number of other conveyances issued by said commissioner, as the record discloses, to other persons; but, as they are all in similar form, it is unnecessary to insert them, as the form of the one herein quoted will be a sufficient indication of the character of instrument. Stoddard county, through its officers, had certain portions of these lands sold for taxes, and there was introduced in the Himmelberger case a sheriff's tax deed, dated March 7, 1891, purporting to convey certain of these lands to the plaintiffs, I. & J. H. Himmelberger. It also appears from the record that the county court of Stoddard county, in order to induce Himmelberger to pay the taxes on this land that had been returned delinquent, agreed to, and did, execute another conveyance, dated as

late as November, 1897, which conveyance was executed, acknowledged, and delivered by the presiding judge of the court of Stoddard county. While these deeds are not relied upon as passing the title to the lands embraced in them, yet they were admitted, doubtless for the purpose, at this late day, of showing a recognition and a ratification of the original conveyance executed by Commissioner Eltzroth. It also appears from the record that the defendant, Stoddard county, introduced records of the county court indicating a claim by the defendant county on these lands. These orders purported to give authority to certain persons to institute suit for the recovery of these lands. Subsequently there are other orders introduced, revoking such authority. It, however, appears, so far as the record indicates, that all efforts to recover these lands were abandoned by the county. The record in this case discloses this admission (it appears in the record as well as in the brief): "We admit that for more than thirty years the respondents have been the apparent owners of said land, and have been paying the taxes levied and assessed thereon by the agents of the county."

This cause was submitted to the trial court, and its findings were for the plaintiffs, as indicated by the decree, which quiets the title of plaintiffs to the land in suit, and enjoins the county from further undertaking to dispose of the same. From this judgment and decree, defendant appealed.

Mozely & Wammack, for appellant. J. F. Shepley, L. F. Dinning, J. J. Russell, and Martin L. Clardy, for respondents.

FOX, J. (after stating the facts). The lands, the title to which plaintiffs seek to quiet by this suit in equity, are a portion of the lands originally granted to the state of Missouri by act of Congress of September 28, 1850 (9 Stat. 519). That act is entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits." The first section provides "that to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said state." By the fourth section of said act its provisions are extended to, and the benefits thereof are conferred upon, each of the other states of the Union in which such swamp and overflowed lands were situated; thus granting to the state of Missouri all of the swamp lands within her borders which had not, previous to the enactment of that law, been sold by the United States government. The second section, after directing a listing of said lands by the Secretary of the Interior, and the issuing of a patent therefor to the state, further pro-

vided that, "on that patent, the fee simple to said lands should vest in the state subject to the disposal of its Legislature. Provided, however, that the proceeds of said lands from sale or by direct appropriation in kind, shall be applied exclusively, as far as is necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

This act of Congress was a legislative grant, and required no formal conveyance to transfer the title to all of these swamp lands to the several states. It was, as has been repeatedly ruled, a grant in present; the selection ordered to be made by the Secretary of the Interior being merely for the purpose of subsequently identifying the land, and the patent, when issued, relating to the passage of the act. *Tubbs v. Wilhoit*, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578; *M., K. & T. Ry. Co. v. K. P. Ry. Co.*, 97 U. S. 491, 24 L. Ed. 1095; *Wilson v. Beckwith*, 140 Mo. 385, 41 S. W. 985; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551.

After the title to these lands had thus been vested in the state of Missouri, the state through its General Assembly, by an act approved February 23, 1853 (Laws 1852-53, p. 103), donated its swamp lands to Stoddard county, upon the terms and provisions of an act approved March 3, 1851 (Laws 1850-51, p. 233), which granted all of said lands to the county in which they were situated, except such as were situated in the counties of Scott, New Madrid, Pemiscot, Mississippi, Cape Girardeau, Stoddard, Dunklin, Ripley, Butler, and Wayne. The state by previous act having appropriated \$50,000 to reclaim said lands in the counties excepted, it was provided in the act of 1853 that said counties should refund to the state said sum, as the price of being placed on an equal footing with all other counties in the state as to their swamp lands. By an act approved January 28, 1855, so much of the act of February 23, 1853, as required "that the amount appropriated for the reclamation of said lands," etc., "be refunded to the state," was repealed. *Sess. Acts 1854-55*, p. 160. By an act of the Legislature approved February 28, 1855, the several county courts of this state were authorized to sell and dispose of the swamp and overflowed lands within their respective counties, either with or without draining and reclaiming the same, as, in their discretion, they might think conducive to the interests of said counties. Subsequently, by an act of the Legislature approved November 4, 1857 (Laws 1857, p. 32), all the lands in this state selected under and by virtue of the act of Congress approved September 28, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp land within their limits," which have been or may here-

after be patented to the state, "be and they are hereby declared to vest in full title and belong to the counties in which they may lie"; this act including, by its general terms, Stoddard county. This was the statutory law in regard to these swamp lands when the revision of the laws took place in 1865. *Gen. St. 1865*, p. 278 et seq. And such was the law when Ringer obtained his judgment against Stoddard county, which may be accepted as the initiatory step out of which this litigation has grown. Subsequently, by an act approved March 27, 1868 (Laws Mo. 1868, p. 68), the Legislature revised the swamp-land laws of the state. The first section of that act is in the identical language of section 1 of chapter 48, *Gen. St. 1865*, p. 278. By its terms "all of said lands in this state are hereby donated to the counties in which they may be respectively situated, and shall be the absolute property of such counties for the purposes hereinafter designated." This act simply confirmed to the counties the title which had been already granted to them by the acts of 1851, 1853, 1855, and 1857, above noted. The designated purposes were "drainage and reclamation," the primary and exclusive purpose for which they had originally been granted by Congress to the state; and after that was accomplished, and all costs of reclaiming, drainage, and selling had been first paid, then the balance should go to the school fund. As already said, in the view we take of this case it is not necessary, in order to sustain the judgment of the circuit court, to hold that these lands could be sold under execution on a general judgment against the county for a debt entirely disconnected with its administration of its swamp lands.

The important question to determine on this appeal is the power of the county court of Stoddard county to sell and convey these lands, and what limitations have been imposed upon them by our several statutes. In *Linville v. Bohanan*, 60 Mo. 554, the act of February 28, 1855, came before this court for construction as to the rights of the counties thereunder; and Judge Wagner, speaking for the whole court, said: "By the legislative enactments above referred to, the absolute title to the lands was vested in the counties, to be disposed of in the discretion of the county courts. The counties were then the proprietors, with the right of discretionary disposal; but by a law of the state they were required to apply the proceeds" to a particular purpose, to wit (2 *Rev. St. 1855*, p. 1006, § 6), "the net proceeds of the sales of all such lands, after defraying the expenses of draining, reclaiming, surveying and selling the same, shall be paid into the county treasury, and become a part of the public school fund of the county." In that case this court drew a clear distinction between the power of a county court over the sixteenth section school lands, the title to which had never been in the counties, and

these swamp lands, which had been donated to the counties by such plain and unequivocal language as was found in the act of 1855. Said this court: "The absolute title to the lands was vested in the counties to be disposed of in the discretion of the county courts. * * * In selling the land they possessed the same powers that owners generally possess under like circumstances, one of the most important of which is the right to buy in the premises to secure the debt"—a right which he had already shown was not in the county as to the school or sixteenth section lands. When that decision was rendered there was imposed upon the county courts the same duty to cover the net proceeds, after the costs of reclamation and sale had been deducted, into the school-fund, that was subsequently imposed by the act of 1868.

The county of Stoddard, as held by this court in *State v. New Madrid County*, 51 Mo. 85, did not acquire its title to the lands in suit by the act of March 10, 1869 (Sess. Laws 1869, p. 66), but by the previous acts already cited, which were continued in the act of March 27, 1868. Prior to the act of 1868 there was no restriction of the sale of these lands to public sales by the sheriff. By section 3 of that act, it may be fairly inferred that the Legislature intended to require them to sell them only at public vendue by the sheriff, and for not less than \$1.25 an acre. But by the act of March 10, 1869, there was an unmistakable purpose on the part of the General Assembly to restore to the county courts the power of private sale which they had prior to the act of March, 1868. The act of 1869 recites "that in order to convey to the different counties in the state of Missouri a complete title to all the swamp lands which were granted and have been patented to the state of Missouri by the act of Congress of September 28th, 1850, the register of lands is directed to prepare a patent or patents embracing all the swamp lands lying within the limits of the several counties, conveying thereby all the title and interest of the state in and to such lands," and makes it the duty of the governor "to sign such patents and have them attested by the Secretary of State." The sixth section of that act provides, "The several county courts shall have full power and control over all such overflowed and swamp lands patented to their respective counties under the provisions of this act and to sell and dispose of the same in like manner and with like effect as now provided by the General Statutes in relation to the conveyance of other real estate belonging to their respective counties."

This act came before this court in *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743, and, speaking for the court, Judge Brace said: "By the act of March 10, 1869, supra, the whole previous system of the state in regard to these lands was changed by general law applicable to every county in the state, by which a

complete title was to be vested in each county by a patent to be issued for the swamp land therein situate, and thenceforth the state delegated to each county the execution of its trust as to the land situate in each county under the general law as expressed in this act and the act of 1868, which, in the main, has since remained the general law of the land, governing the sale and transfer of title to the purchaser of swamp lands. * * * And thereafter the swamp lands in said county were subject to sale and conveyance by the county under the provisions of the general law expressed in those acts. The county court had power to sell the land therein described at private sale, to such purchaser as it might seem advisable, at a price less than \$1.25 per acre, upon the terms upon which sale was made." And as confirmatory of his construction of the act of 1869, the learned judge cites *Linville v. Bohanan*, 60 Mo. 554, and says further, "The limitation of section 3 of the act of 1868 as to price applies to public sales of swamp lands, and this limitation had expired by lapse of time before this sale was made." Obviously the remark as to the five-year limitation had no reference to the power and right of the court to sell at private sale, but merely to give an additional reason why in that case the limitation as to \$1.25 would not have been applicable even if it had been a public sale. In *Pool v. Brown* the court was called upon to construe the act of March 10, 1869, as to the powers of county courts in dealing with their swamp lands, and the point in judgment was, what was the scope of that power? That proposition was met and discussed in the light of all the previous general and special acts of our General Assembly from the time the state had received the donation of these lands from the general government. The subject-matter was of immense practical interest not only to every county in this state, but to thousands of purchasers throughout the state. Prior to that act the county court was a mere intermediary trustee for the state. It bargained the lands and received the purchase money, but the title was required to be made by a patent from the governor. As said by Judge Brace, the last act requiring a patent by the state to the purchaser was the act of March 27, 1868; and by the act of March 10, 1869, the whole previous system, both general and local, was changed, and thenceforth the counties were vested with the title, and were authorized to convey such lands, just as they could any other lands owned by them. In that case the lands were sold at private sale for 75 cents, and the court was requested to declare the law that the county court was not authorized to sell swamp lands for less than \$1.25 per acre; and this court, responding to this contention, unanimously ruled that the limitation as to the price of \$1.25 only applied to public sales of such lands by the sheriff, and that the county

courts were authorized to sell such lands at private sale for less than \$1.25 per acre, and fortified its judgment by reference to the decision in *Linville v. Bohanan*, 60 Mo. 554. Placing section 6 of the act of March 10, 1869, in juxtaposition with the act of 1855, we find that the former confers upon the county courts full power and control over the swamp lands in their respective counties, and the right and power to sell and dispose of the same as they had to dispose of other real estate belonging to their respective counties; and in the act of 1855 they were authorized to sell and dispose of the swamp lands in their respective counties either with or without draining and reclaiming the same, as, in their discretion, they might think most conducive to the interest of their counties.

In a word, the two acts confer the same power upon the county courts, and this court having construed that an absolute title was vested in the counties by the act of 1855, and that as to them they possessed the same powers that owners generally possessed, and, where a county had sold to a purchaser of such land on a credit, it could buy it in without any further enabling act authorizing it so to do, the only consistent construction of the act of 1869 was that which the same court had given the act of 1855. Indeed, when we consider the emphatic, unambiguous language of both of said acts, we are at a loss to see how the court could have reached a contrary conclusion without rejecting the positive command of our statutes as to the construction of laws, which requires all courts in this state to give to words their ordinary and usual sense; and conceding, as it has everywhere been recognized, that the state had the power to grant these lands to the counties, divested of all trusts, we can conceive of no words or language which could have better effectuated that purpose than was employed in both the act of 1855 and that of 1869.

So that, while we entirely agree that the county courts are statutory bodies, and we must look to the laws of the state for their powers, we have no hesitancy in putting our fingers upon section 6 of the act of 1869 as the authority for the county courts to sell and convey the swamp lands in their respective counties at private sale, and for less than \$1.25, as was unanimously ruled by this court in *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743. That case was decided nearly 14 years ago, and, until the decision in the case of *State ex rel. Public School v. Crumb*, 157 Mo. 545, 57 S. W. 1030, was never questioned. In that case, without adverting to the unanimous decision of this court in *Pool v. Brown*, *supra*, it was ruled that "these lands could only be sold at that time by the sheriff at public vendue on sixty days' notice, for not less than \$1.25 an acre, by order of the county court." No reference was made to the decision in *Pool v. Brown*, which had necessarily become a rule of property. We

are constrained to think the conclusion in the *Crumb* Case on this point was an inadvertence, but, in any event, in view of the plain language of the act of 1869, which was in force when that case originated, and in view of the decisions in *Linville v. Bohanan*, 60 Mo. 554, and *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743, and of the serious consequences which are almost certain to follow to purchasers who have dealt in these lands on the faith of said decisions, the *Crumb* Case, on this point, at least, ought no longer to be regarded as controlling. In *Reed v. Ownby*, 44 Mo. 206, it was said by Judge Wagner, speaking for the court: "The question is firmly settled in this state by two direct adjudications holding that an unrecorded deed is good against a judgment if recorded before an execution sale under judgment." *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105; *Valentine v. Havener*, 20 Mo. 133.

The counsel for plaintiffs admits these authorities are directly against him, but asks this court to review the question and determine the law otherwise. This we are not at liberty to do. The law has been settled for many years. It has become a rule of property, and titles have been vested on the strength of it. "The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property, and they are not to be tampered with to suit the views of different persons." *Dunklin County v. Chouteau*, 120 Mo. 578, 25 S. W. 553. But it may be asserted that in *The Cape Girardeau S. W. Ry. Co. v. Hatton*, 102 Mo., loc. cit. 55, 56, 14 S. W. 765, it was said, "The county courts may cause the swamp lands to be sold with or without drainage, at public or private sale, but they must be sold for not less than \$1.25 per acre." The same able and learned judge who wrote that opinion made no reference to *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743, in which he had fully concurred when the question before the court was whether swamp lands could be sold under the act of March 10, 1869, at private sale, for less than \$1.25 an acre, and it was decided they could be. But there is nothing to show that the learned judge who wrote that opinion had changed his views as to the proper construction of the act of 1869, nor that the learned judge who wrote *Pool v. Brown* regarded that case as in any wise affecting his decision in the *Pool* Case. Judge Black was construing a contract made in 1882, long after the act of 1868 had been amended by the act of 1874 (*Laws 1874*, p. 101), which expressly provided that the county court could sell swamp lands at private sale without advertisement, but "at a price not less than \$1.25 per acre." It was not necessary to decide even in that case at what price the lands could be sold for at private sale, as the court held in the construction of the contract it was neither for drainage nor sale, but a pure gift of the lands to the railroad company if it would run its road on a

designated route, and as the law did not authorize the county court, under any circumstances, to give away these lands, its contract to do so could not be enforced in equity. As the acts of 1868 and 1869 were in pari materia, and entirely consistent the one with the other, neither had been repealed, and the act of 1874 amending the act of 1868 doubtless was properly construed as limiting the power of the county courts after its enactment to sell swamp lands at private sale for not less than \$1.25; but that case in no manner impinges upon the controlling weight and authority of *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743, as to the proper construction of the act of March 10, 1869, under which the transactions in suit were had.

That the conveyance by Eltzroth, as special commissioner, was sufficient to carry the legal title, there can be no doubt. *Hall v. Gregg*, 138 Mo. 286, 39 S. W. 804; *Elliott v. Buffington*, 149 Mo. 676, 51 S. W. 408; *Prior v. Scott*, 87 Mo. 303; *Wilcoxon v. Osborn*, 77 Mo. 621.

But notwithstanding the act of 1869 provided in the most emphatic and unambiguous terms that "the several county courts shall have full power and control over all such overflowed and swamp lands and to sell and dispose of them in like manner and with like effect as now provided by the General Statutes, in relation to the conveyance of other real estate belonging to their respective counties," and notwithstanding the act of 1868, by the eighth section thereof, expressly provided that "the net proceeds of the sales of all such lands, after defraying the expenses of draining, reclaiming, surveying and selling the same as herein provided, shall be paid into the county treasury and become a part of the public school fund of the county," it is insisted the county held the lands under a trust which, it is said, "ran with the lands." This contention is not a new one, either in this court or in the Supreme Court of the United States. In *Dunklin County v. Dunklin County Court*, 23 Mo. 456, it was insisted that an order of the county court directing the alternate sections of the swamp lands owned by Dunklin county to be sold and conveyed to the Cairo & Fulton Railroad in payment of a subscription to the capital stock of said company was a breach of the trust which Congress confided in the state of Missouri, when it granted it these lands in 1850 for the exclusive purpose of reclaiming said lands by means of levees and drains; but Judge Leonard, speaking for this court, in answer to such contention, said: "The original grant made by the state to the counties was in order to execute this trust, and it is supposed that the trust is fastened upon the lands, so that they cannot be disposed of by the state for any other purpose. This, however, is not correct. The trust reposed by the United States is in the state of Missouri. It is a personal trust in the public faith of the state, and not a property trust,

fastened by the terms of the grant upon the land itself, and following it into whose hands soever it may pass. It is proper, however, to remark, in vindication of the state, that the original grant by the United States contemplates, of course, a sale of the land in order to render it available for the purposes of the trust." And he cited *Cooper v. Roberts*, 18 How. 181, 15 L. Ed. 338; *Long v. Brown*, 4 Ala. 622.

Afterwards the case of *The Emigrant Co. v. Adams County, Iowa*, 100 U. S. 61, 25 L. Ed. 563, came before the Supreme Court of the United States. That county had conveyed its swamp lands to the Emigrant Company, and subsequently brought suit to avoid its contract on the grounds, first, that the sale of the county's swamp lands was made at a much less price than the law allowed them to be sold for; that by the laws of Iowa it was unlawful to sell them for less than \$1.25 per acre, whereas by the said contract nearly 8,000 acres were sold for \$2,000; and for fraudulent representations. Mr. Justice Bradley, speaking for the court, among other things, said: "But there was one aspect of it which at the conclusion of the first hearing we thought deserving of consideration, and that was the general character of the transaction viewed in connection with the act of Congress by which these lands were granted to the state." He then repeats the provisions of the act of September 23, 1850—the same under which the state of Missouri obtained the lands in suit; especially the proviso which required the proceeds of said lands, whether from sale or direct appropriation, to be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of drains and levees—and said: "Our first view was that this was so explicit and controlling as to invalidate the scheme finally devised by the Legislature of Iowa for the disposal of the land, under which the contract in question was made. But on more mature reflection, we are satisfied that such a result did not necessarily follow." He then points out that the Legislature of Iowa, by act of February 2, 1853 (Laws 1852-53, p. 29, c. 13), granted the lands to her several counties, subject to the conditions of the act of Congress and such laws as the Legislature might thereafter pass. The argument was that it was a scheme to divert the proceeds of the lands from the purposes of the grant, and to that the learned justice answered: "The proviso of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the state was to have the full power of disposition of the lands, and only gives direction as to the application of the proceeds, and of this application only 'as far as necessary' to secure the object specified." It was accordingly held, just as Judge Leonard had held

nearly 23 years before, that the county which had thus disposed of its swamp lands could not rescind its contract on the ground that it was a violation of the trust imposed by the act of Congress. The same doctrine was announced in the subsequent case of *Mills County v. Railroad Companies*, 107 U. S. 557, 2 Sup. Ct. 654, 27 L. Ed. 578, in which the Supreme Court of the United States, referring to the duty of the state to apply the proceeds of such lands to reclaiming them, remarked that "whether faithfully performed or not was a question between the United States and the states, and it is neither a trust following the lands, nor a duty which private parties can enforce as against the state." And such has been the unbroken line of adjudication in this state. *Sturgeon v. Hampton*, 88 Mo. 210; *Pool v. Brown*, 98 Mo. 681, 11 S. W. 743.

Conceding, as we do, that it was entirely competent for the state to grant these lands to the several counties, either with or discharged of a trust, and that the Legislature could designate, as it did, the purposes to which the counties should devote these lands, we think it is clear that the only use or trust which the state declared, so far as the schools were concerned, was upon "the net proceeds" of such lands, after deducting all the expenses and costs of draining, reclaiming, surveying, and selling the same. As said by the Supreme Court of the United States in *Emigrant Co. v. Adams Co.*, 100 U. S., loc. cit. 69, 25 L. Ed. 563, the language of the act of 1868 and the previous act of 1851 gave "the full power of disposition of the lands, and only gives direction as to the application of the proceeds." The trust was declared as to "the net proceeds," and not on the land, so as to fasten it on the lands in the hands of the purchasers from the trustees, to whom the county had granted the absolute power of disposal.

We concede that the state has full power to compel the county of Stoddard to account for "the net proceeds" of the sales received by the county court from Ringer, but that is a very different proposition from that advanced that the county can after 30 years repudiate the sale it made to Ringer, and the patent which its commissioner, Eltzroth, made by the direction of the county court. We are dealing not with a case in which the county court had no authority to sell and convey the lands, in which the acts of the court and its commissioner would be void, but, at most, an irregular or defective execution of an indisputable power, and in a case in which no fraud is charged or proven. To hold that this trust is fastened upon these lands in the hands of these remote purchasers from Ringer, when the substituted trustees had a plain statutory power to sell and convey, and they had executed that power, and their commissioner had conveyed the lands by an instrument which gave no notice of any breach of the trust, would, in our

opinion, be subversive of all the principles of equity and justice, especially after the lapse of 30 years. That the county of Stoddard may be required to make good to its public school funds the amount it received from Ringer and others who purchased these lands from the county courts is equitable, but it has no right to repudiate a contract which is not tainted with fraud because at this late day it is assumed or appears that the court did not obtain the full value of the lands, although the purchasers were bound to know the power of the county court. We find the court had the undeniable right to sell these lands at private sale for less than \$1.25, and, this being so, when they made their purchases, and paid over to the county the price agreed upon, they are not to lose their titles because the authorities of that county now deem the price then received was inadequate. The state selected its agents to sell and convey, and did not limit them as to the price they were to obtain; and the inequity is the more glaring because there is no offer made to restore the purchase money, which the county has kept for 30 years. It was not incumbent on the purchasers to see that the county court properly covered the purchase money into the school fund.

Upon the contention that the acts of the county court in respect to the disposition of the land in controversy were absolutely void, and that the powers of the county court are limited and defined by law, our attention is earnestly invited to numerous cases decided by this court. Before proceeding to an investigation of these cases, it must be observed that the record discloses, in respect to the sale of this land, that the acts of the county court are divisible. If the county courts were authorized to sell this land in pursuance of the act of 1869, then we look to the act of the court that consummated that sale; that is, the Eltzroth patent. That act is regular upon its face—does not purport to be based upon the Ringer judgment or upon the order of compromise, but specially recites that it is done in "pursuance of the provisions of the law of this state." That act, in itself, if the power to perform it existed, is not void; but, in order to have its force and power rendered inoperative, it is necessary, even if appellant's contention is to be upheld, to show by evidence allunde that such patent emanated from the order of compromise, which appellant insists was without authority of law. We fully concur in the principles announced in the cases cited—that the powers of the county courts are limited and well defined by the law, and that parties dealing with them must take notice of their limited powers. In the leading case in this state, and the one upon which appellant firmly relies for support of this contention (*Sturgeon v. Hampton*, 88 Mo. 203), it will be noted that this case was decided by Black, J., the same able and learned judge that decided the case of *Dunklin County v. Chouteau*, 120 Mo. 577,

25 S. W. 553, and who was a member of the court when the opinion of *Pool v. Brown*, 98 Mo. 675, 11 S. W. 743, was announced, and concurred therein. In the *Sturgeon Case*, an examination of it will demonstrate that it has no application to the facts in this case. The learned judge announced the principle as applicable to the facts before him. In that case the powers sought to be exercised were, beyond dispute, unauthorized. In referring to the attempted execution of the two deeds involved in that dispute, the court, through Black, J., says: "Both these acts were not simply irregularities, but they were without any warrant or authority in law, and are void. These infirmities appear upon the face of the deeds and orders to which they make reference, and the purchaser from the company took with full notice." It will be observed in this case that the want of authority appeared upon the face of the instrument. It was from this state of facts that the principle was announced that "persons dealing with such agents are bound to take notice of their powers and authority." Conceding, for the purposes of this case, that the order of compromise was without authority, such order is totally disconnected with the instrument that undertook to convey the title. There was no reference made to that order. The order of compromise was not such an instrument affecting real estate as was required to be recorded in the land records of the county. We do not, by the views expressed upon this particular branch of the case, pretend that a sale of swamp lands by a conveyance regular upon its face, based upon orders of the county court that were unauthorized, would pass the title to such lands, but simply maintain that the instrument is valid until set aside by appropriate proceedings. It is not absolutely void, but may be avoided in an action for that purpose, upon a showing of the independent, unauthorized acts upon which the instrument is based. Persons buying real estate look to the land records—the recorder's office—for the instruments upon which title is based; and the respondents in this case had the right to regard the *Eltzroth* patent as valid, if, upon its face, it was regular, and the county court had the power to have a commissioner duly appointed to make such conveyance. They were not required to examine every detail leading up to the execution of the instrument. While such instrument may have been based upon such irregularities that in an appropriate proceeding it would be declared invalid, yet notice of such irregularities is not to be imputed to the respondents in this case.

In the case of *Butler v. Sullivan Co.*, 108 Mo. 630, 18 S. W. 1142, cited by appellants, is simply a reiteration of the principle announced in the case of *Sturgeon v. Hampton*, *supra*. Hence what is said as to the application of that case to the case at bar is for the same reason applicable to the *Sullivan*

County Case. The case of *St. Louis, Cape Girardeau & Ft. Smith Railway Company v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494, was a suit upon a contract entered into by the county with the railroad company relative to certain work in respect to draining certain swamp lands belonging to Wayne county. All the defects and infirmities appeared upon the face of the contract, and that suit was on the contract, and the court announced the principle discussed under this contention. We readily assent to the doctrine as announced upon the facts in that case, but a casual examination of it will demonstrate beyond dispute that it is not applicable to the case before us. In the case of *Moss v. Kauffman*, 131 Mo. 424, 33 S. W. 20, the county of Bollinger sold swamp land to Thomas Allen, and accepted stock in the St. Louis, Iron Mountain & Southern Railway Company in payment. This appeared upon the face of the deed. The court said, through Burgess, J., that this deed "was void and of no effect, and all persons purchasing under it were bound to take notice of its infirmities. No extrinsic evidence was necessary to show its invalidity, which appeared from its recitals." It will be observed that the notice imputed to the purchasers of that title was of defects and infirmities that were stamped upon the instrument itself. In the case of *Hooke v. Chitwood*, 127 Mo. 372, 30 S. W. 167, there was no evidence upon the face of the instrument that the county ever sold the land. Hence the court very appropriately quoted the principle that "the statutes constituted the warrant of authority in the county courts to sell or dispose of swamp land." As to instruments where the defects appear on the face of the instrument, the rule announced in the case of *Tydings v. Pitcher*, 82 Mo. 379, and other cases on effect of notice cited by appellant, will apply, but they do not apply where the instrument is regular on its face and is issued by proper authority. In the patent executed by Commissioner *Eltzroth*, no reference is made to the order empowering him to act as such commissioner, nor does it make any reference to the order of compromise. Nor was it necessary for him to recite the power under which he acted. *Henry v. Atkison*, 50 Mo. 266; *Swartz v. Page*, 13 Mo. 608; *Jamison v. Fopiana*, 43 Mo. 565, 97 Am. Dec. 414. In the case of *Tydings v. Pitcher*, *supra*, the true test as to the character of notice that is to be imputed to a purchaser is very tersely stated: "In the language of Commissioner Leonard, of New York: 'The principle of equity is well established that a purchaser of land is chargeable with notice by implication of every fact affecting the title which would be discovered by an examination of the deeds or other muniments of title of his vendor. If there is sufficient contained in any deed or record which a prudent purchaser ought to examine to induce an inquiry in the mind of an intelligent person, he is chargeable with

knowledge or notice of the facts so contained.' *Cambridge Valley Bank v. Delano*, 48 N. Y. 336." Apply this test, and we find that the notice imputed to a purchaser is of the recitals in the muniments of title.

We repeat that the only instrument in respect to the sale of the swamp land by Stoddard county involved in this case that was entitled to a place upon the land records of Stoddard county was the one that evidenced the sale of the land—that is to say, the Eltzroth patent. Of this instrument, and its entire contents, the respondents were charged with notice. Again we say they were not required to investigate and examine the various orders of the county court authorizing such conveyance. They had the right, as was announced in the case of *State ex rel. Board of Education v. Wayne County Court*, 98 Mo. 362, 11 S. W. 758, "to assume that public officers have proceeded in obedience to, not in disregard of, their duties and obligations as such."

It is insisted by appellant that the acts of the county court of Stoddard county were void, and that respondents are charged with notice of all the orders of the county court, and its acts, being void, cannot be ratified, and that the county cannot be estopped by reason of such void acts. If such contention is maintained, we are unable to discover upon what theory the learned judge in the case of *Dunklin Co. v. Chouteau*, supra, reached the conclusion he did in respect to the contention in that case, which is identical in principle with the one involved in the case before us. In the *Dunklin County Case* there was involved 100,000 acres of the most valuable swamp land in that section of the state. The district county court of Dunklin county subscribed for stock in the *Cairo & Fulton Railroad*, which was to be built through the county. A patent was issued by the governor of the state, referring to the orders of the district court, conveying the lands to the railroad company. This suit was instituted 33 years after the district court had made the orders, and the patent issued in pursuance thereof, to set aside the patent and orders of the district court. It was insisted by the county in that case, just as it is being insisted in this case, that the orders of the county court were void and without any warrant of law, and that the purchasers were imputed with notice of such void orders. It was insisted that under the statute in force, providing for subscription to the stock of railroad companies, to be paid for by a conveyance of swamp lands to be selected by said railroad company, it was essential to the validity of such conveyance that a petition signed by a majority of the voters of the county must be presented to the district county court, requesting the court to subscribe for stock in the *Cairo & Fulton Railroad Company*. It was also contended that, in order to support the validity of such subscription, it was necessary to have a vote of the tax-

payers on such proposition. The record of the district court of Dunklin county disclosed that the petition was not signed by the proper number of voters, and that there was no vote taken by the taxpayers of the county, yet in that case the court says: "But let it be conceded that a vote of the taxpayers was essential to a valid subscription, and that such a vote was essential to a valid transfer of the lands to the company in payment of the subscription; still, it does not follow that the county should have the decree prayed for in this case. We think the county has no standing in a court of equity to question the validity of the sale at this late day." And the court held in that case that the conduct and action of the agents and officers of Dunklin county was a ratification of the transfer of the lands in suit. If the court in that case had maintained the position urged in the case at bar, then no such conclusion could have been reached, for the subsequent purchasers in that instance were in no better attitude than the purchasers in this case. By an examination of the record, it would have disclosed the irregular and void orders of the district court, and notice of it would be imputed to them. But the court, as it doubtless did from the discussion in the case, reached the conclusion, as the patent was regular upon its face, that at least that was not a void act, and that the subsequent purchasers were not charged with notice of the void orders. That case was ably presented by counsel, and is regarded by the bench and bar as being most carefully considered upon the questions involved. We regard the reason of the learned judge as sound, and well supported by the adjudications, and see no reason why that case should be overruled.

It is next insisted by appellant that "this case, in its very nature, is not susceptible of being controlled by the doctrine of laches." We will say in respect to that contention that we have reached the conclusion that the county court of Stoddard county had the power to sell the lands under the act of 1869, at private sale, through its appointed commissioner, at less than \$1.25 per acre. We are of the opinion that the patent executed by Commissioner Eltzroth was not absolutely void. And this leads us to the discussion of the only unsettled question in that contention, and that is as to the application of the doctrine of laches to counties.

The administration of equitable principles is not dormant, but, as the development of the county and business interests advance, new subjects are created to which these principles are to be applied, and it has very appropriately been elsewhere said: "It is a mistake to assume that the doctrine of laches or delay, or the doctrine of estoppel, does not apply to a county or other municipal corporation. Indeed, it may be said that there is no state, or any of the political subdivisions of a state, against which the doctrine of estoppel or laches may not, in certain

instances, be urged. If a transaction shows all the observances of the law, then the law itself will afford all the relief necessary, and estoppel or laches need not be urged. It is only where there are irregularities by the officers and agents of states or municipalities in the performance of certain duties imposed upon them by the Constitution or laws that there is reason that they should not be allowed to insist that the act was improperly or irregularly done, to the prejudice of those who in good faith have assumed, and acted upon the assumption, that the acts of such officers and agents were within their power to perform. The doctrine of estoppel is not only a very old doctrine, but, it may be said, is one that 'has grown with the growth' of human affairs. It is a principle whose existence is not to be deprecated, for its enforcement not only prevents the commission of a wrong upon those who are innocent, but it teaches the moral lesson to all persons that they shall not to-day dispute the truth of what they said yesterday, to the financial injury of others. 'Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case.' Herman on Estoppel & Res Adjudicata, § 14."

In the case of *People v. Maynard*, 15 Mich. 463, where the invalidity of an act organizing a county was suggested on constitutional grounds, Campbell, J., says: "If this question had been raised immediately, we are not prepared to say that it would have been altogether free from difficulty; but, inasmuch as the arrangement there indicated had been acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations the acts of parties interested may often estop them from relying on legal objections which might have availed them if not waived; but in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin. * * * Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can no longer be open to question. * * * The exercise of jurisdiction being notorious and open in all such cases, * * * there is no principle which could justify any court in going back to inquire into the regularity of the law of 1857." To the same effect is the case of *People v. Alturas County* (Idaho) 55 Pac. 1067, 44 L. R. A. 122, where the court says, "Public policy and sound principles of law require that the state now be held estopped from questioning the manner of the passage of the act in question." In the case of *Adams County v. Railroad Co.*, 39 Iowa, 507, where the county set up the title to

swamp land claimed by defendant, the court held that the plaintiff, by assessing the lands to the railroad company, and collecting taxes from the company thereon, had estopped itself from claiming title to the land as against the company. The cases are very numerous in which it is held that a county may be estopped by the acts of its agents. In the case of *H. & St. J. R. Co. v. Marlon Co.*, 36 Mo. 294, it is said: "Where a county, acting under authority it supposed to be valid, subscribed to the stock of a railroad company in good faith, issued its coupon notes in payment of such subscription for a series of years, voted such stock, and paid its coupons, and such notes passed into the hands of innocent and bona fide purchasers, it is estopped from asserting that such notes were illegally issued." The cases of *Dunklin County v. Chouteau*, 120 Mo., loc. cit. 594, 25 S. W. 553; *Boone County v. R. R.*, 139 U. S. 684, 11 Sup. Ct. 687, 35 L. Ed. 319; *Colonial & U. S. Mortgage Co. v. Tubbs* (Tex. Civ. App.) 45 S. W. 623; *State v. West*, 68 Mo. 229—announced the same principles in respect to this subject.

If the Legislature had never conferred upon the counties the power, through their county court, to sell and dispose of swamp lands, and the court had undertaken to do so, it is very clear that no subsequent action of the counties could have ratified the unauthorized act of the county court. The principle is that where a county court is charged by law with the performance of certain duties in reference to a particular subject-matter, and that court undertakes, in good faith, to execute its powers, but fails to observe certain requirements of the law, so that its acts in that regard are irregular, such acts, if acquiesced in, will become binding upon the counties as completely as if they had been regular in the first instance. Here the Legislature authorized the counties to sell the swamp lands. When Stoddard county undertook to sell the land, it but exercised the right of disposing of the land conferred upon it by the Legislature. It had the right to sell it, and, as we think, at public or private sale. Anyhow, it had the right to sell it, and it did undertake to sell it more than 30 years ago, and had acquiesced in the sale which it has made, ever since.

We take it that it is no longer a disputed question that the doctrine of laches applies to a county or other municipal corporation as well as to individuals. This brings us to the application of the doctrine of delay or laches to the facts of this case.

The admission of appellant in respect to the conduct of Stoddard county in reference to these lands for the last 30 years renders it unnecessary to minutely detail all the testimony submitted in the trial court. The appellant says, "We admit that for more than thirty years the respondents have been the apparent owners of said land, and have been paying the taxes levied and assessed thereon

by the agents of the county." It will be noticed that these respondents are not the original purchasers from Stoddard county; that they purchased these lands upon the faith of the regularity of the conveyance of Eltzroth, the commissioner; that they placed their deeds upon record; that those from whom they purchased and the respondents have been regularly assessed and have paid the taxes on this land for more than 30 years. It will be observed that the county of Stoddard, in consideration of the conveyance, as executed by the commissioner, accepted \$13,500; that the respondents and their grantors have had such possession of these lands as they were susceptible of, and at all times and under all circumstances have claimed to be the legal owners thereof. Appellant in this case makes no pretense of offering to return the money it received, but simply takes the unenviable position: "We have had your money for thirty years; have made you pay the taxes for all those years. We will now retain all this, and take the land in addition." And this court is asked to denominate this as the administration of equity to the parties in this suit.

There was some evidence introduced that the \$13,500 in warrants issued by Stoddard county, and accepted by it, were only worth 30 or 40 cents on the dollar, and it is intimated by counsel for the board of education that this is an important fact in the consideration of this case. It will be observed that the board of education is not a party to this suit. The county of Stoddard is the only party defendant, and the only necessary party in this proceeding; and we say now that, standing as she does in a court of equity, her position is a very unfavorable one, to ask this court to consider the worthlessness of its own obligations, created by itself, and for the payment of which her entire taxable property is subject. These warrants in the hands of Stoddard county were worth 100 cents on the dollar. However this may be, it does not meet the difficulty presented to the appellant in this case. As before stated, the patent did not disclose that the payment for this land was in county warrants, and if this was a valid ground for avoiding the patent issued by its commissioner, regular in all respects upon its face, the courts were open and ready to render such relief as the county might be entitled to.

The chancellor who tried this case doubtless reached the conclusion that appellant was a long time in making known her grievances in this transaction which is now so earnestly urged as a base outrage. It is no answer to the proposition involved in this case to say that the county courts are the trustees of a sacred fund. The people are the beneficiaries of this fund, and the county court represents the people; and while we fully concur in the doctrine that the county courts are creatures of the statute, with limited and well-defined powers, it is not contemplated

that they are to be regarded as perfect "dummies," and the sooner and more firmly it is impressed upon the public that the acts and conduct of public officials may, under certain conditions, affect the interests of the public, the more readily will the conclusion be reached that in the selection of our official representatives it is important that some attention be given not only to their honesty, but also to their business discretion and judgment. If these lands were improperly disposed of by Stoddard county, her agents and officials knew it as well 25 years ago as they do now, or at least they had the same opportunity of knowing it; and still these parties are permitted to remain in possession of these lands, exercise acts of ownership over them, and at this late day (1898), after the expiration of 30 years, for the first time take steps to resell them. This we do not think, upon any principle of equity, can be done. The Dunklin County Case, supra, is decisive of this. The facts in that case did not appeal as strongly to the conscience of the chancellor as they do in the case at bar. Dunklin county never received a dollar in consideration for the large body of land conveyed in the patent by the Governor. The Cairo & Fulton Railroad, to which these lands were conveyed, was never built. It was simply a railroad on paper. Still the county remained silent for 30 years, assessed and collected taxes on the land, and made compromise deeds; and the learned judge in that case said: "No excuse whatever is offered for the long delay and inaction on the part of the plaintiff. The neglect of the county in asserting its rights in a proper way for so great a length of time, to the continual prejudice of the rights of the defendant, cannot be excused. Courts of equity cannot, and ought not to, give relief in such a case. The delay and conduct of the county is a complete bar to the relief which it now asks, and this is true though the defendant may not have had ten years' adverse possession of the lands." The same doctrine is clearly announced in the case of Boone County v. Burlington & Mo. R. Co., 139 U. S. 684, 11 Sup. Ct. 687, 35 L. Ed. 319. The court said in that case: "The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or to an individual person."

The principle of applying laches to counties finds strong support in the recent case of American Stave & Cooperage Company v. Butler Co. (C. C.) 93 Fed. 301. This was a suit against Butler county to quiet title to certain swamp lands which had previously been conveyed by said county to the Iron Mountain Railway Company, the grantor of plaintiff. Butler county undertook by its answer in that case, as Stoddard county does in this, to avoid the conveyances, for the reason that the county had been defrauded out of its swamp lands. Adams, J., in passing upon the questions involved, said: "If

the county had seasonably instituted some proceedings for rescinding the contracts and conveyances in question, it may be that relief could have been afforded. But a different question is raised at the present time. The railroad company, upon securing title to the lands in question, in 1871 and 1874, proceeded to exercise such acts of ownership and control over them as their locality and condition permitted. It and its rival claimant to title, Mr. Chouteau, paid the taxes duly assessed by Butler county for a period of twenty years or more. It is altogether too late for the county to take any such position. Its acquiescence for twenty years or more effectually bars it from any attempt at rescission at this late day. Applying the principle announced by the Supreme Court of the United States in the case of *Boone Co. v. Burlington & Mo. R. Co.*, 139 U. S. 684, 11 Sup. Ct. 687, 35 L. Ed. 319, the county, by its delay or laches, has effectually ratified what was, at the worst, but a voidable transaction between it and the railroad company." He cites in support of this principle applied in that case *Dunklin Co. v. Chouteau*, 120 Mo. 577, 25 S. W. 553. To the same effect is the case of *Rummel v. Butler Co.* (C. C.) 93 Fed. 304. In this last case cited, lands were conveyed in payment of subscription of stock to the Cairo & Fulton Railroad. The county asserted that the subscription for stock and the conveyances were invalid. Adams, J., said in deciding the case: "The county must be held to have effectually ratified its subscriptions by its long delay and laches in asserting any claim to the contrary."

It must be remembered that the cases cited as applying the doctrine of laches to counties were cases in which the very character of land (that is to say, swamp land) was involved, as is in suit in the case before us; and in these cases it was urged with the same earnestness and ability that, this land being held in trust for the school fund, this doctrine did not apply. The courts applied it with its full force, and we fully concur in their application of the doctrine. /The facts in this case fully warranted the trial court in the conclusions reached. It was especially appropriate to apply this doctrine upon the facts as disclosed. It must not be forgotten that these respondents are not the original purchasers of this land, but they stand before the chancellor as innocent purchasers for value, in good faith. Their position entitles them to every favorable presumption in their behalf. If the county of Stoddard had rights in this land, her long silence, her acceptance and retention of the money paid her, her continuous acceptance of taxes, and efforts to enforce the collection of the assessments levied, is a complete ratification of the conveyance made by the commissioner, Eltzroth, to these lands, and the appellant is now estopped by reason of laches or delay in asserting such rights.

This leads us to the last proposition involv-

ed in this case. The General Assembly at its session in 1901 (Laws 1901, p. 202) enacted the following provision in respect to swamp lands. Section 8197, Rev. St. 1899, was amended, and the amended section contained this proviso: "Provided, further, that in all cases where the county courts of this state have, prior to 1880, sold or disposed of any such swamp lands in their respective counties and have issued or caused to be issued patents for the same, and the patentees or those claiming under them have been claiming such lands and paying county and state taxes thereon for more than twenty years, such grants shall be deemed and held to be good and valid, and no action shall be maintained for the purpose of setting aside or calling in question such patent or patents." This amended section presents two questions for our consideration: First. What is the force and power of the act? Second. The act not being in force at the time of the trial of this cause in the lower court, can this court, where this cause is now pending on appeal, apply this new statute in the determination of this case?

It is unnecessary for us to state that the swamp lands in the respective counties of this state have been the subject of litigation for years past, for we need only turn to the numerous reports of cases in the appellate courts, or examine the dockets in the circuit courts of the state, to have a full and complete verification of this statement. This statute was doubtless intended as a curative act. Its purpose was to make valid powers defectively executed, and put an end to litigation on this subject. As we have heretofore stated in this opinion, the title to these lands was vested in the counties, with power of disposition; and the trust reposed in the counties of the state in donating these lands was a personal one, applicable alone to the net proceeds of the sale. These lands were held in subordination to the power of the state. A county is simply a part of the state. It is a mere subdivision of it. Although these lands were donated to the counties by the state, it did not divest itself of all control or management over the same. *Barton Co. v. Walser*, 47 Mo. 189. In fact, a reference to the innumerable statutes upon the subject of swamp land will disclose that the state has ever kept in touch with those lands, and from time to time, as occasion required, has changed the method of disposition by the counties. In fact, all the power, capacity, and duties of the counties are derived from the Legislature, and they are subordinate to the power of the state, through this legislative body. *Hamilton et al. v. St. Louis Co.*, 15 Mo. 3; *People v. Power*, 25 Ill. 190; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 541, 13 L. Ed. 518, 531.

An act was passed by the Legislature very similar to this one in 1868. It provided: "Section 1. That all deeds or patents granted or made by the county courts of the state, in

which any lands known as swamp or overflowed lands may lie, shall be deemed and held to be valid and legal, whether issued by the county court or a commissioner appointed by the said court for that purpose, and such deed or patent shall vest in the purchaser of any such lands all right, title or interest of said counties in said lands, as fully as if said patents or deeds had been granted by the Governor of the state and countersigned by the Secretary of State, as is now provided by general statutes; and the funds arising from such sale shall constitute a part of the school fund of the respective counties, as is now provided by law." Laws 1868, p. 67. This act was in judgment before this court in the case of Barton County v. Walser, supra. The act was held valid. The court announced in that case that, as between individuals, "The Legislature cannot validate void deeds. But counties are not individuals. They are political divisions of the state. Their functions are of a public nature. They hold their property in subordination and under the control of the Legislature." In that case the deeds validated were void. They were executed by a person without authority. The conclusion reached in the Barton County Case was bottomed upon the ground that the Legislature had given the power to the counties to dispose of the land; that the counties had exercised the power, but not in the method designated by statute. The court further said in that case that "no vested right of the citizen is interfered with. The state is only rendering valid the acts of one of her political divisions, which was done under and by virtue of the authority of the Legislature, but was carried out and executed in an informal manner. The act of 1868 is a legislative confirmation, and simply makes good the acts of the officers in the same manner as if they had proceeded in a formal, regular way in the execution of their authority." The case of Barton Co. v. Walser, supra, was approved in the case of Sturgeon v. Hampton, 88 Mo. 203.

The act before us for interpretation does not impair any vested rights of individuals, nor does it undertake to validate void instruments; but the act itself is based upon equitable grounds. The state, in the exercise of its just power, by this act simply said to her people, who had for more than 20 years been responding to its demands for taxes upon lands that they claimed as their own, and who in good faith believed that they had the legal title, "Your claim and right to this land shall be quieted." In this case it is admitted that the patent was issued over 30 years ago; that the taxes have been paid by the parties claiming through the patent. It is true, in the Barton County Case it is said the money was paid and went into the school fund, but that does not prevent the principle from being applicable to the case at bar. In this case it is not pretended that this transaction was based upon fraud, but doubt-

less the county court proceeded upon the theory that Stoddard county was not only the legal owner of the land, but that there was no trust as to the proceeds of the sale, and accepted the \$13,500 in warrants issued by Stoddard county, and upon receipt of this the patent was issued. As to whether the county of Stoddard has ever applied the value of the consideration received to the school fund, the record does not disclose. We do not think that the respondents or their grantors had to follow the fund. In the case of Moss v. Kauffman, supra, the facts in that case were that Thomas Allen purchased from Bollinger county certain swamp land, and paid for it in railroad stock, which appeared upon the face of the deed. This deed was held void, but the county of Bollinger had converted the railroad stock into money. Houck and Brown succeeded to whatever equities Thos. Allen had in the money realized by the county from the stock. They afterwards purchased the land from Bollinger county, and the value of this railroad stock was considered a part of the purchase money. Burgess, J., in that case, as to the title thus obtained by Houck and Brown, said: "We can see no reason why the title thus acquired by them should not be upheld. Certainly this deed is not void." In the case of Linville v. Bohanan, 60 Mo. 554, the commissioner sold the swamp land on a credit; the purchaser executing a mortgage for the purchase money. The land was sold in pursuance of the provisions of the mortgage, and the county became the purchaser. There was no provision of the statute authorizing the county to buy. This transaction was upheld under the statute then in force, which authorized the county courts to sell and dispose of the swamp lands. These cases indicate very clearly that the title to these lands being in the county, and the trust only being applicable to the proceeds of the sales, the powers of the county court, as designated by statute, in respect to the sale and disposition of these lands, are not to be construed as meaningless. But aside from this, the act of 1901 is not to be construed as making a patent valid that recites a consideration which would make it void; but its application is sought as to patents reciting "that full payment has been made to the county of Stoddard as provided by the laws of this state." When this act was passed, the state, to whom the counties are subordinated, was presumed to know the conditions and character of title it desired to relieve and quiet; and, when it stretched out its strong arm to accomplish this purpose, we are of the opinion that it had full power to do so.

The only remaining question is the power of this court to apply the curative provisions of the act of 1901 to this case, the act not being in force at the time of the trial in the lower court. This is the first time this question has ever been presented to this court for determination. Upon an examination of this

subject, we find that recognized authority fully supports the contention of respondents, and that this court has the power and it is appropriate to apply the provisions of this curative act to the cause before us. Mr. Chief Justice Marshall, in the case of *United States v. The Schooner Peggy*, 1 Cranch, 103, 2 L. Ed. 49, announces the doctrine very tersely. He says: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, is erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, for it is obligatory." Cooley's Constitutional Limitations states the rule in this way: "The bringing of a suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered." It may be said that the last citation has reference to judgments in the trial court. This may be true, but we see no valid reason why the court, if it finds a law intervening subsequent to the judgment, changing the rule as applicable to that judgment, could not apply it. If this act of 1901 is the law of the land, then we can apply it in support of the judgment of the lower court. Certainly it will not be disputed that if this act is obligatory, and if this case was reversed, we could require the trial court to enforce it. If we have the power upon reversal to say to the lower court that this statute is in force and entitles the respondents to a judgment, we have the right to do directly what we could do indirectly. This curative act not only provided that "no action shall be maintained for the purpose of setting aside or calling in question such patent or patents," but it expressly declared that "such grants shall be deemed and held to be good and valid." The patent involved in this case, together with all the acts of the parties claiming through such grant, is brought directly within the character of instruments intended to be cured by the act of 1901; and, if such instrument was burdened with any defect or irregularity, that act cured it.

Entertaining the views as herein expressed, we have reached the conclusion that the action of the trial court was not only appropriate and just, but is supported by every principle of equity, and its judgment will be affirmed.

BURGESS, GANTT, and VALLIANT, JJ., concur. ROBINSON, C. J., and BRACE and MARSHALL, JJ., dissent.

BRACE, J. I do not agree to the foregoing opinion of the majority of the court, but adhere to the views expressed in the original opinion in this case, delivered on the 28th day of March, 1902, and in which all the

members of the court, except BURGESS, C. J., absent, then concurred, and which is as follows:

"These two cases were tried together, brought here on a single transcript, and may be treated as one case. The decrees of the circuit court were in favor of the plaintiffs in each case, and the defendant appeals.

"On the 13th of March, 1868, in the Stoddard county circuit court, a judgment was rendered as follows: 'Louis M. Ringer v. Stoddard County. Civil Action. Debt. Now comes the plaintiff by his attorney, and it appearing to the satisfaction of the court that the defendant herein has been duly notified of this proceeding by personal service as the law directs, and that said plaintiff did at the last term of this court recover an interlocutory judgment against said defendant, and the said defendant being solemnly called, comes not, but continues to make default, whereupon, upon said motion, said judgment is made final for \$1,136.08. It is therefore considered and adjudged by the court that said plaintiff recover of and against said defendant his debt aforesaid in form aforesaid found, in the sum of \$1,136.08, together with his costs and charges by him laid out, and his said suit in this behalf expended, which costs amount to \$10.65, and that he have execution therefor, and that this judgment draw interest at the rate of six per cent. per annum.' In pursuance of an execution issued upon said judgment, dated August 17, 1868, the sheriff of said county levied upon all the right, title, and interest of Stoddard county in and to 80,172¹/₁₀₀ acres of land situate in said county, and on the 15th of September, 1868, sold said lands to D. Starks Crumb and Louis M. Ringer for the sum of \$663.95, and duly executed and delivered to them a deed therefor, dated September 16, 1868. The lands thus sold and conveyed were swamp lands donated to the state of Missouri by act of Congress approved September 28, 1850, and by the state of Missouri donated to Stoddard county by the act of the General Assembly approved March 27, 1868, and previous acts for the purposes in said acts designated (Laws Mo. 1868, p. 68; 2 Laws 1857, p. 32; Laws 1854-55, p. 154; Laws 1852-53, p. 108; Laws 1850-51, p. 238). Afterwards, on the 23d of April, 1869, an order was entered of record by the county court of Stoddard county as follows: 'Whereas at the March term, A. D. 1868, of the circuit court of Stoddard county, in the state of Missouri, Louis M. Ringer obtained a judgment against Stoddard county upon warrants on the swamp-land fund of said county, upon which said judgment an execution issued according to law, by virtue of which said execution the sheriff of Stoddard county did seize and levy upon all swamp land owned and possessed by said county, of which said lands so levied upon one hundred and seven thousand, or near that amount, of acres of said lands, were sold by said sheriff, in due accordance

of law, at the September term of the circuit court of Stoddard county, A. D. 1868, to Louis M. Ringer and others; and whereas, the county court of Stoddard county did at its February term, A. D. 1869, by an order of record, appoint William G. Pelham and David G. Hicks attorneys for and on behalf of said county, to institute suit for the recovery of the lands sold as aforesaid, granting to them the interest of the county to fifty thousand acres of lands so sold, as their fee: Now, therefore, in consideration of the facts that said suit would be attended with much uncertainty in the recovery of said lands, and require years of litigation to terminate the same, it is therefore considered by the court that a compromise of the same would be for the benefit of the said county of Stoddard, if made with the parties who bought said lands at said sale, whose names are as follows, to wit: Louis M. Ringer, D. Starks Crumb, Erastus W. Hill, Thomas W. Johnson, Samuel J. Burdett, L. Frank Starrs, Robert W. Carter, M. E. Leach, William P. Knox, Clarissa M. O'Dell, H. H. Bedford, James Frazier, William W. Norman, J. Moore, J. E. Liles, and Jesse B. Leggett; and whereas, said purchasers agree and covenant to pay to the said county the sum of thirteen thousand five hundred dollars in Stoddard county warrants, which sum is to be paid into the county treasury on the following terms and in the following manner, to wit: Said parties either paying as aforesaid, or executing their promissory notes, bearing six per cent. interest. One-half of said sum shall be paid as aforesaid on or before the 1st day of January, A. D. 1870, and the remaining half on the 1st day of January, A. D. 1871. Each of said parties giving notes for their portion of said sum shall secure the same by mortgage on real estate to the satisfaction of the county court of the said county. Therefore it is considered, adjudged, ordered, and decreed that, in consideration of the premises aforesaid, the county court shall and will cause letters patent to be issued to the purchasers of said lands, and to their assigns, conveying in fee simple all the right, title, interest, and claim of said county of, in, and to the lands sold by virtue of said execution, to the parties who purchased the same, or to their assigns. And it is further ordered that for the purpose of carrying out this order in good faith towards the purchasers aforesaid, and their assigns, the county court of this county does hereby make, constitute, and appoint Alfred Eltzroth a special commissioner for and on behalf of said county of Stoddard to make, execute, and deliver to said purchasers or their assigns letters patent for the lands aforesaid. Said commissioner to receive the usual fee for such services, to be paid by the parties to whom the patents shall be made, which said patents shall be delivered to the parties aforesaid, upon the execution, acceptance, and delivery of the mortgage aforesaid, on the production of the

county treasurer's receipt for the pro rata of the aforesaid thirteen thousand five hundred (13,500) dollars due upon the amount of lands for which patents are to be issued. And it is further ordered that on compliance with a special provision of this compromise, William G. Phelan and David G. Hicks are to receive out of said lands so sold ten thousand acres each, in lieu of the fifty thousand (50,000) acres mentioned heretofore; the same to be selected. Said selection to be justly proportioned between the parties who are to receive patents for said lands as aforesaid in equal pro rata of said lands so sold, that being $17\frac{1}{2}$ per cent. And the commissioner aforesaid is hereby ordered to issue to said Phelan and Hicks patents for the lands so selected, upon their securing or paying to said county fifteen hundred (\$1,500) dollars of said thirteen thousand five hundred (\$13,500) dollars. And it is further ordered that, upon the issuing of patents to William G. Phelan and David G. Hicks to the amount of lands above mentioned, then the order made at the February term, 1869, granting said Phelan and Hicks, as attorneys, the interest of said county in fifty thousand (50,000) acres of said land, shall be considered revoked, held for naught, and cease to be of effect.'

"Afterwards, on and before May 1, 1869, the said special commissioner, in pursuance of said order, upon compliance with the terms thereof, issued patents to the purchasers. By mesne conveyances the plaintiff Albert P. Simpson has acquired the title of the said Ringer & Crumb so conveyed by said sheriff's deed, and patents to 9,121.50 acres of said land, and the plaintiffs Himmelberger have acquired title to 640 acres thereof. Afterwards, in an action in ejectment in the United States Circuit Court for the Eastern District of Missouri, this title came before that court for adjudication in the case of *Stone v. Perkins et al.*, 85 Fed. 616, in which it was decided 'that the land in question was held in trust by Stoddard county for the ultimate use and benefit of the public schools of the county, and was not a part of the general assets of the county of Stoddard, or subject to be sold on execution to pay a general judgment of the county.' Hence 'the plaintiff's remote grantor acquired no title by virtue of the execution sale, and the plaintiff has acquired none by the several mesne conveyances from such grantor to him.' And that 'the county court exceeded its authority in making the compromise agreement in question, and that the deed made by the commissioner, Eltzroth, to plaintiff's grantor, pursuant to such compromise, conveyed no title, for the following reasons: (1) Because the compromise was based upon a recognition that Ringer had some right to the land, arising out of the execution sale, and in the settlement with him, and the deed executed pursuant thereto, trust property belonging to the public schools was indirectly appropriated to the payment and satisfaction of a general judg-

ment against Stoddard county. (2) Because the compromise involved a settlement of a large demand on the part of the attorneys above named against Stoddard county, arising out of their said contract of employment with the county. (3) Because by the terms and provisions of the compromise the land was bartered; that is to say, was not sold for cash, or for work done or to be done in draining other swamp lands. (4) Because, treating the consideration received as the equivalent of cash to the amount of the alleged face value of the securities taken (the same being \$13,500, in the aggregate, for 107,000 acres of land sold), it amounts to only about 8 cents per acre, instead of \$1.25, as required by the act of March 27, 1868, *supra*, as construed by the Supreme Court of Missouri, *supra*. (5) Because the compromise, as made, taken as a whole, as above analyzed, can in no proper sense be regarded as a sale and disposition of the swamp lands for the benefit of the schools of the county, under and pursuant to the statutory authority conferred upon the county court.' Afterwards, on the 16th of April, 1898, the county court of Stoddard county made an order, of record, as follows: 'On this day the question of the future action of this court in relation to the swamp lands of Stoddard county known as the "Ringer Lands" coming on to be heard, and the court, being fully advised in the premises, doth consider and adjudge that, in view of the recent decision of Judge Adams, of the United States Circuit Court for the Eastern District of Missouri, in the case of *Stone v. Perkins*, said lands belong to Stoddard county, and ought to be sold by the county, and the revenue arising therefrom applied as directed by the statute. It is further considered and adjudged by the court that justice demands that those parties having a bona fide chain of title, coming down through the Ringer sale, ought to have the preference in the sale of said lands. It is therefore ordered by the court that all parties holding the Ringer title to said lands be, and are hereby, given until the first Monday in November, 1898, to come on and make application to the court for the purchase of any of such lands which they may hold under and by virtue of the Ringer sale at the price and sum of one dollar and twenty-five (\$1.25) cents per acre, on such terms as the court by order of record may direct, and that all of said lands that shall remain unsold after the first Monday in November next will be offered for sale to the general public as other lands of the county are now sold, and that the holders of the Ringer lands be notified of this action of the court by the publication of this order in the *Bloomfield Vindicator*, and that all parties desiring to make application for the purchase of any such lands should apply to Ralph Wammack, of Bloomfield, Missouri, who is hereby constituted agent of the county in the settlement of the title to

said lands.' Afterwards, on the 14th of September, 1898, these suits were instituted.

"The petition, which is very voluminous, sets out at length plaintiff's chain of title, the facts aforesaid in detail, and further alleges, in substance, that the Ringer judgment was upon county warrants issued for work and labor done under a contract made with the county court of said county for the construction of certain ditches, dikes, and levees, for the purpose of reclaiming said lands, whereby it was agreed that payment therefor would be made, by warrants on the swamp-land fund of said county, and thereupon it was represented by said county court that such warrants would be paid on presentation to the county treasurer, the custodian of the swamp-land fund; that the same having been presented to the county treasurer, and payment thereof refused, the said Ringer, being the assignee and holder of said warrants, instituted the suit thereupon in which said judgment was rendered; that since the conveyance by the sheriff's deed aforesaid, and the issue of the patents aforesaid by Eltzroth, the lands claimed in this controversy have been assessed to, and the taxes paid by, the plaintiffs and their grantors; that they have been in the continuous, open, notorious, and adverse possession thereof for more than ten years before the institution of this suit, and that for more than twenty-nine years they and their grantors have exercised all such acts of ownership and control over said lands as their condition permitted, during which time their right thereto was not questioned by the county; that the claim set forth in said order of the county court of April 16, 1898, is a cloud upon plaintiffs' title; that defendant by the facts aforesaid is estopped, and by its laches is precluded, from setting up or maintaining any claim to said lands. Wherefore plaintiffs pray that the title to said lands be vested in them; that the defendant be forever enjoined from asserting any claim thereto, or interfering in any manner with plaintiffs' possession thereof, etc.; and for general relief. The parol evidence, so far as is necessary, will be noticed later in the course of the opinion. From decrees in favor of the plaintiffs in accordance with their prayers, the defendant appeals.

"At the time this suit was instituted there was pending in this court on appeal an action in which this same title was involved, and which was thereafter passed upon in Division No. 1, June 30, 1890 (*State ex rel. Public Schools of Stoddard County v. Crumb et al.*, 157 Mo. 545, 57 S. W. 1030), in which, after summarizing the statute governing the subject, it was held that the plain scheme and policy of the act was to vest the title to the lands in the county for the purpose of drainage, reclamation and sale, or sale without drainage or reclamation, the proceeds to go to the school fund; to authorize the coun-

ty court to have the lands drained, reclaimed, and surveyed under the direction of a commissioner, and to give power to the county to raise money for this purpose by borrowing money and issuing bonds; to have the land sold by the sheriff at public vendue on sixty days' notice, but not for less than one dollar and twenty-five cents an acre, within five years from January 1, 1866; and to require the net proceeds of such sale, after deducting the expenses of draining, reclaiming, surveying, and selling the same, to be paid into the county treasury, and become a part of the public school fund of the county, and to be loaned out like other school funds, and only the interest arising therefrom to be apportioned and distributed like other school funds. The act was approved March 27, 1868. Ringer obtained judgment on March 13, 1868. The sheriff sold the land under execution on September 16, 1868. The judgment therefore antedated the approval of the act, but the sale under execution was after the act took effect. The judgment was a general judgment against the county. * * * The sheriff therefore sold these lands, which the state conveyed to the county for the benefit of the school fund, to satisfy a general judgment against the county. Such a sale was without authority of law, and conveyed no title to the purchaser. Such lands were exempt from such a sale for ordinary county indebtedness. *State ex rel. v. Co. Ct. New Madrid Co.*, 51 Mo. 82. The property held by a person in trust cannot be sold under legal process to satisfy a personal judgment for a personal debt of the trustee. The effect of the sale was to make the school lands pay \$1,136.90 of the general indebtedness of the county, and this could not lawfully be done. *Montgomery Co. v. Auchley*, 103 Mo. 492, 15 S. W. 626. The sheriff's deed should therefore be canceled as a cloud upon the title to the lands.

"But the defendants rely also upon the patents issued by the county, through its special commissioner, on May 1, 1869. Prior to the passage of the act of March 10, 1869, the patents for all such lands sold by the county courts were issued by the Governor, countersigned by the Secretary of State, and registered in the office of Register of Lands. *Laws 1868*, p. 69, § 4. The sixth section of the act of 1869 (*Laws 1869*, p. 67, § 6) authorized the county courts to issue the patents to such lands, and to sell and dispose of such lands like any other real estate belonging to the county. But this act has been held by this court not to destroy the trust created by the act of 1868, and not to vest absolute ownership of such lands in the county. *State ex rel. v. Co. Ct. New Madrid Co.*, 51 Mo., loc. cit. 85; *Sturgeon v. Hampton*, 88 Mo. 203; *C. G. S. W. Railroad Co. v. Hatton*, 102 Mo., loc. cit. 55, 14 S. W. 763; *St. L., C. & F. S. Railroad Co. v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494; *Hooke v. Chitwood*, 127 Mo. 372, 30 S. W. 167; *State ex rel. v. Wayne Co.*

Ct., 98 Mo., loc. cit. 366, 11 S. W. 758. The act of 1869 did not, therefore, divest or destroy the trust upon which the county held the land, nor did it change the manner of selling the same, nor remove the limitation as to selling for less than one dollar and twenty-five cents per acre within five years after January 1, 1868. Its only effect was to authorize the county to issue the patent, instead of having it issued by the state. When, therefore, the county court, by its order of April 23, 1869, ordered these lands to be conveyed by a commissioner to the purchasers at the execution sale under the Ringer judgment, in consideration of \$13,500 'in Stoddard county warrants, or, at the option of the purchasers, in cash, one-half payable January 1, 1870, and the other half January 1, 1871,' it acted wholly without authority of law. As before shown, these lands could only be sold at the time by the sheriff, at public vendue, on sixty days' notice, for not less than one dollar and twenty-five cents an acre, by order of the county court. The proceeds were required to go to the school fund. The county court had no power to authorize them to be sold for \$13,500 'in Stoddard county warrants.' That they were so paid for is *prima facie* shown by the fact that the commissioner's deed was dated May 1, 1869, which could not have been the case if the purchasers had elected to pay in cash, one half on January 1, 1870, and the other half on January 1, 1871. These inherent infirmities in these patents and want of power of the county court were known to the purchasers, for they knew the law, and knew the power of the court under the law.

"It is clear that the trust ran with the land, not only from the statutory provisions quoted, but from the decisions of this court, from the case of *State ex rel. v. Co. Ct.*, 51 Mo. 82, down to *St. L., C. & F. S. Railroad Co. v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494, and from the provisions of section 8042, *Rev. St. 1889*, which contemplate that such a suit as this shall be brought to recover lands, and from section 8040, *Rev. St. 1889*, which makes it the duty of the State Board of Education to ascertain and sue for lands which have been used for purposes other than those named in the grant or intended by law. It is equally well decided in this state that in selling these swamp lands the county court is not the general agent of the county, but is a special agent, invested with only the powers prescribed by the act granting these lands to the counties, and that all persons dealing with the county court in respect to these lands are charged with notice of its power. *Sturgeon v. Hampton*, 88 Mo. 211; *C. G. S. W. Railroad Co. v. Hatton*, 102 Mo., loc. cit. 55, 14 S. W. 763; *State ex rel. v. Wayne Co. Ct.*, 98 Mo., loc. cit. 366, 11 S. W. 758; *St. L., C. & F. S. Railroad Co. v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494; *Hooke v. Chitwood*, 127 Mo., loc. cit. 377, 30 S. W. 167. The case of *Pool v. Brown*, 98 Mo. 675,

11 S. W. 743, holds that the trust is a personal one as to the state, but that as to the county the trust runs with the land, and that the acts of 1869 and 1868 do not destroy the trust and remove the limitations upon the county as to the manner of selling these lands, and the price for which they might be sold; and therefore there is no conflict between that case and the prior and subsequent decisions of this court on these questions.

"The circuit court therefore erred in not cancelling the patents issued by the county court through its commissioner. * * * It is only necessary to add that the plaintiff's rights are not barred by limitation. Section 6772, Rev. St. 1889. Neither is there any laches in the case; nor is the case, from its very nature, susceptible of being controlled by the doctrine of laches. * * * While the case of *Stone v. Perkins* (C. C.) 85 Fed. 616, was an action in ejectment, and the legal title to the land under the sheriff's deed and patents aforesaid, only, was passed upon, the case of *State ex rel. Public Schools of Stoddard County v. Crumb et al.*, 157 Mo. 545, 57 S. W. 1030, was a suit in equity to set that title aside as a cloud upon the title of the county as trustee of the public schools of said county. In these cases the whole subject has been so thoroughly and recently discussed that it is unnecessary to go over the ground again. The conclusions therein reached, that the title under which defendants claim has no standing either in a court of law or a court of equity, is so clearly demonstrated as to be decisive of the present case, unless a different conclusion is warranted by the additional facts disclosed by the record in this case, and to these additional facts only need our attention be directed.

"The effect of the recital, 'Whereas, at the March term, A. D. 1868, of the circuit court of Stoddard county, in the state of Missouri, Louis M. Ringer obtained a judgment against Stoddard county upon warrants on the swamp-land fund of said county,' etc., in the order of the county court of April 23, 1869, on the judgment, was not directly passed upon in *State ex rel. v. Crumb*, 157 Mo. 561, 57 S. W. 1030, for the reasons stated in the opinion; and on the trial of this case the plaintiffs, after showing that all of the original 'files' in the case of *Ringer v. Stoddard County* had been destroyed, introduced two witnesses who had seen the files before they were destroyed (some twenty or thirty years before), the evidence of one of whom tended to prove that the suit in which said judgment was rendered was based entirely on a number of certificates signed by James Cooper, superintendent of public works of Stoddard county, called 'county scrip' or 'swamp-land scrip,' and of the other that the suit was based partly on such scrip and partly on county warrants; and the defendant introduced one witness, who examined the files at the time of the sale, and

who testified that the suit was on two county warrants on the general revenue fund of the county. The parol evidence also tended to prove that, about the time of the institution of the suit against the county, Ringer was the holder by assignment of some of such scrip or certificates, amounting to the sum of twelve or thirteen hundred dollars; that they were issued in the year 1858 or 1859 for work done in Stoddard county in constructing a road called the Bloomfield & New Madrid Plankroad, in doing which it became necessary to dig ditches, erect bridges, and make a levee about three miles long, from a foot and a half to eight feet high. It would seem to go without saying that neither the misrecital of the judgment in the order of the county court, nor this parol evidence, affects said judgment in any manner. Whatever the cause of action may have been upon which it was rendered, that cause of action was merged in the judgment. It was a general judgment against the county by its terms, imports absolute verity, is impervious to collateral attack, and, even if there was a mistake, on such evidence it could not be changed, altered, or corrected, even in a direct proceeding for that purpose. *Board of Relief C. P. Church v. Drummond*, 167 Mo. 54, and cases cited. It may be remarked, however, that, as appears from this evidence, Stoddard county had no swamp-land fund; and, under the law in force in that county at that time, the only right Ringer, as the holder of such certificates, had quoad the swamp lands in such county, was with them to enter or purchase such lands, to the amount of such certificates, at the price of one dollar per acre. *Laws Mo. 1854-55*, p. 154. And it is upon this shadowy foundation that it is sought by this parol evidence to set up an equity by which the character of the judgment under which the defendants claim is to be changed, and the beneficiaries of this trust deprived of 107,000 acres of land set apart for them by the state and the general government. Such a claim could have no standing in a court of equity, even if defendants were not precluded from setting it up by the well-settled principles of law which make such judgment a finality as to them. And the ruling as to the character and effect of the judgment in this case must be the same as it was in the *Crumb* and *Stone* Cases. These lands are not, and never were, the property of the county, or subject to its obligations as a county, and could not be subjected to them by a judgment against the county; nor could the county court trade them off for the obligations of the county, as was attempted by the order of the county court of April 23, 1869, and the patents issued in pursuance thereof. As to these lands the county was a mere trustee, and the county court and the other officers of the county were mere agents for their disposition in the manner and for the purposes designated

by law, whose powers were defined and limited by law, and whose acts beyond the limits of such powers were void. Of those limitations the defendants and their grantors were required to take notice, and hence they acquired no title to the lands in question under the sheriff's deed aforesaid, or under the patents issued in pursuance of the order of the county court aforesaid. In support of which conclusion we deem it sufficient to cite the cases: *State ex rel. Pub. Schools v. Crumb*, 157 Mo. 545, 57 S. W. 1030; *Stone v. Perkins* (O. C.) 85 Fed. 616; *Hooke v. Chitwood*, 127 Mo. 372, 30 S. W. 167; *St. L., Cape G., & Ft. Smith Ry. Co. v. Wayne Co.*, 125 Mo. 351, 28 S. W. 494; *Wm. Brown Est. v. Wayne Co.*, 123 Mo. 464, 27 S. W. 322; *Butler v. Sullivan Co.*, 108 Mo. 630, 18 S. W. 1142; *Cape G. & S. W. Ry. Co. v. Hatton et al.*, 102 Mo. 45, 14 S. W. 763; *Sturgeon v. Hampton*, 88 Mo. 203; *Saline Co. v. Wilson*, 61 Mo. 237; *State ex rel. Robbins v. County Court New Madrid*, 51 Mo. 83; *State v. Bank*, 45 Mo. 528.

"The plaintiffs acquired no title by the statute of limitations. The doctrine of laches is not applicable to it, nor is the defendant estopped from asserting its title as trustee to these lands for the purposes of the trust by reason of the fact that for more than twenty-nine years they have been paying the taxes assessed against these timber lands, of which during that time they have been in the profitable enjoyment. *Rev. St. 1889, § 6772*; *State ex rel. v. Crumb*, 157 Mo., loc. cit. 564, 57 S. W. 1030; *Hooke v. Chitwood*, 127 Mo., loc. cit. 372, 30 S. W. 167; *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *State ex rel. v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Heidelberg v. St. Francois Co.*, 100 Mo. 69, 12 S. W. 914; *Sturgeon v. Hampton*, 88 Mo. 203; *City of St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586. The plaintiffs having, therefore, failed to make good their claim to these lands upon any of the grounds set forth in their petitions, the circuit court erred in rendering the decrees aforesaid in their favor, and the same should be reversed. But at the last session of the General Assembly, by an act approved March 14, 1901 (*Laws Mo. 1901, p. 202*), section 8197, art. 3, c. 122, *Rev. St. 1899*, entitled 'Swamp and Overflowed Lands,' was amended by adding at the end of said section the following proviso: 'Provided further that in all cases where the county courts of the state, have, prior to 1880, sold or disposed of any such swamp lands in their respective counties, and issued or caused to be issued patents for the same and the patentees or those holding under them have been claiming such lands and paying county and state taxes thereon for more than twenty years, such grants shall be deemed and held to be good and valid, and no action shall be maintained for the purpose of set-

ting aside or calling in question such patent or patents.' At the time this act was passed and went into effect these cases had been tried and finally determined in the circuit court, and were pending in this court on appeal. The jurisdiction of this court over them is purely appellate, in the exercise of which we are confined to a review of the case as it was tried below. No new issue can be injected into the cases in this court. Moreover, this statute does not purport to give a cause of action, or to give aid to one, but only to bar an action 'for the purpose of setting aside or calling in question such patent or patents.' Hence it cannot be invoked in these cases in aid of the decree herein rendered, and we refrain from expressing any opinion upon it. The decrees and the judgments in these cases will therefore be reversed."

In this opinion ROBINSON, C. J., and MARSHALL, J., still concur.

HUNTER v. HELSLEY.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

EVIDENCE—COMPROMISE—ASCERTAINMENT OF LIABILITY—WAIVER OF OBJECTION—EXPERT TESTIMONY—QUALIFICATION—EXPRESSION OF OPINION—APPEAL—JUSTICE COURT—FAILURE TO PLEAD COUNTERCLAIM.

1. Under the express provisions of *Rev. St. 1899, §§ 3852, 4078*, in an action before a justice, defendant must, before trial, file a statement of his set-off or counterclaim, or he cannot avail himself thereof on appeal and new trial in the circuit court.

2. Evidence, in an action to recover freight under a contract providing that in payment for a farm defendant was to take a stock of merchandise at cost "and freight added," considered, and held sufficient to show that plaintiff had paid freight charges for merchandise shipped to defendant under the contract.

3. Evidence of the ascertainment by plaintiff and defendant of the amount of freight due under a contract, made for the purpose of determining what was actually due, and not to effect a compromise, was properly admitted.

4. Defendant, who objected to evidence of a certain transaction, but in his own evidence went fully into the details thereof, could not predicate error on the overruling of his objection.

5. Evidence by plaintiff, who was a merchant accustomed to handling shoes, of what in his judgment a cargo of shoes purchased by him would weigh, was admissible as expert testimony, although he had testified that he had never actually weighed a box of shoes.

6. It is for the court to determine whether testimony given by an expert as to what he "expects" or "guesses" to be the case expresses his judgment.

Appeal from Circuit Court, Benton County; W. W. Graves, Judge.

Action by J. M. Hunter against George E. Helsley. From a judgment for plaintiff, defendant appeals. Affirmed.

Lay & Lay, for appellant. W. S. Jackson, for respondent.

SMITH, P. J. The plaintiff and defendant entered into a written contract by which

plaintiff agreed to take from defendant a farm valued at \$18,000, and to give in exchange therefor certain other real estate valued at \$4,600, and also a stock of merchandise, the latter "at cost and freight added." The transaction to which the contract related was completed, except the plaintiff insisted that the defendant had refused to pay him the freight on said stock of merchandise, as he had bound himself to do; and, based upon this alleged breach of the contract, this action was begun before a justice of the peace to recover the amount of freight so claimed.

In the circuit court, where the cause was removed by appeal, there was a trial by a jury, whose verdict, under instructions impliedly admitted to have been correct in expression, was for the plaintiff.

It is conceded that the contract heretofore referred to was entered into, and that the defendant has paid nothing for freight on said stock of merchandise. The defendant, in effect, admits his liability to the plaintiff under said contract, but contends that under some oral agreement entered into between the plaintiff and himself the plaintiff is indebted to him (defendant) for the discount which he (plaintiff) received on the cost price of goods, by reason of paying cash therefor, in an amount equal to that for which plaintiff sued.

No statement of any set-off or counterclaim was filed before the justice, as required by sections 3852, 4078, Rev. St., and therefore that defense was not available in the trial court. *McCormick v. Crawford* (just decided by us) 72 S. W. 491; *West v. Freeman*, 76 Mo. App. 96; *Stephens v. Supply Co.*, 67 Mo. App. 589; *Gantt v. Duffy*, 71 Mo. App. 93. And, besides this, the abstract nowhere discloses any evidence whatever which in the least tends to prove that the plaintiff ever received any discount whatever on any purchase of goods, so that the defendant's defense was wholly unproved. Whether such a defense was submitted by the instructions to the jury does not appear, the instructions not being preserved by the bill of exceptions, nor is it material to inquire.

It is no doubt true that the admission implied by the nature of the defense interposed by the defendant did not bind him, and therefore the question remains whether or not the plaintiff adduced sufficient evidence to support the verdict. The obligation imposed on defendant by the contract to pay plaintiff, as a part of the purchase price of the goods, the amount of his outlay for the freight, or the cost of carriage thereon, from the place of purchase to that where the sale was made, is conceded; so that the plaintiff, to make out his prima facie case, was only required to prove the amount of such outlay or some part thereof.

It appears from the evidence that the value of the goods which the plaintiff transferred to defendant was \$7,000, and that the same were purchased by plaintiff in Chicago, Cincinnati, St. Louis, and Jefferson City; that

the freight paid on those purchased at the last two places was 65 cents per hundred. The first two are cities located in other states, and we may know are more distant than the last. The freight paid on goods purchased at said first two places, it may be safely assumed, at least equaled that paid on those purchased at the last. There was some testimony which tended to show the weight of the goods referred to in the contract, which weight afforded a basis for the computation of the aggregate amount of freight paid thereon by the plaintiff. The bills of lading showing the amounts of freight paid by plaintiff were left in the store when he turned the possession of it over to the defendant, but they had been lost or mislaid, so that they could not be produced at the trial. It appears that the plaintiff and defendant, with the aid of Brunz, an experienced clerk, who was then employed by defendant, in the store, and had been so employed by plaintiff when he carried it on, undertook on an occasion to ascertain and determine the amount of the freight which was due the plaintiff under said contract; that after ascertaining the various articles of merchandise and the value thereof on which no freight had been paid, and excluding the same from the computation, and "figuring" the amount due on the residue from such data and facts as were accessible, it was concluded all around that the freight paid by plaintiff would approximate 3 per cent. on the value. It appears that the defendant, who, as already stated, took part in the undertaking, after it was through admitted that the result arrived at was right. In addition to this, the plaintiff testified that he was certain from the bills that he paid as much as \$200 freight.

It may be fairly inferred from the facts and circumstances disclosed by the evidence that the plaintiff paid a considerable amount of freight, but the difficulty encountered is in arriving at the exact amount. The proof as to this we think was sufficient to carry the case to the jury for its consideration, and no doubt such was the thought of the defendant, for it does not appear that either at the conclusion of plaintiff's evidence or at that of the whole evidence he interposed a demurrer thereto.

But the defendant contends that, when he and plaintiff ascertained and determined that 3 per cent. on the value of the goods was the amount of the freight paid by plaintiff thereon, they were attempting to compromise their differences, and that, therefore, the court erred in admitting evidence of the same. The rule is well settled that declarations made by a party to a controversy in the course of negotiations looking to a compromise are inadmissible. *Huetteman v. Viesselmann*, 48 Mo. App. 582; *Fink v. Ins. Co.*, 60 Mo. App. 673; *Ferry v. Taylor*, 33 Mo. 323. But this rule has no application here, for the plaintiff testified that the ascertainment and determination of the amount of freight which was due him was not made for the purpose of

effecting a compromise, but to ascertain the amount actually due plaintiff.

There is nothing seen in the testimony of defendant to support the contention that the acts and admissions therein stated related to, or had for their object, a compromise settlement of the plaintiff's claim, and therefore we do not think the court erred in admitting such testimony.

It is to be further observed that the defendant did not stand on his objection that the evidence relating to the ascertainment and determination of the freight paid by plaintiff amounted to 3 per cent. of the cost of the goods was incompetent, but in the evidence introduced by him he went fully into the details of that transaction; and therefore if the plaintiff invited the court into error he (defendant) is in no situation to complain, since he lead the court into a like error, which thereby became common. *Crabtree v. Vanhoozier*, 58 Mo. App., loc. cit. 410.

While the plaintiff was testifying he was asked to state what, in his judgment, the thousand dollars' worth of shoes purchased by him in Chicago would weigh, and to which question the defendant objected on the ground that the plaintiff, according to his own admission, had never weighed a box of shoes in his life. It appears that the plaintiff was a merchant, and had been accustomed to handling shoes, and no reason is seen why he was not sufficiently qualified by practical experience to give his opinion or judgment as to the weight of the boxes of shoes purchased by him in Chicago, or on an issue like that in this case.

Where a witness, though qualified to express an opinion, testifies that he "guesses" or "expects" so and so to be the case, such testimony will be rejected, unless it sufficiently appears that these terms are used to express his opinion or judgment, and it is for the court to determine whether this is so. While evidence of this kind was not primarily the best, it seems to have been all that was obtainable under the then existing circumstances, and it, along with the other evidence, was, we think, sufficient to entitle plaintiff to a submission.

After a rather careful consideration of the entire case, we have been unable to resist the conviction that the plaintiff is entitled to recover some amount, and we cannot say that that found by the jury was wholly unauthorized by the evidence; and, this being so, it follows that the judgment must be affirmed. All concur.

DOWNING v. LEE.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

ARBITRATION—ACCEPTANCE OF AWARD—ESTOPPEL—CONTROVERSY SUBMITTED—LEGAL CAUSE OF ACTION—NECESSITY—CONSIDERATION TO SUPPORT AWARD.

1. Where a person accepts the award of arbitrators, and gives his note for the amount

awarded against him, he cannot afterwards, when sued on the note, successfully contend that the submission was not to arbitration, but to appraisement.

2. To furnish a sufficient basis for a submission to arbitration, it is not necessary that the submission be of a claim valid in law; it is sufficient if there be a bona fide contention between the parties as to their legal rights.

3. A mutual submission to arbitration is a sufficient consideration to support a note given in pursuance to an award of the arbitrators.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by Abel G. Downing against W. M. Lee. From a judgment for defendant, plaintiff appeals. Reversed.

This is a suit upon a promissory note for \$40, executed by defendant August 21, 1899, and payable to plaintiff in 60 days from date. The note was given upon a common-law award had between the maker and the payee, wherein it was awarded that defendant owed plaintiff said sum. The case originated before a justice of the peace, and there were no written pleadings, but it is to be gathered from the statement of the defendant's lawyer to the court and jury that the principal defense was that the note was without consideration.

The facts as shown on the trial, in a general way, were that on the 2d day of January, 1872, defendant, by his deed, conveyed to Rosa Lomas and one Walter Bradbury the southwest quarter of the southeast quarter of section 4, township 46, range 20, Pettis county, Mo., and prior thereto, in the year 1864, undertook to convey to one Allen Webb two and one-half acres of land by the following description, viz.: "Two acres and a half of land adjoining the southwest quarter of the southeast quarter, on the north end of said forty acres." In 1899, Rosa Lomas died, leaving plaintiff and two other children her heirs at law; but prior to her death she had obtained by deed Bradbury's interest in said land, thereby becoming the sole owner of same. It seems from the testimony that she had been married to a man by the name of Downing, plaintiff's father, prior to dates herein mentioned, and that at the time of her death she was the wife of a man by the name of John Thomas.

It was shown that at the time of the date of defendant's deed to said Webb he was of the opinion that said 40-acre tract, which he conveyed as aforesaid to Mrs. Lomas, contained 42½ acres, and that it was his intention when he made said deed to Webb to convey to him this excess of 2½ acres. After the death of Rosa Lomas (then Mrs. Thomas) plaintiff and her other heirs made an agreed partition of her real estate, and the 40-acre tract fell to the lot of plaintiff. It appears, however, that prior to the death of Mrs. Thomas she and her children had come to the conclusion that there was only 37½ acres

¶ 2. See *Arbitration and Award*, vol. 4, Cent. Dig. § 13.

of land in said tract, and at the time of said partition it was agreed between said heirs and children that, as plaintiff had become the owner of said tract of land, he would be entitled to their claim against defendant for the shortage of said $2\frac{1}{2}$ acres, and they verbally transferred their interest in said claim to him. Soon after said partition plaintiff demanded of defendant that he should make good his alleged contention of said deficiency in the number of acres of said tract of land. After some preliminary talk, two persons were finally selected to arbitrate the matter, and went upon the land, and returned their award to the effect that the defendant pay plaintiff the sum of \$40. The defendant contends here that the act of said persons was not in the nature of an award, but only an appraisement of the value of $2\frac{1}{2}$ acres of said land; but he stated at the trial, among other things, that "they [the arbitrators] finally decided that I must pay him [plaintiff] for two and one-half acres." It seems, too, that he affirmed the award by giving the note in controversy. As to whether there was a shortage in the number of acres in said tract of land the evidence was conflicting. The court, upon the close of all the evidence, instructed the jury to return a verdict for the defendant. The jury returned a verdict as directed, upon which judgment was rendered against plaintiff for costs, and from all of which he appealed.

Sangree & Lamm, for appellant. R. A. Higdon, Montgomery & Montgomery, and G. W. Barnett, for respondent.

BROADDUS, J. (after stating the facts). The defendant seeks to uphold the action of the court upon the ground that as plaintiff's claim was without any legal foundation there was nothing to arbitrate, and therefore there was no consideration for the note; and, further, incidentally, that the action of the so-called arbitrators did not amount to an award upon the merits of plaintiff's claim, but was only an appraisement of $2\frac{1}{2}$ acres of land.

It is true that it has been held by the courts of this state and of other jurisdictions that if the persons called upon to act are so called as mere appraisers of value they are not arbitrators, and that their appraisement is not an arbitration. *Curry v. Lackey*, 35 Mo. 389; *Garred v. Macey*, 10 Mo. 161; *Leonard v. Cox*, 64 Mo. 32. But defendant construed it as an arbitration; in fact, he testified that the award was that he was to pay plaintiff \$40. Having accepted the award of the so-called arbitrators by giving his note for the amount of their award, he ought not to be permitted afterwards to deny its effect as such.

The main contention is, however, that there was nothing to arbitrate; therefore the award was without effect, and the note without consideration. The defendant has offered many good reasons, supported by undeniable authority, that plaintiff's claim had no valid support in law, and as such could not have been enforced in the courts. But that is an evasion of the real question presented by the record.

"To furnish a sufficient basis for entering into a submission, no legal cause of action in favor of either party need exist. That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough. Nor, indeed, is it necessary that they should have come to the actual point of dispute; for a matter simply in doubt may be submitted." *Morse on Arbitration and Award*, p. 36; *Mayo v. Gardner*, 49 N. C. 359. "A reference to arbitration will be binding if there be a bona fide difference of opinion between the parties as to their rights, although there be no legal cause of action." *Findly v. Ray*, 50 N. C. 125. In *Parsons on Contracts* (7th Ed.) vol. 1, pp. 467, 468, pp. *438, *439, the rule is stated thus: "The prevention of litigation is a valid and sufficient consideration, for the law favors the settlement of disputes. Thus, a mutual submission of demands and claims to arbitration is binding so far as this: that the mutual promises are a consideration each for the other." And further: "With the courts of this country the prevention of litigation is not only a sufficient, but a highly favored, consideration; and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them."

Under the foregoing authorities no question could arise as to the character or value of plaintiff's claim. It was sufficient to sustain said arbitration that the plaintiff's claim was made in good faith, that it was disputed by defendant, and that it was submitted to arbitration, because the parties thought at the time it was a question to be settled, all of which was fully shown by the record. Arbitration, under the rule as we have seen, was not only a sufficient, but a highly favored, consideration in law for the note in question. It therefore follows that the finding should have been for the plaintiff instead of for the defendant.

The cause is reversed, with directions to set aside the finding for the defendant, and to enter a finding and judgment for plaintiff for the amount of the note and interest. All concur.

DRIES v. CITY OF ST. JOSEPH.

(Court of Appeals at Kansas City, Mo. April 6, 1908.)

HIGHWAYS—ALLEYS—RIGHTS OF ABUTTING OWNERS—OBSTRUCTION OF TERMINUS.

1. Owners of property abutting on an alley have property rights not shared by the general public in the entire alley, and the obstruction of a terminus of the alley by a city, thus preventing ingress and egress from the street, is an actionable private wrong.

Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Peter Dries against the city of St. Joseph. Judgment of nonsuit, with leave, and plaintiff appeals. Reversed.

Kelley & Kelley, for appellant. Kendall B. Randolph, for respondent.

BROADDUS, J. This is an action brought to recover damages to certain lots, and the improvements thereon, in the defendant city—incorporated of the second class—which were the property of the plaintiff. The petition alleged that plaintiff was the owner and in possession of lots 9 and 10, and 1 foot 4 inches of the north side of lot 8, in block 56 of Patee's addition to the defendant city, and that said lots front on the west on Fifteenth street; that Mitchell avenue ran east and west on the north side of said block, north and near to plaintiff's said lots; that there was an alley which ran north and south through the center of said block, and on which the east end of said lots abutted; and that on said lots there were valuable improvements, etc. It is further alleged that the defendant city, under certain ordinances which had been duly passed and approved, so graded said Mitchell avenue along the north side of said block as to place an embankment of earth and dirt in said street, and on the north of said lot 10, and across said alley, about 5 feet high above the level of the former grade of said avenue and lot, and the foundation of the building thereon, thereby rendering said lots, and the buildings thereon, inaccessible from said alley, and causing the water to stand upon said lots, and the buildings thereon to be damp and unhealthy, so that goods placed in the said buildings and cellar thereunder became damaged, and the health of the occupants impaired, to plaintiff's damage, etc. The answer was a general denial. At the trial the defendant objected to the admission of evidence on the ground that the petition showed that the plaintiff's lots did not abut on Mitchell avenue. It was then conceded by the plaintiff that there was a strip of ground 45 feet wide between his lots and Mitchell avenue, and thereupon the court sustained the defendant's said objection, and the plaintiff took a nonsuit, with leave, etc.

It was held in *Bailey v. Culver*, 12 Mo. App. 175, that "the owner of an abutting lot

has a vested right in the easement, coextensive with his boundary line, as a means of egress into the outer world from any part of his lot contiguous therewith. * * * But beyond the limits of contiguity with his lot, his rights in the easement are only those of a member of the public at large." Under the rule in said case, the action of the court in sustaining the demurrer to plaintiff's case here, as made by his petition, was correct; but the rule was not well founded, and has since been wholly overthrown by the decisions of the Supreme Court. "An abutting property owner on a street in a city has equal right with the public to use the street, and, in addition thereto, he has certain rights which are special to himself; e. g., that of ingress and egress." *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Glaessner v. Brewing Ass'n*, 100 Mo. 508, 13 S. W. 707. In *Corby v. Railway*, 150 Mo. 457, 52 S. W. 282, the distinction was clearly drawn between the rights of abutting property owners on an alley and that of the general public, in which case an injunction was sustained at the instance of the abutting property owner on a certain alley restraining defendant—a railroad corporation—from constructing its track on such alley. The special contradistinguished from the general right of the public was also recognized in *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783, and *Glaessner v. Brewing Co.*, 100 Mo. 508, 13 S. W. 707. We do not consider that the law as held in *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257, is in conflict with the holding in the cases cited, for in that case it was held that the damages claimed by plaintiff were not special to himself, but such as were suffered by the general public, for which reason he was not allowed to recover. In *Corby v. Railway*, supra, the court very justly made this distinction between an alley and a street: That the whole public was interested in the streets, because they were continuous, and, as such, served a general public use, "but the alley in each block is a complete entity unto itself, and it is immaterial to the owners of property in one block whether there is an alley in the next or any other block, or not, and likewise immaterial to the general public whether there are any alleys or not." It seems to us that it is plain that abutting property owners on an alley have property rights in the entire alley not shared by the general public. If the city had a right to obstruct one end of the alley in question, it had the right to obstruct both ends, and thus prevent any use whatever of the same by the plaintiff. The very statement of the proposition is sufficient to condemn it. The courts of other jurisdictions have emphasized the special property rights of abutting owners in streets and alleys, but the question seems to be so plain that further illustration is deemed wholly useless.

For the reasons given, the cause is reversed and remanded. All concur.

**A. A. COOPER WAGON & BUGGY CO. v.
BAILEY & GEORGE'S ESTATE.**

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

**SALES—CONTRACT—CONSTRUCTION—ORDER
—ACCEPTANCE—ABSOLUTE SALE
—CONVERSION.**

1. Defendants ordered from plaintiffs certain wagons, to be purchased under the terms of the order, on conditional sale. Plaintiffs inserted in the order the words "terms Comm. con.," meaning "consignment on commission;" but when the wagons were shipped they were accompanied by a bill which showed the wagons to be sold to defendants, and stated certain discounts on payment within 30 days, though the bill recited, "commission contract." Subsequently defendants made an assignment for benefit of creditors, and plaintiffs sued for a conversion of the wagons. *Held* to show an absolute sale.

Appeal from Circuit Court, Nodaway County; Gallatin Craig, Judge.

Action by the A. A. Cooper Wagon & Buggy Company against the estate of Bailey & George (Fred Wooldridge, assignee). From a judgment for defendant, plaintiff appeals. Affirmed.

E. A. Visonhale, for appellant. James B. Newmad, for respondent.

BROADDUS, J. The case stands as follows: On the 15th day of July, 1901, the firm of Bailey & George, doing business at Hopkins, Mo., made a written order on plaintiff company, doing business as a manufacturer at Dubuque, Iowa, for 20 wagons, and other articles not in controversy here. The wagons were shipped to said first-named firm on the 1st day of August next thereafter. Some time later, the date of which does not appear in the record, said Bailey & George conveyed their property and effects to respondent, Fred Wooldridge, as assignee for the benefit of their creditors; and plaintiff filed its claim before the assignee for the value of said wagons so shipped to said firm, alleging conversion, and asked that the same be allowed as a preferred demand. The referee refused to allow said claim, whereupon plaintiff appealed to the circuit court of the county, where, on trial anew, the finding was against claimant, and an appeal was taken to this court.

The written order aforesaid made upon plaintiff for said wagons and other articles was in the nature of an application to purchase on condition that the title of the property remain in the plaintiff until the purchase price was fully paid; but, when said application was received by the plaintiff company, the latter, without the knowledge of the defendant firm, inserted therein the words "terms Comm. con.," meaning thereby that the transaction would be a consignment for sale on commission. But when the wagons were shipped they were accompanied by the following bill, viz.: "A. A. Cooper Wagon and Buggy Co., Wagon, Buggy and Sleigh Manufacturers, Dubuque, Iowa, 8-1

'01. Sold to Bailey & George, Hopkins, Mo. Terms, commission contract. Shipped via C. B. & Q. Car No. 42,050. Order No. 3,363. Payable in New York or Chicago exchange or funds at par in Dubuque, Iowa. 20 31/4x9, C. S. wagons, complete, gear brake, double box, Nos. * * *, \$80, \$1,200. * * * A discount of \$7 per wagon will be allowed on this invoice if paid 1/3 each in 4, 6 and 9 months, and an additional discount of 5 per cent. on net amount (after deducting above discount) if paid within 30 days." The evidence disclosed the fact that Bailey & George sold the wagons, but failed to pay plaintiff for them.

Judging by the argument of the respective parties, the court held that the transaction was a sale, and not a consignment on commission; therefore, the action being in tort, for a conversion, and not on contract, plaintiff was not entitled to recover.

The order made by Bailey & George for the goods was not accepted by plaintiff as it was written, and the insertion of the words, "terms Comm. con." was intended to, and did, so change its nature from that of a conditional sale to a consignment for sale on commission. By reason of the spoliation of said order by plaintiff without the consent of defendant firm, plaintiff was precluded from recovering thereunder, either on the ground that the sale was a conditional one, or that the contract was one for sale on commission. *Girdner v. Gibbons*, 91 Mo. App. 412; *Bank v. Bosserman*, 52 Mo. App. 269; *Powell v. Banks*, 148 Mo. 620, 48 S. W. 664. In order to constitute conversion, the plaintiff was required to show either a conditional sale or a consignment for sale on commission, or, in other words, that the title of the property was at all times in the plaintiff. The only remaining evidence bearing on that question is contained in the bill herein inserted, which accompanied the delivery of the goods. And it must be admitted that it does in fact contain the contract between the parties. The original order for the goods was not a contract until accepted by the plaintiff, and the receipt by the said firm of said goods with the bill was an acceptance by them of the terms and conditions of the shipment, and thus constituted the contract between the parties. An inspection of said bill, in our opinion, clearly shows a contract of sale, and not a consignment for sale on commission. The words, "Terms, commission contract," mean nothing, taken in connection with the other parts of the instrument, as there is no provision therein as to the amount of commission to be paid for selling the wagons, or of any commission whatever. The words have no bearing and no connection with any other part of the writing. But it does appear clearly that the wagons were "sold to Bailey & George, at Hopkins, Mo.," at a specified price for each wagon; and, further, if payments are made in certain specified lengths of time,

the purchasers are to have certain discounts. As the plaintiff, therefore, had no interest in the property itself, having parted with both the title and the possession, there was no conversion by Bailey & George.

For the reason given, the cause is affirmed. All concur.

CITY OF PLATTSBURG v. HAGENBUSH.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

MUNICIPAL ORDINANCE—SPEED OF TRAINS—REASONABLENESS OF REGULATION.

1. An ordinance limiting the speed of trains within a city of 2,000 inhabitants to six miles an hour, enacted, under the express authority granted by Rev. St. 1899, § 5963, was reasonable as to a populous part of the city, where the track for a part of the distance was not only curviform, but ran through a deep cut, and over which there were numerous street crossings.

2. The ordinance was unreasonable as to a part of the city where there were but few houses near the track, and where, to maintain such slow speed, heavy trains would have to be doubled in order to pull up the grade.

Appeal from Circuit Court, Clinton County.

Proceeding by the city of Plattsburg against William E. Hagenbush for the violation of an ordinance regulating the speed of trains. Judgment for plaintiff, and defendant appeals. Reversed.

Gardiner Lathrop, S. W. Moore, F. B. Ellis, and J. P. Gilmore, for appellant. H. T. Herndon, for respondent.

SMITH, P. J. The plaintiff is a city of the fourth class. The complaint, in substance, alleged that the defendant, a conductor on the Atchison, Topeka & Santa Fé Railway, a corporation, run the said train through said city at a greater rate of speed than six miles per hour, contrary to the provisions of section 1 of Ordinance No. 130 of said city, etc. Said ordinance declared that "it shall be unlawful for any railroad company or conductor, engineer, agent or any employé of a railroad company, or other person managing or controlling any locomotive engine, car or train of cars, to run the same within the corporate limits of the city at a greater rate of speed than six miles an hour; and that any person convicted of violating said section should be fined not less than five dollars." It is conceded that the defendant did run a train within the corporate limits of the plaintiff city at a rate of speed far in excess of six miles an hour. There was a trial, resulting in a judgment for the plaintiff city, and defendant appealed.

The vital question raised by the defendant's appeal is whether or not the said ordinance is oppressive and unreasonable. The power of the plaintiff city to pass said ordinance is expressly conferred by its charter, the statute section 5963, Rev. St., but the

rate of speed to be allowed is left to the discretion of its council, and, when that body exercised that discretion and judgment in passing the said ordinance, it was *prima facie* valid. *Zumault v. Air Line*, 71 Mo. App. 670; *Evison v. Railway*, 45 Minn. 375, 48 N. W. 6, 11 L. R. A. 434. It has been settled in this state since the decision in *St. Louis v. Weber*, 44 Mo. 547, that municipal corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner. *Corrigan v. Gage*, 68 Mo., loc. cit. 544. Ordinances of this kind are passed for the purpose of affording protection to persons and property while on the streets at grade crossings and other places on the line of a railroad where they customarily have a right to go. And a clear case must be made out to authorize an interference by the court on the ground of unreasonableness. *Gratiot v. Ry. Co.*, 116 Mo., loc. cit. 467, 21 S. W. 1094, 16 L. R. A. 189; *Corrigan v. Gage*, 68 Mo. 544; *Kelly v. Meeks*, 87 Mo. 396; *Zumault v. Air Line*, ante; *Chillicothe v. Brown*, 38 Mo. App. 609; *Kansas City v. Sutton*, 52 Mo. App. 898.

Turning to the evidence in the present case, and we there find that the plaintiff city contains about 2,000 inhabitants, and that the said railway line runs through it for about three-quarters of a mile. From where it enters the city limits on the east to the first street—which is East street—the distance is upwards of a fifth of a mile, and between that street and the depot there are six grade crossings, and between the depot and the western limits of the plaintiff city are two more street crossings. The right of way of said railway through plaintiff city is from 20 to 30 feet wide. The line enters the plaintiff city at the east on a bridge, and from the west end of the bridge to East street, already mentioned, it runs on an upgrade through a cut about 10 feet deep, and this cut, but of less depth, extends on west to Main street. It is so curviform that in places the railroad track cannot be seen from one crossing to another. It appears that between the eastern limits of the city and East street there are only two or three houses adjacent to the road, but that further north and east of said last-named street is a part of the city in which a great many people reside, and from where, in going to the business portions of the city, they cross the said railroad. From East street on west the road passes through a populous part of the city. This case, as may be seen, differs in many of its facts from that of *White v. Railway*, 44 Mo. App. 540, and *Zumault v. Air Line*, ante. In each of those cases the limitation imposed by the ordinances on the rate of speed applied to a part of the railway line which for a considerable distance passed through territory of merely a rural character, though within the corporate limits; but

In this case the road, with the exception hereafter to be noticed, runs through the thickly populated portions of the plaintiff city over a line a part of which is not only curviform, but runs through a cut, whereon "you cannot see from one crossing to another." It is true that on that part of the road extending from the bridge to East street, a distance of a fifth of a mile, there are but a few houses, and it would seem for this short distance a greater rate of speed could be permitted without detriment to the public. And it may, too, be that, if an increase of speed were permitted on that part of the line, it would facilitate the movement of heavy trains entering the city from the east. We are unable to conclude that the limitation imposed by the ordinance, when applied to trains running on that part of said railroad line between East street and the western limits of the city, is in the least unreasonable or oppressive. A like ordinance limitation in what was doubtless a less populous city was held by the Supreme Court to be not unreasonable. *Robertson v. Railway*, 84 Mo. 119. And so, too, it has been held by the same court that an ordinance of the city of St. Louis limiting the speed of certain trains to six miles an hour was not unreasonable. *Gratnot v. Railway*, ante. But it seems to us that the limitation as applicable to the movement of trains on that part of the said railroad between the eastern limits of the city and Second street is wholly unnecessary for the protection of the public. In order to conform to that limitation, the railway company is compelled to slow up its trains before reaching the eastern limits of the city, and in that way such trains are subjected to an unnecessary loss of time between there and East street. The loss so incurred by any train may not exceed three minutes, yet, if it be subjected by all the cities and villages through which its line runs, where like conditions exist, to a similar loss, the aggregate would be very considerable.

But the undisputed evidence showed that the heavy freight trains of the railway company, in approaching the city from the east, were unable to pull up the grade from the bridge to East street without doubling into the city, which would not be required if a greater speed were allowed over that part of the road. The subjecting of the railway company to this needless trouble, delay, and expense is not required by the public weal. Accordingly, it seems to us that the limitation imposed by said ordinance in its application to the movement of trains on that part of said railway just mentioned is exceedingly oppressive and unreasonable, and for that reason must be held invalid.

The trial court should have given the defendant's instruction in the nature of a demurrer to the evidence, and for its refusal to do so the judgment must be reversed. All concur.

O'NEAL et al. v. SAVILLE et al.
(Court of Appeals at Kansas City, Mo. April 6, 1903.)

APPEAL—ABSTRACT AND BRIEFS—DISMISSAL.

1. Where appellant failed to file and serve on respondent the abstract and briefs as required by court rule 15, the appeal will be dismissed.

Appeal from Circuit Court, Nodaway County; Gallatin Craig, Judge.

Action by Olive S. O'Neal and others against John Saville and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Newman & Vinsonhaler, for appellants.
W. C. Ellison, for respondents.

PER CURIAM. The appeal in this case was taken to the Supreme Court on the 10th of March, 1900. The bill of exceptions was filed on the 15th of August following. The certified copy of the judgment, together with that of the order granting the appeal, as required by section 813, Rev. St. 1899, was filed by the clerk of the Supreme Court on December 31, 1900. The cause was ordered by that court to be certified to this, and was filed here on October 21, 1902.

In any view that may be taken of the appeal, it was at least returnable to the March term, 1903, of this court, and the cause was accordingly docketed for hearing on the third day of that term; but, notwithstanding this, the appellants, as appears by the affidavit filed by respondents, have wholly neglected to comply with the requirements of our rule 15 (67 S. W. vi), and therefore the respondents' motion to dismiss the appeal will be sustained.

HARTMAN v. CITY OF BRUNSWICK.
(Court of Appeals at Kansas City, Mo. April 6, 1903.)

MUNICIPAL CORPORATIONS—JUDGMENTS—PAYMENT—LEVY OF TAXES—MANDAMUS—APPEAL—BILL OF EXCEPTIONS—REVIEW OF RECORD.

1. Where the only exception contained in a bill of exceptions was to the denial of defendant's motion to set aside an order directing a peremptory mandamus and in arrest of judgment, and no exception taken at the time of the court's rulings was preserved, only such errors as appear in the record proper can be reviewed.

2. Where an alternative mandamus to compel a city to levy a tax to pay a judgment alleged that plaintiff had obtained such judgment, and that execution issued thereon had been returned unsatisfied, but defendant had not made a levy to pay such judgment, though empowered to do so, and commanded that the levy be made within the legal limits, the proceeds to be paid to plaintiff or his assigns, save such as was necessary to pay reasonable salaries of city officers and the police force, as required by Rev. St. 1899, § 3223, it sufficiently alleged plaintiff's case.

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Mandamus by John T. Hartman against the city of Brunswick. From a judgment directing the issuance of a peremptory writ, defendant appeals. Affirmed.

Louis Benecke, for appellant. James O. Wallace and Crawley & Son, for respondent.

ELLISON, J. This is a proceeding by mandamus to compel the city authorities of Brunswick, Mo., to levy and collect a tax for the payment of a judgment of \$400, which had theretofore been duly obtained against such city by the plaintiff. The trial court ordered a peremptory writ, and defendant appealed.

It seems that a portion of defendant's return to the alternative writ was stricken out on motion by plaintiff. Thereupon plaintiff filed his motion for a peremptory writ for certain grounds therein stated. This motion was sustained and writ ordered. Thereafter defendant filed its motion "to set aside and arrest the judgment" for certain alleged errors, and for the further reason that "upon the pleadings and record" the judgment should have been for defendant. This motion was overruled, and exception taken by defendant. No other exception is preserved by the bill of exceptions save the one just mentioned. There is no exception preserved which was taken at the time of the court's ruling. This practically eliminates the bill of exceptions, and leaves us to examine the record proper, which includes the alternative writ.

Passing, then, to the record proper, we find that it fully sustains the judgment of the court. The writ sets forth that plaintiff obtained a judgment against the city; that proper execution had issued, and been returned nulla bona; that defendant had not made a levy as in duty bound, although lawfully authorized and empowered so to do. The command of the writ (in the alternative) was that a levy be made within legal limits, the proceeds of which to be paid to plaintiff or his assigns, save such as was necessary to pay reasonable salaries of city officers therein named, and a police force, as provided by section 3233, Rev. St. 1899. The writ, instead of being deficient, was, in point of fact, a fuller allegation of plaintiff's case than defendant had a right to require. It was fully up to the requirement as set out in *Hambleton v. Town of Dexter*, 89 Mo. 188, 1 S. W. 234. A much less statement would not have entitled defendant to complain, since proceedings under the statute of the nature of these are informal. *State ex rel. v. Norvell*, 80 Mo. App. 180; *Hubbel v. Maryville*, 85 Mo. App. 165.

The judgment of the court and the power of the city are supported by the case of *Webb Waterworks Co. v. City of Carterville*, 142 Mo. 101, 43 S. W. 625, and *Id.*, 153 Mo. 128, 54 S. W. 557.

The judgment will be affirmed. All concur.

STANLEY et ux. v. VERITY et al.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

BUILDING AND LOAN ASSOCIATIONS—PAYMENTS ON STOCKS AS CREDITS ON LOAN—USURIOUS CONTRACT.

1. Plaintiff made a loan of defendant building association, took a certificate of stock, assigned it to the association as security, and gave his note as additional security. He was to make monthly payments as interest and payments on stock, which he did for more than three years, until after the association became insolvent. The evidence showed that no fraud was practiced on plaintiff, and that he knowingly became and continued a member and stockholder. *Held*, that plaintiff could not now claim that he was not a stockholder, and have his monthly payments made as payments on stock credited on the loan.

2. A stockholder in a building association cannot claim that his contract of membership and stock subscription was a fraud on the usury law, as Rev. St. 1889, § 2814, Rev. St. 1899, § 1364, specifically exempts building and loan associations from such law.

Appeal from Circuit Court, Mercer County; Paris C. Stepp, Judge.

Bill by John J. Stanley and wife against W. H. Verity and others. From a decree for plaintiffs, defendants appeal. Reversed.

Morton Jourdan and Conkling & Rea, for appellants. Platt Hubbell, Geo. Hubbell, and Martin Read, for respondents.

ELLISON, J. This is a bill in equity, whereby plaintiff seeks an accounting with defendant, and, after paying what is found to be due from him, to cancel a note and deed of trust securing the same. The defendant appealed from the decree of the trial court. It appears that the Missouri Guarantee Savings and Building Association, existing under the building and loan statute, became insolvent, and that defendant became the assignee thereof; that some years prior to the insolvency, viz., in 1893, plaintiff became a member of said association, and borrowed \$700 of it; that he took a certificate of stock as a stockholder, and assigned it to the association as security for the loan, and also gave his note for the amount of the loan, and deed of trust aforesaid, as additional security. The provisions of the loan contract were that plaintiff should make monthly payments as interest and payments on stock, and that he paid these monthly for more than three years, and until after the association became insolvent. It is conceded that the loan was made without competitive bid, and that under the statute at that time it was thereby rendered usurious. The only controversy between the parties is whether the monthly payments made by plaintiff as payments on stock are to be credited on the loan. The trial court held with plaintiff that they should be.

We decided in *Brown v. Archer*, 62 Mo. App. 277, that when a borrowing stockhold-

¶ 1. See *Building and Loan Associations*, vol. 8, Cent. Dig. §§ 63, 66.

er comes to settle with his insolvent association he has no right to have his payments on stock credited on his loan, since that would give him an inequitable and unjust advantage over the nonborrowing stockholder. We so decided again in *Price v. Loan Ass'n*, 75 Mo. App. 551, and the same was held by the St. Louis Court of Appeals in *Clark v. Lopp*, 80 Mo. App. 542. But plaintiff's position in the trial court and here is that plaintiff was never a stockholder; that he did not understand that he had subscribed for the stock, or had become a stockholder. He charges in his petition that the transaction was, in truth and in fact, only a loan of \$700, to be paid in monthly installments, and that the defendant corporation fraudulently induced him to execute some fictitious instruments of writing, showing him to be a stockholder and subscriber for stock, which he has since learned was a scheme and artifice in attempted evasion of the usury laws of the state, and a fraud in law and equity. There is not only no evidence whatever to sustain this charge, but the testimony of plaintiff, given in his own behalf, affirmatively shows the contrary. He does not pretend that any fraud or device was brought into play to induce him to sign the papers which made him a subscriber for stock. He does say that he only wanted to borrow money, and did not intend to become a member of the association, and that "there was no claim that I was to be held as a stockholder." But he further stated that the company told him that his rate of payments would pay off the debt in a hundred months, and, "if the company was successful, much sooner than the hundred months." He further stated that he expected, if the general loans of the company proved to be good, and everything went smoothly, that the profits would pay his debt sooner, and that he "expected that the profits the company might receive from other borrowers would help to pay out his loan." It was shown by plaintiff's passbook that he made monthly payments on stock for four years, when he went into what is called a "supplemental agreement" with the association, in which his being a stockholder is recited; that thereafter he made payments as a stockholder. In short, the undisputed evidence is absolutely conclusive that there was no fraud practiced upon plaintiff, and that he knowingly became and knowingly continued to be a member and stockholder of the association for a period of several years, and he cannot, at this late day, be permitted to deny it. *Griswold v. Seligman*, 72 Mo. 110; *Fisher v. Seligman*, 75 Mo. 14; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Bank v. Bartlett*, 71 Ga. 797.

2. There is, however, included in plaintiff's petition a charge that, though plaintiff did in fact become a stockholder in the association, the contract of membership and stock subscription whereby he became such mem-

ber and stockholder was a fraud on the usury law of the state, and a scheme devised for the purpose of evading such law. We are cited to cases in other states deciding that, in order to defeat illegal exactions of interest, under whatever name it may be called, and though the borrower become a member and stockholder, it could be shown that he became such member and stockholder in order that he might get the money of the borrower at an illegal rate, in evasion of the usury law. *Fidelity Sav. Bank v. Shea* (Idaho) 55 Pac. 1022; *People's B. & L. v. Keller* (Tex. Civ. App.) 50 S. W. 183; *Peightal v. Cotton States B. & L.* (Tex. Civ. App.) 61 S. W. 431; *Southern Home B. & L. v. Thomson* (Tex. Civ. App.) 58 S. W. 203. Those cases are from states which have not specifically granted immunity from usury laws to such associations. A like holding has been announced in states where such exemption from usury laws has been made, but the ruling is based on the invalidity of the statute granting the exemption as being in conflict with the peculiar provisions of the Constitution of such states. *Henderson B. & L. v. Johnson*, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289; *Citizens' Security Co. v. Uhler*, 48 Md. 455. The cases first cited and others of similar import are not applicable in this state, since our statute specifically exempts building and loan associations from the usury law (section 2814, Rev. St. 1889, and section 1364, Rev. St. 1899), and those last cited are not applicable, since our statute has never been said to be in conflict with the Constitution of this state. Therefore, since our statute itself exempts building and loan contracts with members from the operation and penalties of the usury law, it is manifest that there can, ordinarily, be no such thing as a contract with such company made to evade that law.

Building and loan associations are authorized by statute in most of the states. They are permitted to contract for monthly interest, for monthly payments on stock, for fines, and for premium for the privilege of the loan. The interest, premium, etc., most frequently exceeds the lawful rate of interest in ordinary contracts, and, though not specifically exempted from the usury law, the great weight of authority refuses to apply that law to them on the general ground that such associations are composed of a mutual membership, and, when properly conducted, are very profitable to the stockholders. Each member, especially each borrowing member, is interested in the profits and successful operation of the company, since such success redounds to his benefit, and aids in the liquidation of his debt. The premium and interest he pays really goes to make up a fund of which he is a part owner, and the benefit of which he at last receives in reduction, if not full payment, of the sum borrowed. There are, however, some courts which refused to allow such exemption, and, when

the interest, premium, etc., amounted to more than the ordinary lawful rate of interest, they have declared the contract usurious. *Meroney v. Loan Ass'n*, 116 N. O. 882, 21 S. E. 924, 47 Am. St. Rep. 841, and cases cited. It thus was made to appear that, in the absence of specific statutory exemption, the policy of each state, though legislative in its nature, would depend upon the view which the courts of that state might adopt. In this situation, some of the states, among them Missouri, adopted a statute like that above cited, which specifically exempts such associations from the usury statute. It is thus seen that the authorities cited from states which have not an exempting statute like ours are not applicable to a case arising under our law.

It follows that the decree was erroneous. It will be reversed, and the cause remanded. All concur.

BLOM-COLLIER CO. v. MARTIN et al.
(Court of Appeals at Kansas City, Mo. April 6, 1903.)

FRAUDULENT CONVEYANCE—GARNISHMENT—ABANDONMENT—SERVICE OF WRIT—CONCLUSIVENESS OF RETURN—INSTRUCTIONS—APPEAL—INVITED ERROR—FINDINGS—REVIEW.

1. Where plaintiffs abandoned a garnishment served on a claimant of attached property, where the issue was as to whether a certain payment was made before service of the garnishment, the claimant was not bound by the return of the garnishment, but was entitled to show that the writ was not served on the day stated in the return.

2. A finding of the trial judge based on the credibility of witnesses testifying personally before him will not be reversed on appeal.

3. In an action to recover goods alleged to have been fraudulently conveyed, an appellate court is not entitled to interfere with the findings of the trial court on the ground that they are contrary to the preponderance of the evidence.

4. An appellant is not entitled to allege error in instructions which it invited by embodying the same theory in instructions which it requested.

5. In an action to recover goods alleged to have been conveyed in fraud of creditors, an instruction that if there was a settlement between the purchaser, seller, and mortgagee, whereby the mortgagee demanded that the purchaser make a deed to land, which was a part of the consideration for the sale of the goods, to the seller's wife, who was the mortgagee's daughter, and that the purchaser paid the mortgagee \$500, to be applied on the mortgage debt, whereupon the latter agreed to deliver possession of the goods to the purchaser, the purchaser was entitled to recover, was erroneous, as eliminating the question of the fraudulent intention of the parties.

Appeal from Circuit Court, Sullivan County; John P. Butler, Judge.

Action by the Blom-Collier Company against J. W. Martin, in which J. R. Smith filed an interpleader. From a judgment in favor of the interpleader, plaintiff appeals. Dismissed. Rehearing granted. Reversed.

This suit was instituted in the Schuyler county circuit court, and taken to Sullivan

county on change of venue, where it was tried before the judge, the parties having waived a jury. The petition was filed and writ of attachment issued on the 20th day of July, 1898. The sheriff's return shows that, on the day the writ was issued, defendant, Martin, was served with process, and interpleader, Smith, was garnished, and the writ of attachment read to him, but the goods in controversy were not then seized under the writ. After hearing all the evidence, the court found for the interpleader, and plaintiff appealed. The principal contention is that the finding was not supported by the evidence. It was shown at the trial that on July 5, 1898, the interpleader, who had been informed by a person named Lile that defendant, Martin, wanted to sell the goods in dispute, for the first time met him in his store in Queen City, Mo. After a casual inspection, the interpleader proposed to trade his equity of redemption in certain land in Barton county for the goods. Defendant proposed to trade if interpleader would give him a difference of \$500, provided the land was as described. Without any definite conclusion between the parties, interpleader went away. Soon thereafter defendant made inquiry as to the land, and on July 12th telegraphed interpleader to come to his place. On the 13th of July interpleader arrived in Queen City, and the proposed exchange was agreed upon and reduced to writing, by the terms of which interpleader undertook to convey to defendant the land in question, subject to a mortgage for \$2,400, and to pay him \$500 out of the proceeds of sale of goods, and defendant put interpleader into possession of the said goods. It was also made to appear that interpleader himself owed \$500 on the land, and that he could not get his deed therefor until this debt was discharged. It was shown that defendant had never seen the land named; that no invoice was taken of the goods; that the bargain was concluded as late as 9 or 10 o'clock at night; that an attorney was then sent for, who drew the writing evidencing the trade; and that Stanley, defendant's clerk, was awakened and informed of the change of ownership of the goods, and that he was to be employed by the purchaser, the interpleader. At midnight, interpleader took a train for Kansas City; stating that he would return and complete the transaction as soon as he could get his abstract and deed to the land. On about the 26th of July interpleader again went to Queen City, at which time he found a man by the name of Warnick in possession of the goods for Mrs. L. F. Warnick, who was claiming then under a mortgage. Wm. Saxbury, a lawyer, advised interpleader to pay the \$500 which by the agreement was to be paid out of the receipts of sale of goods, and have it applied in satisfaction of said mortgage. Interpleader, on this advice, gave a check for the amount, which satisfied the mortgagee's claim for the goods, whereupon

said Warnick left the store and goods in his possession. There is some controversy as to the time when and the circumstances under which the payment was made, and whether before or after interpleader was served with garnishment notice. Although the sheriff's return shows, as has been stated, that interpleader was garnished on the 20th of July, there was evidence tending to show that such service was not made until the 28th of July, and after interpleader had paid the \$500 on the purchase price of the goods. Instead of conveying the land to defendant, interpleader, upon the written order of defendant, conveyed it to the latter's wife. While being cross-examined he denied having any knowledge of who wrote said order, but, upon its being shown to him, he stated that he was mistaken; that it was in his handwriting. He further stated that he had nothing to do with the insertion of defendant Martin's wife as grantee in the deed he executed conveying the land, but afterwards admitted having written an order from defendant to insert his wife's name as such grantee. He also made misstatements in reference to the check for \$500 which was taken in payment of the goods, and made more than one mistake as to the day on which he was served as garnishee. A witness by the name of Booth testified, in substance, that he was present (after Warnick got possession of the goods under the mortgage) when defendant, interpleader, and Warnick were together, at which time he heard Warnick say that he "would not close the deal until the check was made to Mrs. Warnick and the deed made to Mrs. Martin." It was shown by this witness that defendant's wife was a daughter of said Warnick. After giving several declarations of law for both sides, the court found for interpleader, and the plaintiff appealed.

Ellison & Campbell and Higbee & Mills, for appellant. Fogle & Eason, Crawley & Son, F. O. Sasse, and Kinley & Kinley, for respondents.

BROADDUS, J. (after stating the facts). The contention of plaintiff is that the evidence did not justify the finding, and the court mistook the law. The plaintiff is in error in its claim that the sheriff's return showing that interpleader was served with garnishment July 20, 1898, is conclusive and not subject to contradiction. Such would have been the rule had not the plaintiff abandoned its garnishment, but as the interpleader, after such abandonment, was in no way a party to the attachment proceedings, he would not be bound by such return, and was authorized to show by evidence that it was not true. It must be admitted that the evidence went strongly to show that interpleader, before he paid the \$500 to Warnick and conveyed the land to defendant's wife, had such knowledge and information of the intent of defendant to

defraud his creditors as to put a prudent person on inquiry, which was equivalent to actual notice of such fact. *Edwards v. Railway*, 82 Mo. App. 96, and cases cited. The interpleader misstated some of the most important facts in the case, which he persisted in until confronted with his own handwriting, showing that they were untrue; but, as the judge who tried the case and saw the witness on the stand was in much better position than we are to judge of his credibility, we are not justified in holding that he was not entitled to belief, and for that reason failed to prove his case, as plaintiff contends. This is not an equity case, where the appellate court may review all the evidence and make a finding of its own; but it is a case at law, where this court is not authorized to interfere because there has been a great preponderance of evidence one way.

The plaintiff contends that the court committed error in declaring, as a matter of law, in behalf of interpleader, that, in order to attach fraud to the transaction in question, it was necessary to show that interpleader had not only notice of the fraudulent intent of the defendant in making the sale of the goods, but that he participated in aiding him in doing so. Without deciding whether the declaration was or was not good law, it seems that the plaintiff invited the error, if it be an error, by embodying the same theory in the declarations it asked and obtained of the court. *Noble v. Blount*, 77 Mo. 241; *Phelps v. Salisbury*, 161 Mo. 1, 61 S. W. 582; *Railway v. Vivian*, 33 Mo. App. 583.

But a more serious objection is made to interpleader's declaration of law No. 8. This instruction, in substance, is that if the court finds that there was a settlement by interpleader, defendant, and Warnick, whereby Warnick demanded that interpleader make a deed to the land in question to defendant's wife, and that interpleader paid him for Mrs. Warnick \$500, to be applied on the mortgage debt, and that the said Warnick would then redeliver possession of the goods to interpleader, and the latter so contracted, the finding would be for said interpleader, if the court further finds that the arrangement was carried out by the parties. The vice of this instruction is, in our opinion, that it eliminates the question of the fraudulent intention of the parties altogether. It seems to us that, if such an arrangement was made, its effect was to use the mortgage as an instrument to cover up the fraud of defendant. Mrs. Warnick, it is true, was the owner of the mortgage debt covering the goods in question, and had the right to have her claim as such mortgagee satisfied before she redelivered said goods to the interpleader, but she held no lien against the land in question. The conveyance of the land by the interpleader to defendant's wife, the daughter of the Warnicks, in pursuance of said alleged agreement was without consideration, and as such was fraudulent as to creditors; and if

interpleader had notice, or its equivalent, that such would be its effect, he became a participant in the fraud. But under the theory of the court, as contained in said declaration of law, whether fraudulent or not, it gave interpleader a good title to the merchandise. The value of the land was not treated as part consideration for a surrender of the goods to interpleader, as Mrs. Warnick did not get the land herself, but had it conveyed to her daughter. It was indirectly a deed of gift by defendant to his wife—an act which was consummated by the aid of interpleader; and, such being the case, it was a pertinent inquiry whether he had participated with notice or knowledge of the intention on the part of the defendant to defraud his creditors.

For this reason, the cause is reversed and remanded. All concur.

GOSSETT v. DEVORSS.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

UNLAWFUL DETAINER—CERTIORARI—BOND—APPROVAL—INDORSEMENT BY CLERK—AMENDMENT NUNC PRO TUNC—ISSUANCE OF WRIT—SERVICE—COMPLAINT—ELECTION.

1. Under Rev. St. 1899, § 3385, providing that no cause removed to the circuit court by certiorari shall be dismissed for any informality or imperfection in the recognizance, if a sufficient recognizance be filed within such time as shall not delay the other party, where the clerk neglected to fill in the blank approval of a bond for certiorari, and sign the same, the court properly permitted him to formally indorse his approval thereon thereafter, as of the date the bond was actually approved.

2. Where a summons in a suit for unlawful detainer before a justice of the peace and a writ of certiorari removing the suit to the circuit court were served on the same day, and the justice certified that he, in obedience to the writ issued by the clerk, returned the papers after the service of the summons, it will be presumed, in support of the writ, that the clerk did not issue the certiorari until after the summons had been served.

3. A writ of certiorari to a justice may properly be served by a private person.

4. Where a complaint in a suit for unlawful detainer charged a willful holding over by defendant, and then alleged that one W. leased the premises to defendant, and afterwards sold the land to plaintiff, and that prior to plaintiff's purchase defendant had terminated his tenancy by repudiating W.'s title, and by accepting a lease from another, and that defendant willfully held over after a proper demand in writing, such allegations were not necessarily inconsistent, so as to compel plaintiff to elect on which he would rely.

Appeal from Circuit Court, Holt County; Gallatin Craig, Judge.

Action by William M. Gossett against George B. Devorss. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. C. Dungan, for appellant. Petree Bros. and S. F. O'Fallon, for respondent.

ELLISON, J. Plaintiff brought suit for unlawful detainer before a justice of the

peace, and removed same by certiorari to the circuit court for Holt county. The result in the trial court was in his favor.

Defendant makes several complaints of a technical nature, some of which we do not deem to be justified by the facts as disclosed by the record. We will set out the facts as they appear here, and pass upon the case from that standpoint.

The complaint was filed March 29, 1901, and summons was issued returnable April 12th following. The summons was served April 1st. The record states that plaintiff presented a copy of the complaint to the circuit court clerk of Holt county, "except the jurat thereto was not signed by the justice," but the complaint as filed before the justice shows the jurat was signed by the justice. Plaintiff filed his affidavit and bond for writ of certiorari with the justice on April 1st. The clerk failed to indorse his approval of the bond on the back thereof. But a blank indorsement was on the back in the following words: "Approved this ____ day of April, 1901. ____ Circuit Clerk." And on said 1st day of April the clerk issued the writ. The justice obeyed the writ, and indorsed his return thereon on April 4th. The writ was served on the justice by a private person, who made affidavit thereto.

Defendant's objections are so worded that we cannot say definitely just what is intended as matter of complaint. They are as follows: "That no copy of the complaint (the justice's name not being attached to the jurat) nor an affidavit of complainant and no bond sufficient in amount and security approved by the clerk, with such approval endorsed thereon was filed with such clerk before said writ of certiorari was issued. That the pretended affidavit and bond filed were executed on the 30th day of March, 1901, and were filed with said clerk on the 1st day of April, and before the service and return of the summons before the justice." We have already disposed of the objection as to copy of complaint. We do not know whether it is meant that no affidavit at all was filed, or that one was filed, but not before the clerk issued the writ. As to the bond, we do not know whether it was meant to say that it was insufficient in amount and in security; or whether it was not approved by the clerk; or whether, if approved, his approval was not indorsed on the bond; or whether these matters were all proper, and the objection was merely that the affidavit and bond were not filed before the clerk issued the writ. At any rate, taking the objections in either their narrowest or broadest sense, they are not, in reality, borne out by the record.

1. It appears that the clerk neglected to fill in the blank approval of bond and sign the same, though, as it afterwards appeared, he did approve it, and was permitted by the trial court to formally indorse his approval as of the date approved, viz., April 1, 1901.

We do not think the court committed error in allowing this to be done. 4 Ency. Plead. & Prac. 243; *Watson v. State*, 85 Ga. 237, 11 S. E. 610. We do not see why it could not have been allowed, within the spirit of section 3385, Rev. St. 1890.

2. The statute (section 3358, Rev. St. 1890) authorizes a clerk of the circuit court to issue a writ of certiorari at any time after service of summons issued by a justice of the peace and before trial. The foregoing statement of defendant that the writ was issued before service of summons is not borne out by the record, as shown by the abstract, in connection with plaintiff's additional abstract. Both acts occurred on the same day, but the justice certifies that he, in obedience to the writ issued by the clerk, returned the papers after the service of the summons. While it is not, in specific terms, stated that the clerk issued the writ after the summons issued by the justice was served, yet, we think, taking all entries together, it sufficiently appears that the clerk did not act until after service of summons. The jurisdiction of the case in the justice's court is affirmatively shown, and it would require a presumption stronger than we feel justified in applying to hold that the circuit court had none.

3. Objection was taken to the service of the writ. As before stated, it appears that it was served on the justice by a private party, who made affidavit that he delivered it to the justice. The contention of defendant is that it should have been served by an officer. The objection is not well taken. The writ is not like a writ of summons, which is directed to some officer, whereby he is commanded to notify certain named parties. The writ is addressed to the persons composing the court or tribunal direct. It has not been the practice to have officers serve writs of error, which are continuously being issued from the appellate courts of this state. Nor is it necessary that such service should be had of writs of certiorari. It is sufficient if such writ be delivered to the party to whom directed. 2 Tidd, Prac. 1170. It is stated by Harris in his work on Certiorari (section 294) that, in the absence of a statutory mode enacted for service of such writ, it may be served by any person, or in any manner, by means of which the party to whom it is directed may receive its command. And so the same thing was decided in *State v. Dwyer*, 41 N. J. Law, 93.

The complaint charges a willful holding over by defendant after the time the premises were let to him. It then proceeds to state that one Worley leased the premises to defendant, and afterwards sold the land to plaintiff, whereby he succeeded to Worley's right in the lease; that defendant prior to plaintiff's purchase had terminated his tenancy by renouncing and disputing Worley's title, though he still retained possession of

the land, and without right or excuse accepted a lease from another party; and that after proper demand in writing for possession he willfully held over, etc. Defendant construes the complaint into a petition, and contends that it is in two counts, and that such counts are inconsistent—that each negatives the other—and the court should have required the plaintiff to elect. This was a proceeding before a justice of the peace, where strict rules of pleading are not required. We construe the complaint as setting up two states of facts not necessarily inconsistent, and we approve of the court's refusal to require the plaintiff to specify which he would rely upon as making his case.

We have gone over the entire record, and find that the evidence was sufficient to justify the verdict, and find nothing which would justify us in disturbing the judgment; and it is accordingly affirmed. All concur.

WILLIAMS v. VERITY et al.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

BUILDING AND LOAN ASSOCIATION—MATURITY OF STOCK—ULTRA VIRES REPRESENTATION—ESTOPPEL—DEFENSE OF ULTRA VIRES.

1. The act of a building association in determining and representing that, on making a certain number of monthly payments of a certain amount, certain stocks would be brought to par so as to release a deed of trust, was ultra vires.

2. A defense of ultra vires must be pleaded in order to make it available.

3. A building association, in answer to an inquiry by one of its collecting agents, represented that, on making a certain number of monthly payments of a certain amount, certain stocks would be brought to par so as to release a deed of trust. Plaintiff, relying on such representation, bought the property and made the payments. Held that, though the act of the association in arbitrarily fixing the time when the stocks would mature was ultra vires, as it was not expressly prohibited by statute, the assignee of the association was estopped from claiming a greater amount, though the association did not know for what purpose the inquiry was made.

4. The rule that a representation relating to something to be afterward brought into existence cannot be the basis of an estoppel does not apply as to an estoppel from claiming that a deed of trust had not been extinguished, as the debt was in existence at the time the representation was made.

Appeal from Circuit Court, Nodaway County; Gallatin Craig, Judge.

Suit by Elizabeth Williams against William H. Verity, assignee, and another, to restrain a sale under a deed of trust, and for a cancellation of such deed. From a decree for plaintiff, defendants appeal. Affirmed.

In 1891 the Missouri Guarantee Savings & Building Association of Hannibal, a building and loan company, which, for the sake of brevity, we shall hereinafter refer to as the "Building Association," advanced to one Yeaman, a holder of 12 shares of its stock, of

the par value of \$1,200, the sum of \$1,200, and the latter executed to the former a deed of trust on lots 1 and 2 in the city of Maryville, and also on his said stock, to secure the payment of the monthly dues, interest, premiums, etc., and which said deed was properly recorded. Some time afterwards Yeaman sold lot 1, and under an agreement with all the parties the building association divided the loan so that each of said lots became subject to the lien of the deed of trust for only \$600. Afterwards, in 1896, the title to lot 2 had been conveyed to one Coulter, who offered to sell the same to John F. Williams, plaintiff's son, for a certain sum, subject to existing incumbrances. Williams was unwilling to close the negotiations with Coulter for the purchase without first ascertaining the exact amount claimed by the building association under its deed of trust, and thereupon he requested Rowley & Owen, who were local collecting agents of the building association, as well as real estate agents, to inquire of said building association the exact amount it would require to secure a release of its deed of trust; and accordingly they wrote to said building association, and received an answer to the effect that: "Your favor of the 10th is received. Mr. Coulter has made 54 monthly payments, leaving 46 monthly payments of \$9 each still due. [Signed] Herbert Harris, Secretary." Rowley & Owen were fully apprised of the negotiations between Coulter & Williams, and the purpose the latter had in seeking the information requested. On receipt of the information thus sought, Williams closed the negotiations with Coulter, and accepted a deed conveying the land, subject to the deed of trust lien. Shortly thereafter he by deed conveyed said lot to the plaintiff, subject to the said deed of trust.

It appears that said Williams, in making the purchase, was acting for the plaintiff, who desired to acquire the lot. After the purchase plaintiff made the 46 \$9 payments, which were received by the building association. On December 8, 1900, the building association became insolvent, and made a general assignment of its assets to the defendant Verity, who claimed that the said deed of trust had not been satisfied in full by the several payments made by the plaintiff, and that there was upwards of \$100 still due said building association, and, the plaintiff refusing to pay the same after demand, he directed the trustee in said deed of trust, the sheriff, who is the other defendant, to advertise and sell said lot 2 according to the terms of that instrument, and who accordingly proceeded to comply with said direction; and thereupon the plaintiff brought this suit to enjoin the trustee from proceeding with the sale, for a cancellation of the deed of trust, etc.

In the petition it is alleged, amongst other things, that before making the purchase of said lot plaintiff caused inquiry to be made

as to the amount of the debt secured by the deed of trust, and that the building association, through its secretary, knowing the object of such inquiry, informed her that there was due at that time 46 monthly payments, of \$9 each, and that she paid the full sum of all the payments so claimed by the said building association under the deed of trust, and that the said assignee was estopped to claim anything further on that account.

The trial court found (1) that the debt described in plaintiff's petition was paid in full, and the defendant, the assignee, was estopped to claim more was due than was claimed by his assignor, the building association, at the time the plaintiff purchased the lot; and (2) that there was no competent evidence that any of the money paid defendant's assignor was paid on stock; and accordingly entered a decree for plaintiff, and from which defendants appealed.

A. F. Harvey and J. S. Shinabargar, for appellants. E. A. Vinsonhaler, for respondent.

SMITH, P. J: (after stating the facts). It is contended by the assignee that a building and loan association cannot arbitrarily fix any period when its shares shall mature, and that a borrowing stockholder is not entitled to have a deed of trust, given by him to secure the payment of his monthly dues, released until such dues are paid and the earnings thereon bring his stock to par; and that therefore the action of defendant in fixing the number and amount of the monthly dues to be paid on the Coulter stock by the plaintiff to bring such stock to par and to entitle her to a release of the deed of trust as to lot 2, as stated by its secretary in his letter to Rowley & Owen, was arbitrary and in excess of its authority.

As was said by us in another case, there are only two ways by which a borrowing stockholder, under the statute of 1889, may be entitled to have released a deed of trust given to secure the payment of his monthly dues, one of which is when he repays the advance, as provided in section 2813, and the other when the payment of monthly dues on his stock and the profits of the business of the association together become sufficient to mature such stock or bring it to par. *Caston v. Stafford*, 92 Mo. App. 182. And when such an association fixes and declares that the payment of any given number and amount of monthly dues will bring the shares of its stockholder in the association to par it acts in excess of its authority; for whether or not any specified number and amount of monthly payments would bring its stock to par must depend on the earnings thereon, which, of course, is an element of uncertainty in its business that renders it impossible for it, or any of its officers, to determine in advance when its stock, or any part of it, will mature, or, which is the same thing, reach par.

It seems clear to us that the act of the building association in determining and representing that it required the payment of 46 monthly payments, of \$9 each, to bring the Coulter stock to par, and to thereby authorize a release of the deed of trust, was arbitrary and capricious—*ultra vires*. In the present case the plaintiff in her petition pleaded, in effect, that in consequence of the action of the building association in representing that, on making a certain number of monthly payments of a certain amount, the Coulter stock would reach par, that she acted on that representation, and that by reason thereof the assignee was estopped to claim that it required the payment of a greater amount to bring about that result. If the assignee intended to rely upon the defense that the act of the building association, his assignor, in making the representation, was in excess of its lawful authority, and therefore *ultra vires*, it should, as it did not, have pleaded that defense in order to make it available. *Warehouse Co. v. Stewart* (Ky.) 70 S. W. 285. But, aside from this, was not the representation of the building association, though *ultra vires* the corporation, sufficient upon which to base an estoppel in pais?

There is no provision of the statute relating to building and loan associations which expressly prohibits such associations or their officers from arbitrarily fixing a time when the shares of any stockholder shall mature, though it does so by necessary implication. It is quite well settled in this state that the defense of *ultra vires* is not open to a corporation when the contract has been fully executed on the part of the other contracting party and it is not expressly prohibited by law. *Grohmann v. Brown*, 68 Mo. App. 630; *City of Goodland v. Bank*, 74 Mo. App. 365; *Chenoweth v. Express Co.*, 93 Mo. App. 185, loc. cit. 195 et seq. And in *Thompson on Corporations*, § 6016, it is stated that the great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.

But it is argued that the building association ought not to be bound by the representation made by its secretary because it does not appear that he knew or was apprised that the property was being purchased by the plaintiff or her grantor, or that he (the secretary) ever thought of stating a sum that would mature the Coulter shares at a future time by making a certain number and amount of monthly payments.

In *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111, it was said that: "If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the

party against any one who has trusted in them and acted on them. * * * Where a man makes a statement in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant should act."

In *Bank v. Hazard*, 30 N. Y. 226, it was said that "it is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and has actually misled, another acting in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough."

Coal & Ice Co. v. Ottumwa Belle (D. C.) 78 Fed. 643, was where the Atlesses were contemplating the purchase of the steamer *Ottumwa Belle*, and were informed that the Ice & Coal Company held some demand against said steamer, and accordingly wrote to it inquiring if it had any claim against said steamer for supplies furnished. The latter replied that it had an account amounting to about \$50. The Atlesses purchased the steamer, which thereafter, in a proceeding in admiralty by the said Ice & Coal Company, was taken into the custody of a United States marshal. The libellant claimed a lien against the steamer for a much larger amount than it had stated to the Atlesses, the intended purchasers, was owing to it. The Atlesses alleged that the libellant was estopped to make any claim in excess of that stated in its letter to them. The court in its opinion says that the transaction itself was sufficient to advise libellant that the letter was not a mere "busybody" inquiry. "Here was a business firm, in a near-by city, writing a letter which, upon its face, is apparently about a business matter. Is the court to assume that business men write, or that business men receive, such inquiring letters as a matter of mere curiosity, without a desire to use, or a reasonable expectation that use will be made of, the response as a basis for action in business matters? * * * A disclosure by claimants of their reason for writing the letter was not required to impose on libellant the duty of stating the truth in whatever response it made."

Rowley & Owen were the collecting agents of the building association, and were therefore known to it to be business men, and when they wrote the inquiry in respect to the amount of the incumbrance on the property it must have been reasonably expected

that use would be made of its response as the basis for action in some business transaction relating to the property or the incumbrance. In responding to the letter of inquiry, if it chose to respond, it was its duty to state what was true. And, as has been seen, it is not essential to an equitable estoppel that a party sought to be estopped by his statements must have intended to mislead.

Why did the secretary respond, if he did not intend or expect his statement would be relied on? Certainly he could have had no other thought or expectation. It appears that the plaintiff's grantor acted upon the statement made by the building association, through its secretary, and the latter accepted the payments made in accordance with the statement of its secretary without murmur or dissent. Under the circumstances which the plaintiff assumed and made the payment of said 46 monthly dues on the Coulter shares, and the building association received the same, we cannot see that on principle the case is different than if the said building association had agreed with plaintiff's grantor that if he purchased said property and would make said specified monthly payments it would treat the Coulter shares as at par on the completion thereof. The rule that a representation relating to something to be afterwards brought into existence cannot be made the basis of an estoppel has no application here, for the reason that the secretary in answering the inquiry as to the amount of the incumbrance then on the property stated the amount to be such as it would require 46 monthly payments of \$9 each to extinguish it. The debt or incumbrance was then in existence.

We think the evidence fully justified the finding and decree of the court, and accordingly the latter will be affirmed. All concur.

STATE v. STUCKEY.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

SUNDAY — LABOR — NECESSITY — EVIDENCE — CRIMINAL LAW — SUMMONING THE JURY.

1. Defendant had contracted to thresh wheat on Monday. His engine had been undergoing repairs at a town 10 miles distant, which were not completed until the previous Friday, and on Saturday he went for the machine, but was delayed in its transportation, and was compelled to leave it overnight in a public highway, and finished such transportation on Sunday. *Held*, that the fact that the wheat owner had made preparation to have the threshing done on Monday did not render the transportation of the engine on Sunday a work of "necessity," so as to exempt defendant from prosecution for violation of the Sunday law.

2. Under Rev. St. 1899, §§ 3769, 3770, providing for the drawing of jurors by the county court, and empowering the sheriff to summon jurors when the county court fails to act, where, prior to the calling of the cause for trial, the regular panel summoned by the county court had been discharged, the sheriff was properly ordered to summon a jury for the trial of the cause.

Appeal from Circuit Court, Platte County; A. D. Burnes, Judge.

James Stuckey was convicted of working on Sunday, and he appeals. Affirmed.

John W. Coots, for appellant. Sid Beery, for the State.

ELLISON, J. The defendant was indicted and convicted of working on Sunday.

Among other instructions there was a demurrer to the evidence for the state. It was refused. There is no dispute of the substantial facts, and the only question is whether the work was one of necessity, and thus brought within the exception to the statute. Defendant in the year 1901 was the owner of a threshing machine, and operated it with a steam engine, now commonly used for such purpose. He had engaged to thresh some wheat in his neighborhood, and to begin on Monday, June 31st. He had taken the engine to Leavenworth, Kan. (about 10 miles from his home in Missouri) for repairs, and was notified on June 28th that it would be ready for him on Saturday, June 29th. He went for it on the morning of that day, and after getting it out of the repair shop, only a short distance into the street, found it could not be propelled by its own power, and he was delayed with further repairs until near 5 o'clock in the afternoon. He then proceeded with it towards home. He got near half way by 10 o'clock at night, to a place in Missouri known as "Green's Lane," and there had to leave it in the public highway. The next morning (Sunday) he went after it, and, after getting up steam, propelled it on to his home. He did this with the avowed knowledge that he might be prosecuted.

What labor should be called a work of necessity or charity has produced as much of conflict of decision as any other branch of the law, and Ringgold's Law of Sunday, 193, says that "it is safe to say that the vagueness of these words, and the impossibility of applying them with anything like uniformity to everyday life, would cause the courts to hold the whole law void for uncertainty, if it were anything else but a Sunday law."

In *City of St. Joseph v. Elliott*, 47 Mo. App. 422, we said that, whether Sunday laws are upheld on the theory of religious, political, or social duty, it was certain that religious promptings have been, in great part at least, the cause of their enactment in this country. Judge Scott stated that they were designed to compel a cessation from labor, that there might not be a profanation or desecration of the day. *State v. Ambs*, 20 Mo. 216. Judge Burgess said in *State v. Granneman*, 132 Mo. 326, 33 S. W. 784, that the policy of such laws was "to compel the observance of Sunday as a day of rest." But while those cases may show the object of Sunday laws and the cause back of their enactment, they throw no light on the puzzle.

zing words, "necessity" and "charity." "Necessity" is the word with which we are now concerned.

The only necessity which was brought forward by defendant in his defense was that he had a contract to thresh his neighbor's wheat on Monday, which was then standing in shocks in the field. But that (if a necessity at all) was a necessity voluntarily brought about by himself, and is not allowable as a defense. *State v. Wellott*, 54 Mo. App. 310.

The upshot of the contention is that it was more convenient to move the engine on Sunday in consequence of work to begin on Monday morning, and "threshing preparations" having all been made by the owner of the wheat. But that will not do. For "it is no sufficient excuse for work on the Lord's Day that it is more convenient or profitable if then done than it would be to defer or omit it." *Commonwealth v. Sampson*, 97 Mass. 407. "The cleaning out of a wheel pit on the Lord's Day, for the purpose of preventing the stoppage on a week day of mills which employed many hands, is not a work of necessity." *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119. A person cannot "supply fresh meat to marketmen whom his master has agreed to supply therewith, although he could not do this, in addition to his other work, on Monday morning, and his master, by reason of being ill, is unable to do it himself." *Jones v. Andover*, 10 Allen, 18. A person traveling "on the Lord's Day to ascertain whether a house which he has hired, and into which he intends to move the next day, has been cleaned, is not traveling from necessity." *Smith v. Ry. Co.*, 120 Mass. 490, 21 Am. Rep. 538.

If it had appeared that the engine thus unavoidably left in the highway was an obstruction interfering with travel, either by actual obstruction or the scaring of horses, a different case would have been before us; for it may be that such and perhaps other reasons of kindred nature might have made a real necessity to remove it. Nothing of that nature appears in the case, and no issue of that kind was tried. We therefore feel constrained to hold, with the trial court, that defendant was not entitled to a peremptory instruction.

What we have already said makes little consequence of objections to evidence which defendant made as the case progressed concerning the good state of weather, and there being no probability of the wheat injuring by delay. If this had been a case of impending necessity to thresh the wheat at that particular time on account of a condition of weather, it might, in certain circumstances, have been a good defense to be made to appear by the defendant. But we do not wish to make decision of cases not in the record. We are, however, satisfied that no harm resulted to defendant, since, if for no other reason, his own testimony, in the views we have herein

set out, showed him to have violated the statute.

2. It appears that some days prior to this case being called for trial the court had discharged the regular panel, and when this case came up the sheriff was ordered to summon a jury. Objection was made to the jury as summoned by the sheriff, on the ground that the statute (section 3769, Rev. St. 1899) provides that juries are to be drawn by the county court. We believe the objection to be unsound. Besides, the statute having been held to be directory (*State v. Pitts*, 58 Mo. 556; *State v. Knight*, 61 Mo. 373), the next following section empowers the sheriff to summon grand jurors when the county court fails to act, and for the same reason authorizes the court to order the sheriff to summon a petit jury from by-standers.

What we have already said in effect disposes of defendant's complaint of the court's action in refusing his first instruction.

The judgment is affirmed. All concur.

WALTHERN v. WALTHERN.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

DIVORCE—DESERTION—SEPARATION— CONSENT.

1. Plaintiff in a suit for divorce for desertion testified that she lived pleasantly with defendant until a few weeks before the alleged desertion, when she prosecuted an investigation as to whether he was doing nightwork, as he said, and, finding that he was not, she became angry with him. A quarrel ensued, which led to the separation. Plaintiff testified that she did not care much about defendant's leaving her, and made no inquiry for him, but that she would have lived with him if he had stayed at home. *Held*, that the evidence warranted an inference that the separation was by mutual consent, and was therefore insufficient to justify a divorce.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Suit by Barbara Walthern against Claude Walthern for divorce. From a decree dismissing the bill, plaintiff appeals. *Affirmed*.

Kurt Von Reppert, for appellant.

Opinion.

GOODE, J. The parties to this action were married May 14, 1901, and lived together until August 22d thereafter, when, the petition alleges, the defendant left home, and has since continuously absented himself from the plaintiff, without cause, for more than one year. The action was begun by personal service on the defendant, but he filed no answer and made no appearance. At the conclusion of the testimony for the plaintiff the circuit court dismissed her bill without prejudice, and an appeal was taken from that judgment to this court.

We have perused the evidence, and are disinclined to interfere with the decision below.

¶ 1. See Divorce, vol. 17, Cent. Dig. §§ 112, 155.

In our opinion, the testimony warrants the inference, if it does not compel it, that these parties separated by mutual consent, and that there was in no proper sense a desertion or abandonment of plaintiff by defendant. She testified that defendant always treated her well and they got along together pleasantly until a few weeks before the alleged desertion, when she prosecuted an investigation to see whether he was doing nightwork, as he said he was, and, finding out that he was not, she grew very angry with him. This quarrel apparently led to the separation. Plaintiff further testified she did not care much about his leaving her, and made no inquiry for him, but that she would have lived with him if he had stayed at home.

The proof of desertion, considered in its best phase, is very weak, and we affirm the judgment. All concur.

STATE ex rel. COPE et al. v. BENNETT
et al.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

INTOXICATING LIQUORS—DRAMSHOP LICENSES
—ISSUANCE—STATUTES—BONDS—CONDITIONS
PRECEDENT—CERTIORARI—APPLICATION
—VERIFICATION.

1. Where a writ of certiorari was issued to review the issuance of a liquor license for errors appearing of record, as the application need not be verified, it was immaterial that one of the relators administered the oath to his co-relators.

2. Rev. St. 1899, § 2995, authorizing the issuance of dramshop licenses, provides that the county court shall require of the person applying for such license that he give bond in the sum of \$2,000, to be approved by the court, conditioned as provided. *Held*, that the giving and approval of such bond is a condition precedent to the authority of the court to issue the license, and a license issued without the approval of such bond is void.

Appeal from Circuit Court, Dent County;
L. B. Woodside, Judge.

Certiorari by the state, on the relation of J. J. Cope and others, against H. A. Bennett and others. From a judgment in favor of relators, defendants appeal. Affirmed.

L. Judson, for appellants. J. J. Cope, for respondents.

REYBURN, J. The relators, the respondents in this court, presented their petition, at the relation of the state of Missouri, to the circuit court of Dent county, praying that a writ of certiorari be issued, requiring appellants, who constituted the county court of Dent county—commanding them—to certify to the circuit court the record of their proceedings by which a dramshop license was granted to J. L. Chambers. The allegations of the petition material to quote are that relators are resident, assessed, taxpaying citizens of the city of Salem; that the defendants compose the county court of Dent coun-

ty, and on the 14th day of August, 1902, a proceeding was begun before such county court by J. L. Chambers to obtain a license for a dramshop in block 10, west side of the creek, in the city of Salem, a city of less than 2,000 inhabitants; that such county court on the 14th day of August acted therein without authority of law, in that the petition of Chambers did not contain a majority both of assessed taxpaying citizens and guardians of minors owning property therein, and in the block where the dramshop was to be kept, as shown by the last previous annual assessment and vote of the city, nor did it so appear from the petition or any part of the record; that the county court on the 14th day of August, 1902, granted Chambers such license, and said license was by the clerk of the court, under the orders of the court, on the 20th day of August, 1902, issued and delivered to Chambers, under which he is selling intoxicating liquors, without such court first approving a bond in the sum of \$2,000, as required by section 2995, Rev. St. 1899. After the issuance and service of the writ, the defendants appeared and filed a motion to quash, averring that the petition was not signed and verified as the law directs: being signed by J. J. Cope as a petitioner, and verified by his copetitioners before him as notary public. The motion was overruled, and, in opposition to the writ, defendants, as justices of the county court, made a return to the circuit court of the record and proceedings before them in the matter of the granting of the dramshop license in question, from which it appeared that the petition was filed August 20, 1902, and the license granted thereunder to Chambers for a period of six months from the 18th day of August, 1902. It further appears in the order of the county court granting the license that at the time the license was issued no bond had been tendered or approved by the county court; but a bond is among the proceedings, bearing no date or file marks, but indorsed as taken and approved the 18th day of August, 1902, by J. H. Sharp, clerk of the county court.

1. As in this state no statutory provisions exist regulating proceedings for such writs, it must be assumed that the procedure is the same as at common law. *State v. Schneider*, 47 Mo. App. 669. In the absence of statutory requirements, the petition need not be sworn to for errors appearing of record; and, after return thereto has been made, it is immaterial whether the affidavit on which the certiorari was granted was sufficient or insufficient. 2 *Spelling, Injunction & Other Extraordinary Remedies* (2d Ed.) p. 1725, § 1996. In granting or refusing such an extraordinary remedy, the court has a wide latitude of discretion, and, where the writ has been issued in the absence of a showing to the contrary, it will be presumed that the court awarding it exercised a sound discretion in its issuance. *State ex rel., etc., v. Moore*, 84

Mo. App. 11; 2 Spelling, Injunction & Other Extraordinary Remedies (2d Ed.) p. 1646, § 1905. The objection presented that J. J. Cope, appearing as a relator, administered the oath to the application for the writ to his co-relators, and therefore the writ should not have issued, will therefore be overruled.

2. By section 2905 of chapter 22, Rev. St. 1899, governing dramshops, and kindred subjects, before a license as a dramshop keeper is permitted to be granted, the county court is directed to require of the person applying for such license that he give bond in the sum of \$2,000, with two or more resident sureties, to be approved by the court, conditioned as provided. The language of the statute is clear, explicit, and unequivocal; and, before the court had lawful authority to issue the license applied for, the terms under which it is to be granted must be complied with; and, as a condition precedent to the issuance of the license, the applicant's bond must be executed and approved by the court itself. *State v. Schneider*, 47 Mo. App. 669. And such facts should have affirmatively appeared in the record of the proceedings. The provisions of the statute are mandatory, and not directory, and a substantial compliance with the requirements of the law therewith is exacted to render valid the granting of the license. *State v. Schneider*, supra; *State v. Heege*, 37 Mo. App. 338.

It follows, therefore, that the order of the county court granting J. L. Chambers a license was without warrant of law, illegal, and void; and the judgment of the circuit court annulling the order of the county court in granting such license, and revoking such license, is hereby affirmed.

BLAND, P. J., and GOODE, J., concur.

COGAN v. CASS AVE. & F. G. RY. CO.*
(Court of Appeals at St. Louis, Mo. Dec. 23, 1902.)

STREET RAILWAYS — PERSONAL INJURIES —
DUTY OF PUBLIC TO LOOK OUT FOR CARS —
NEGLIGENCE — ADMISSIONS — EVIDENCE —
INSTRUCTIONS — TRIORS.

1. The strongest admissions which a party makes against himself are those by which he must be concluded in determining the effect of his testimony, unless, before closing his evidence, he shows that there was some mistake or misapprehension in what he stated.

2. Plaintiff admitted that he was driving in the rails of a street car track, and was coming on a cross-track, when he first saw the car approaching on the cross-track, very near to him, and stated that he thought he had time to pass; that when he realized that the car was going to catch him his horses "were going towards the crossing on the track" and that he was struck before he got off. Held to show a want of ordinary care, which precluded his recovery.

3. The rule that where defendant, by ordinary care, may discover and avert the peril wherein plaintiff has negligently placed himself, it is defendant's duty to exercise such care,

does not apply where there is no testimony tending to show the facts essential to its application.

4. In determining whether or not plaintiff has a case to submit to triors of the joined issues, he is entitled to the benefit of every fact in evidence favorable to his contention, and of every reasonable inference therefrom.

5. Where, after giving plaintiff the full weight of every fact in evidence favorable to his contention, and of every reasonable inference therefrom, there is no testimony to support his contention on some material and essential feature of his case, the court may properly give a binding instruction to find for defendant.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by Richard Cogan against the Cass Avenue & Fair Grounds Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. Sanders and Boyle, Priest & Lehman, for appellant. A. R. Taylor, for respondent.

BARCLAY, J. Plaintiff has a verdict and judgment in the circuit court in this action for injuries sustained by him in a collision in June, 1899, with a street railway car operated by the defendant company. He began his action before Justice Cullinane, and on appeal the case was tried anew, with the result of a finding and judgment for plaintiff in the sum of \$550. Defendant then prosecuted this appeal after taking the necessary steps for that purpose.

Plaintiff's case, as stated by him as a witness, discloses that he was a man of about 56 years at the time of the mishap in suit. He was engaged in hauling for one of the electric power companies, and was on his way from home to work, driving a two-horse team in a wagon, almost empty, at about 6:20 a. m., June 21, 1899. The collision took place at Fourteenth and Carr streets, in St. Louis. Plaintiff was driving south on Fourteenth street, and the car which hit his wagon was moving east on Carr street. The day was bright and clear. Plaintiff's own story of the affair, or the material features of it, had better be given in his own language as it appears in certain passages of his testimony, as follows: "Q. Now, you were driving south on Fourteenth street with your team? A. Yes, sir. Q. Was your wagon empty, or did it have any load? A. It had nothing only me and the feed box; that is all. Of course, you don't want to work all day without eating something, do you? Q. Well, now, as you approached and were crossing Carr street, how were you moving—in a walk, or trot? A. I was going in what you call a little 'dog trot'; just trotting along something like a good spring walk. Horses that are used to going that way go easier than in a spring walk. Q. Now, in what part of Fourteenth street were you driving? A. I was in the middle of the track, going south. Q. Was your wagon in the track? A. Yes, sir; on the Fourteenth

*Rehearing denied April 14, 1903.

street track, going south. Q. There was a railroad track on Fourteenth street, was there? A. Yes, sir; of course there was. Q. Now, on Carr street was the defendant's track—the Cass avenue and Fair Grounds Railway Company? A. Yes, sir. Q. Did they have one track or two tracks on Carr street? A. Now, I don't exactly know, but I know there is one. I don't know whether it has a double track on that street or not. Q. Well, when you were coming into Carr street did you look west to see if there was a car coming? A. I did. Q. Did you see a car? A. I did. I seen a car about 200 or 250 feet from me, coming down. The car was going east. Q. Well, it was coming towards you? A. Yes, sir. Q. Looking up the street, and seeing the car coming, could you tell anything about its speed? A. Well, sir, I could not tell exactly how fast they were going until they struck me, and I know they knocked me down pretty quick. Q. Where were you when you realized that the car was about to catch you on the track? Had your horses crossed the track, or on the track, or how? A. They were going towards the crossing on the track, and I was sitting in the middle of the wagon on a seat, and I thought I had time to pass, and before I got off the track I was struck. Q. Well, I asked you if at that time your horses were on the track? A. When I saw the car? Q. No, when you first saw the car; as I understood you, you were just coming on Carr street? A. No, I was coming onto the track. Q. About how wide is Carr street? Do you remember or do you not? A. Well, I should think it is about—it is a public thoroughfare—it is over forty feet. I think that is about it. Q. Now, I ask you the question, where were you when you saw the car was coming dangerously close to you? Were your horses across the track, or on the track? A. They were just crossing on the track when the car struck me. Q. Were the horses on the track, or your wagon? A. My wagon was on the track, and the hind part of the horses were just getting off the track when I was knocked down. Q. How long was your wagon—about how many feet in length? You had a tongue to your wagon, did you? A. Yes, sir; I could not drive it without a tongue. Q. Well, you had a tongue to it? A. Yes, sir. Q. Now, can you tell the jury about how long from tongue to rear the wagon was—the wagon and team—about how many feet; 25 or 30, or what? A. I should say about 25 feet. Q. The whole length of wagon and team? A. I think about 25 feet; probably a little more. Q. Were these large or small horses? A. They were a large team. One was 16½ hands high and one 18. Q. The length of the horses would be about what—that is, hitched to the wagon—the length would be about what? A. I should think they would come very near 10 feet. The coupling pole, I should think, was 12 or

14 feet. Q. The tongue, you mean? A. Yes, sir; some 12 or 14 feet long. It is longer than the horses maybe two feet, because they must have something to bear back on. Q. Now, what part of your wagon or team did the car strike? A. It struck me about the center. I dashed in from the hind wheel and struck the forward hound, and I did not know anything more after that. Q. Do you know how you fell, or where you fell? A. I know very well I thought my neck was broke against the car, and I dropped down between the car and the wagon, and I could not tell you any more. I thought my neck was broke." The foregoing quotation is from plaintiff's direct examination. On cross-examination he made the following further statements: "Q. Now, Mr. Cogan, you were driving these two horses south on Fourteenth street? A. Yes, sir. Q. You were going to work? A. Yes, sir. Q. Going down to the corner of Nineteenth and Locust streets to work that day? A. Yes, sir. Q. At what rate of speed were you driving south on Fourteenth street? A. It was my nearest route. Q. I say at what rate of speed were you driving—how fast? A. Well, something in a small trot; what you call a little jog trot. Q. Just a little faster than a walk? A good walk? A. Yes, sir. You see, lots of horses walk as fast as that kind of a trot. Q. Well, you were going four or five miles an hour? A. Yes, sir; four or five miles an hour. I wanted to get there first in the morning. Q. You were in a hurry to get to work? A. Undoubtedly. The first man there has the first load. Q. Now, Fourteenth street is a narrow street, is it not? A. Oh, I don't think so. Q. Well, what is the width of it, about? A. It is a pretty wide street, I think. Q. Well, what is the width? A. I think about forty feet. Q. And what is the width of Carr street? A. I think about the same. I think there is a ten-foot sidewalk. Q. There is a single car track on Fourteenth street and a single track on Carr street, is there not? A. I don't know. I think there is on Fourteenth street. Q. You say you were driving south in the track? A. Yes, sir. Q. Isn't there a church at the northwest corner of Carr and Fourteenth streets? A. Yes, sir. Q. That church is built right up to the building line? A. Something like it. Q. Well, as a matter of fact, the corner of the church comes flush up to the building line? A. What do you call the building line? Q. I thought everybody in town knew what the building line was. For instance, this is the car (illustrating) and this the church (illustrating), there is no vacant space there except the sidewalk? A. That is all. Q. Then, there is a row of tree boxes along the north side of Carr street? A. I think there is. * * * Q. By Mr. Saunders: That was an open wagon? A. It was not a covered wagon, I am sure, to haul dirt with. The Court (to witness): Just answer the question. He has

the right to ask you any question he desires. Q. By Mr. Saunders: That was an open wagon? A. Yes, sir. Q. It had a seat in front? A. No, sir; I had a board right across the center of the wagon. Q. There was a board across the center of the wagon, and you were sitting on that board? A. Undoubtedly. Q. Now, when you drove into Carr street, you say you looked up? A. I did. Q. Where were you at the time you looked up? A. I was in the wagon. Q. I understand that, but whereabouts on Carr street were you? A. I was just getting about to the building line, as you call it, when I saw the car coming, and the car— I thought I could pass it. I thought it was about 200 or 250 feet away. Q. You had cleared the building line before you looked up, is that right? A. Yes, sir; I could not look up and the church be there. I could not look through the church, could I? Q. Now, how far were you from the track at the time you looked up? A. Well, I could not be very far from the track. * * * Q. I say you were fifteen or twenty or twenty-five feet away from the rail when you looked up? A. I suppose so. Q. And the car at that time was 250 feet west of you, coming east? A. Something like that. Q. The car was coming downgrade, was it not? A. Of course. You know it is downgrade there. Q. Now, it is about one hundred yards, is it not, between Fourteenth and Fifteenth streets? A. Well, I don't know, now. Q. Well, it is an average city block there? A. Yes, sir. Q. When you saw this car, then, it was still a little east of Fifteenth street, is that right? When you saw the car you said it was about 250 feet away? A. Yes, sir. Q. And it was just a little east of Fifteenth street, is that right? A. Well, I suppose so. Q. Now, then, did you continue to look at the car, or drive on across the track without looking? A. I drove on across without looking any more. Q. You did not look any more? A. No, I was driving, and the car came and struck me. Q. Did you increase the speed of your horses? A. I had them going the sild gait, but I believe I turned the whip on them when I saw the car getting so close. Q. You threw the whip on them when you saw the car was so close? A. Yes, sir. Q. Then you increased the speed? A. Well, I did; yes, sir. Q. But as a matter of fact you whipped up your horses when you saw the car coming closer. A. Yes, sir. Q. How far was the car away from you when you whipped up your horses? A. I could not exactly say. Q. Well, about? A. I don't know. Q. Well, you can give me some idea, can't you? The car was 250 feet away when you first saw it? A. The car was maybe 50 or 60 feet. Q. And where were your horses at that time? A. Crossing the track. Q. And you were going between four and five miles an hour before you got there, and you increased the speed as you got on the track? A. I did the best I could to get off. Q. What

part of your wagon was struck? A. About the center of the wagon. The hind wheel was struck first and then the hound right in the middle of the wagon. Q. Were you driving straight across the track or had you turned? A. I was driving straight across on the Fourteenth street track. I was on that track, and I was in that track when I was struck. * * * Q. Did you notice the motorman at all at these various times you looked up when the car was coming? A. I seen the motorman on the car, and he never put on any brake until he had me knocked down pretty near. Until he was as near to me as I am to that south wall of this courtroom. Q. You said just now that you looked up when you started across the track, and saw the car 250 feet away. Was that the first time you looked up? A. Yes, sir. Q. And the second time you looked up the car was 50 or 60 feet away? A. Yes, sir. Q. And you whipped up your horses? A. And the motorman started to put on the brake then, and he never rang any bell or drew a brake until he struck me. Q. Now, you say that you looked up the first time, and the car was 250 feet away, and the second time when it was 50 or 60 feet away, and at that time you urged your horses on. Is that right? A. Well, yes, sir. Q. Did you ever look up again toward the motorman? A. I don't believe I did until I was knocked down. Q. When you looked up the second time, the motorman was putting on the brake? A. He was, but he was as near to me as that clock. Q. You say it was 50 or 60 feet away? A. Yes, sir. Q. The motorman was then putting on the brake? A. Yes, sir; he was putting on the brake. He did not ring the bell. Q. But he was putting on the brake? A. Yes, sir. Q. That was the second time you looked up? A. I believe so."

1. In the foregoing quotations are found the material statements of plaintiff bearing directly on the chief contention of defendant, which is that the testimony does not warrant the submission of the case to the jury. That contention was made in the trial court by a peremptory instruction to the jury to find for defendant, which the court declined to give. There is some contradiction in the plaintiff's own testimony touching the time when he first saw the approaching car which hit his wagon and touching the distance between the car and him at that time. But the strongest admissions which he makes against himself are those by which he must be concluded in determining the effect of his testimony. From the general rule that plaintiff's admissions in evidence are binding upon him (for the purposes of the trial when they are made), it is a necessary deduction that the strongest admission he so makes must be accepted as the extent of his concession, unless (before he closes his evidence) he shows that there was some mistake or misapprehension in what he stated. The general rule it-

self is well established in this state. *Shirts v. Overjohn*, 60 Mo. 308; *Bogle v. Nolan*, 96 Mo. 91, 9 S. W. 14; *Feary v. Railway*, 162 Mo. 75, 62 S. W. 452. Here the plaintiff admitted that he was driving south in the rails of the street car track on Fourteenth street, and that "he was coming on to the track" when he first saw the car. He stated further that he "thought he had time to pass," that when he realized that the car was about to catch him on the track the horses "were going toward the crossing on the track," and that before he got off the track he was struck. It is clear beyond the possibility of a reasonable inference to the contrary that he saw the car approaching, that he was very near it then, and that he drove ahead in front of it, expecting to pass in safety, but missing it, unfortunately. It was his duty to use ordinary care to look out to see the car on the cross street he was entering as he drove along Fourteenth street. According to his admissions aforesaid, he did not do so until too late, and then he thought he had time to pass in front of the car, and drove on. We think that the plaintiff's testimony shows a state of facts which precludes recovery because of his own want of that ordinary care in the circumstances which the Supreme Court and the Appellate Courts of this state have defined in discussing other cases of alleged negligence. *Lane v. Railroad*, 132 Mo. 4, 33 S. W. 645, 1128; *Watson v. Railway*, 133 Mo. 246, 34 S. W. 573; *Huggart v. Railroad*, 134 Mo. 673, 36 S. W. 220; *Peterson v. Railway*, 156 Mo. 552, 57 S. W. 709; *Lien v. Railway (K. C.)* 79 Mo. App. 475; *Conrad Grocer Co. v. Railway (St. L.)* 89 Mo. App. 534. It is certain that, if he did not look out at all for the car on the cross-street until too late to avoid getting in front of it before it reached him, in the circumstances shown in this case, no inference that he used ordinary

care in the premises could be reasonably drawn, in view of the decisions aforesaid.

2. There is no testimony before the court which would bring plaintiff's case within the saving reach of the precedents which hold that where defendant, by ordinary care, may discover and avert the peril of plaintiff (wherein he may have negligently placed himself) it is defendant's duty to exercise such care to avoid the injury. That rule of law we fully recognize as established by ample authority binding on this court. *Werner v. Railway*, 81 Mo. 368; *Weller v. Railroad*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; *Bunyan v. Railway*, 127 Mo. 12, 20 S. W. 842. But that rule does not come into play where there is no testimony tending to show the facts essential to its application.

3. In determining whether or not plaintiff has a case to submit to the triors of the joined issues, he is entitled to the benefit of every fact in evidence favorable to his contention, and of every reasonable inference therefrom. *Norton v. Ittner*, 56 Mo. 351; *Barth v. Railway*, 142 Mo. 535, 44 S. W. 778; *Lamb v. Railroad*, 147 Mo. 171, 48 S. W. 659, 51 S. W. 81. But if, after giving to plaintiff the full weight of such facts and inferences, there yet is no testimony to support his contention on some material and essential feature of his case, it is proper for the court to give a binding instruction for a finding for defendant. And it is, moreover, error to refuse an instruction to that effect when requested in such circumstances as here appear. *Barton v. Railroad*, 52 Mo. 253, 14 Am. Rep. 418; *Sharp v. Railway*, 161 Mo. 214, 61 S. W. 829; *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 826.

The judgment is reversed. *Carroll v. Transit Co.*, 107 Mo. 664, 17 S. W. 889.

BLAND, P. J., and GOODE, J., concur.

SMITH'S ADM'R v. WELLS.

(Court of Appeals of Kentucky. April 17, 1903.)

JUDICIAL SALES—ORDER DIRECTING CONVEYANCE TO PERSON OTHER THAN PURCHASER—FRAUD IN OBTAINING.

1. Land was sold to plaintiff under the lien of a judgment recovered by him as administrator, and the report of the court commissioner was confirmed, but nothing was paid by plaintiff, in the way of costs or otherwise, and no deed was given him. Subsequently the commissioner reported that he was informed that plaintiff had sold the land to defendant, and an order was entered reciting that it was made on plaintiff's motion, and directing the commissioner to convey to defendant on payment of \$600. Defendant paid \$300 thereof to plaintiff's attorney, who, after paying the costs and attorney's fees, paid the balance to a devisee under the will of testator, who had prior thereto commenced an action against plaintiff, as administrator, to recover the amount devised her. Five years after he first learned of the purchase and possession by defendant, plaintiff sued to recover the land; alleging that the report of the commissioner as to plaintiff's sale, and the order purporting to have been made on his motion, were fraudulently obtained, and that he was never in the county where the order was made. The commissioner and plaintiff's attorney had both died. No evidence of any wrongdoing on the part of any one connected with the transaction was shown. *Held* insufficient to show that the order directing the conveyance to defendant was obtained by fraud.

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Action by B. W. Boone, as administrator of Enoch Smith, deceased, against H. C. Wells. Judgment for defendant, and plaintiff appeals. Affirmed.

Winfield Buckler, for appellant. J. I. Williamson, for appellee.

NUNN, J. On the 6th day of September, 1879, a suit was brought in the Nicholas circuit court by Enoch Smith against Mitchell Grimes and others, by which action he sought to sell 47 acres of land for the satisfaction of a claim due the plaintiff for purchase money. This suit was litigated by the parties until the March term, 1890. During this litigation the plaintiff, Enoch Smith, died testate in the state of Missouri, and appellant, B. W. Boone, was in August, 1889, appointed administrator with the will annexed of the estate of Enoch Smith, deceased; and the action was regularly revived in his name, and prosecuted by him to judgment in the March term, in 1890. The debt, interest, and costs amounted at that time to something like \$1,600, and the court adjudged the same to be a lien upon the land; and on the 14th day of April, 1890, T. J. Glenn, the master commissioner of the Nicholas circuit court, sold the land, and reported to the court that he had sold it to the plaintiff, B. W. Boone, at the price of \$1,335, and that the plaintiff was the purchaser, and that he did not take any bond for the purchase price. The report was confirmed, but no

deed was ever made to him for the land, nor did he ever pay anything thereon in the way of costs or otherwise. On March 17, 1891, the master commissioner was directed by the court to collect from the plaintiff, the purchaser, a sufficient amount of money to pay all the costs of the proceedings; and in response to that order the commissioner on the 19th day of March, 1891, filed his report, in substance, stating that the land was sold, and was purchased by the plaintiff by his attorney, and that the commissioner was informed that the purchaser, the plaintiff, had no funds in hands with which to pay costs, but that the purchaser was endeavoring to make a sale of the land to enable him to settle up the whole matter incident to the proceedings. The commissioner filed like reports November 19, 1891, and March 24, 1892. November 24, 1892, he reported that he had been informed that the plaintiff had sold the land to H. C. Wells. On February 14, 1893, the following order was entered in the action of Enoch Smith against M. Grimes, etc.: "On motion of Ben W. Boone, administrator, purchaser of the tract of land heretofore sold under judgment herein, T. J. Glenn, master commissioner, is directed to convey said land to H. C. Wells, to whom said Boone had sold it, reserving a lien on the land in the deed for price of and by said Wells to be paid to said Boone, to wit, \$600; one-half payable 26th day of April, 1893, and the remainder 26th day of October, 1893. Thereupon the said Glenn produced in open court and acknowledged his deed as commissioner, conveying said land to said Wells, which, being examined, is approved and ordered to be certified to proper office for record. * * *" It appears from the record that appellee, H. C. Wells, paid his first note, of \$300 and interest, to Judge W. P. Ross, plaintiff's attorney in that action, and that Ross, out of said fund, paid the costs of that action to the clerk, sheriff, commissioner, etc., reserving to himself a fee of \$75, paid H. L. Stone, attorney for Enoch Smith, a fee of \$100, and paid the balance, of about \$38, to Kennedy & Kinsolven, attorneys for Caroline Hayden. Appellee paid the other and last note to the last-named attorneys, as counsel for Caroline Hayden, and took their receipts therefor. It appears from this record that, under the will of Enoch Smith, Caroline Hayden was a devisee, and that she, prior to the year 1893, instituted an action in the Nicholas circuit court against Ben W. Boone, administrator with the will annexed of Enoch Smith, to recover the amount devised to her, and that Kennedy & Kinsolven were her attorneys in this action. The clerk of the court proves the records of this action to have been lost or misplaced. On the 25th day of April, 1901, the appellant instituted this action against the appellee to recover the 47 acres of land, and the rents thereon from 1893 to the institution of the action, and afterwards, by an amendment,

alleged that the reports by the master commissioner, stating that he was endeavoring to sell the land to pay the costs, were made without his knowledge or consent, or without any authority from him, and the order of court purporting to have been made on his motion, in which it is stated that he had sold the land to appellee for the price of \$600, was made without his knowledge or consent, or by his authority, and was fraudulently made by some one unknown to him. The appellant, in his deposition, swears to the same statements that he makes in his petition, and, in addition, states that he was never in Nicholas county, Ky., in his lifetime; that the first he heard of Wells being in possession of the land as a purchaser was in the year 1896, and that he had never received as much as a dollar of the purchase money; and when asked why he had not taken steps to recover the land before April, 1891, he answered that he was depending upon Judge Ross, his attorney, to look after his interests. It further appears from the record that both Judge Ross and T. J. Glenn, the master commissioner, had died prior to the institution of appellant's action. Appellant was the only witness who testified to any fact sustaining the allegations of his pleadings. It further appears from the record that the land in controversy, at the time appellee bought it, was in a dilapidated condition, with no building of any kind on it, and the fencing on and around it about all destroyed. The land was rolling, and had washed into gullies, and its value, by reason thereof, had been greatly decreased. The witnesses, in fixing its value, varied from \$400 to \$1,000.

Considering all the facts and circumstances as developed by this record, namely, that appellant never was in Nicholas county, Ky., in his life; that Judge W. P. Ross was his attorney, and bid the land in at the sale for the appellant (and it is evident that Judge Ross gave the information to the commissioner from which he reported that the plaintiff was endeavoring to sell the land to get money to pay the costs, and from whom he got the information that he had sold the land, and we are satisfied that it was Ross who prepared the order directing the conveyance of the land to the appellee); and the fact that the appellee paid all the purchase money in the year 1893, the first note to Ross, and the second note to the attorneys for Caroline Hayden, who had sued the appellant; the fact that the papers in that suit were lost before the institution of this action; and the further fact that his attorney, Judge Ross, and the master commissioner, Glenn, had both died before the institution of this suit; and the further fact that the appellant admits that he was informed of the purchase and possession by the appellee of the land in controversy for five years before the institution of this action, and not a word from him indicating that he had made any effort to

ascertain the facts with reference to appellee's purchase or the situation prior to the death of Ross and Glenn, and not until shortly before the institution of this action; and the further fact that there is not developed in this record any evidence or any circumstance of any wrongdoing, or any apparent attempt at wrongdoing or sharp practices, on the part of his attorney, Judge Ross, or the appellee, or on the part of any person connected with this transaction—we are convinced that the lower court did right in dismissing the appellant's petition, and that there is not sufficient evidence to authorize this court to adjudge that the order of court directing the deed to be made to appellee was obtained by fraud, and to declare it a nullity.

Wherefore the judgment of the lower court is affirmed.

FOX v. WILLIS et al.

(Court of Appeals of Kentucky. April 17, 1903.)

INTEREST—JUDGMENT—AWARD OF MONEY—WITHDRAWAL FROM COURT—REVERSAL.

1. Where a party to a cause is awarded a sum by the judgment, and withdraws the same from the court, on a reversal he should be ordered to pay the sum into court, with 6 per cent. interest, and not with 10 per cent.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Application to modify opinion. Denied.

For former opinion, see 72 S. W. 330.

NUNN, J. The appellant asks this court to modify the opinion herein to the extent that he be not charged the \$180, the amount paid to J. P. Morton & Co., and the amount of \$2,222.42; appellant claiming that he has paid and settled these sums. We have again examined the record, and find that appellant is mistaken. It appears from the record that Mrs. Willis, as executrix, paid the Morton & Co. claim. Appellant is mistaken when he states that this court, in the opinion, charged him with \$2,222.42. On the contrary, he is credited with it, and properly credited, as shown by the record and receipt of J. L. Clemmons. The settlement of October 20, 1893, and the deposition of Mr. Fox in answer to question 41, show that Fox at that time was indebted to Willis in the sum of \$4,707.04, and in the settlement of March 6, 1894, Fox paid on that debt the sum of \$2,222.42; leaving a balance due on that matter of \$2,484.62, which sum is charged to him in the opinion.

Appellant also moves the court to adjudge him 10 per cent. damages on \$6,924.35, the amount adjudged to appellee in the lower court, and alleged to have been withdrawn by her. We are not aware of any law authorizing this court, on the reversal of a case, to assess such damages. If appellee, under the judgment of the lower court, withdrew

from the court the sum of \$6,924.35, and did not return it, then she received \$1,679.59 more than she was entitled to, as shown by the opinion of this court; and on the return of this case the lower court should order her to pay into court the sum of \$1,679.59, with 6 per cent. interest from the time she received it until she pays it.

**OWENSBORO, FALLS OF ROUGH & G.
R. R. CO. v. COMMONWEALTH.**

(Court of Appeals of Kentucky. April 17, 1903.)

TAXATION—RAILROAD CORPORATIONS—VALUATION OF PROPERTY—MODE.

1. Gen. St. c. 92, art. 3, § 1, requires railroad companies, on or before the 1st of September of each year, to report to the auditor of public accounts the length of their road with their average value per mile, and all other properties belonging to the company. Section 8 requires the auditor to lay the reports before the railroad commissioners, whose duty it is to examine them, and, if either too high or low, correct and equalize the valuation. Section 4 provides that the same rate for state purposes which is or may be levied on other real estate shall be levied on the value so found by the commissioners. A railroad made the required report, not, however, for purposes of taxation—the railroad believing itself exempt—but for statistical purposes. The railroad was not in fact exempt, and the commissioners fixed the valuation of its property from the reports thus furnished. *Held* proper, it not being presumed that the corporation would make a different report for statistical purposes than for purposes of taxation.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Suit by the commonwealth of Kentucky against the Owensboro, Falls of Rough & Green River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Walker & Slack, D. W. Lindsey, J. M. Dickinson, and Pirtle & Trabue, for appellant. C. J. Pratt and M. R. Todd, for appellee.

BURNAM, C. J. This suit was instituted by the commonwealth of Kentucky in September, 1892, against the Owensboro, Falls of Rough & Green River Railroad Company to recover taxes alleged to be due by the company for the years 1889, 1890, and 1891. The trial court adjudged the railroad company exempt from taxation, under the act of May 5, 1884, for five years from the date of the beginning of the construction of the road, which was in December, 1888. The judgment was reversed by this court in an opinion filed October 26, 1893 (23 S. W. 868, 56 S. W. 993), the court holding that the act of May, 1884, had been repealed by the act of May, 1886, known as the "Hewitt Revenue Bill," as to all roads the construction of which was begun subsequent to the date when that act took effect, and the cause was remanded to the lower court for a trial upon

its merits. Substantially the only ground relied on to escape liability by the company is that there had been no valid assessment by the railroad commission of Kentucky of the property of the company prior to the institution of this suit. The trial judge held the company liable for the taxes sought to be recovered for the years 1890 and 1891, finding from the evidence as a matter of fact, first, "that during the period for which taxation for 1889 was due and payable the defendant had not completed its railroad, and consequently did not own and operate a railroad within the meaning of the statute"; second, "that during the years 1890 and 1891, Triplett, who was manager of the defendant company from October, 1889, to November, 1891, did make to the railroad commissioner a report, which he intended for statistical purposes, and not for assessment purposes; and that this report was before the railroad commissioners, and made the basis of an action by them, which became a record in the auditor's office"; and from these facts found as a matter of law that the defendant was liable for taxes for the years 1890 and 1891 upon the assessment so made, and rendered judgment therefor, and the company has again appealed.

Plaintiff introduced as a witness the then auditor of the state, who testified: That the records of the assessments made by the railroad commissioners for the years 1890 and 1891, which constituted a part of the records of the auditor's office, contained the following written memorandum, which was signed by each of the then acting railroad commissioners of the state: "Owensboro & Falls of Rough R. R. State of Kentucky. 26 miles at \$10,000.00 per mile, \$260,000.00. Davis County 18 miles at \$10,000.00 per mile, \$180,000.00. Ohio County 8 miles at \$10,000.00, \$80,000.00." And that the following certificate was appended to this valuation: "Commonwealth of Kentucky. Office of the Railroad Commission, Frankfort, Ky., Nov. 14, 1890. The undersigned Board of Commissioners, acting under an act entitled an act to prescribe the mode of ascertaining the value of railroad and for taxing same, approved April 3, 1878; and an act entitled an act to amend an act entitled an act to prescribe the mode of ascertaining the value of property of railroad companies and for taxing same, approved April 19, 1882, hereby certify that the foregoing pages from page 178 to the beginning of this certificate embrace the valuation of property of companies owning railroads subject to taxation in the State of Kentucky, and the figures set opposite the names of counties, cities, and incorporated towns show the valuation of property within same subject to taxation. Said valuation includes the sidings and rolling stock." That a similar certificate appears in the record of 1891 assessments, and similarly certified by the railroad commissioners. And Robert S. Triplett, who was the general manager of

the appellant corporation during this period, testifies that he made the report required by the statute to the railroad commissioners of Kentucky for each of these years upon printed blanks furnished to him for that purpose by the auditor of public accounts for statistical purposes, as he supposed that company was exempt from taxation during this period under the act of 1884. These reports were laid before the railroad commissioners, and that board made their finding of the length of the defendant's road and its valuation per mile therefrom. As was properly said in the opinion rendered by the trial court: "It cannot be assumed that these officers would report a fact as true for statistical purposes which would not be true for purposes of taxation, nor can it be assumed that Triplett, in making his report, would have fixed the valuation of the road lower for taxation than its actual value. If the railroad was worth \$10,000 for statistical purposes, it was worth \$10,000 for purposes of taxation."

Section 1 of article 3 of chapter 92 of the General Statutes provides that: "The chief officer of each railroad company owning a railroad line in whole or in part in this state shall on or before the first day of September of each year report to the auditor of public accounts the length of such road, with its average value per mile and all other property belonging to the company." Section 3: "The auditor shall lay these reports before the railroad commissioners, whose duty it is to examine such reports, and, if either too high or too low, to correct and equalize such valuation." Section 4: "The same rate of taxation for state purpose which is or may be levied on other real estate shall be levied on the value so found by the railroad commissioner upon the rolling stock and real estate of each railroad company." There is no pretense that appellant has ever paid any taxes to the state for either of these years, and we have reached the conclusion that the assessments shown upon the books of the railroad commission are a substantial compliance with the requirements of the statute, and the judgment appealed from is affirmed.

LYNCH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 17, 1903.)

JAILERS—MISCONDUCT—ESCAPE OF PRISONER—INSTRUCTIONS.

1. Ky. St. § 8748, which provides that jailers shall be subject to indictment "for misfeasance and malfeasance in office, willful neglect in the discharge of official duties," makes an intent on the part of the jailer to do wrong an essential ingredient of the offense.

2. Under Ky. St. § 1339, declaring that if any jailer "negligently suffer or permit any person, convicted or charged with a public offense, to escape," he shall be fined or imprisoned, or both, the jailer may be convicted, though he had no intent to permit the escape.

3. A prisoner committed to the custody of defendant, as jailer, for 100 days, asked leave to go home to his family, a member of which was sick. The jailer refused unless the consent of the county judge was obtained. On application made, the judge consented, whereupon the prisoner was permitted to go home one day each week during his term; the time of his absence being deducted therefrom. *Held* that, as the offense of the jailer appeared to be due to ignorance, the jury should have been instructed under section 1339, as well as under section 3748.

Appeal from Circuit Court, Estill County.
"To be officially reported."

J. Sidney Lynch was convicted of crime, and appeals. Reversed.

Riddell & Riddell, for appellant. C. J. Pratt and M. R. Todd, for the Commonwealth.

BURNAM, C. J. The appellant, J. Sidney Lynch, jailer of Estill county, was indicted for "willful neglect in the discharge of his official duty," and was by the verdict of a jury found guilty, and his fine fixed at \$100, and, in the judgment rendered pursuant thereto, his office as jailer of Estill county was adjudged vacant, and he has appealed to this court.

The indictment charges that "the appellant, while acting as jailer of Estill county, did unlawfully and willfully and corruptly allow William Bellis, who was at that time confined in jail on a fine from the Estill circuit court, to go to his home and such other places as said Bellis desired, and unlawfully, willfully, corruptly refused to keep the said Bellis confined in jail under said judgment, when it was the duty of said defendant, Lynch, as jailer aforesaid, to keep the said Bellis confined in jail." It appears from the testimony that Bellis had been committed to the custody of the appellant, as jailer of Estill county, under an order of the Estill circuit court, to remain in confinement for 100 days; that during his confinement a member of his family became sick, and that he asked appellant to allow him to go home to see his family, but that appellant refused his request, but agreed that, if the county judge would consent, he would permit him to do so, and that, upon application to him, the county judge consented for the jailer to permit him to do so, and that he subsequently went home every Saturday afternoon during his term of imprisonment, returning on Sunday afternoon; that he remained in jail the full number of days required by the judgment, the time he was absent therefrom being deducted, and he otherwise performed the sentence of the circuit court.

It was the defendant's duty, as jailer of Estill county, to receive and keep all persons in the jail, lawfully committed thereto, until they were lawfully released. See section 2226 of the Kentucky Statutes. And it was a violation of his official duty for him to have permitted a prisoner committed to jail to have left for any purpose at the direction

of the county judge, who had no authority in the premises. Section 3748 of the Kentucky Statutes provides: "Judges of the county court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys, constables, shall be subject to indictment in the county in which they reside for misfeasance and malfeasance in office, willful neglect in the discharge of official duties, and upon conviction shall be fined in any sum not less than one hundred nor more than one thousand dollars, and upon such conviction the office held by such person shall become vacant, and the judgment of conviction shall so recite." And section 1339 of the Kentucky Statutes provides that: "If any jailer, officer or guard, negligently suffer or permit any person, convicted of or charged with a public offense, to escape, * * * he shall be fined not less than \$100.00, nor more than \$500.00, or confined in the county jail not less than one nor more than six months, or both." Whilst the indictment and instruction in this case were drawn under section 3748 of the Kentucky Statutes, it is evident that the averments of the indictment are sufficiently broad to have authorized an instruction submitting to the jury the question of defendant's guilt under section 1339 as well. Section 3748 looks to the punishment of a public official for willful neglect in the discharge of his official duties, and, to constitute this crime, an intention on the part of the officer to do a wrong is one of the fundamental and essential ingredients. The act must be done by the officer *mallo animo*, and not through mere ignorance, inadvertence, or mistake. See Hawk, P. C. 254, and Bishop's New Criminal Law, c. 35. Whilst section 1339 provides a punishment for mere negligence in the discharge of official duty, in permitting a prisoner convicted of a public offense to escape, either wholly or partially, the penalty is denounced by the judgment of conviction. To constitute this offense, it is not necessary that the officer should have designed or intended that the prisoner committed to his care should escape or evade, either in whole or part, the judgment of conviction. The two sections quoted supra clearly illustrate the difference in character of these two offenses by a public official, and provide a different punishment. If a public officer willfully or intentionally disregards a duty imposed upon him by law, in addition to the fine imposed by the statute he forfeits his office. But if the act is only one of mere negligence, ignorance, or inadvertence, a less severe punishment is imposed. The testimony does not show a willful disregard of official duty by appellant. Undoubtedly he violated the law in permitting Bellis to leave the jail for any purpose, but his conduct seems to have been due to ignorance, and the belief that the county judge had authority to control him in the matter. But his ignorance of the law was due to his own negligence, and does

not excuse the offense; but it seems to us to be covered by section 1339 of the Kentucky Statutes, instead of section 3748, and the jury should have been instructed under this section, as well as under section 3748.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 16, 1903.)

CRIMINAL LAW—APPEAL—DISTURBANCE OF VERDICT—PROVINCE OF JURY—WEIGHT OF EVIDENCE—NUISANCE—EVIDENCE—TESTIMONY AS TO OWNERSHIP—MODIFICATION.

1. When there is any evidence conducing to establish the guilt of accused, the court on appeal will not disturb the verdict.

2. In a prosecution of a distillery company for creating a nuisance, where witness testified that the distillery was operated by a company other than defendant, it was not error to permit him to explain that he did not know but what it had been changed to defendant.

3. The jury is the judge of the weight of statements made by witnesses.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

The Kentucky Distilleries & Warehouse Company was convicted of creating a nuisance, and appeals. Affirmed.

George R. Hunt and C. H. Stoll, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

PAYNTER, J. The grand jury of Fayette county returned an indictment against the appellant for creating a nuisance by polluting a stream with the offal from its distillery, and the cattle pen used in connection therewith. The grounds urged for a reversal are as follows: (1) That the testimony was not sufficient to establish the guilt of the appellant beyond a reasonable doubt; (2) error in instructing the jury; (3) in admitting incompetent evidence.

The testimony conduces to show that the stream was polluted by the offal from the distillery, and the cattle pen in which the cattle were fed with its product. The rule is that, when there is any evidence conducing to establish the guilt of a defendant, the court will not disturb the verdict. Certainly there was evidence tending to establish the guilt of appellant. It is suggested that the cattle pen did not belong to the appellant, but the evidence shows that it was used in connection with the distillery, because the slop was conveyed to receptacles in the cattle pen. It is urged that the proof is not sufficient to show that the distillery was operated by the appellant. The evidence shows that W. J. Wilmore was one of the supervisors of the appellant, and that the reports of the grain mashed were made to him. Besides, the admissions of Wilmore were sufficient to authorize the jury to infer that the distillery was operated by the appellant.

The court certainly gave the law of the case. Under the instructions, the jury could not have found against the appellant unless it believed beyond a reasonable doubt that it operated the distillery and used the cattle pen in connection therewith, and, further, that the stream was polluted by it.

It is claimed that the court erred in allowing Wilmore to explain what he meant by "Commonwealth Distillery Company." He had said that the distillery was operated by the Commonwealth Distillery Company, and the commonwealth's attorney then asked him what he meant by the "Commonwealth Distillery Company." He answered, substantially, that the distillery had been previously operated by that Company, but that he did not know but what it had changed to the Kentucky Distilleries & Warehouse Company, which was; in effect, a withdrawal or modification of the statement that the distillery was at the time in question operated by the Commonwealth Distillery Company. The jury was the judge of the weight to be given the statements made by the witnesses.

The judgment is affirmed.

ALLEN v. NEW DOMAIN OIL & GAS CO.

(Court of Appeals of Kentucky. April 17, 1903.)

CONTRACT—LACK OF MUTUALITY—INJUNCTION.

1. A contract is not void for lack of mutuality if the party on whom it is not binding has nevertheless complied with its conditions.

2. Some 500 landowners in a county executed and delivered exclusive leases of the oil and gas privileges under their respective lands to plaintiff's assignors. Plaintiff itself had complied with the conditions of the lease, but defendant nevertheless endeavored to obtain leases of the land to himself, representing to the various owners that the leases to plaintiff had been forfeited. Defendant had actually obtained some leases. *Held*, that injunction was the proper remedy.

Appeal from Circuit Court, Floyd County.
"To be officially reported."

Injunction by the New Domain Oil & Gas Company against M. T. Allen. Judgment for plaintiff, and defendant appeals. Affirmed.

James Goble, for appellant. W. S. Harkins, for appellee.

NUNN, J. The record, or that part of it necessary to be considered on this appeal, shows that during the year 1891 about 500 landowners in the county of Floyd, in this state, executed and delivered leases of the oil and gas privileges under their respective lands to G. H. Dimick and L. H. Gormley, of Pittsburg, Pa. The terms and conditions of the leases being similar, we copy such parts of one of them as will be necessary to elucidate the issues involved.

"This lease made this 7th day of Septem-

ber, A. D. 1891, between Joel Allen of the county of Floyd and State of Kentucky, first party, to G. H. Dimick and L. H. Gormley, of Pittsburg, Pa., second parties:

"Witnesseth: That the first party grants to the second parties the sole right to produce petroleum and natural gas from the following named tract of land: * * *.

"Specifically granting to the second parties for and during the term of 15 years, from this date, the exclusive rights to drill and operate oil and gas wells; to lay and operate pipe lines; the necessary right of way over the premises; the use of enough land on which to preserve the products, and to erect such buildings as they may desire; the free use of the water, if found on the premises; with the right at any time to annul this lease by failing to comply with its terms; and to remove all machinery and fixtures which they may have placed thereon; and should the second parties find a paying production of oil or gas on said land during said term, then first party agrees to extend this lease from year to year, as long as said production continues.

"First party further agrees within ——— days after the discovery of oil in paying quantities on said land to make the second parties a good and sufficient deed of the oil and gas right in said land, for which said second parties shall pay first party the sum of ——— dollars per acre.

"In consideration for which the second parties agree as follows:

"1st. To pay the sum of one dollar in hand, the receipt of which first party hereby acknowledges.

"2nd. To use and occupy only so much of said land as may be necessary for the purposes therein granted.

"3rd. To commence operations and complete one well on the land herein leased, within two years after finding oil in paying quantities in one of the test wells named below, or thereafter pay as rent to first party ten cents per acre yearly in advance until such well is completed, or until second parties elect to cancel this lease by nonpayment of said rent.

"4th. To deliver to first party in pipe lines, free of charge, one-tenth of all the oil they may produce and save from said land.

"5th. To pay first party for any well from which gas is marketed, semi-annually in advance, the sum of one hundred dollars for each pound of gas pressure per square inch shown by the well at the beginning of each six months while the sale of gas continues.

"6th. To pay any money becoming due to first party at Prestonburg in said county.

"7th. Second parties agree to drill and complete one or more test wells to a depth of eighteen hundred feet, if oil or gas is not found in paying quantities at a less depth, and said well or wells shall be located within fifteen miles of Prestonburg and shall be completed within eighteen months from

the date hereof, or a failure so to do shall work the absolute forfeiture of this lease.

"First party reserves all timber, coal and other minerals, and second parties shall only use enough ground for the privileges above named and shall have no railroad right or use of salt water.

"All rights under this instrument shall accrue to the heirs, assigns and other legal representatives of each party hereto.

"In witness whereof," etc.

After these leases were taken, a corporation was formed under the laws of Kentucky and under the name of the appellee, and Dimick and Gormley, as authorized by the leases, transferred and assigned each and all the leases to this appellee corporation. On the 30th day of September, 1896, the appellee filed its petition against appellant in the Floyd circuit court. After setting forth the corporation and all the leases, in substance it charged that the appellant, M. T. Allen, without any right, and against the will and consent of appellee, had taken leases upon the gas and oil privileges on a portion of the same lands leased to appellee, and was without right and unlawfully soliciting others of the persons named as lessors of appellee to lease the oil and gas privileges on their lands to him, and is urging and persuading them to believe that appellee's leases are and have become forfeited. That appellee, in order to remove the leases of appellant, which had been taken subsequent to its leases, had been compelled to institute and prosecute suits to remove the cloud from its title; and that the appellant, by his unauthorized acts, had involved appellee in vexatious and expensive litigation, and, unless prevented by an order of injunction, would continue to take other leases covering appellee's property, and further involving it in other expensive and a continued series of suits in order to protect its property in the leases against appellant's unlawful acts; and that it was without adequate remedy at law to protect itself against the unlawful acts of appellant threatened and complained of, and that appellant was insolvent, and any judgment it might obtain against appellant at law could not be collected, for the reason that he had no property subject to execution or choses in action which could be subjected to the judgment, or any judgment, against him; and that, unless appellant be prevented by injunction from taking and procuring other leases from its lessors, great and irreparable injury would result to it. The other necessary and formal allegations to obtain an injunction were made, and the injunction granted and issued. The appellant answered, putting in issue all the material allegations of the petition, and attacked the validity of appellee's leases. Other pleadings were filed by the parties until issues were formed. Many depositions were taken by the parties, and filed in the action. At the September term, 1900, the action was

called for trial. The appellant, by counsel, withdrew his pleadings, and filed a general demurrer to the petition. Pending the demurrer, appellee filed an amended petition, by which it was, in substance, alleged that appellee had fully kept and performed the covenants and undertakings set out in the several leases enumerated in its petition, and that its assignors, Dimick and Gormley, had so kept and performed the same; that the test wells provided for and mentioned in the leases were begun by them on or about the 15th day of May, 1892, on Right Beaver, in Floyd county, Ky., within 15 miles of the town of Prestonburg, Ky., and that the drilling thereof was prosecuted with all due and proper diligence to a greater depth than 1,800 feet within 15 months from the date of the leases; that one of the wells was drilled and completed to a depth of 2,248 feet on December 2, 1892, but that oil in paying quantities was not found in this well, nor any or all the wells so drilled; that in an effort to find oil in paying quantities, the appellee, up to the time of the commencement of this action, had drilled various wells within 15 miles of the town of Prestonburg, to wit, about 30 wells in all, in that district, most of them within 15 miles of Prestonburg, but not finding oil in paying quantities in any or all of them; that by reason of not having found oil in paying quantities in any or all of the wells so drilled the leases continued in force without appellee being required to drill a well upon each of the tracts of land, and without being required to pay rental thereon; and then reiterated the alleged unlawful and wrongful acts of appellant in his attempt to induce the lessors of appellee to attempt to break their lease contract and to place subsequent leases on the same property, thereby creating a cloud on appellee's title, and putting him to expense of litigation, etc. Appellant then filed a demurrer to the petition and amended petition, which the court overruled, and, the appellant failing to plead further, the court granted appellee's petition, and made the injunction permanent. The appellant took the proper exceptions, and is here on appeal.

The contract, in substance and effect, required appellee to drill and complete one or more test wells to a depth of 1,800 feet, if oil or gas should not be found in paying quantities at a less depth, and said well or wells should be located within 15 miles of Prestonburg, and to be completed within 18 months from the date of the lease; a failure to drill these test wells to work a forfeiture of the lease. If oil or gas should be found in paying quantities in the test well or wells, then, in such event, appellee bound itself to drill a well on each of the leased premises within two years thereafter, or pay each lessee 10 cents per acre yearly in advance. It will be observed that the drilling of the wells on each of the leased premises or the

payment of 10 cents per acre in advance was upon the contingency that oil or gas in paying quantities should be found in the test wells. It is stated in the petition and admitted by the demurrer that the test wells were drilled to the depth and within the time required by the contract, showing a compliance with the contract on the part of the appellee.

Appellant contends that the contract is void because there is a want of mutuality in it, because the appellee is not bound to perform its part of the contract.

The general rule of law is that, to enable either party to compel a specific execution, the contract must be mutually binding on each. There are some exceptions to this rule—as where the party not bound performs his part of the contract. In the case of *Friend v. Mallory* (W. Va.) 43 S. E. 114, this language is used: "A contract is not void for lack of mutuality where the party who is not bound has performed the conditions of the contract." It appears from the petition and contract that appellee has fully complied with its part of the contract, at great expense to itself, and without injury to the lessors; and it is now too late for appellant to contend that appellee is not bound to perform its part of the contract. It further appears from the petition that appellant was, by his conduct and acts, casting a cloud upon the title or leases of appellee by his effort to obtain leases and the obtention of some, and was causing appellee a multiplicity of suits, vexatious and oppressive litigation, and irreparable injury; and in such a case injunction was the proper remedy, as has been repeatedly decided by this court. See the cases of *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440; *Walker v. Leslie*, 90 Ky. 642, 14 S. W. 682; *Hillman v. Hurley*, 82 Ky. 626.

Neither the judgment of the lower court nor the affirmance hereof can have any effect on the lessors, for the reason that they are not parties to this proceeding, and the judgment of the lower court and this affirmance can only affect the appellant in his improper conduct as admitted by his demurrer. Wherefore the judgment of the lower court is affirmed.

KIRBY v. SCOTT.

(Court of Appeals of Kentucky. April 17, 1903.)

FORCIBLE ENTRY—RIGHT TO MAINTAIN ACTION—EXTENT OF POSSESSION—ADVERSE POSSESSION—NOTICE.

1. Part of a tract of land included in one patent was leased by a party that claimed title under various patents, of which some were junior and some senior to the larger survey. The lessee inclosed and put in cultivation part of the land held by virtue of one of these junior patents. *Held*, that by so doing the lessee gave notice to all claimants under the larger survey of his adverse possession of so much thereof as was included in his lease; there being no one in possession under the larger survey.

2. Although a lessee has not settled on that part of the premises which his lessor claims by

virtue of a patent junior to another, he can maintain forcible entry against a stranger to the elder title who attempts to take possession thereunder.

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Proceedings of forcible entry by Winfield Scott against G. W. Kirby. Judgment for plaintiff, and defendant appeals. Affirmed.

S. B. Dishman and D. D. Field, for appellant. W. B. Dixon and Jas. H. Hazelrigg, for appellee.

SETTLE, J. This proceeding of forcible entry was instituted by appellee against appellant before a justice of the peace, and then taken by traverse to the circuit court, in each of which courts judgment went against appellant, who brings the case to this court by appeal.

Appellee, by a writing of date February 1, 1900, leased of John S. and Mary D. Wentz, for the year 1901, 1,758 acres of land lying in Letcher county, composed of a number of adjoining patents, but the whole of the leased boundary is embraced in that of a 34,000-acre survey patented to one W. H. Nicholls February 28, 1874, though some of the patents comprising the leased boundary are senior, and some of them junior, in date to the Nicholls patent. Included in the boundary of 1,758 acres, and also in the Nicholls patent, are two small, adjoining surveys—one of 92 acres, patented to the wife of J. J. Lewis, and the other of 75 acres, patented in the name of Wilson Raleigh; but both patents are junior in date to the Nicholls patent. Appellee at the time of the issue of the writ of forcible entry was in possession of the 1,758 acres leased by him of Wentz and wife, by actual occupancy of some of the senior and some of the junior patents composing it, and was in fact then living on a patent included in the leased boundary which was older than the Nicholls patent; and, in addition, he had inclosed and under cultivation a field of 12 or 15 acres in the Lewis 92-acre patent, which adjoins the Raleigh 75-acre patent. The forcible entry complained of consisted in appellant's building and occupying a house on the Raleigh patent over appellee's objection.

Appellee testified upon the trial in the circuit court that he moved upon the boundary contained in his lease with the intention of taking actual possession of the whole thereof, and that such was in fact the character and extent of his possession. It appears that the lands leased by appellee of Wentz and wife were conveyed to the latter by deeds—one from J. J. Lewis and wife, and the other from D. M. Collier; both deeds being of record in the office of the clerk of the Letcher county court. These deeds are referred to in the lease as containing the boundaries of the several surveys included in the 1,758 acres, and both were introduced on the trial

in the circuit court by appellee to show the boundary of the leased premises and the extent of his possession. Only two witnesses were introduced on the trial by appellee—himself and J. J. Lewis; the latter being a surveyor of considerable skill. No evidence was offered by appellant. By the two witnesses named the following facts were established: First, that appellee, in addition to his actual residence upon the 1,758 acres leased by him, had under fence and in cultivation at the time of the forcible entry complained of a strip of 12 or 15 acres, which, though a part of his leased boundary, is outside of the senior patents, but is included in a patent issued to the wife of J. J. Lewis that is junior in date to the Nicholls patent; and, second, that this inclosure is likewise a part of a strip which is connected with, and not cut off from, the Wilson Raleigh patent by any of the senior grants.

So far as the record shows, no possession is held by any one under the Nicholls patent, and the act of appellee in inclosing and putting in cultivation the field of 12 or 15 acres, in the interference of the Lewis 92-acre junior survey, with the Nicholls 34,000-acre senior patent, constituted an entry upon and actual possession of the lap or conflict; and such entry gave notice in fact, and at once, to the owner or any claimant under the Nicholls patent, that so much of that patent as lay within the leased boundary of appellee was in the actual, adverse possession of the latter. In such a case the possession acquired was not limited to the inclosure, but extended over the entire boundary claimed by him. See *Calk v. Lynn's Heirs*, 1 A. K. Marsh. 346, and cases therein cited. Tested by the rule stated, appellee's possession must be regarded as actual, and as extending over the whole of the boundary leased by him of Wentz and wife, including the Raleigh 75-acre patent, at the time of the appellant's entry thereon. But in *Bush v. Coomer*, 69 S. W. 793, yet another rule has been announced by this court, which holds that the junior patentee is not required to enter on the lap of the conflicting patents in order to maintain a proceeding of forcible entry against a stranger to the senior title. Coomer, as lessee of Thomas Turner and others, was in possession of a large tract of land in Wolfe county. Bush, as lessee of the Kentucky Union Company, entered upon a part of this land and began building a house. Coomer, by proceeding of forcible entry in a justice's court, sought to oust him. Judgment went in Coomer's favor in both the justice's and circuit courts, and Bush thereupon appealed the case to this court. In passing upon the question of law and fact presented by the appeal, the court said: "It was shown that there were about ten thousand acres in the boundary on which Coomer lived, and that he lived within the John Coman patent, under which his lessors claimed. It was also shown that Bush entered within the Sam Young

patent, under which it is said that his lessors claimed; and it is insisted that a settlement within the Carnan patent, outside the lap, did not give Coomer possession of any land within the older patent of Young. On this ground it is earnestly claimed that the verdict is against the evidence. The court refused to allow appellant to read in evidence title papers of his lessors, and of this earnest complaint is also made. These two objections will be disposed of together. In a proceeding of this character, title is not in issue. The only question to be determined is possession. Title papers are never competent, except so far as they may show the extent of possession. Appellant did not connect himself with the Young patent. He offered a deed from Young, the patentee, to Charles Van Couver; also a deed from Sylvanus Shumway to Thomas Duckham. But Shumway was in no way connected with Charles Van Couver. He also offered to read a copy of a deed from Thomas Duckham, as guardian for his son Samuel, in whom the title had been previously vested, but there is no authority in a guardian to make a conveyance of the land of his infant ward. The court therefore properly refused to allow the other deeds to be read, for no connection was shown with the patentee. And while a settlement under a junior patent will not give possession, as against an older patent, where the settlement is without the lap, this principle has no application to strangers to the title, but is only for the benefit of the holders of the older title. The extent, therefore, of Coomer's possession, was not affected by the fact that his settlement was without the Young patent." In the case at bar, nothing appears in the evidence to connect appellant with the Nicholls patent, nor does it appear that he was claiming to hold the survey upon which he entered by virtue of the Nicholls patent. He has not attempted to show any right of possession to the land in controversy either as owner or lessee. It is true that there is in the bill of evidence a statement from appellee that appellant informed him, when ordered to betake himself from the land in controversy, that he (appellant) "was building a house, and had leased it from Altemus & Co."; but no evidence was introduced to prove that Altemus & Co. are the owners or claimants of the land covered by the Nicholls patent, or any part thereof. Appellant was a mere stranger to the title, and nothing more. So the rule announced in the case of *Bush v. Coomer*, supra, applies to the facts of this case like the fit of a glove. And according to that rule, the mere fact that appellee lived within his leased boundary was all that was necessary to entitle him to recover as against appellant, in the matter of the forcible entry complained of. It therefore follows that the lower court did not err in refusing the peremptory instruction asked for by the appellant.

We are further of opinion that the instruction given by the lower court to the jury was

free from error, as it, in simple and apt language, told them that if they believed from the evidence that appellee was in actual possession of the land described in the warrant of forcible entry at the time that appellant entered on said land, and that said entry was without the consent of the appellee, they should find appellant guilty of the forcible entry complained of in the warrant; otherwise that they should find for the appellant. As there was no question, under the evidence, as to the appellee's actual possession of the boundary of land leased by him of Wentz, including the 75-acre Raleigh patent, there was nothing for the jury to do but to find the appellant guilty of the forcible entry complained of, which they did, as shown by the verdict returned by them.

Finding no error in the judgment appealed from, the same is affirmed.

COMMONWEALTH v. NELSON.

(Court of Appeals of Kentucky. April 16, 1903.)

CRIMINAL LAW—APPEAL BY STATE—JURISDICTIONAL PREREQUISITE—FILING OF TRANSCRIPT.

1. Cr. Code Prac. § 334, gives the Court of Appeals appellate jurisdiction in prosecutions for felony, subject to certain restrictions, one of which is that contained in section 337, providing that in case of appeal on behalf of the commonwealth the Attorney General may take the appeal by lodging the transcript in the clerk's office of the Court of Appeals within 60 days after the decision. *Held*, that the court has no jurisdiction to review the action of the trial court where the transcript was not filed within 60 days after decision rendered.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

J. F. Nelson was acquitted of perjury, and the Commonwealth appeals. Dismissed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth.

PAYNTER, J. The defendant was indicted and tried on the charge of perjury, and was acquitted under a peremptory instruction of the court. From that action of the court this appeal is prosecuted by the commonwealth. The judgment from which this appeal is prosecuted was rendered in September, and an appeal was granted by the circuit court at the same term it was rendered. More than 60 days had elapsed from the time the judgment was rendered from which the appeal is prosecuted until the filing of the transcript in the office of the clerk of this court.

By section 334, Cr. Code Prac., the court is only given appellate jurisdiction in prosecutions for felonies subject to restrictions contained in the article of the Code of which that section is a part. Section 337, Cr. Code Prac., reads as follows: "If an appeal on behalf of the commonwealth be desired, the commonwealth's attorney shall pray the ap-

peal during the term at which the decision is rendered, whereupon the clerk shall immediately make transcript of the record and transmit the same to the Attorney General, or deliver the transcript to the commonwealth's attorney, to be transmitted by him. If the Attorney General, on inspecting the record, be satisfied that error has been committed to the prejudice of the commonwealth, upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide, he may, by lodging the transcript in the clerk's office of the Court of Appeals, within sixty days after the decision, take the appeal." Section 338 provides that no summons or notice shall be necessary upon an appeal. As the transcript was not filed in the clerk's office of the Court of Appeals within 60 days after the decision from which the appeal is prosecuted, the court has no jurisdiction to review the action of the court below; therefore the appeal is dismissed.

CHESAPEAKE & N. RY. CO. v. OGLES.

(Court of Appeals of Kentucky. April 16, 1903.)

RAILROADS—CROSSINGS—CROSSING HIGHWAY ON TRESTLE—SIGNALS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Where a railroad trestle crosses a highway, it is the duty of those in charge of a train approaching the trestle to give warning of its approach for the protection of those who may be riding or driving on the highway.

2. The question as to whether or not the failure to give a warning at an overhead railroad crossing is negligence is for the jury.

3. If there is any evidence conducing to show a right of recovery in plaintiff, it is improper to give a peremptory instruction for the defendant.

4. A horse drawing a buggy in which plaintiff was riding became frightened at a train on an overhead crossing. There was a high bluff a little further along the road, and, fearing the horse might jump over it, plaintiff leaped from the buggy, and injured herself. *Held*, in action against the railroad for negligence in failing to give warning of the approach of the train, that the plaintiff's act in jumping from the buggy was not contributory negligence, since one suddenly placed in imminent danger by failure of duty on the part of another is not guilty of contributory negligence because he does not adopt the best means of escape.

Appeal from Circuit Court, Allen County.
"Not to be officially reported."

Action by Lula Ogles against the Chesapeake and Mobile Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Goad, for appellant. B. W. Bradburn, for appellee.

BURNAM, C. J. The track of the Chesapeake & Nashville Railway Company crosses the Scottsville and Gallitan turnpike road upon a high trestle near the point where Tramel creek is spanned by a large inclosed

bridge. On the 8th day of July, 1901, the appellee, Lula Ogles, and her husband and brother-in-law, were traveling over the turnpike road from Scottsville to their home near the village of Petroleum, in Allen county, and in doing so necessarily passed under the railroad crossing. The testimony shows that neither appellant's track nor trains thereon could be seen from any point south of this crossing, both because it was much higher than the turnpike road, and for the reason that the approach to the crossing was at the end of a high bluff, which obstructed the view. When appellee and her husband had arrived at within about 60 yards of the crossing, they stopped their horse, which was a young and inexperienced animal, and listened for a signal, or any noise that would indicate the approach of a train. But, hearing none, they sent their brother-in-law, who was riding with them, forward to the crossing, to see if he could discover any evidence of the approach of a train. He informed them that the way was clear. They then proceeded on their way, and while passing under the crossing appellant's train of cars came suddenly from the south, running rapidly over the crossing, making a loud noise, which so frightened their horse that he began to tremble, jump, and make efforts to escape. Realizing that further along on the turnpike road there was a high and unfenced bluff, and fearing that her husband would not be able to control the horse, and that it would succeed in running away, and in all likelihood throwing her over the bluff, she jumped from the wagon, and in so doing dislocated her ankle, and suffered other serious injuries, which confined her to her bed for many weeks; and this suit was instituted to recover damages for the injuries so received, which she alleges was due to the negligence of the defendant in failing to give notice of the approach of its train to the turnpike crossing by ringing its bell or blowing its whistle. The trial before a jury resulted in a verdict and judgment for appellee for \$600.

The only ground upon which a reversal is asked is that the trial court failed at the conclusion of appellee's testimony to direct the jury to find a verdict for the defendant. It is insisted for the appellant that, as the railway track does not cross the turnpike road upon the same level, the company were under no obligation to give the signals of its approach required by section 786 of the Kentucky Statutes. But they also insist that as a matter of fact these signals were given, and that appellee, who lived in the immediate vicinity of Petroleum, knew, at the time she attempted to make the crossing, that it was the regular schedule time for the passage of one of their regular trains, and that she

was, therefore, guilty of contributory negligence in attempting to drive an unbroken horse under the track. Five witnesses testify positively that no signal was given by appellant of the approach of their train, and the engineer in charge thereof, while expressing the opinion that a signal was given, testified that previous to the accident he had no instruction from the railway company to blow the whistle for the Big Tramel crossing, but that he received such instruction shortly after the accident. It was decided in *Rupard v. Chesapeake & Ohio R. R. Co.*, 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316, that, where a railroad track crossed a public highway on a trestle, it was the duty of those in charge of the train approaching the crossing to give some warning of its approach for the protection of those who might be riding or driving on the highway, that they might secure themselves against injury by reason of the frightening of their horses, and that the question as to whether or not the failure to give such warning was negligence should be left to the decision of the jury. This is undoubtedly the common-law rule upon the subject, and the instructions in this case are carefully drawn with the view of leaving to the jury to determine whether appellant actually gave the signals of its approach to the crossing, and also whether a failure to do so under the facts of the case was negligence, and the proximate cause of plaintiff's injury. In fact, no complaint is made of the instructions on this point. And it is a well-established rule in this state that, if there is any evidence conducing to show a right of recovery in the plaintiff, it is improper for the court to give a peremptory instruction for the defendant, even though the court may be of the opinion that the verdict should be for the defendant. This is a question of fact, which must be left to the determination of the jury. So far as we are able to discover, the conduct of this case by the trial court is in accordance with well-settled rules of law. Nor was appellee guilty of contributory negligence in jumping from the spring wagon at the time and under the circumstances. The right of a person to damages for a personal injury due to the negligence of another is not affected by his having contributed thereto, unless he was in fault in so doing, as the rule is well settled that one suddenly and unexpectedly placed in a position of imminent danger by the failure of duty on the part of others will not be held guilty of contributory negligence because he did not adopt the best means of escape, or made an error in judgment as to the best course to pursue. See *Middlesborough R. R. Co. v. Stallard's Adm'r* (Ky.) 72 S. W. 17, and authorities there cited.

Judgment affirmed.

COYNE v. ANDERSON'S EX'RS.

(Court of Appeals of Kentucky. April 18, 1903.)

NOTES — RENEWAL — NOTICE OF DEFENSES —
BONA FIDE PURCHASER — DISCOUNT —
PAYMENT AFTER DISHONOR.

1. A bona fide purchaser of a note is not affected by notice to his agent on the renewal thereof, that, as to one of the makers, the note was without consideration.

2. A bona fide purchaser of a note, which on nonpayment was renewed by agreement of all parties, who has discounted the same to a bank, and on dishonor of the renewal note has paid the same and taken it up, assumes the position of the bank as a bona fide holder, and is not affected by equitable defenses between the original parties.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by L. L. Anderson's executors against Joseph Coyne and another. From a judgment for plaintiffs, defendant Coyne appeals. Affirmed.

E. Macpherson, for appellant. Helm, Bruce & Helm, for appellees.

BARKER, J. Appellant, Joseph Coyne, and one Joseph Clark, executed their joint note, payable to the order of Joseph Clark, for the sum of \$1,500, negotiable and payable at the Louisville City National Bank. This note was assigned through W. S. Parker, the cashier of the bank, to L. L. Anderson, for whom Parker was agent. Clark's indorsement to Anderson is as follows: "For value received, I hereby assign the within note to L. L. Anderson. [Signed] Joseph Clark." After the expiration of several months, and before maturity, Anderson discounted the note to the Louisville City National Bank, which thereby became its owner and holder. When this note became due, it was not paid, but, by arrangement of all the parties, it was renewed, and, for convenience, was separated into two notes, one for \$500, and the other for \$1,000. The renewal notes, not being paid by the makers at maturity, were protested for nonpayment, and thereafter paid off and taken up by Anderson's executor, he having in the meantime died. Suit having been instituted by the executor in the Jefferson circuit court against Joseph Clark and Joseph Coyne, the makers of the notes, substantially alleging the facts as herein set out, Joseph Coyne filed an answer, in which he denied the sale of the notes to L. L. Anderson, and pleaded that he was not indebted to Clark or Anderson; that he had joined in the making of the note for the accommodation of Clark, and upon the agreement that he was to be bound on the notes merely as surety to the bank at which they were or might be discounted, and was to be bound in no other way, and to no other person; and charged that Parker, the cashier of the bank, knew of this agreement between him and

Clark, and that L. L. Anderson also had notice thereof; that the notes in question were obtained from him by fraud and covin, and that Joseph Clark, the assignor, was justly indebted to him in the sum of \$1,264.57, which was pleaded as an offset. The case coming on to be tried was submitted to a jury, who returned a verdict in favor of appellee. For some reason, which does not appear, the court set aside this judgment, and awarded appellant a new trial. The case again coming on for trial, the court, after all the evidence was in, awarded appellee a peremptory instruction to the jury to find a judgment in its favor, as prayed for in the petition. Appellant's motion for a new trial having been overruled, he has appealed the case to test the soundness of the judgment awarding appellee a peremptory instruction.

We may say in the outset that there is no evidence in the record warranting the charge that either the original or the renewal notes were obtained from appellant by fraud or covin to which the appellee or the decedent was a party, or of which they had notice; nor is there any evidence to sustain appellant's contention that either Parker or Anderson knew of the alleged arrangement between appellant and Clark that appellant was only to be surety on the original note, or that there was no consideration, as between appellant and Clark; nor is there any evidence to sustain the claim that the original note was to be discounted in any particular bank. We think it clear that the original note was executed and delivered by appellant for the purpose of enabling Joseph Clark to raise money generally, and the question as to where he raised it was immaterial. It is doubtless true that appellant did not know Clark assigned the original note to Anderson, and, as the transaction occurred in the business place of the Louisville City National Bank, with its cashier, he doubtless thought that it was discounted to the bank; but that he was at all interested in this question there is not the slightest evidence in the record. The case of *Cline v. Templeton*, 78 Ky. 550, will not support appellant's contention that, when Anderson's executor took up and paid off the notes discounted to the bank, they became, in its hands, subject to such defense or defenses as existed between the parties prior to their discount to the bank. The consideration of the note in the case cited was illegal, and of that fact the holder who indorsed it to the bank well knew; and when the maker failed to pay at maturity, and the indorser to the bank was required to pay it off and take it up, it became, in his hand, subject to all the original defenses, because he had notice of its infirmity. The court say: "In this case appellants, having received the note sued on with the knowledge that it was without consideration, took it up from the bank with the same right in appellee to make defense as he had prior to the

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 812.
73 S.W.—48

discounting. Appellants being holders with notice of the infirmity in the bill, it is in their hands subject to all the defenses that exist between the original parties to the paper." It will thus be seen that the court rested their opinion that the parties were relegated to their original rights after it was taken up by the indorser to the bank, alone upon the fact that he had notice of the original infirmity in the bill. Not so in this case. Neither Parker, the agent, nor Anderson, the principal, had any notice, or any reason to suspect, that the original note discounted by Clark was anything but what it purported on its face to be—a merchantable piece of paper based upon a valuable consideration. It may be true that in the negotiation for the renewal of this note Parker, the agent, discovered that Coyne had joined in the making of it for the accommodation of Clark, but this would not alter the status of matters; the rights of Anderson, the principal, having been fixed by the original transaction. No information which he or his agent received subsequent to the original indorsement to him vitiated or weakened his position as an innocent holder for a valuable consideration.

What, then, were the rights of his executor, the holder and owner of the notes in question, after it had taken them up from the bank, to which their decedent had discounted them, assuming, as the facts show, that Anderson was an innocent holder for a valuable consideration of the original note, of which these sued on are the renewals? In the case of *Spencer v. Biggs*, 2 Metcalfe, 123, it is said: "But it is contended by the counsel of appellants that the note, having been taken up from the bank by appellee, after it had been negotiated and discounted at the bank, is no longer upon the footing of a foreign bill of exchange. We are satisfied that this position is not tenable. The seventh section of the 'Act to incorporate the Bank of Ashland' (1 Laws Ky. 1855-56, p. 26 c. 153) invests said bank with power and authority to discount promissory notes, and provides that the promissory notes made payable to any other person or persons, and payable and negotiable at the principal office of discount and deposit or branch of said bank, or at any other bank, and indorsed to and discounted by said bank, are by the act on the same footing as foreign bills of exchange, and the same remedies are given upon such notes as were allowable upon bills of exchange. It is apparent from the record that the note sued or had been indorsed to and discounted by the Bank of Ashland. At the very moment that it was so discounted, it was, by the charter of the bank, invested with the nature and properties of a bill of exchange. The act does not provide that these properties shall be changed or lost afterwards, if the bank indorse the paper to some one else, or if it is taken up by the indorser to the bank. Such

an act does not deprive the paper of the character and properties which it possessed in the hands of the bank. The impress which was stamped upon it by law at the instant of its discount remains unchanged, although the note may find its way again into the hands of the person who indorsed it to the bank, provided that such person be an innocent holder. Any one who receives it from the bank is substituted to all of the rights and remedies which the bank had whilst the holder of the note." In the case of *Feland v. Stirman*, 15 Ky. Law Rep. 271, the superior court substantially said: "A note in the hands of one who, having received it with notice of the defense against it, discounts it in bank, and afterwards takes it up, is subject to any defense that might have been made to it before it was discounted. But where the payee has indorsed the note to an innocent indorsee, and the latter, after discounting it in bank upon its maturity, takes it up, he occupies, so far as defenses against it are concerned, as good a position as the bank did." In the case of *Frank, etc., v. Quast*, 86 Ky. 649, 6 S. W. 909, it is said: "The paper had not matured when discounted, and there is no evidence conducing to show bad faith on the part of the appellees in discounting the paper, or that they had any notice of the agreement between the parties to the bill that it should be negotiated at the Breckinridge Bank, and nowhere else. The appellees had no reason to suspect the honesty of its debtors, and took the paper as innocent holders for value. * * * The paper was made for the accommodation and use of Frank & Sons, and no restriction as to the application to be made by them of the money. Mr. Daniels, in his work on Negotiable Instruments, says: 'It is immaterial that the paper executed or indorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money, though not applied to the purpose intended by the accommodation party, will constitute a misappropriation.' Volume 1, p. 742. Again: 'The accommodation party must have some interest in the application of the money, otherwise he is in no condition to contend that there has been a misappropriation of it, or of the security on which it was to be raised.' This doctrine was applied to a case where the party had applied the proceeds to a pre-existing debt. It is now well settled that where a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in payment of a debt or otherwise for the credit of the maker.' Daniels on Negotiable Instruments, vol-

ume 1, page 742. Here the drawers and indorsers gave to Frank & Sons the use of their names to raise money in any way beneficial to that firm, without restriction or condition, except, as they say, the money was to be obtained from a particular bank. Such a condition, unknown to a bona fide holder, cannot affect the validity of the bill in his hands, and from the facts before us we perceive no merit in the defense."

These cases are conclusive of the case at bar, and it follows that none of the defenses set up by appellant could avail him in the action by Anderson's executor, and the court properly instructed the jury peremptorily to find for the appellee; wherefore the case is affirmed.

TRUEDELL et al. v. DARNALL et al.
(Court of Appeals of Kentucky. April 18, 1903.)

WILLS—CONSTRUCTION—SUBSTITUTION OF LEGATEES.

1. Testator in one clause of his will gave "unto my wife and H. all my lands, money, and perishable property, to be divided equally, share and share." In another clause he declared that "if my wife and H. shall die without children, then in that case I want my brothers and sisters to have the land equally between them," etc. *Held*, that on the death of the wife without children the brothers and sisters took her share, though H. still lived.

Appeal from Circuit Court, Lewis County.
"Not to be officially reported."

Action by Sarah Truesdell and others against Peter F. Darnall and others. Judgment for defendants, and plaintiffs appeal. Reversed.

A. E. Cole & Son, for appellants. Thos. R. Phister, for appellees.

HOBSON, J. Appellants are the only surviving brothers and sisters of John Gilbert, who died a resident of Lewis county in the year 1848, leaving surviving him his wife, Nancy Gilbert. She died on December 8, 1900, without children. They claim that they are the owners of one-half of the land owned by John Gilbert at his death, as the wife, Nancy, died without children. Their rights depend upon the proper construction of his will, which is in these words:

"I, John Gilbert, of Lewis county and State of Kentucky, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

"1st. When I die, I will my soul to God.

"2nd. As I am very little in debt, I wish my estate not to be administered upon.

"3rd. I give unto my wife and Nancy Fulton Hoover, all my lands, money and perishable property to be equally divided share and share.

"4th. And I hereby constitute and appoint my wife Nancy Gilbert executor of this my last will and testament, who is to pay all my

debts and funeral expenses, who is to let Jane Hoover live on the place, support her while she remains single.

"5th. When my brother Nathaniel Gilbert's son, John Gilbert, settles himself and marries, I wish my wife Nancy to give him fifty dollars when she can spare it.

"6th. If my wife and Nancy Fulton Hoover shall die without children, then in that case I want my brothers and sisters (Margaret Hoover and Elizabeth Sherley excepted) to have the land equally between them, and not to sell it unless to one another. My living brothers and sisters at that time is all that are to have the land.

his
"John x Gilbert."
mark.

Jane Hoover, named in the will, is dead. Nancy Fulton Hoover is still living, and is now Nancy Fulton Tolle, one of the appellees. The question to be determined is, what became of the interest devised to the widow, Nancy, upon her death without children? The contention of appellees is that the surviving brothers and sisters take no interest in the land under the will until the wife, Nancy, and Nancy Fulton Hoover shall both die without children, and that, as the latter still lives, the circuit court properly dismissed the action.

By the third clause of the will the testator devised to his wife and Nancy Fulton Hoover all his "lands, money, and perishable property, to be equally divided, share and share." If the will had stopped here, it is clear that the wife and Nancy Fulton Hoover would have taken the estate equally, share and share alike, and neither would have had any interest in the share of the other. The sixth clause is the only modification of this disposition of the estate, and by it, if the wife and Nancy Fulton Hoover shall die without children, his brothers and sisters then living are to have the land equally between them. This takes away what would have been a fee simple in the wife and Nancy Fulton Hoover in the land under the third clause, and makes it a defeasible fee. When the wife died without children, the estate devised to her was defeated, and there is nothing in the will to indicate that in any event Nancy Fulton Hoover was to have any interest in the share of the estate devised to the wife. Taking the will as a whole, we are of opinion that the testator intended to dispose of his whole estate. The purpose seems to have been to provide for his wife and Nancy Fulton Hoover equally, and to make each independent of the other by directing an equal division of the land between them. His purpose also was that his land should go to his surviving brothers and sisters on the death of these devisees without children. As neither the wife nor Nancy Fulton Hoover had any interest in the land of the other, neither was in any wise affected by the death of the other without children. But when the wife died

without children, her share of the land went to somebody, and, as there is nothing in the will to show that Nancy Fulton Hoover was in any contingency to have any interest in the wife's share, our conclusion is that it passed on her death without children to the testator's then surviving brothers and sisters. The only other possible construction of the will is that the testator died intestate as to this interest in his estate, and that upon his wife's death without children her share passed to his heirs at law, and will not vest in the residuary devisees, unless Nancy Fulton Hoover shall hereafter die without children. But the testator manifestly intended by the third clause to dispose of his entire estate, and the sixth clause must be read in connection with it. There is no reason why the brothers and sisters, on the death of the wife without children, should not take her share of the land, if they are ever to take it, and the testator's purpose to provide for his surviving brothers and sisters in the event of the death of the first devisees without children is as clearly expressed as his intention to provide for them. It would certainly defeat the intention of the testator if it were held that on Nancy Fulton Hoover's death hereafter, leaving children surviving her, her share would go to her children; but that the share of the wife, Nancy, who has died without children, would not go to the testator's surviving brothers and sisters as directed in the sixth clause. The object of all construction is to arrive at the testator's intention, and cases are not wanting in which, to carry out the testator's intention, the word "and" has been read as equivalent to "or," and vice versa. The language of wills is to be construed according to common intendment. Technical rules must not defeat intention. *Moore v. Moore*, 12 B. Mon. 656; *Darnell v. Crain's Guardian*, 1 Ky. Law Rep. 354.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

HARL v. HARL.

(Court of Appeals of Kentucky. April 16, 1903.)

DIVORCE—EVIDENCE—SUFFICIENCY—APPEAL—DISPOSITION.

1. On appeal in divorce the court will give great weight to the judgment of the chancellor in refusing a divorce, and will not reverse unless the evidence clearly shows complainant's right to a divorce.

2. Drunkenness in a husband cannot excuse cruel treatment of the wife.

3. In divorce the evidence showed that the husband periodically went on sprees, when he became cruel and inhuman in his conduct towards his wife; that on one occasion, without provocation, he caught her by the throat and threw her to the floor, at a ball attended by her neighbors and friends; and that he publicly applied to her epithets which, if deserved, would

have shown her to be a woman without honor or chastity. *Held*, that a divorce should be granted the wife.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Suit for divorce by Florence M. Harl against James C. Harl. From a decree for defendant, complainant appeals. Reversed.

Sweeney, Ellis & Sweeney, for appellant. Montgomery Merritt, for appellee.

BARKER, J. This action was instituted by appellant, Florence M. Harl, against her husband, the appellee, James C. Harl, for the purpose of obtaining a judgment divorcing her from him a vinculo matrimonii. The grounds alleged in her petition were that he had "habitually behaved towards her for more than six months past in such cruel and inhuman manner as to indicate a settled aversion to her and to permanently destroy her peace and happiness; that appellee had so cruelly mistreated and injured her as to indicate an outrageous temper in him, and that she believed her life was in danger from living longer with him; and that she was in constant danger of great bodily harm." The answer of appellee put these allegations in issue. Upon the trial the court dismissed appellant's petition, and from this judgment she has appealed.

The court will give great weight to the opinion of the chancellor in a case like this, and will not reverse his judgment unless the evidence clearly shows the wife's right to a decree of divorce. As said in the case of *Shrout v. Shrout*, 12 Ky. Law Rep. 470, by the superior court: "While an appellate court should give great weight to the judgment of a lower court in refusing a divorce, and should never reverse such a judgment unless the grounds relied upon have been clearly established, the court is of opinion in this case that the evidence clearly established the wife's right to a divorce, upon the ground that her husband had treated her in such a cruel and inhuman manner as to indicate a settled aversion to her, and that his conduct is such as to destroy permanently her peace and happiness. There is no act of a husband toward a wife that so clearly indicates a settled aversion to her, none that will so permanently destroy her peace and happiness, and none so cruelly inhuman, as to charge her falsely with being untrue to her marriage vows."

In the case at bar the evidence shows that the husband periodically gets upon sprees, and that when thus intoxicated he becomes cruel and inhuman in his conduct towards his wife; that upon one occasion, without any provocation, he caught her by the throat and threw her to the floor. This was done at a ball attended by her neighbors and friends, and where her humiliation at being thus publicly assailed was added to the cru-

¶ 2. See *Divorce*, vol. 17, Cent. Dig. § 144.

elty of the assault itself. The evidence further establishes as a fact that at least upon one occasion he publicly applied to her epithets so vile as to be nameless in this opinion, and which, if deserved, would have shown her to be a woman without honor or chastity. Appellee's conduct towards his wife when he was under the influence of liquor, which was frequent, was always rough and cruel, and his language in addressing her profane. The cross-examination of the learned counsel for appellee seemed generally addressed to the end of showing that appellee's outrageous conduct was dependent upon his inebriety. We know of no reason why drunkenness in the husband should justify his cruel treatment of his wife; nor do we understand that personal injuries from a drunken husband are less painful to the wife, or his insults less humiliating, than they would be if he was sober.

Assuming the evidence for the appellant to be true, it would be cruel, indeed, to require her to remain the wife of a man who could so far forget himself as to wantonly injure without cause the wife whom it was his duty to protect, and so grossly insult her whose honor he should have been willing to maintain with his life. No self-respecting woman could live with appellee in the bonds of matrimony after receiving at his hands the injuries which the evidence shows have been inflicted upon appellant.

The court below should have granted appellant a divorce from appellee, and awarded her the custody of her children; making sufficient provision for the father to see them, and enjoy their society. Wherefore the judgment is reversed for proceedings consistent with this opinion.

DOUTHITT v. CANADAY, GILLIUM & KEY.

(Court of Appeals of Kentucky. April 16, 1903.)

DEED-EASEMENT-DEDICATION-ACCEPTANCE.

1. Where a landowner lays the land off into lots, with alleys and streets, and records the plat, an owner of property abutting on one of the alleys has a right to the use of the same as appurtenant to his property, independently of the act of the city in accepting the dedication, or its excluding the alley from its limits when the boundary of the city was fixed.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Suit by Canaday, Gillium & Key against H. B. Douthitt. From a decree for plaintiffs, defendant appeals. Affirmed.

J. C. Spelght, for appellant. D. G. Park, for appellees.

HOBSON, J. Appellees filed this action against appellant to enjoin him from closing up an alley 10 feet wide between their property in the city of Mayfield, and, the court having decreed them the relief sought, he appeals. The alley in contest is in what is known as R. K. Williams' addition to the city of Mayfield. The proof shows that Williams cut up his tract into town lots, subdividing it by streets and alleys, and sold the lots under this division. A plot was made of it, which was recorded in the county clerk's office; and no trouble would, perhaps, have ensued, but for the burning of the courthouse and public records some years ago. The alley in question was laid off on the side of Williams' addition, and between it and the adjoining property. When the railroad was built through the town, it ran through the addition of Williams, crossing this alley. The alley was not as much used as it would have been but for the difficulty in getting across the railroad. It also appears that by an act of the Legislature the town boundary was drawn in so as to leave this land outside of the town for some years, but subsequently the boundary was extended so as to take it in. The proof in the case satisfies us that the alley was established in the laying off of the Williams' addition, and was shown on the recorded plot, and called for in the deeds to the property abutting on it, under which appellees claim. This gave the owners of this property the right to the use of the alley as an appurtenant to their property, independently of the act of the city in accepting the proposed dedication, or its excluding the land from its limits when the boundary was drawn in. The proof also satisfies us that the alley in question is no part of appellant's property, and never was. His deeds call for an 80-foot lot. He has that outside of the 10-foot alley. His title is not deduced from Williams, but from another person who made an addition to the town, and we are satisfied from all the evidence that the 10-foot alley in question is on the ground owned by Williams. The proof fails to show any such adverse possession of the land as would give appellant, or those he claims under, any title to it. The chancellor's conclusion on the facts is supported by the weight of the evidence. These conclusions make it unnecessary for us to consider the rulings of the court on exceptions to the testimony, as none of these matters affected the result.

Judgment affirmed.

¶ 1. See Easements, vol. 17, Cent. Dig. § 48.

**COMMONWEALTH v. SWEIGART'S
ADM'R.**

(Court of Appeals of Kentucky. April 15,
1903.)

TAXATION—OMITTED PROPERTY—INFORMATION BY AUDITOR'S AGENT—STATEMENT OF PROPERTY—SUFFICIENCY OF DESCRIPTION—DEMURRER—MOTION TO MAKE MORE SPECIFIC—LIABILITY OF HEIRS FOR OMITTED TAXES.

1. In a proceeding to assess property omitted to be listed for taxation, an information alleging that the owner "was possessed of a large estate, consisting of notes, mortgages, choses in action and money, and that he failed, omitted and refused to assess a large portion of said property for taxation," sufficiently describes the property.

2. Where an information, in a proceeding to assess property omitted to be listed for taxation, does not sufficiently describe the property, the proper way to reach it is by motion to make the information more specific, and not by demurrer.

3. Heirs take property of an ancestor subject to its liability for omitted taxes, the collection of which is not barred by the statute of limitations.

Appeal from Circuit Court, Mason County.
"To be officially reported."

Information by auditor's agent of Mason county against John G. Sweigart, as administrator of Christian F. Sweigart, deceased. From an order sustaining demurrers to the information, the commonwealth appeals. Reversed.

G. A. Cassedy, for the Commonwealth.
Garrett S. Wall, E. L. Worthington, W. H. Wadsworth, M. D. Cochran, and L. W. Robertson, for appellee.

NUNN, J. On the 30th day of July, 1901, F. S. Watson, as auditor's agent, filed in the county court of Mason county, Ky., a statement or information alleging that certain property belonging to Christian F. Sweigart, amounting to about \$210,000, each year, for several years prior to the death of Christian F. Sweigart (which occurred in April, 1897), was by him omitted to be assessed or listed for taxation, and that the defendant, John G. Sweigart, qualified as administrator of the decedent at the April term of the Mason county court in the year 1897. That he never at any time filed, with the county court, an inventory or report of any kind showing what estate came into his hands as such administrator.

On the 9th day of August, 1897, the year in which he qualified, he made a settlement with the Mason county court, of the estate which came into his hands, but by this settlement he failed to disclose the amount of the estate, and merely took the receipt of the widow and each of the five children in full of their interest, without naming any amount, and closes the settlement with these words: "Which winds up the affairs of the estate. The estate amounted to more than \$500.00."

The county court, and the circuit court on appeal, sustained demurrers to this information, because the plaintiff failed to sufficiently describe the property sought to be listed for taxation.

The appellees further contend that they are not liable for the taxes which were failed to be assessed against their ancestor. We cannot agree with the action of the lower court, nor with the appellees' contention. The property, as described in the statement or information filed by appellant, is as follows: "That Christian F. Sweigart, deceased, was possessed of a large estate in the county of Mason, consisting of notes, mortgages, choses in action, and money, and that he failed, omitted, and refused to assess a large portion of said property for taxation, and failed to pay taxes on same from and including the year 1876 up to and including the year 1896." They contend that the information should have stated how much cash, how much notes, and how much of each. If this was error, the proper way to have reached it was by motion to make the information more specific, and not by demurrer. By their demurrer, appellees admitted that they had received the property of their ancestor to the amount of \$210,000, which had escaped taxation for each of the years named, and that it was subject to taxation, nor had any tax been paid thereon. They were in a better position to know the truth or falsity of this allegation, and the kind and character of such property, and the amounts of each, if any, than the appellant, and, if the allegations contained in the information are true, it is evident that the appellees intentionally and studiously avoided the disclosure of the kind and character of the estate that they received in the distribution of their ancestor's estate, and it comes with very bad grace from appellees to come now and ask appellant to more specifically describe the property which they had received from their ancestor, which they had failed to make a record of as the statute required. For a full discussion of this question see the case of *Commonwealth, by, etc., v. Collins* (recently decided by this court) 72 S. W. 819.

According to the allegations of the information, the appellees received \$210,000 worth of property from their father's estate, which was subject to and had escaped taxation, and they received this property with this liability to taxation existing against it, and therefore they should be compelled, out of the property so received, to pay all the taxes on such property, the collection of which is not barred by the statute of limitations. See the case of *Commonwealth, by, etc., v. Mahala Nute* (Ky.) 72 S. W. 1090.

For the foregoing reasons, the case is reversed, and the cause remanded for further proceedings consistent herewith.

RUDD et al. v. TRAVELERS' INS. CO.

(Court of Appeals of Kentucky. April 15, 1903.)

WILLS—LIFE ESTATE—VESTED AND CONTINGENT REMAINDERS—MORTGAGE—JUDGMENT—TITLE PASSED BY SALE.

1. Where a testator devised certain property to a son "during his life, and for his lifetime only, and no longer," and upon the death of the son the property "to go, belong, and become the property equally of his children," except that if, before that event, any of the children had "died having a lawful child or children, then such to take the part of their parent," the children took a vested remainder, with a contingent remainder in their grandchildren.

2. Under a will a man had a life estate in certain property, his children had a vested remainder, and his grandchildren had a contingent remainder, which would be defeated if their parents were living at their grandfather's death. The life tenant and his adult children mortgaged the premises, covenanting that they were seised in fee simple, and had good right to convey; and the judgment on foreclosure of the mortgages directed the sale of all the interest in the property the mortgagors held, and all that might accrue to them under the will or otherwise. *Held*, that the judgment properly included the mortgagors' future interests in the property.

3. The purchasers at a sale under this judgment would take the interests of the mortgagors, but not the interests of the contingent remaindermen.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by the Travelers' Insurance Company against James C. Rudd, trustee, and others, to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. *Affirmed*.

W. Scott Morrison, for appellants. John Allen Dean, and Pirtle & Trabue, for appellee.

NUNN, J. Many years ago James Rudd, Sr., died, having made a will, which was duly admitted to probate in the Jefferson county court. In the eleventh clause of the will the testator used this language: "I give and devise to my son James C. Rudd, during his life, and for his lifetime only, and no longer, my tract of land beginning on the Ohio river in Daviess county, Ky., containing 300 acres, it being the same tract of land that was deeded to me by David Todd and wife; he is to be charged with the same on the final division and settlement of my estate at the price of \$15,000.00; said tract of land is hereby declared, and the products thereof, to be for my son James C. Rudd's use and benefit for the support and maintenance of himself and wife and children during his life, and in no way or event to be liable for his debts or engagements in any way whatever; and at the death of my son James C. Rudd said tract of land is to go, belong and become the property equally of his children. In the event, however, at his death any of his children have died leaving a lawful child,

or children, then such to take the part of their parent." By a codicil he lessened the quantity of land devised to 100 acres, and gave in lieu of it certain property in the city of Owensboro, as follows: "My son James is to have and to hold my city property in Owensboro, on St. Ann street, opposite the courthouse and jail in said city. The property in Owensboro herein devised to my said son is for the benefit of himself, wife and children, and is to be held subject to the same limitations, restrictions, etc., as are imposed on the 300 acres named in the 11th clause of this will." In the year 1889, the children of James C. Rudd and his wife brought an action against him in the Daviess circuit court, alleging the ownership of the property to be as provided in the will, and that, as James C. Rudd and his wife were still living, it was uncertain as to the ultimate ownership of the property; that is to say, what part, and who, would own it at the death of James C. Rudd and his wife. It was sought to improve the property in the city of Owensboro, the allegation being that by reason of a loss by fire the buildings thereon were destroyed, and that the insurance money received thereon would not be sufficient to rebuild; that the beneficiaries under the will of James Rudd, Sr., had theretofore, by James C. Rudd, trustee, borrowed some \$14,000, and with this sum and the insurance money from the buildings destroyed they, through their trustee, James C. Rudd, had begun and were erecting a valuable improvement or hotel on the property in the city of Owensboro; that, to secure the \$14,000 borrowed, a mortgage had been executed on the property to one H. A. Williams. They allege that they had already contracted to lease the hotel, when completed, at a very advantageous rental, and they asked the court to permit a mortgage to be executed on the farm for additional sums of money to complete the building, and that the mortgage already executed to Williams be ratified, and both the mortgages be adjudged a lien on the property. The court granted the prayer of the petition, and directed W. M. Rudd, one of the appellants here, to take charge of the hotel and other property, and to superintend the completion of the hotel; and, after it was completed, by an order of the Daviess circuit court, a mortgage for \$30,000 was executed to the Travelers' Insurance Company. This money was directed to be used in discharging the other mortgage debts already incurred. This hotel was destroyed by fire, and in the year 1891 the court, by its judgment, directed W. M. Rudd, agent, to negotiate a loan with the Travelers' Insurance Company for \$40,000, to run for five years, at 6 per cent., and to execute a mortgage to the Travelers' Insurance Company to secure the loan on all the property mentioned in the record; the judgment reciting that Rudd had paid off all

liens and incumbrances on the property except \$4,000 due the Travelers' Insurance Company on the \$30,000 loan. In June, 1892, by the report of the agent, W. M. Rudd, the court adjudged that a substantial and valuable hotel had been erected on the trust property, and that the sum borrowed had been insufficient to pay for the cost of the hotel. The agent, W. M. Rudd, was directed to negotiate a further loan of \$10,000 from the Travelers' Insurance Company, to be secured by a like mortgage, and was directed out of this sum to pay the Travelers' Insurance Company the \$4,000 balance on the \$30,000 loan and to use the \$6,000 in paying bills and liabilities incurred in the erection of the hotel. The loans of \$30,000, \$40,000, and \$10,000 made by the appellee to the appellants were authorized and directed by the court without any amended pleading filed in the action referred to, or any pleading or proof of any kind asking or authorizing the court to make any such order or orders.

It appears from the record that James C. Rudd and his wife are still living, and have four, and only four, children living, viz., W. M. Rudd, R. H. Rudd, James C. Rudd, Jr., and C. B. Rudd, the first three of whom are over the age of 21 years, and are married. The first two named have children. C. B. Rudd is under the age of 21 years. All of the appellants named above, with the exception of C. B. Rudd, the infant, together with their wives, duly signed and executed the mortgages before named to the Travelers' Insurance Company. Appellee, after the maturity of these mortgage debts, sought to enforce in this action the mortgage lien. The appellants resisted same, and claimed that by reason of the defects in the proceedings in the court in the direction of said loans and the 11th clause of the will of James Rudd, Sr., no lien existed for the payment of appellee's claim. The lower court sustained their contention with reference to the first proposition, because the pleadings and proof did not authorize the order directing the loans to be made, under an amendment to section 498 of the Civil Code passed in 1882, and therefore released the interest of C. B. Rudd, the infant, from the payment of any part of appellee's claim. The court held that the adult children were bound because they themselves had the power and right to do as they thought proper with their property, or their interest in it, as they, with their wives, had all united with the trustee in the execution of the mortgages; and it is admitted by all the parties that the money loaned went into the improvement of the property of appellants. Under the will of James Rudd, Sr., James C. Rudd and wife took only a life estate in the property, their children a vested remainder, and their grandchildren a contingent remainder; the grandchildren's interest depending upon their parents dying before their grandparents. A will

similar to this was construed by this court in the case of *Mercantile Bank of New York v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160.

The appellants complain that the judgment of the lower court was erroneous in not only selling all the interest of the adult appellants then held and owned by them in said property, but directing a sale of all the interest that might thereafter accrue to them under the will of James Rudd, Sr., or otherwise. We think that the court was correct in this. In the mortgages referred to, after the usual form of such conveyances, this language is found: "And the said grantors further hereby covenant and agree with the said grantee, the Travelers' Insurance Company, that they are well seised of the said premises as a good and indefeasible estate in fee simple, and have good right to convey and incumber the same in manner and form as is above written." The judgment foreclosing the mortgages gives full notice of what is sold, and the purchaser under that judgment would take no more than is conveyed by the mortgages as construed and defined by the court; and if the vested remaindermen, the children of James C. Rudd, should die before him, leaving children, there is nothing in the judgment to bind the children, and therefore, of course, nothing to bind any one claiming through the children. The purchaser takes nothing more than the interest of the parties named in the judgment, whatever that interest may be.

Wherefore the judgment is affirmed.

COCKERELL v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 15, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION—VIOLATION—SUFFICIENCY OF INDICTMENT—COMPETENCY OF EVIDENCE—INSTRUCTIONS.

1. An indictment for a violation of the local option law, charging that defendant unlawfully sold "intoxicating liquors, to wit, whisky, brandy, ale, beer, and wine, a mixture thereof," etc., informed the defendant that the intoxicating liquor he was charged with selling contained one or more of the liquids mentioned, and sufficiently described the offense, within Cr. Code, § 124, requiring an indictment to be direct and certain.

2. Under an indictment charging an unlawful sale of "intoxicating liquors, to wit, whisky, brandy, ale, beer, and wine, a mixture thereof," a defendant may be convicted if the "hop tonic" or "tonica" he had sold was "whisky, brandy, beer, or wine, or a mixture thereof."

3. Where, in a prosecution for the violation of the local option law, the witness to whom it was charged defendant had sold "intoxicating liquors, to wit, whisky, brandy, beer, or wine, or a mixture thereof," gave it as his opinion that the "tonica" or "hop tonic" which he admitted defendant had sold him would not produce intoxication, it was competent for the state to prove that hop tonic or tonica is a well-known drink, and contains some ingredients that will produce intoxication in the same manner as spirituous, vinous, or malt liquors.

4. Though Ky. St. 1890, § 465, provides that if a penalty or punishment for an offense is mitigated by a provision of a new law taking effect after the commission of an offense, and before the trial of the offender, such provision may, by consent of the parties, be applied to the judgment at the trial, a defendant tried after the law in force at the commission of the offense had been amended was not prejudiced by an instruction that his punishment would be according to the old law, though the amendment might be taken to have mitigated it, where the record does not disclose that the parties had consented that the penalty be that provided by the amendment.

Appeal from Circuit Court, Bullitt County.

"To be officially reported."

J. L. Cockerell was convicted of violating the local option law, and he appeals. Affirmed.

Ben Chapeze and N. W. Halstead, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

SETTLE, J. The appellant, J. L. Cockerell, was indicted, tried, and convicted in the Bullitt circuit court for selling intoxicating liquors in violation of the local option law, and his punishment fixed by verdict of the jury at a fine of \$100. He was refused a new trial by the lower court, and from the judgment of that court refusing him a new trial he prosecutes this appeal.

It is contended for appellant that the indictment is defective, and that the lower court should have sustained the demurrer filed thereto. We are of opinion that the indictment is sufficient, in that it substantially conforms to section 124 of the Criminal Code, which provides that "the indictment must be direct and certain as regards, first, the party charged, second, the offense charged, third, the county in which the offense was committed, fourth, the particular circumstances of the offense charged, if they be necessary to constitute a complete offense." That part of the indictment describing the offense charges that the appellant "did then and there unlawfully, without license so to do, sell to P. G. Trunnell intoxicating liquors, to wit, whisky, brandy, ale, beer, and wine, a mixture thereof," etc. This language, in direct and explicit terms, informed appellant of the offense charged. It apprised him of the fact that the intoxicating liquor which he was charged with selling contained one or more of the liquids mentioned. It will not be denied that a drink containing any one of them, or composed of two or more of them, would be an intoxicating liquor, in the meaning of the law. So a sale of such liquor or mixture in territory where local option is in force would constitute a violation of the law. It must be presumed that appellant would know whether the liquid sold by him contained whisky, brandy, ale, beer, wine, or any mixture thereof; and, if so, he was as

well prepared to make defense to the charge presented by the language contained in the indictment as if it had been confined to an averment of the sale of any one of them. We are therefore of opinion that the lower court did not err in overruling the demurrer to the indictment.

It is also contended for appellant that the lower court erred in instructing the jury. Instruction No. 1 is, however, the only one complained of, the language of which is as follows: "If the jury believe from the evidence, to the exclusion of a reasonable doubt, that in Bullitt county, within twelve months before the finding of the indictment herein, the defendant, J. L. Cockerell, sold to P. G. Trunnell hop tonic or tonica in a quantity less than five gallons at one time, and that said hop tonic or tonica was whisky, brandy, beer, or wine, or a mixture of any two or more of said liquors, they should find him guilty as charged in the indictment, and fix his punishment at a fine in any sum not less than \$100 nor more than \$200." It is claimed by counsel for appellant that this instruction was improper, because of the use therein of the words "hop tonic," or "tonica," as those words do not appear in the indictment. It is true that the words in question are not found in the indictment, but their use in the instruction was nevertheless proper, as spirituous, vinous, and malt liquors are often sold under other than their true names, in violation of law; and there could certainly have been nothing misleading in these terms as used in the instruction, for the jury were, in effect, therein told that, in order to convict appellant, they must believe from the evidence, beyond a reasonable doubt, that the drink sold by him as hop tonic or tonica was in fact whisky, brandy, beer, wine, or a mixture of any two or more of such liquors.

It is further contended by counsel for appellant that the lower court erred in allowing the testimony of Fort, Hall, and others, to go to the jury. P. G. Trunnell, to whom the appellant sold the hop tonic, upon being introduced, admitted the sale to him by appellant of the drink called "hop tonic" or "tonica," and that hop tonic or tonica, whether called by the one name or the other, is the same drink, but gave it as his opinion that it would not produce intoxication. He testified, however, that he was not a chemist, though a physician, and that he had never seen a chemical analysis made of the liquid. So the witnesses of whose testimony appellant complains were introduced by appellee to prove that hop tonic or tonica is an intoxicating drink, and many of them so stated. According to the testimony of these witnesses, it would seem that hop tonic is a well-known drink; that it contains some ingredient that will intoxicate in the manner in which intoxication is produced by spirituous, vinous, or malt liquors. Upon the

other hand, witnesses were introduced by appellant who testified that the drink called "hop tonic" or "tonica" does not contain spirituous, vinous, or malt liquors, and is incapable, therefore, of producing intoxication. It was the province of the jury to determine whether or not hop tonic would produce intoxication, and, if so, whether its intoxicating effects were caused by the presence therein of spirituous, vinous, or malt liquors, such as are named in the indictment, or a mixture thereof. It was therefore relevant and proper for the appellee to show by the witnesses whose testimony is complained of that hop tonic or tonica is an intoxicating drink; and, in view of the verdict returned by the jury, it is manifest that they were convinced by the evidence, beyond a reasonable doubt, that the drink which was sold by appellant as hop tonic or tonica was an intoxicating drink, composed of or containing spirituous, vinous, or malt liquors, or a mixture thereof.

It is charged in the indictment, and was admitted upon the trial, that the local option law was in force in Bullitt county when appellant sold the liquid mentioned in the indictment. We deem it proper to state in this connection that the statute known as the "Local Option Law" was amended by act of the General Assembly at its last session, which amendment may be found on pages 41-43, c. 14, of the volume containing the Acts of 1902. The amendment provides that any person who shall sell, barter, or loan, directly or indirectly, any spirituous, vinous, or malt liquors in any territory where local option is in force, shall, upon conviction, be fined in any sum not less than \$60 nor more than \$100, or confined in the county jail not less than 10 nor more than 40 days, or both so fined and imprisoned, in the discretion of the jury, whereas, the punishment under the old statute was only a fine of not less than \$100 nor more than \$200. The sale of spirituous liquors of which the appellant was convicted was made in 1901, and before the enactment of the amendment referred to, although his trial did not take place until after the amendment went into effect. The record discloses the fact that the instructions given on the trial in the lower court directed the jury, in the event that they found appellant guilty, to fix his punishment as provided by the old statute. Section 465, Ky. St. 1899, provides that "no new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense, or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the pro-

ceedings thereafter had shall conform so far as practicable to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, by consent of the party affected, be applied to any judgment pronounced after the new law takes effect." It will be observed that, though the amendment in question mitigates the punishment provided in the original statute by reducing the fine that was imposed thereby, it allows the jury, in addition to or in lieu of the fine of not less than \$60 nor more than \$100, to inflict upon the offender against the local option law imprisonment in the county jail not less than 10 nor more than 40 days. In view of the imprisonment that may be imposed under the statute as amended, and which was not permitted to be inflicted under the former statute, it may well be doubted whether the new law mitigates the punishment provided by the former statute. At any rate, it cannot be said that the appellant was prejudiced by the failure of the lower court to instruct the jury to inflict the penalty found in the amendment or new law, as that could not have been done without the consent of appellant, and such consent is not disclosed by the record.

We are unable to see that any error was committed by the lower court to appellant's prejudice, and the judgment is therefore affirmed.

WOOD v. CARR et al.

(Court of Appeals of Kentucky. April 15, 1903.)

BANKRUPTCY ACT—ATTACHMENT IN STATE COURT—VACATION OF ATTACHMENT—CONSTITUTION—IMPAIRING OBLIGATION OF CONTRACTS—DISCHARGE.

1. Bankr. Act 1898, § 67, subsec. "f," 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3450], providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, etc., applies to attachments sued out in state as well as in federal courts.

2. The dissolution, under the express provisions of Bankr. Act 1898, § 67, subsec. "f," 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3450], of an attachment made long after the act went into effect, does not impair the obligation of a contract, or divest the attaching creditor of a vested right.

3. A state court is bound to take notice of a discharge in bankruptcy under the national bankruptcy act of 1898, when properly pleaded as a defense.

Appeal from Circuit Court, Mason County.
"To be officially reported."

Action by H. R. Wood against R. A. Carr and another. Judgment for defendants, and plaintiff appeals. Reversed.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 236.

W. G. Dearing and O. R. Bright, for appellant. Slattery & Collins, for appellees.

BURNAM, C. J. This suit was instituted in the Mason circuit court by the appellant, H. R. Wood, against the appellees, Charles Newell, presiding judge of the Mason quarterly court, and R. A. Carr, to prohibit the collection of a judgment recovered against him by the defendant Carr in such court by the sale of a horse claimed by him as exempt, and for the recovery of the horse, which had been taken under attachment, and damages for his detention. The defendants filed a general demurrer to the petition, which was sustained, and, the plaintiff declining to plead further, it was adjudged that his petition be dismissed, and that defendants recover their costs; and from this judgment this appeal is prosecuted.

The plaintiff alleged, in substance, that on the — day of September, 1899, the defendant R. A. Carr instituted a suit against him in the police court of the city of Maysville, and at the same time sued out an attachment, which was levied upon a gray horse belonging to him; that he appeared in the police court on the day the case was set for trial, and claimed to be a housekeeper with a family, and that the horse was exempt from attachment and sale; that the police court decided that it was not exempt, and adjudged it to be sold to satisfy the debt of the defendant Carr; that on the 30th day of October, 1899, he appealed from the judgment of the police court to the Mason quarterly court, and executed a supersedeas bond suspending the collection of the judgment; that on the 24th day of October, 1899, he filed his petition in the United States District Court at Covington, Ky., to be declared a bankrupt, in which he claimed the horse upon which the defendant Carr had levied his attachment as exempt property; that notice of this proceeding was served upon the defendant Carr, who appeared in the office of the referee in bankruptcy on the morning designated for the appointment of a trustee, and that he made no objection to plaintiff's claim of the horse as exempt property; that on the 10th day of February, 1900, he obtained his discharge in bankruptcy, and that subsequently thereto, and before the trial of the appeal in the Mason quarterly court, he filed therein a certified copy of the order adjudging him a bankrupt, and his certificate of discharge, and moved that the petition of Carr be dismissed, and the attachment discharged. He also alleges that he was insolvent when the attachment of the defendant Carr was levied upon his horse, and also at the time he was adjudged a bankrupt; that the defendant Newell, as presiding judge of the Mason quarterly court, in disregard of his certificate of discharge in bankruptcy, gave a judgment against him in favor of the defendant, and ordered the horse sold under the judgment to

satisfy it; that he appealed from this judgment to the Mason circuit court, and all the papers and orders were transferred to the circuit court, but that the Mason circuit court dismissed his appeal for want of jurisdiction; that the defendants are proceeding to enforce the judgment of the Mason quarterly court by a sale of his horse. It is further alleged that at the time Carr sued out the order of attachment in the Mason quarterly court he was a married man, with a family, residing in this commonwealth, and that he was the owner of only two horses.

Subsection "f" of section 67 of the Bankruptcy Act of 1898, 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3450], provides that: "All levies, judgments, attachment or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt unless the court shall on due notice order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate, and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid." The proceedings in bankruptcy were commenced by plaintiff within less than four months after the levy of the defendant's attachment upon the horse in controversy, and under the express letter of the statute, if plaintiff was insolvent, all rights acquired thereunder became null and void, and the jurisdiction to determine all questions growing out of it was transferred to the federal court. In *Bank of Columbia v. Overstreet*, etc., 73 Ky. 150, the court, through Judge Lindsey, said: "It is insisted by the appellant that the provisions of this section do not apply to attachments sued out in state courts. This position cannot be maintained. The federal congress had undoubted power to establish 'uniform laws on the subject of bankruptcy throughout the United States.' All laws of Congress enacted pursuant to the powers delegated to it by the federal Constitution are binding as well upon the state as the federal courts. It may be that the state courts are not bound to administer the federal laws, but they are bound to respect all rights acquired under them. There is nothing in the act of Congress from which it can be inferred that an exception was made in favor of creditors prosecuting their claims against a bankrupt in state courts; and if the law had been so framed as that a proceeding in bankruptcy would dissolve attachments sued out in the federal courts, and leave unaffected those sued out in the state courts, it would not have been 'uniform,' in the consti-

tutional sense of that term. Nor are we able to perceive that the dissolution of appellant's attachment in any sense impaired the obligation of a contract or divested it of a vested right. The attachment lien was secured by legal diligence, and not by contract. The right to subject the attached property to the payment of its debt vested long after the bankrupt act had gone into effect. It was, therefore, a conditional right, subject to be defeated by the debtor's being thrown into bankruptcy. In this case no peculiar hardship results to appellant. Its debt was contracted after the bankrupt act became a law. The credit was extended to Overstreet, with notice of the fact that the remedies afforded by the state laws for the enforcement of the contract were liable to be interrupted or superseded by proceedings in bankruptcy which might be instituted by the debtor, or by one of his creditors, in case he should be guilty of an act of bankruptcy." And the opinion of the court in this case is in accord with the rulings of other courts who have passed upon this question. See *In re Hopkins*, 1 Am. Bankr. R. 209; *In re Richards*, 2 Am. Bankr. R. 520, 95 Fed. 258; *In re Rhoads*, 3 Am. Bankr. R. 380, 98 Fed. 399; and *Levor v. Seiter*, 5 Am. Bankr. R. 576, 69 N. Y. S. 987. Section 17 of the Bankruptcy Act of 1898, 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3428], provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with certain exceptions, to which defendant's claim does not belong. His debt might have been proven in the bankruptcy proceedings, and is, therefore, embraced by the language of the act.

The judge of the Mason quarterly court was bound to take notice of plaintiff's discharge in bankruptcy. It had the effect to release the plaintiff from all debts which were or might have been proven against his estate in bankruptcy, and, when properly pleaded, was a conclusive bar to any action on such debt. The debt of this defendant having been wiped out, the attachment necessarily failed also.

The trial court erred in sustaining a demurrer to plaintiff's petition, and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

HENDRICKSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 17, 1903.)

HOMICIDE—DYING DECLARATIONS—ABSENT WITNESS—CONTINUANCE.

1. On a prosecution for murder, it appeared that deceased, being conscious of impending death, made a statement, which was written out in lead pencil by the one to whom it was dictated; and subsequently he transcribed the paper by typewriting, and returned with it and read it over to deceased, who signed it and swore to it. *Held*, that the typewritten paper was competent as a dying declaration, but the original one, written in lead pencil, was not.

2. Other statements made by the deceased, not included in the writing, but made about or subsequent to the time of the drafting of the paper, were competent as dying declarations.

3. On a prosecution for homicide, an affidavit for a continuance stated that a certain absent witness, who was an eyewitness to the killing, would corroborate the evidence of accused on all points. The application was refused, and accused was successfully impeached at the trial. *Held*, that it was error to refuse the continuance.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Nick Hendrickson was convicted of murder, and he appeals. Reversed.

Smith & Ingram and E. N. Ingram, for appellant. C. J. Pratt and M. R. Todd, for the Commonwealth.

O'REAR, J. Appellant prosecutes this appeal from a judgment of conviction, sentencing him to 21 years' confinement in the penitentiary, under the charge of the murder of William Hendrickson. Two grounds are relied upon for reversal.

It is claimed for appellant that the court erred in admitting the dying declarations of the deceased. That the wounded man, when he made the statement, was in extremis, and was conscious of the fact, and made his statement under such circumstances as admitted its proof in this case, is not questioned. The person to whom the statement was made first wrote it down as it was dictated by the decedent, using a lead pencil. Subsequently he transcribed the paper, as written, by typewriting, and some hours afterwards returned and read it over to the deceased, who assented to its correctness, and signed it in the presence of attesting witnesses, and swore to it. Appellant contends that the original paper—the one written with the lead pencil—should have been used. It was not signed, nor was it read over to the party making it. The court is of opinion that the typewritten paper, adopted by the wounded man, was the one, and the only one, that was competent as the dying declaration.

The witness who took down the statement also testified as to other statements made by the deceased, not included in the writing, but made about or subsequent to the time of the drafting of the paper, and made under circumstances showing a sense of impending dissolution by the deceased. This was objected to, but we are of opinion that it was likewise competent. A dying declaration need not be in writing. It need not be made at one time, or to the same witness. Any statement of the deceased, made after the mortal injury, and when he is rational, and made by him under the sense that death is imminent, is relevant upon the trial of the person whom he accuses of inflicting his injury. The statement or statements made may be proved by a witness or any number of witnesses who may have heard them or any of them.

Appellant shot and wounded the deceased December 24, 1901. Death ensued within two days. He was indicted at the following term. The commonwealth then announced, "Ready for trial," and a continuance was procured by appellant because of the absence of the particular witness, Bev Jackson, who appears to have been subpoenaed. A warrant of arrest was directed to be issued against the witness Jackson. At the next May term he was again absent. His recognizance was forfeited, and, although the commonwealth announced "Ready," appellant again procured a continuance because of the absence of this witness; and an alias warrant of arrest was directed, with bail fixed at \$2,500. The next term of the court was in October, 1902. In July appellant caused a warrant of arrest to be sent to the sheriff of Clay county, which is alleged to have been the county of the residence of the witness; and the sheriff returned it, indorsed as of 28th of September, 1902, that he had arrested the witness Bev Jackson, and that he had escaped, and could not thereafter be found. Appellant immediately (so it is stated in his affidavit for a continuance filed at the October term) had other attachments issued for this witness, which were returned not executed, the witness not being found. Bev Jackson is alleged in the affidavit to have been an eyewitness to the killing. The materiality of his evidence is obvious. The affidavit for the continuance says that the absent witness would corroborate the evidence of appellant upon all points. In view of the fact that appellant was successfully impeached at the trial which followed, when he had testified in his own behalf, the testimony of any other eyewitness for him is of double importance to him. The court refused the continuance. The affidavit as to what this absent witness would prove was not admitted as the deposition of the absentee. The court is of opinion that forcing the defendant to trial, under the circumstances, without admitting the statement of the absent witness, was error.

The judgment is reversed and the cause is remanded, with directions to award appellant a new trial.

CINCINNATI, N. O. & T. P. RY. CO. et al.
v. COOK'S ADM'R.

(Court of Appeals of Kentucky. April 16, 1903.)

INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE—PRESUMPTION FROM INJURY.

1. In an action against a railroad company for death of a brakeman caused in switching operations, where the only evidence was that deceased had been crushed between two cars while the train was backing, and was discovered lying wounded on the side of the track, and there was no evidence to show why he went between the cars, or that the engineer knew or should have known that he was there, or that the engineer had failed in his duty in any way,

or had been signaled by deceased, there was no negligence shown on the part of defendant.

2. The fact of injury does not raise a presumption of negligence or make out a prima facie case.

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action by Edward Cook's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Gaither & Van Arsdall and John Galvin, for appellants. Robt. Harding, Thos. Shay, and E. M. Hardin, for appellee.

HOBSON, J. On the former appeal (67 S. W. 383) the facts of this case were stated as follows: "The engineer, fireman, and two brakemen were engaged in transferring cars from the main line to the side track in the yards of the company in Burgin, Kentucky, the intestate being one of the brakemen. The purpose was to leave a car on the side track. To do this the engineer was required to back the cars in on the side track, there being a number of cars between the engine and the car intended to be left. The cars were provided with automatic couplers, which were operated by a bar extending out from the coupler to the side of the car, so that the brakemen could take hold of it while standing on the outside of the car and couple the cars without danger. The intestate was on the fireman's side of the engine and went down on this side to uncouple the car in question. The other brakeman was on the other side of the train to turn the switch, so that when the car was uncoupled it might be pushed on the side track. The engineer could see this brakeman, but he could not see the intestate, Cook, who was on the other side of the train from him; and neither could his fellow brakeman. Cook communicated to the engineer by signals to the fireman, who reported them to the engineer. When Cook got to the car that was to be cut off, he signaled for slack, which meant that the engineer must back the train a little. The engineer did this. Cook gave the stop signal, and the engineer stopped after the train had only moved from three to six feet. The iron bar of the automatic coupler was bent, and would not work the coupler; so Cook went in between the cars after he got the slack to raise the pin with his hand, as it was his duty to do. While he was doing this, the other brakeman, who had turned the switch, and did not know of the difficulty Cook had met with in uncoupling the car, gave a signal to the engineer to come on, and the engineer, without a signal from Cook, or without knowing whether he was out or not, began backing the train down to the switch. In this way Cook was caught between the cars, and dragged some twenty

¶ 2. See Negligence, vol. 37, Cent. Dig. §§ 218, 371.

feet; his breast bone and ribs were crushed and smashed, and he died in a few minutes." On these facts it was held that the case was properly submitted to the jury, and that if the engineer in charge of the train knew, or had reasonable grounds to know, that Cook was between the cars, engaged in making the uncoupling, and, with this knowledge, received a signal to move the cars from the other brakeman, and negligently obeyed this signal, not exercising proper care for Cook's safety while he was in between the cars uncoupling, and thus injured him, the defendants were liable. See *L. & N. Railroad v. Adams' Adm'r* (Ky.) 51 S. W. 577; *L. & N. Railroad Co. v. Earl's Adm'r*, 94 Ky. 368, 22 S. W. 607. But the judgment was reversed for an error in one of the instructions. On the return of the case to the circuit court it was tried anew, and, a verdict having been again rendered in favor of the plaintiff, the defendants have appealed.

The only question we deem it necessary to consider is whether the evidence introduced on the last trial was sufficient to submit the case to the jury, or to sustain the verdict. On the former appeal the defendants introduced their testimony, and thus all the facts of the case were brought out, but on the second trial the defendants introduced no testimony, and the case was submitted to the jury on the testimony introduced by the plaintiff alone, the defendants standing on their motion for a peremptory instruction. The rule is that, where the defendant moves for a peremptory instruction at the conclusion of the plaintiff's evidence, and, his motion being overruled, introduces his testimony, if that testimony supplies any fact or facts not shown by the evidence for the plaintiff, and thus makes out a case, this court will not reverse because these facts were not shown by the plaintiff before the motion for a peremptory instruction was made. To avoid this rule, the defendants on the last trial of the case did not introduce any evidence, this court on the former appeal having considered the case under all the evidence before it. The evidence for the plaintiff on the second trial falls far short of showing the facts set out in the former opinion. But one witness who saw the occurrence was introduced, and he knew nothing more about it than that the train was backing in obedience to the signal of Sinkhorn, and about this time he saw Cook lying on the side of the track, wounded. The other testimony for the plaintiff added nothing to the testimony of this witness as to the facts of the occurrence, except to show that Cook was dragged along the track, as shown by the signs on the ballast, and was crushed between two cars, as shown by signs on the cars. It was not shown that Cook went between the cars for the purpose of uncoupling them, or in fact why he went between the cars, or for what purpose, or that the engi-

neer knew he was between the cars, or ought to have known it, or that there was any failure on his part to exercise proper care for Cook's safety. It was not shown that Cook gave the engineer any signal, and to sustain a verdict under such evidence would be, in substance, to hold that Cook's injury made out a prima facie case against the defendants. The law does not presume negligence, and, to recover, the plaintiff must show facts establishing negligence on the part of the defendant.

As the case may be tried again, we deem it proper to say that the court should instruct the jury that, if Cook failed to use ordinary care, and but for this would not have been hurt, they should find for the defendants. The court should also instruct the jury that the admissions of Milligan were only competent against him, and that no fact so admitted by Milligan should be considered against the railroad company, unless shown by other evidence in the case.

Judgment reversed, and cause remanded for a new trial, and for further proceedings consistent herewith.

ILLINOIS CENT. R. CO. v. WHITWORTH.

(Court of Appeals of Kentucky. March 24, 1903.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—NONRESIDENCE OF BOTH PARTIES.

1. Under Act Cong. Aug. 13, 1888, § 2, 25 Stat. 435 [U. S. Comp. St. 1901, p. 509], providing that suits of which the federal Circuit Courts are given jurisdiction, brought in any state court, may be removed into the federal Circuit Court for the proper district of the defendant or defendants therein being nonresidents of the state, a suit between citizens of different states may be removed to the federal court, though neither party is a resident of the state where the suit is brought.

"To be officially reported."

On rehearing. Former opinion withdrawn, and judgment below reversed.

For former opinion, see 70 S. W. 657.

BURNAM, C. J. In the petition for rehearing in this case our attention is called to the fact that in the decision heretofore rendered in 70 S. W. 657, we failed to pass upon the validity of the motion of the defendant to transfer the case from the McCracken circuit court to the United States Circuit Court for the Western District of Kentucky. In response to this contention it is proper for us to say that we did not overlook the fact that this question was presented by the record, but, as counsel for appellant in their brief did not rely upon this alleged error of the circuit court as a ground for reversal, but were content to rest their contention wholly upon the merits of the case, we concluded that they did not desire upon this appeal to rely upon that ground, but it seems from their petition for

rehearing that we have misconstrued the purpose of counsel, and they now insist upon a decision upon that point. The plaintiff, a citizen of Tennessee, as he alleges in his petition, brought this suit in the McCracken circuit court against the defendant, whom he alleges is a citizen of Illinois, to recover a sum in excess of \$2,000. The defendant tendered and filed its petition and bond for removal to the United States Circuit Court for the Western District of Kentucky upon the ground of diverse citizenship, but the McCracken circuit court decided that no ground for removal existed, and thereupon the defendant, under protest, answered, and made defense. The trial resulted in a verdict and judgment for the plaintiff. In the meantime a copy of the record in the McCracken circuit court was filed by the defendant in the United States Circuit Court for the Western District of Kentucky, and the plaintiff appeared in that court, and asked that it be remanded to the state court for trial, basing its claim to this relief upon the provision of section 1 of the act of August 13, 1888, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. The motion to remand in the federal court was overruled.

Article 3, § 2, of the Constitution of the United States, defines the extent of judicial power which may be conferred upon courts of the United States as follows: "The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty or maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between different states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." The enforcement of this provision of the federal Constitution was for a very long time controlled by Judiciary Act 1789, § 11, 1 Stat. 78. But other acts were passed from time to time by the Congress of the United States conferring upon the Circuit Courts of the United States various special jurisdictions, but the present general right to remove a suit from a state to a Circuit Court of the United States is governed by section 2 of the act of 1875, as amended by the acts of 1887 and 1888 [U. S. Comp. St. 1901, p. 509]. An interesting history of these various acts is found in "Moore on Removal of Causes." The second section of the act of 1875, as amended by the act of 1887, reads as follows: "When in any suit mentioned in this section there shall be a controversy, which is wholly between citizens of different states and which can be

fully determined between them, then either one of some of the defendants, actually interested in such controversy, may remove such controversy to the Circuit Court of the United States for the proper district." And section 1 of the act of August 13, 1888 (25 Stat. 434 [U. S. Comp. St. 1901, p. 508]), amending the act of 1875, provides: "The District and Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, over all suits of a civil nature at common law or in equity, * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the value of" \$2,000. And the act further provides that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. But when the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant. The second section of the same act (25 Stat. 435 [U. S. Comp. St. 1901, p. 509]), provides that: "Any suits of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district of the defendant or defendants therein being non-residents of this state." As neither of the parties to this action are citizens or inhabitants of Kentucky, it is contended, under section 2, that the case is not removable, and appellees refer to *Shaw v. The Mining Co.*, 145 U. S. 144, 12 Sup. Ct. 935, 36 L. Ed. 768, and *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. The question decided in the first case was that a corporation created by one state did not become a resident of another for jurisdictional purposes by establishing a place of business therein. And in the second it was decided that an action by an assignee, where an assignor could not maintain his suit in a federal court, was not removable. In the case of the *Central Trust Co. v. McGeorge*, 151 U. S. 133, 14 Sup. Ct. 286, 38 L. Ed. 98, it was held that exemption from being sued out of the district of its domicile was a privilege which a corporation might waive, and which was waived by pleading to the merits of the controversy without objection. But the case clearly recognizes the right of transfer to the federal court where the citizenship of the parties is diverse. And this case seems to be in accord with the current of the recent decisions of the federal court on this question. See *Cowell v. Supply Co. (C. C.)* 96 Fed. 769; *Creagh v. Society (C. C.)* 83 Fed. 849; *Duncan v. Asso-*

ciated Press (C. C.) 81 Fed. 417; Long v. Long (C. C.) 73 Fed. 369; Sherwood v. Mississippi Valley Co. (C. C.) 55 Fed. 1; Amsinck v. Balderston (C. C.) 41 Fed. 643; Uhle v. Burnham (C. C.) 42 Fed. 1; Burck v. Taylor (C. C.) 39 Fed. 581; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C.) 37 Fed. 3; First Nat. Bank v. Merchants' Bank (C. C.) 37 Fed. 657, 2 L. R. A. 469; Hulbert v. City of Topeka (C. C.) 34 Fed. 511; Wilson v. Telegraph Co. (C. C.) Id. 561; Fales v. Railroad Co. (C. C.) 32 Fed. 673. And Judge Dillon, in his well-approved work on Removal of Causes (section 96), says: "At first it was held that, if the action was brought against a defendant in a district of which he was not an inhabitant, so that the federal court would not have originally had jurisdiction of it under the first section of the act, it could not be removed under the second section. But this position was soon abandoned. It was next considered that, while the right of removal might depend upon the capacity of the particular federal court to entertain original jurisdiction of the suit sought to be removed, yet the statute permitted the plaintiff to sue the defendant in the federal district of the plaintiff's own residence as well as in that of which the defendant was an inhabitant, where the federal jurisdiction depended only on the fact of diverse citizenship of the parties; and therefore such a suit was removable by the defendant if brought in the state court of the plaintiff's own state. But this rule was in turn superseded by a more liberal doctrine. It came to be perceived that the restrictive language of the first section of the act was referable only to suits commenced in a federal court by original process or proceeding, and had no application to suits removed from state courts, and that the word 'juris-

diction' in the clause in the section relating to suits of which the federal court may have original jurisdiction is not to be taken in the narrow sense of certain territorial limits, but in a wider sense, meaning jurisdiction over the whole class of cases enumerated in the statute. Accordingly, it is now well settled that, where the parties are citizens of different states, and the other conditions of removability are satisfied, the cause may be removed to the federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the state where the suit is brought, or of the district within the territorial jurisdiction of the federal court to which it is to be transferred."

It is evident that under the section of the Constitution quoted supra the Congress of the United States is authorized, where there is a controversy between citizens of different states, to confer jurisdiction for the determination of such controversy upon the federal courts, and to provide for the removal of suits involving such an issue from the state to the federal courts. And a careful review of the decisions of the federal courts construing the statute regulating this question has satisfied us that the circuit court of McCracken county had no jurisdiction to hear and determine this controversy after the defendant had complied with the provisions of the federal statute, and had petitioned for its removal. Nor was the right of transfer waived by the defendant in pleading under protest to the issue in the state court. See *National S. S. Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 58, 27 L. Ed. 87.

For reasons indicated, the opinion heretofore delivered is withdrawn, and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

KENTUCKY DISTILLERIES & WAREHOUSE CO. et al. v. SCHREIBER.

(Court of Appeals of Kentucky. April 23, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES—SUPERIOR SERVANT—NEGLIGENCE—QUESTION FOR JURY—COMPENSATORY DAMAGES—EXEMPLARY DAMAGES—INSTRUCTIONS.

1. In action by an employé in defendant's distillery for personal injuries, evidence examined, and held, that plaintiff's superior was guilty of gross negligence for which defendant was liable.

2. Where a servant was injured by the negligence of one of two of defendant's other servants, the question as to which one was negligent was for the jury.

3. No recovery of damages will be allowed to an employé for injuries not resulting in death, received through the negligence of a superior in the service of such employer, unless such negligence be gross; and even then the recovery is limited to compensatory damages.

4. The evidence showed that plaintiff, an employé, was confined to his bed for several months by reason of his injuries, that he suffered excruciatingly, and that his arm would never regain its former strength. Held, that a verdict of \$600 showed that exemplary damages were not allowed, and an error in an instruction allowing the finding of such damages was not prejudicial.

Appeal from Circuit Court, Jefferson County, Second Common Pleas Division.

"Not to be officially reported."

Action by John Schreiber against the Kentucky Distilleries & Warehouse Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Joyes, Jarvis & Swope, for appellants. Forcht & Field and O'Neal & O'Neal, for appellee.

SETTLE, J. Appellee, John Schreiber, while employed by appellants, the Nelson Distillery Company and the Kentucky Distilleries & Warehouse Company, in one of their distilleries, was scalded and injured, and for the injuries thus received he sued, and recovered of appellants in the lower court a verdict and judgment of \$600 in damages. Appellants complain of that judgment, and of the refusal of the lower court to grant them a new trial; hence this appeal.

At the time of receiving the injuries complained of, appellee was at work in the mashroom of the distillery, which is on the first floor. The proof shows, however, that his regular place of work was in the mealroom, on the second floor above the mashroom, but he occasionally worked in the mashroom when ordered to do so by his superiors in appellants' service. The distillery, according to the evidence, was under the control of a superintendent, one Murphy, and the mashroom in charge of a subordinate of Murphy's, called "Monz." The evidence further shows that both Murphy and Monz were the superiors of appellee, and that he was required to obey their orders. The mashroom was, as to size, about 40 feet

square, and in one corner of this room stood a mash tub about 22 feet in diameter and 5½ feet in height. The tub was covered with a conical shaped top. The material for the tub was admitted through chutes from bins in the mealroom. Water, hot and cold, was run into the tub by means of pipes from above that ended about three inches above the covering of the tub, the water pipes being about three feet apart. Just beneath each pipe was an opening in the cover of the tub of a size to properly admit the stream of water from the pipes, and these openings, when water was not being introduced into the tub, were always covered with movable plates, which served to preserve the temperature of the tub and prevent leakage from the pipes into the tub. The cold water was let into the tub by means of a valve, or stopcock, two feet above the tub, and the hot water was regulated by pulling a rope in an adjoining room which was attached to a lever near the hot-water tank. Appellants' agent Monz, who had control in the mashroom, was intrusted with the duty of seeing that the proper materials were placed in the tub, and that the mash was properly scalded, his post of duty in watering the tub being at the thermometer and gauge in the mashroom. Just before receiving his injuries, appellee was standing in the mashroom, waiting to be relieved by the night helper, whose duty it was to take his place, when he was ordered by Monz, the mash boss, to turn the cold water into the mash tub, which he at once did, after removing the plate from the opening under the cold-water pipe. While appellee was thus engaged in turning on the cold water, Ed Saur, another servant of appellants, by order of Monz, turned on the hot water from an adjoining room without first removing the plate which covered the opening in the tub under the hot-water pipe. The hot water was thus thrown and splashed upon appellee, whereby he was badly scalded upon the head, neck, body, and arms. It is averred in the petition that: "Pursuant to and in obedience to the orders of said foreman, he (appellee) went to the stopcock, or faucet, for the purpose of turning on said faucet, and while endeavoring to turn on same in a cautious, proper, and prudent manner, the defendant, by and through its agents and servants superior in authority to this plaintiff, did cause a large quantity of hot water to be turned on at or near the same place from said mash tub, and did allow, permit, and order the same to be turned on without removing a certain plate, which it was necessary to remove before turning on said water, in order to allow the same to get into the said mash tub. That by reason of the said negligence and carelessness of the defendant and its agents, servants, and employes superior in authority to him in the turning on of said hot water, which was done without any notice or warning to him whatever, he

¶ 3. See Master and Servant, vol. 34, Cent. Dig. § 536.

was deluged with scalding hot water, and was greatly burned and scalded. * * * That at said time and place the defendants, and each of them, their agents, servants, and employes, superior in authority to him, neglected each and every precaution usual and customary under the same or similar circumstances, and by reason of their neglect caused and occasioned the said injuries; and that said injuries, and each of them, were received by him by reason of the gross carelessness and negligence of the defendants, their agents and servants superior in authority to him." The appellants filed separate answers, each of which contains a traverse of the averments of the petition, and in addition it is further alleged in each that at the time and in the matter of receiving his injuries the appellee was himself guilty of negligence, which contributed to his injuries to such an extent that, but for same, he would not have been injured. It is, however, proper to say in this connection that the evidence found in the record wholly fails to show any contributory negligence on the part of appellee.

While there are numerous alleged errors set forth in the motion and grounds for a new trial, the refusal of the lower court to peremptorily instruct the jury to find for the appellants is practically the only thing complained of by counsel in the brief filed for appellants, and this contention is based upon the theory that, as both appellee and Saur were acting under the direction of Monz, their superior, he had a right to assume that each of them would properly perform the duty required of him; and, when injury resulted to one of them by the negligent act of the other, a recovery for the injury will not be allowed against the master, as the negligence was that of a fellow servant. The only Kentucky authority cited by counsel for appellants as supporting this contention is the case of *Coffman v. L. & N. R. R. Co.*, 18 S. W. 1012. It appears from the opinion in that case that Coffman and other employes of the railroad company were, by direction of the section boss, carrying a rail to be laid on the track. The latter ordered them to drop the rail. The order was obeyed by the hands having hold of the front end of the rail, and the dropping of that end of the rail caused the end held by Coffman to jar out of his and the others' hands, and to fall, and to catch Coffman's leg between the falling rail and another rail lying on the track. In passing upon the action of the lower court in giving a peremptory instruction in behalf of the railroad company, and in approval of that ruling of the circuit court, this court, in part, said: "But the leading fact is that the section boss had the right to order the rail to be thrown down at any place that he might select, and when the appellant was ordered to throw it down it was his duty to do so without question. All that he could require of the section boss in such a case was notice to throw it down, which notice he received, and which

he could have executed, and his failure to do so was not the fault of the section boss." It is apparent that Coffman was nonsuited upon the ground that the injury received by him was caused by his own negligence, for which reason we are unable to regard that case as an authority in the case at bar; and the same may be said of the other cases cited by counsel for appellants in support of their contention, for neither in point of law nor fact do they, in our opinion, throw any light upon the questions involved in this case. The evidence furnished by the record in this case conduces to prove that appellants' agent was the superior in service of appellee, with authority to command his services and direct his work in the mashroom; and, though the latter's place of labor was in the mealroom of the second floor, he was frequently called on to render service in the mashroom. It is further shown by the evidence that appellee was ordered by Monz to turn the cold water into the mash tub, and that it was his duty to obey the order of Monz. The work thus required of him was not familiar to him, and, though not dangerous per se, its performance was liable to be attended with dangerous consequences, as the turning on of the hot water while he was engaged in turning on the cold would inevitably result in great injury, perhaps death, to him. He undertook to obey the order of Monz, mounted the trestle used to reach the water pipe over the tub, removed the plate under the cold-water pipe, and turned on the cold water. At this juncture the hot water was turned on by Saur from the adjoining room, and appellee was thereby scalded and injured. Having ordered appellee into a place of danger, or probable danger, it was the duty of Monz to use reasonable or ordinary care to protect him from injury, instead of doing which, while appellee was thus exposed to such danger or probable danger, Monz ordered Saur, who was standing near him, and on the opposite side of the tub from appellee, to turn on the hot water, without ascertaining whether the plate in the covering of the mash tub under the hot-water pipe had been removed, or requiring Saur to remove it. Saur had to go into the adjoining room to turn on the hot water, and at no time after receiving the order from Monz was Saur where he could see or be seen by appellee, and the first intimation that he had of appellee's peril was given by the cry or exclamation of the latter when the hot water struck him.

We are of the opinion that Monz, in thus failing to protect appellee from injury, was guilty of gross negligence, for which appellants are liable. As said by this court in *Southern Railway Co. v. Hart*, 64 S. W. 650: "It is the duty of the servant who takes employment to submit himself to the reasonable demands of his employer, not only as to the work to be done, but as to the manner of doing it; and he has the right to believe that his superior would not require him to perform a dangerous act without ac-

quainting him with the special peril attending its performance." So, in the case at bar, appellee had the right, in attempting to perform the duty required of him by Monz, to rely upon being protected from injury by him during its performance. Saur may have been negligent in turning on the hot water at the time and in the manner in which he did it. If he was performing that duty by order of Monz, it was the duty of the latter to see that it was done in such manner as to prevent injury to appellee, especially as appellee and Saur were so separated as that neither could see the other during the performance of their respective duties. If there were any doubt of the view of the law herein expressed, we would nevertheless have to hold that the case should have gone to the jury, for, in any event, appellee's injuries were caused by the negligence of either Monz or Saur, and in case of doubt as to whether Monz or Saur was the negligent party the court must have submitted the question to the decision of the jury. The question of negligence is a mixed question of law and fact. If disputed, it is the duty of the jury to find the degree; if undisputed, the court determines the question. If it be questionable where the duty rests in a particular case, or which of two parties charged have been guilty of negligence, it should be left to the jury. *Dawson v. L. & N. R. R. Co.*, 4 Ky. Law Rep. 810; *L. S. R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378; *N. N. & M. V. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 14 S. W. 958.

We are of opinion that no error was committed by the lower court in refusing the peremptory or other instructions asked by appellants, and we think those given, with the exception of No. 5, fairly presented to the jury the law of the case; but instruction No. 5, after defining the measure of compensatory damages to be awarded appellee if the jury found for him, allows the finding of exemplary damages in addition. This was error, as this court in recent years has repeatedly held that no recovery of damages will be allowed to an employé against an employer for injuries not resulting in death received through the negligence of a superior in the service of such employer, unless such negligence be gross; and even then the recovery is limited to compensatory damages. *Cinn. N. O. & T. P. Ry. Co. v. Palmer* (Ky.) 33 S. W. 199. But the error contained in the instruction mentioned was not prejudicial, as it is perfectly manifest from the smallness of the verdict that exemplary damages were not allowed. The evidence shows that appellee was confined to his bed for several months by his injuries, that he suffered excruciatingly from the burns received by him, and that his arm will never regain its former strength; and for these injuries, and the permanent impairment of his ability to earn money, the \$600 allowed him by the jury is poor compensation indeed.

Finding no error in the record by which the appellants were or could have been prejudiced, the judgment of the lower court is affirmed.

DINKELSPIEL v. CENTRAL KENTUCKY ASYLUM FOR INSANE et al.

(Court of Appeals of Kentucky. April 23, 1903.)

INSANE PERSONS—SERVICE OF SUMMONS—PHYSICIAN IN CHARGE OF LUNATIC—INQUESTS—JURISDICTION—STATUTORY PROVISIONS.

1. The Code does not require that the summons in an action against a lunatic be served on the physician in charge of such lunatic, unless it appear from the certificate of such physician, attested by the officer serving the summons, that, in his opinion, a personal service would be injurious to the lunatic.
2. Act Jan. 16, 1882 (Gen. St. 1888, p. 751, c. 53; 1 Laws 1881-82, p. 10, c. 55), authorized city or police courts, when no circuit court was in session, to hold inquests in lunacy proceedings.
3. All questions raised on a former appeal, and that were in the record and might have been adjudicated, must be construed on a subsequent appeal as having been adjudicated.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the Central Kentucky Asylum for the Insane against Joseph Schrorer to subject defendant's interest in certain real estate to the payment of his board. Judgment for plaintiff, directing the sale of the property, and confirming the report of sale thereof; and Joseph Dinkelspiel, the purchaser at such sale, appeals. Affirmed.

L. N. Dembitz, for appellant. A. L. Dembitz and G. L. Everback, for appellee Mary Hulsmeyer. Holt & Alexander, for appellee asylum.

NUNN, J. On the 12th day of April, 1900, the Central Kentucky Asylum for the Insane instituted an action in the Jefferson circuit court against Joseph Schrorer, Annie Schrorer, Mary Hulsmeyer, and Mary Hulsmeyer, committee of Joseph Schrorer, and Annie Schrorer, etc., by which it sought to recover of, and subject the estate of Joseph Schrorer for the payment of, \$2,200 for board and necessaries furnished him from the year 1889 to the year 1900; and summons was served upon each and all of the defendants, and also upon Mary Hulsmeyer, committee for Joseph Schrorer. This action was litigated, and on the trial the lower court adjudged that the plaintiff was entitled to \$2,200, and adjudged that Joseph Schrorer's real estate should be subjected to the payment thereof. The appellee and his committee, Mary Hulsmeyer, superseded that judgment, and appealed from it to this court, and that judgment was reversed. See opinion, 68 S. W. 150. This court in that case adjudged that Joseph Schrorer's estate was not responsible for more than \$750, and

that his real estate was bound for the payment thereof. Upon the return of the case to the lower court, it was determined that one piece of his real estate should be sold as a whole; it not being susceptible of division without greatly impairing its value. At the sale it brought the sum of \$1,550, and the appellant herein, Joseph Dinkelspiel, became the purchaser. The commissioner filed his report of the sale the 2d day of November, 1902; and on the 8th day of the same month, on motion of the appellant, the report of sale was confirmed, and the commissioner was ordered to convey to appellant the property purchased by him. On the 4th day of December, 1902, the commissioner executed and acknowledged a deed to appellant for the property, which deed was examined and approved by the court. On the 24th day of February, 1903, the following order was entered in the action: "Came the purchaser, Joseph Dinkelspiel, personally, and suggests his willingness to pay off the purchase bonds herein in the event that the court decides that he can obtain good title to the property purchased by him herein; and, in order that the question of title may be promptly decided, he expressly waives the fact that the bonds are not yet due, and consents that the case may proceed in the same manner as if they were both now due. Thereupon, on joint motion of plaintiff and defendant, a rule is awarded against the purchaser to show cause why he should not pay into court the amount of the purchase bonds, with interest." The appellant entered his appearance to this rule, and filed his response, and claimed that the judgment directing the sale of the property, and the confirmation of the report of the sale thereof, were void, because Joseph Schrorer was not before the court. He offers two reasons why said Schrorer was not before the court: First. That Joseph Schrorer was insane, and confined in the asylum, and that the physician in charge of him was not served with a copy of the process; second, that the order of the county court appointing Mary Hulsmeler his committee was void, because Joseph Schrorer had not been legally declared by any court to be a lunatic, for the reasons that the city court of Louisville had no jurisdiction to try such proceedings, and, even if it had such jurisdiction, the record thereof failed to show affirmatively the personal presence of Joseph Schrorer at the time of the trial, and there were no affidavits of physicians showing his inability to be present.

As to the second reason offered by appellant, we are of the opinion that by an act of the Legislature approved January 16, 1882 (1 Laws 1881-82, p. 10, c. 55; Gen. St. 1888, p. 751, c. 53), the Legislature authorized city or police courts, when no circuit court was in session, to hold such inquests. But even admitting the contention of appellant that the inquest and the appointment of

Mary Hulsmeler as committee by the county court were void, it cannot avail appellant in this case, for the law presumes every person to be sane until the contrary is made to appear, and it appears that the process was duly served upon him.

As to the first reason offered by appellant, we are of the opinion that the Code does not require that the summons be served upon the physician in charge of the lunatic, unless it appear from the certificate of such physician, attested by the officer delivering it, that a personal service, in his opinion, would be injurious to such person of unsound mind. It appears from the record that a summons was served upon Joseph Schrorer and his alleged committee, Mary Hulsmeler, the person having charge of him and his estate, and also that a guardian ad litem was regularly appointed to defend for him. And it also appears from the record and the former opinion of this court in this case that they made a very successful and beneficial defense.

As a further reason why the judgment of the lower court should be affirmed, it may be said that all questions raised on the former appeal, and that were in the record and might have been presented, must be construed as having been adjudicated.

For the foregoing reasons, we are of the opinion that the judgment of the lower court was not void, and is binding upon his estate, and it is therefore affirmed.

HALLAM et al. v. COULTER, Auditor, et al.
(Court of Appeals of Kentucky. April 21, 1903.)

ATTORNEYS AT LAW—LIEN—LEGISLATIVE APPROPRIATION—AUTHORITY OF ATTORNEY—TERMINATION WITH CONTEST—COLLECTION OF APPROPRIATION—IMPLICATION OF AUTHORITY.

1. Under Ky. St. 1890, § 107, giving attorneys a lien upon all claims or demands put into their hands for suit or collection, for the value of their services, and, in case of a recovery, a lien upon the judgment for money or property recovered, a lien does not attach to an appropriation made by the Legislature to reimburse a contestant in an election contest for his expenses therein, in favor of the attorney conducting such contest.

2. Where the authority of an attorney to represent a client in an election contest appeared to have terminated with such contest, authority in him to collect a sum allowed by the Legislature to reimburse his client for his expenses incurred in such contest will not be implied.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by D. R. Allen against Gus G. Coulter, Auditor, etc., and another, in which T. F. Hallam was impleaded. From a judgment in favor of Coulter, Hallam and others appeal. Affirmed.

T. L. Edelen, for appellants. C. J. Pratt and M. R. Todd, for appellees.

SETTLE, J. D. R. Allen and W. H. Collopy were rival candidates at the November election, 1899, for a seat in the lower house of the General Assembly of Kentucky, in and for the Eighty-First Legislative District. Collopy received the certificate of election to the office in question, but his right thereto was denied by Allen, who claimed to have been elected; and he thereupon instituted a contest for the office before the General Assembly upon the meeting of that body, in which contest he was unsuccessful. Upon the termination of the contest, the General Assembly, by an act entitled "An act appropriating money," which became a law on March 23, 1900 (Laws 1900, p. 82, c. 27), duly appropriated to the use of Allen and Collopy the sum of \$250 each, wherewith to pay attorney's fees and other expenses incurred by them, respectively, in the contest. For the \$250 thus appropriated for the benefit of Allen a voucher was issued by the Auditor of the state of Kentucky, payable to the appellant T. F. Hallam, as attorney for Allen, who caused the same to be presented to the Treasurer of the state for payment, and the latter thereupon issued his check, payable to Hallam, as attorney, for the amount named in the voucher; and upon this check the appellant Hallam and associate counsel, Durrett and Green, received out of the State Treasury the entire sum of \$250 appropriated to Allen. The voucher of the Auditor was issued upon the following written order: "Cincinnati, Ohio, April 23, 1900. Hon. Gus G. Coulter, Auditor of Kentucky, Frankfort, Ky.—Dear Sir: In the contested election case of D. R. Allen, contestant, against W. H. Collopy, contestee, for the seat as Representative in the General Assembly from the Second District of Kenton county, please make out check and warrant (when due) for allowance by Assembly for contestant's expenses, so that the same shall be payable to the order of T. F. Hallam, attorney, for D. R. Allen, and deliver same to Pat McDonald. Martin M. Durrett, E. J. Green, Jr., T. F. Hallam, Att'ys for D. R. Allen." After the payment of the above sum to the appellant Hallam, Allen demanded of the Auditor a voucher for the amount appropriated to his use by the General Assembly, which was refused. He thereupon instituted suit in the Franklin circuit court against the Auditor and Treasurer, respectively; in his petition setting forth, in substance, the contest, the appropriation of \$250 made him by the Legislature, and the refusal of the Auditor to issue him a voucher or warrant therefor upon the Treasurer; the petition closing with a prayer for the writ of mandamus to compel the Auditor to issue a warrant upon the State Treasurer for the sum of \$250, payable to him, and directing the Treasurer to pay him that amount upon presentation of the warrant. Joint answer was filed by the Auditor and Treasurer, in which they set up the order from appellant Hallam, the issual of the

warrant by the Auditor to him, and its payment by the Treasurer, and further averred that he and his associate counsel and co-appellants, Durrett and Green, had a lien on the sum appropriated by the Legislature to the payment of the expenses incurred by Allen in his contest, and that the appellants had the right to collect and apply the same to the payment of their fees for legal services rendered him in his contest with Collopy. Thereafter an amended answer was filed by the Auditor and Treasurer, in which it is, in substance, averred that the payment to appellants of the sum allowed Allen by the Legislature was made by them in good faith, and with the belief that the appellants had the authority to receive same as attorneys for Allen. They therefore asked that their answer be made a cross-petition against appellants, and that they be made parties defendant, and required to answer and show what authority they had to collect the sum paid them, and, if they had received the same without right, that they be made to pay it into court, that it might be delivered to whomsoever the court might direct. The appellants filed demurrer to the answer and cross-petition of the Auditor and Treasurer, and with same an answer, in which it was admitted that they received the \$250 in controversy, and, in substance, averred that they, by employment of Allen, represented him in his contest before the Legislature, and that he promised to pay them for their services whatever sum might be appropriated by that body in payment of the expense incurred by him in the prosecution of the contest; that they did perform for him all the services contemplated by their employment, and, in addition, that they engaged the services of officers to execute notices and subpoenas and to take depositions in the contested election case, whose fees were paid by them at Allen's request; and, further, that the appellant Hallam came to the city of Frankfort, and there, before the General Assembly and its committees, represented him in his contest, and paid his (Hallam's) own hotel bills and other necessary expenses while there. The answer also sets out in detail the fees paid and expenses incurred by appellants in the prosecution of the contest, and avers that the value of their services, together with the fees paid and expenses incurred by them, exceeds by \$174 the amount of the appropriation collected by them out of the State Treasury, and they deny the right of the Auditor or Treasurer to recover of them the \$250, or any part thereof. A general demurrer was filed by Allen to the answer as amended of the Auditor and Treasurer, which was sustained by the lower court; and, they falling to plead further, judgment was duly rendered directing the Auditor to issue to Allen a warrant upon the Treasurer for the \$250 in controversy, and the Treasurer to pay the same, upon presentation, out of the State Treasury, and further adjudg-

ing to Allen his costs in the action expended. The general demurrer filed by the Auditor and Treasurer to the answer of appellants to their cross-petition was also sustained, and, the latter failing to plead further, it was adjudged by the lower court that appellees G. G. Coulter and S. W. Hager recover of appellants Hallam, Green, and Durrett \$250, with interest thereon from the 1st day of May, 1900, until paid, and their costs expended. To which judgment appellants excepted, and prayed an appeal, and the case is now before this court upon that appeal.

We are not disposed to question the reasonableness of the fee attempted to be asserted by appellants, nor are we inclined to approve of the conduct of Allen in seeking to withhold from his attorneys the sum appropriated by the Legislature to reimburse him for his costs incurred in prosecuting the contest for a seat in that body, for the appropriation was made, in the main, to enable him to pay his attorneys for legal services rendered him in that contest; but we are called upon to determine the legal rights of the parties as presented by the record, in doing which our only guide must be the law.

Appellants claim to have a lien upon the sum allowed appellee by the General Assembly. If they can have and assert such a lien, it must be under and by virtue of section 107, Ky. St. 1899, which provides that "attorneys at law shall have a lien upon all claims or demands, including all claims for unliquidated damages, put into their hands for suit, or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or, in the absence of such agreement, for a reasonable fee for the services of such attorney, and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee. * * *". The liens allowed by this section relate to claims or demands put into the hands of an attorney for collection, or suit, or to judgments for money or property which may be recovered. It is clear that a lien in favor of an attorney cannot arise, under the statute, out of a contest for office before a legislative body, for in such a proceeding neither money nor property is involved; and, if the office be recovered through the efforts or skill of the attorney, no lien can be asserted by him upon the office, its fees or emoluments, for, under our Constitution and laws, the incumbent of an office may not farm it out, or assign the fees or salary thereof. The contest set on foot by Allen was to recover or secure an office, not an appropriation at the hands of the Legislature. The sum allowed was a mere incident or result of the contest, given by the Legislature not as a matter of right, but as a gratuity to indemnify him against loss or expense incurred by reason of the contest; and, according to parliamentary custom, such

allowances are made to the unsuccessful as well as to the successful party. It is not contended by appellants that they were employed to secure for Allen an appropriation at the hands of the Legislature. Such an employment would have been against public policy, and no compensation could have been recovered by them by reason thereof. The sum appropriated by the Legislature to Allen could not have been attached by appellants before its payment by the Treasurer of the state, and we are of opinion that no attorney's lien was created thereon while it remained in the State Treasury. It is not claimed by appellants that they had any express authority from Allen to collect this claim from the state. And as their right to represent him appears to have ended with the contest, authority to collect or receive the sum thereafter allowed him by the Legislature to defray the expenses of the contest will not be presumed or implied.

The judgment in favor of Allen against the Auditor and Treasurer has not been appealed from, but, for the reasons herein given, the judgment in favor of appellees Coulter and Hager on their cross-petition against appellants is hereby affirmed.

FRANK v. FRANK.

(Court of Appeals of Kentucky. April 23, 1903.)

"Not to be officially reported."

On petition for extension of opinion.

For original opinion, see 72 S. W. 275.

PER CURIAM. There is nothing in the opinion delivered in this case which intimates that the order of the Jefferson circuit court of December 1, 1900, stopping the allowance of alimony from and after the original judgment in the divorce case, should be set aside. On the contrary, we fully approve the entry of that order, and it is in conformity with the former opinion in this case (54 S. W. 195), and which is not disturbed by the judgment upon this appeal.

CITY OF UNIONTOWN v. BERRY et al.

(Court of Appeals of Kentucky. April 23, 1903.)

"Not to be officially reported."

On rehearing. Former opinion extended, and judgment below reversed.

For former opinion, see 72 S. W. 295.

O'REAR, J. On the plat used in the preparation of this case the streets were not designated by names, except Water street and Main. The names that the other streets now bear seem to have been given to them recently. In this way the court was misled as to the correct location of the street which, in the opinion, is denominated "Dewey." As a matter of fact, it develops upon the petition

Street," while Dewey is some squares to the west of Watson.

Applying the principles announced in the original opinion, it results that the judgment of the lower court must be reversed, as that judgment confines the city's right to recover to the line lying west of the line drawn from Dewey street to the river, instead of from the street named in the opinion as "Dewey," but which was and is in fact Watson street, to the river. The cause is remanded for proceedings not inconsistent with the opinion herein.

LANCASTER et al. v. CITY OF OWENSBORO et al.

(Court of Appeals of Kentucky. April 23, 1903.)

MUNICIPAL ELECTION—ISSUANCE OF BONDS—VALIDITY—OPPORTUNITY TO VOTE.

1. The fact that voters residing in territory added to the city before an election for the issuance of bonds were not afforded an opportunity to vote did not invalidate the election.

"Not to be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 72 S. W. 731.

O'REAR, J. The question that because the voters residing in the territory added to the city in July before the election were not afforded an opportunity to vote invalidated the election in this case is presented in the petition for rehearing for the first time in this case. The court declines to recede from the opinion heretofore announced. Although the facts involved in that part of appellants' pleading are not denied, the court is of opinion that, taking them as true, they do not constitute a cause against the validity of the election. This question was fully considered and disposed of by the opinion in *O'Bryan, Clerk, v. City of Owensboro (Ky.)* 68 S. W. 858, to which we adhere.

Petition overruled.

BUSH v. LOUISVILLE TRUST CO. et al.

(Court of Appeals of Kentucky. April 22, 1903.)

MORTGAGES—FORECLOSURE—PERSONAL JUDGMENT—SUFFICIENCY OF PETITION—DEMURRER—APPEAL—COSTS—STATUTORY PROVISION.

1. In an action to foreclose a mortgage and to obtain a personal judgment against the mortgagor and two subsequent grantees, the petition averred, on information and belief, that the first grantee, who had assumed the mortgage, made a deed transferring said property to defendant, the second grantee; "that said deed has not been recorded, and plaintiff is not advised as to the terms thereof; that by reason of an agreement of said defendant, made in said deed, he is also liable for the debt due plaintiff, as set up herein." Held simply a conclusion of the pleader, and insufficient to

occasioned by appellant's failure to file a demurrer to the petition he is required to pay the same.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the Louisville Trust Company against W. P. D. Bush and others to foreclose a mortgage and recover a personal judgment for the debt. From a personal judgment against him by default, defendant Bush appeals. Reversed.

Simrall & Doolin, for appellant. W. W. & J. R. Watts, for appellee Louisville Trust Co. W. W. Thum, for appellee Joseph Huffaker. H. L. Stone, for appellee city of Louisville. T. W. Bullitt, for appellee Fidelity T. & S. V. Co.

PAYNTER, J. Joseph Huffaker executed seven promissory notes, for \$500 each, to the appellee Louisville Trust Company, and to secure which he executed a mortgage on certain real estate. Subsequently he sold and conveyed the property to D. E. Caulton. By the terms of the deed, Caulton agreed to pay the debt due the trust company. Afterwards Caulton conveyed the property to the appellant Bush. This action was instituted by the appellee Louisville Trust Company, in which it sought a personal judgment against Huffaker, Caulton, and Bush, and the sale of the property to satisfy the mortgage debt and other debts against the property. The record shows that the court properly entered a judgment enforcing the lien upon the property to satisfy the debts against it. The judgment was rendered by default.

The appellant seeks to reverse the personal judgment against him upon the ground that the petition did not aver facts which authorized the court to render it. The averments which were made as a basis for the personal judgment against him are as follows: "Plaintiff says that thereafter, as plaintiff is informed and believes, the defendant Caulton made, executed, and delivered a deed transferring and conveying said property to the defendant W. P. D. Bush; that said deed has not been recorded, and plaintiff is not advised as to the terms thereof; that, by reason of an agreement of said Bush made in said deed, he is also liable for the debt due plaintiff as set up herein." It will be observed that it is averred that the deed to Bush has not been recorded, that plaintiff is ignorant of its terms, and that, by reason of an agreement of said Bush made in said deed, he is also liable for the debt due plaintiff. The plaintiff not only fails out the terms of the deed which would that Bush was personally liable for the debt due it, but says that it is ignorant of the terms of the deed. The averment v

lows is simply a conclusion of the pleader, not the statement of the terms of the agreement which would make Bush personally liable for the debt. When all the averments are taken together, they show that the plaintiff did not even know what, if any, agreement Bush had made with reference to the payment of plaintiff's debt. The plaintiff was not entitled to a personal judgment against Bush on the averments.

The appellant failed to file a demurrer to the petition, and the cost of this appeal was occasioned by his failure to do so; and under subsection 2, § 98, Civ. Code Prac., the appellant is required to pay the cost of this appeal. *Moore v. Moxey's Adm'r* (Ky.) 39 S. W. 420; *Davis v. Same*, Id. 1116.

The personal judgment is reversed for proceedings consistent with this opinion.

JACKMAN et al. v. JACKMAN.

(Court of Appeals of Kentucky. April 23, 1903.)

WILLS—JOINT DEVISE—DEATH WITHOUT ISSUE—SURVIVORSHIP—DEATH SUBSEQUENT TO TESTATOR—EFFECT.

1. Ky. St. 1899, § 2342, declares that, unless a different purpose appears, every estate created without words of inheritance shall be deemed a fee simple, or such as the grantor or testator had power to dispose of. Testator devised certain realty to his three children in equal shares, providing that, if either should die childless, then his or her share at the death of the surviving one or two should descend to his heirs. One died childless after testator. Held, that the clause as to survivorship would be construed as contemplating a death before testator, and hence the deceased child took an absolute estate, which passed to her heirs.

Appeal from Circuit Court, Barren County.

"Not to be officially reported."

Action by E. G. Jackman and others against J. L. Jackman. Judgment for defendant, and plaintiffs appeal. Reversed.

Baird & Richardson, for appellants. W. L. Porter, for appellee.

BURNAM, C. J. This is an appeal from a judgment of the Barren circuit court construing the tenth clause of the will of William Jackman, and the codicil changing the provision made therein for his daughters Sarah Elrado Jackman and Pocahontas Page and his son John L. Jackman. It reads as follows:

"To my daughter Sarah Elrado and my son John Jackman and my daughter Pocahontas Page, I devise and bequeath in equal shares the farm upon which I now reside, containing about 225 acres, and also in like manner the tract of land adjoining the home tract which I bought of Dora Hulsey, containing sixty acres, more or less. * * * If either of said children should die childless, then his or her share in the land at the death of the surviving one or two shall descend in equal shares to all the heirs to my estate."

"Codicil. Since making the foregoing will, it now seems best that I make a change in

item 'ten,' in this, that therein I bequeathed certain lands to my daughters Sarah Elrado Jackman and Pocahontas Page, and my son John L. Jackman, altogether, I now direct by way of codicil that Elrado's share, or one third in value of all the land described in said item ten, be laid off so as to include my residence and buildings, and John's share must be laid off next to and adjoining said Elrado's share, so that these two shares may be used together, if said devisees see fit to do so, and Pocahontas the other one third."

Sarah Elrado, John, and Pocahontas divided the land devised to them as directed by the codicil, and the executors of testator conveyed to Sarah Elrado 92 acres thereof, including the residence, buildings, etc., in compliance with the stipulations of the will, on the 10th of November, 1899. Sarah Elrado died childless in 1901. After her death the appellee, John L. Jackman, took possession of the land allotted to her, and claimed that it belonged to him during his life, and this action was brought against him by his brothers and sisters and the children of those who were dead for a sale thereof, and a division of the proceeds according to their respective rights; and they also asked that appellee be charged with rents thereof from the time he took possession after the death of this sister. A general demurrer was interposed by John L. Jackman, which was sustained by the circuit court, and the petition dismissed, and the plaintiffs have appealed.

The settled policy of this state has been to favor the vesting of titles. Early in its history the following statute was enacted, now found as Ky. St. 1899, § 2342: "Unless a different purpose appear from express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such estate as the grantor or testator has power to dispose of." In *Ferguson, etc., v. Thomason*, 87 Ky. 520, 9 S. W. 714, the court had under consideration a clause in the will of testator which reads as follows: "If any of my children should die without children or heirs of their body, the estate above devised to them shall be equally divided between my surviving children and the heirs of those who have died in equal shares." And it was held that each of the children of testator took his share in fee, subject to be defeated only in the event of his death before the testator; the court saying: "Where a devise is made to several as a class, with words of survivorship annexed, and the gift as to enjoyment is to take effect immediately upon the decease of testator, the rule is to refer the words of survivorship to that event, and consider them as intended to provide against the contingency of the death of the devisee during the lifetime of the testator." In the recent case of *Lewis v. Shropshire, Trustee* (Ky.) 68 S. W. 426, a testator devised his entire estate to his wife for life, and directed that at her death it be equally divided among his seven children. By a

subsequent clause of the will he provided that, if any of his children should die leaving no heirs or heirs of their body, that their portion of the estate should be equally divided between his grandchildren. His land was divided at the death of his widow, and 25 acres of land allotted to his daughter Elizabeth, who sold it to Shropshire. She subsequently died, having no children, and suit was brought to recover the land for the purpose of having it sold, and the proceeds distributed under the last clause of the will. In that case it was held that, as Elizabeth Stevenson survived her mother, her interest in the land ripened into a fee simple. And the rule announced in that case was followed in *Baxter v. Isaacs* (Ky.) 71 S. W. 907, and is supported by numerous other decisions there cited. We are therefore of the opinion that Sarah Elrado Jackman took under her father's will a defeasible fee, subject to be defeated by her death without leaving issue before her father. As she survived him, she became invested with the complete fee-simple title, which at her death passed to her heirs at law.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent herewith.

ESTEP et al. v. ESTEP et al.

(Court of Appeals of Kentucky. April 21, 1903.)

INFANTS—DEEDS—DISAFFIRMANCE—SUBSEQUENT DEED TO THIRD PARTY—SETTING ASIDE.

1. In 1888 decedent deeded land to his son for the recited consideration that the son should care for and support father, mother, and an idiotic sister during their natural lives. The land was of little value. The son owned another piece of land from which the father sold 96 poplar trees, receiving \$1 per tree, and also a few walnut trees. In 1889, when the son was 16 years of age, he attempted to reconvey to his father. In 1894, on reaching the age of 21, he renounced the deed and conveyed the land to his codefendant. In 1895, just before the father's death, it was proved by several witnesses, and uncontradicted, that he stated he knew the deed made to him by his son was invalid, and that he wanted the son to have the land, etc. Held proper to refuse to set aside the deed from the son to his codefendant.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Daniel B. Estep and others against William F. Estep and others. Judgment for defendants, and plaintiffs appeal. Reversed.

J. M. Roberson and Roscoe Vanover, for appellants. J. F. Butler and N. J. Auxier, for appellees.

NUNN, J. On the 27th day of July, 1900, the plaintiffs, as the heirs at law and real representatives of one John Estep, deceased, instituted this action in the Pike circuit court against the appellees, asking that they be adjudged the owners and entitled to the possession of the land described in their petition,

and that the deed from the appellee Godfrey J. Estep to his co-appellee William F. Estep be canceled, and that the appellants be adjudged the owners thereof, and that the deed from John Estep, deceased, to the appellee William F. Estep be corrected so as to convey the boundary of land actually sold to appellee William F. Estep by the decedent, John Estep, in the year 1892, claiming that, by either fraud or mistake, there was included in the boundary given in the deed much more land than was intended to be conveyed therein. The piece intended to be conveyed was and is bounded as follows: "Beginning at the point at the lower side of a hollow, and running up the point on the lower side of the hollow with Lizzie McCoy's line to the back line on to Martha Dodson's line; thence with Martha Dodson's line to the bed of Peter creek, and with the bed of Peter creek to the beginning." That the parcel of land included in the deed by fraud or mistake is on the other side of Lizzie McCoy's land. The piece intended to be conveyed and the piece not intended to be conveyed are separated by the land of Lizzie McCoy.

According to the deposition of George W. Dodson, Jr., and other evidence which is uncontradicted, except in a manner by the appellee William F. Estep, the parcel of land above that of Lizzie Dodson, included in the deed above referred to, was so included without the knowledge or consent of John Estep, now deceased, and by the fraud of appellee; and the lower court erred in not so adjudging.

The deed from John Estep to his son Godfrey J. Estep was executed in 1888, for the recited consideration that his son Godfrey should care for and support his father, mother, and his idiotic sister during their natural lives. This, from the evidence, was an unconscionable consideration, as the land was of a very little value. He (Godfrey) owned another piece of land conveyed to him by one Blankenship, from which his father sold 96 poplar trees, and received the price of \$1 per tree, and also sold a few walnut trees. In 1889, when Godfrey was 16 years of age, he attempted to reconvey this piece of land to his father. In 1894, after he arrived at the age of 21 years, he renounced the deed which he had made to his father, and conveyed the same piece of land to the appellee William F. Estep. In 1895, and just before the death of John Estep, it is proven by several witnesses, and not contradicted, that he stated that he knew the deed Godfrey had made to him in infancy was invalid, and stated that he wanted Godfrey to have that piece of land which he had conveyed to him, and made arrangements for his widow to remove to and live upon another tract of land, and to surrender that piece of land to Godfrey after his death.

In view of these facts, and the fact that John Estep received the price of the timber sold off of Godfrey's other piece of land, and

that Godfrey was his child, we are disposed to believe that the lower court was right in not setting aside this deed.

For these reasons, the case is reversed, and the cause remanded for further proceedings consistent with this opinion.

CENTRAL COAL & IRON CO. v. WALKER'S EX'X.

(Court of Appeals of Kentucky. April 21, 1903.)

CORPORATION—PRESIDENT—INCUMBRANCE OF REALTY—ACQUIREMENT OF INDIVIDUAL INTEREST—ESTOPPEL.

1. Where one, as president of a corporation, conveys its entire realty to a trustee to secure a debt, and then acquires, as an individual, an outstanding interest, after which the corporation conveys its equity to a second company, which assumes the debt, he is estopped to set up his individual interest as against the second company.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by E. D. Walker's executrix against the Central Coal & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed.

H. P. Taylor, for appellant. J. E. Fogle, for appellee.

BURNAM, C. J. Prior to the 24th day of June, 1870, John Maddox died the owner of a tract of 117 acres of land lying in Ohio county on the waters of Lewis creek, a branch of Green river, which descended to his eight living children and the three children of his daughter Sarah Southard, who died before her father. About that time E. Dudley Walker and others organized a corporation called the Render Coal, Iron, Mining & Manufacturing Company, which company bought the interest of the eight living children in the 117 acres, and also the interest of two of the three children of Sarah Southard. The third, Amelia Southard, had married Thomas Ashby, and died leaving, surviving her, two children as her only heirs at law, W. P. Ashby and Sarah Elizabeth Ashby, who subsequently married Thomas Jones, both of them being infants at the time the Render Company bought out the interest of the other heirs at law. This purchase was made under the advice and through the agency of E. Dudley Walker, who was the acting attorney for the corporation. After the purchase the company took possession of the entire tract of 117 acres of land, laid out and incorporated thereon the town of Hamilton, and subsequently sold and conveyed through Walker, its then president, lots therein to Archibald Pollock and others. On the 27th of March, 1880, the Render Company, through E. D. Walker, its president, pursuant to a resolution of the stockholders of the company, conveyed in fee simple divers tracts of land owned by it, including the 117 acres purchased of the heirs of John Maddox, to L. C. Mur-

ray, as trustee, to secure the payment of 30 negotiable bonds for \$500 each, bearing interest at the rate of 6 per cent. per annum, which were issued and sold by the company. On the 21st day of September, 1881, the Render Company sold and conveyed by general warranty deed to the Central Coal & Iron Company, a corporation organized under the laws of this state, all the property owned by it, including the 117 acres of land purchased of the heirs of Maddox, in consideration of 600 shares of \$100 each in the new company, and the assumption by the new company of the indebtedness of the Render Company, including the 30 bonds of \$500 each. A short time previous to this transfer, E. D. Walker, not desiring to go into the new corporation, sold his stock in the Render Company. On the 19th day of August, 1880, whilst E. Dudley Walker was acting as president of the Render Company, he purchased from W. P. Ashby and Sarah E. Jones, children of Amelia Southard Jones, their one twenty-seventh interest in this tract of land for \$200, and had the title thereto conveyed to himself as an individual. No reservation, however, of this interest was made either in the mortgage made to Murray or the deed to the Central Coal Company. A few months after the sale to the Central Coal & Iron Company, Walker notified them that he claimed to be the owner of this interest in the 117-acre tract, and proposed to sell it to them, but the company declined to buy, upon the ground that he had no valid title thereto. Some 12 years afterwards, on the 7th day of March, 1893, he instituted this suit, claiming to be the owner of this one twenty-seventh interest in the 117-acre tract of land by virtue of this purchase from W. P. Ashby and his sister, and asked that it should be allotted to him contiguous to another tract of land owned by him. The company, in their answer, after denying Walker's right to recover, plead the statute of limitations, and set out in substance the facts recited supra as to the plaintiff's connection with the company, and plead that he was estopped thereby. It appears from the deposition of James A. Thomas, the only surviving incorporator of the Render Company, that the company immediately took possession of the entire tract of 117 acres of land, claimed and used it as their own, and paid the taxes thereon, although he admits that he understood that there was some small interest in this tract of land which the company did not acquire by their original purchase, but that he understood that it was subsequently acquired; that during all this time Walker was a director of the company and its principal attorney, and for a greater part of the time the president; and that after the purchase by the Central Company they held the property in the same way.

An officer of the corporation cannot acquire an interest in land in the possession of the corporation so as to divest the possession of the corporation, and it seems to us that

the plea of the statute of limitations should have been sustained. But even if we are wrong on this proposition, it is perfectly clear that Walker and his heirs at law are estopped from asserting claim to any part of this tract of land in the hands of the Central Coal Company, after he had himself, as president, conveyed the entire tract of land to Murray in trust to secure the payment of bonds issued by the company, and which the Central Company thereafter assumed to pay. It is true that in the reply filed in this case it is claimed that Walker bought this interest in the land with the knowledge and consent of the company; but this plea is not supported by any proof, and is in direct conflict with his own conduct as attorney, director, and president through a long series of years. If he had any valid claim growing out of this transaction, it was against the old Render Company, and should have been asserted prior to its final dissolution.

For the reasons indicated, the judgment is reversed and cause remanded, with instructions to dismiss the petition of appellee.

WIGGINS et al. v. JACKSON et al.

(Court of Appeals of Kentucky. April 21, 1903.)

SALE OF STANDING TIMBER—STATUTE OF FRAUDS—SUIT TO ENJOIN TRESPASS—POSSESSION.

1. Standing timber is a part of the realty within Ky. St. § 470, subsecs. 6, 7, so that a sale thereof, not being in contemplation of immediate separation from the soil, the contract not being in writing, is void.

2. Under Ky. St. § 2361, providing that the owner of land may maintain the appropriate action to restrain any trespass thereto, though he may not have the actual possession of the land at the time of the commission of the trespass, the petition need not allege that he had the actual possession.

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Jarvis Jackson and others against Jack Wiggins and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

James Sparks, for appellants. H. C. Hazelwood, for appellees.

O'REAR, J. Jarvis and Mamie Jackson, infants, by their guardian, A. R. Dyche, by parol contract sold the standing timber on a certain tract of land in Laurel county to S. F. Jackson. The timber was not branded, or otherwise identified than by specification of the character and size of the trees to be taken. The vendee was to have two years from the date of the contract to remove the timber. He paid \$112 on the purchase price, but died shortly thereafter, and before any of the timber was cut. Subse-

quently his administrator disclaimed liability for the remainder of the purchase money, relying upon the invalidity of the contract, because it had not been reduced to writing and signed by the parties to be bound thereby. Dyche, guardian, settled with him the purchase money that had been paid. Thereafter the timber was sold to others by the guardian, acting, so it is said, under a decree of the Laurel circuit court authorizing the sale for the purpose of maintenance and education of the wards. Appellants, claiming to be the vendees of S. F. Jackson, started to enter upon the land and cut and remove the timber, when Dyche, as guardian, and his wards, brought this action and obtained an injunction against the threatened trespass. The circuit court on final hearing perpetuated the injunction.

Standing timber is a part of the realty. It was not sold in contemplation of immediate separation from the soil, and therefore the case is not within the rule announced by this court in *Cain v. McGuire*, 13 B. Mon. 341, and *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am. Dec. 481.

The contract, not having been reduced to writing and signed by the parties to be bound, was void. Ky. St. § 470, subsecs. 6, 7.

Appellants complain that the judgment should not have been rendered in favor of appellees because of alleged defect in the petition. The petition avers that the infant plaintiffs "are the joint owners in fee simple and in the possession of the land in controversy." Appellants' complaint is that, under *Hillman v. Hurley*, 82 Ky. 626, the allegation should have been that the plaintiffs were in the actual possession of the land. Such was the statute at the time the opinion in *Hillman v. Hurley* was rendered, but the present statute is (section 2361, Ky. St.): "The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespass or other injury thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass."

The judgment of the circuit court is affirmed.

WILLIAMS' ADM'R v. SOUTHERN RY. IN KENTUCKY.

(Court of Appeals of Kentucky. April 22, 1903.)

RAILROADS—INJURY TO TRESPASSER—MALICIOUS ACT OF BRAKEMAN—PUSHING BOY OFF CAR.

1. A railroad was liable for the malicious act of its brakeman in pushing a boy off a moving freight car, if such act was done "in the line of his employment and while acting within the scope of his authority," though it was not done "in the interest and business" of the company.

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 117.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by John H. Weller, as administrator of Robert Williams, deceased, against the Southern Railway in Kentucky. From a judgment for defendant, plaintiff appeals. Reversed.

Matt O'Doherty and A. Y. Bizot, for appellant. Humphrey, Burnett & Humphrey, for appellee.

BURNAM, C. J. This suit was instituted by the appellant, John H. Weller, as administrator of Robert Williams, against the appellee, the Southern Railway in Kentucky, for damages for having caused the death of his decedent. The petition alleges in substance that plaintiff's intestate, a boy of about 15 years of age, was on top of one of defendant's freight cars, which was being hauled through the city of Louisville; that one of the defendant's agents in charge of the train wrongfully pushed or threw him from it to the ground below; and that the fall so bruised and injured him that he shortly thereafter died. The defendants in their answer, which is in two paragraphs, first traverse all of the affirmative averments of the petition, and deny that the boy was thrown from the car at all. The second is a plea of contributory negligence.

Upon the trial three witnesses were introduced, who claimed to have seen plaintiff's intestate on the car and to have witnessed his fall therefrom. Two of these, Mesdames Lofler and Kurtzinger, were introduced by the plaintiff. They testified, in substance, that on Saturday, the 17th of March, 1900, between 3 and 4 o'clock in the afternoon, they were walking on the railway track near Greenwood avenue, in the city of Louisville; that a freight train, composed exclusively of box cars, passed the place where they were, going north towards Broadway; that as the train approached them they stepped off the track; that, whilst the train was passing, they saw three boys running along the top of one of the cars which composed the train, and one of the defendant's employés in pursuit of them; that the trainman overtook the last boy and knocked him off the train, saying, "You d— son of a b—, I have been telling you I would kill you if you did not keep off this train"; that when he fell to the ground he lay perfectly still for a few moments, and finally got up, crying, and said he was hurt in the side; that he staggered down the track in the direction of his home, being joined in a short time by the other two boys; that they recognized this boy as Robert Williams; and that he died on the 23d day of March thereafter.

The defendant introduced as a witness James Robertson, who testified in substance that the deceased, Robert Williams, and himself boarded one of the defendant's freight

trains near Weber's Bend, and rode over to Broadway on Sunday after St. Patrick's Day, which was the 18th of March; that he got on top of the car, but that Williams was standing on the side ladder near the front end of the car, holding on with one hand, and in some way he lost his hold, and fell to the ground, near Broadway; that he immediately jumped down from the top of the car and picked him up, and assisted him down to a distillery, from which point Williams went straight home; that none of the train employés knocked or threw him from the train, or were anywhere near him at the time of the fall, nor did anyone threaten or curse him. He also testified that he and Robert Williams had been in the habit of boarding defendant's freight trains and stealing rides in this manner. The physician who attended deceased testified that he died from "spinal meningitis," but that this disease could be produced by a blow or shock such as is alleged the deceased received in being thrown from the car. Numerous other witnesses were introduced with a view of impeaching the testimony of this witness, and the other two for plaintiff, but their testimony is not important in the determination of the questions of law raised by this appeal.

The trial resulted in a verdict for the defendant, and the plaintiff has appealed, relying for reversion upon errors in instructions Nos. 1 and 2 which were given to the jury, and which are as follows:

"(1) If the jury believe from the evidence that Robert Williams was riding upon one of the cars of the defendant, the Southern Railway Company in Kentucky, at the time complained of herein, and that while so riding he was thrown or pushed from said car by one of the servants or employés of the defendant in charge of said cars, and by reason thereof was injured to such an extent that death resulted therefrom, they should find for the plaintiff, unless they believe from the evidence that the act of such employé or servant was malicious, and not done in the interest and business of the defendant.

"(2) If the jury believe from the evidence that Robert Williams was not riding upon one of the cars of the defendant at the time complained of herein, or that while so riding he was not thrown or pushed from said car by one of the employés or servants of the defendant in charge of said cars, or that the act of such employé or servant in throwing or pushing said Williams from said car was malicious, and not done in the interest and business of the defendant, or that the death of Robert Williams was not caused by the injuries, if any, received by him by being thrown or pushed from said car, they should find for the defendant."

In both of these instructions the jury were told that if the act of the servant was malicious, and not in the interest and business of the defendant, no recovery could be had. And we are referred to Smith v. L. & N. R. R.

Co., 95 Ky. 16, 23 S. W. 652, 22 L. R. A. 72, and Illinois Central R. R. Co. v. West (Ky.) 60 S. W. 290, as authority for this qualification of defendant's liability for the malicious act of a servant committed in the course of his regular employment. The opinions in the cases referred to do not support this contention.

In the case of *Smith v. L. & N. R. R. Co.*, 95 Ky. 16, 23 S. W. 652, 22 L. R. A. 72, the plaintiff, a minor, charged that one of defendant's agents or servants kicked or threw him off of its train, thereby breaking his arm and causing other serious injuries. The defense in that case was that the brakeman charged with throwing plaintiff off the train had no authority in the premises, and the court instructed the jury that: "If the brakeman was not charged or required, as part of his duty under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant." The jury found for the defendant, and upon appeal to this court the judgment was reversed, the court saying: "We are of the opinion that the only question under the pleadings and proof which should have been submitted to the jury was whether the brakeman kicked the plaintiff from the train." And quoted with express approval from the opinion in *Hoffman v. New York Central and Hudson River R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, as follows: "But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of 8 years from the platform of the car while the train is running at a speed of 10 miles an hour, he can be said to be acting within the scope of his employment so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless, and illegal, but the point is, was the act within the scope of the employment and authority? In this case the authority to remove plaintiff from the car was vested in defendant's servants; the wrong consisted in the time and mode of exercising it. * * * In all cases where unnecessary force is used, it may be said that the servant acted without authority, express or implied. It can be truthfully claimed in all cases and by all companies that the authority of their servants is limited to the exercise only of force sufficient to eject the passenger in a lawful manner. Nevertheless the company is liable if the servant, in the exercise of his authority within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would seriously injure the person ejected. * * * We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off, and whether he did so without malice or evil design as above indi-

cated. Upon the determination of these issues depend the question of the company's responsibility for plaintiff's injury." And the judgment in favor of the defendant in that case was reversed.

In *Illinois Central R. R. Co. v. West*, appellee had recovered a judgment against the Illinois Central Railroad Company for personal injuries in being thrown or kicked from a moving train of appellant by one of the brakemen employed on it. The company appealed, and sought to escape liability on the ground that the brakeman's act was malicious, and not done in the master's interest and business, and for this reason the company was not liable. Their contention was denied, and the judgment of the lower court affirmed, the court holding that the act of the servant was within the general scope of his employment and authority and in the line of his duty.

In *Thurman v. L. & N. R. R. Co.* (Ky.) 34 S. W. 893, a negro boy 13 years of age, with two companions, crawled under a freight car of appellee, and got on a truss rod, and, while thus riding, they were discovered by one of the defendant's brakemen, who pushed him off while the car was in motion, and he lost an arm and a leg as a result thereof. A trial before a jury resulted in a verdict for the defendant. Upon appeal, this court said: "The boy was a trespasser; nevertheless the trainman might not eject him from the train when to do so would probably endanger his life or even cause him to be injured. If the trainman pushed the boy off the train or caused his fall therefrom, as charged, the law permits a recovery, and if they did not the law is for the defendant. There was nothing else to go to the jury, as it is well settled in numerous cases that, in spite of his wrongful conduct, the trespasser does not forfeit his life or subject himself to loss of limbs without redress."

In the case of the *Lexington Railway Company v. Cozine* (Ky.) 64 S. W. 848, the question was whether the railway company was liable in exemplary damages for the willful, malicious, oppressive, or insulting act of one of its conductors, although it had not previously authorized or subsequently ratified it. After a careful review of the authorities the court reached the conclusion that, while the question was not free from difficulty, the great weight of authority held the master liable for malicious action of his servant when acting in the line of his duty within the scope of his authority.

Appellee's trainman was acting within the scope of his authority and in the line of his duty in requiring decedent to get off the train, and, if his conduct in the discharge of this duty was brutal and reckless, this fact does not relieve the company from liability for his acts committed in the course of his employment. We are therefore of the opinion that the instructions were erroneous and misleading in the use of the words, "not

oftentimes it would be impossible to show who did the killing but for the dying declaration of the party killed; but this is a general necessity, and has no reference to the exigencies of the particular case. The principle being once established as a rule of evidence, such declarations are admissible in every case where they are otherwise competent, without reference to the number of witnesses who may depose as to the facts of the killing. It is true that in the case of *Collins v. Commonwealth*, 12 Bush, 271, the court, in the opinion, uses some general language, which seems to give support to the contention that the admissibility of dying declarations depends on the necessities of the particular case. The exclusion of the dying declaration in the case cited, however, was not based upon this ground, but another, the soundness of which cannot be questioned. If such declarations were admissible only upon the necessity of the particular case, it would follow that the court would be forced to require the commonwealth's attorney to produce all of the state's evidence before the dying declaration could be heard; for, until that was done, it could never know whether or not the commonwealth possessed sufficient evidence to establish the killing without the dying declaration, and it would throw upon the court the burden of deciding in each case whether or not the commonwealth had sufficient evidence to establish the killing without the declaration, thus making the judge decide the weight to be given the commonwealth's testimony. In the case of *Luker v. Commonwealth* (Ky.) 5 S. W. 354, in discussing this question, the court said: "We do not understand the rule to have been heretofore so interpreted and applied by this court as to make dying declarations competent evidence of the act of killing and identity of the guilty party only when there is no other testimony relating thereto; nor do we perceive the reason for such restriction, for it often occurs that the testimony of living witnesses is contradicted and discredited, as was attempted in this case." But the trouble we see in permitting the paper containing the dying declaration in this case to be read to the jury is that it had not been signed by the decedent, or read over to him, or in any way recognized by him after it was written. In the case of *Saylor v. Commonwealth*, 30 S. W. 390, in speaking of written dying declarations, this court said: "It is not necessary that the writing should be sworn to by the deceased. If it is signed by him, it is sufficient." In the *Am. & Eng. Encycl. of Law* (2d Ed.) volume 10, p. 891, the rule is thus laid down: "Even though the declarations have been reduced to writing, the writing is a mere memorandum, and is not competent evidence of the declarations if it was neither signed by the deceased nor read over to him." Citing *Anderson v. State*, 79 Ala. 5, *State v. Fraunburg*, 40 Iowa, 555, *State v. Sullivan*, 51 Iowa, 142, 50 N. W. 572, and *Allison v. Commonwealth*, 99 Pa. 17. It

seems to us that, where a dying declaration is made, as in this case, by one so weak as to speak with great difficulty, and it is reduced to writing, it should have been read over to him as a whole, and assented to by him, and either signed by or for him, before it becomes admissible as his dying declaration. An amanuensis, under such circumstances, is more than ordinarily liable to error, and it seems only fair to the defendant that, before such a paper is read to the jury as the dying declaration of the deceased, he should have given some recognition or assent to it as a whole. But, while the paper in question may not, for the reasons given, be read to the jury as a deposition, the witnesses who heard the declaration may testify orally as to what was said by the deceased, and the witness who wrote down the words may refresh his memory by a reference to the memorandum made by him. Wherefore the case is reversed for proceedings consistent with this opinion.

HALE v. HALE.

(Court of Appeals of Kentucky. April 22, 1903.)

DIVORCE—ABANDONMENT—EVIDENCE.

1. Evidence in a suit by a husband for divorce held not such as to convince the court, on appeal, that the chancellor erred in holding that it did not satisfactorily show that defendant's leaving plaintiff was without the fault of plaintiff.

Appeal from Circuit Court, Russell County.

"Not to be officially reported."

Suit by W. T. Hale against Laura Hale. Decree for defendant, and plaintiff appeals. Affirmed.

Garnett & Garnett, for appellant. Lilburn Phelps, for appellee.

HOBSON, J. Appellant brought this suit to obtain a divorce from his wife, Laura Hale. In his original petition he alleged that in November, 1900, she falsely charged that she had been seduced by him, and that she was then with child, and that he was the father of the child, and threatened to prosecute him on the charge of seducing her, a female under 21 years of age, under promise of marriage, threatening that she would swear enough to convict him, and he would have to serve a term in the penitentiary; that other members of her family made like threats; that by reason of these things, though he was not guilty of the charge, to avoid being arrested and put in jail he suffered himself to be married to her; that soon after they were married she confessed that he was not the father of the child, and had not seduced her, but that she had been seduced by another, who was the father of the child, and since that time he had had nothing to do with her, except he offered to support her, provided she would live at a house he furnished her, but she refused to

live there. He alleged that the marriage was obtained by force, fraud, and duress, and that the defendant's conduct had been so lewd and lascivious as to prove her unchaste, and that since she married him she had been keeping the company of other men. It was alleged that the wife was an infant. She denied the allegations of the petition. On February 22, 1902, the plaintiff filed an amended petition, in which he charged that the wife had abandoned him, and voluntarily lived apart from him, without fault or wrong on his part. The case was after this submitted, and the court entered a judgment to the effect that the plaintiff's petition and amended petition were not sustained by the proof, and therefore dismissed the action at his cost.

The judgment of the chancellor on the facts in cases of this character is given considerable weight, and is not disturbed where, on the whole case, the court is in doubt as to the truth. The proof showed that the husband is 24 years of age, and the wife under 21; that they resided not far apart in Russell county, and were married on November 27, 1900. Some seven or eight weeks before this she had given birth to a bastard child. After their marriage they came to the house of the plaintiff's father, and lived there one week, when, on a rainy day in December, the wife took her baby in her arms and walked to her father's house, some distance away. Soon after this the original petition in this case was filed, attacking the wife's character for chastity, and charging her with lewdness. No proof is offered of these charges, and no greater cruelty can be shown a wife than unfounded charges of this sort. No cause is assigned for the wife's taking up her baby and walking home in the rain, except so far as it may be inferred from the circumstances surrounding the parties. But in view of the allegation of the petition as to how this marriage was obtained, filed so soon after the separation, we are not prepared to say that the chancellor erred in holding that the evidence failed to satisfy the court that her leaving was without the fault of the plaintiff.

Judgment affirmed.

KELLER et al. v. FERGUSON et al.

(Court of Appeals of Kentucky. April 22, 1903.)

ELECTION CASE—APPEAL BOND—SIGNING BY APPELLANTS.

1. Under the election law (Acts Ex. Sess. 1900, p. 40, c. 5, § 12), providing that either party may appeal by giving bond to the clerk of the circuit court, with good surety, conditioned for payment of all costs and damages of the other party from the appeal, it is not necessary that appellants sign the bond.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

Proceeding between J. W. Keller and others and A. L. Ferguson and others. From

73 S.W.—50

the judgment Keller and Motion to dismiss was denied for rehearing. Petition denied.

J. R. Morton, J. B. Finney, for appellants. Jno. Kelly, for appellees.

BARKER, J. In the case of the petition for a rehearing, we examined the record, and we are of the opinion. It is urged to dismiss the appeal of the appellants because of a failure to execute the bond required. It should have been sustained. It is as follows: "Either party, on the judgment of the circuit court of Appeals, by giving bond to the circuit court, with good surety for the payment of all costs and damages the other party may sustain on appeal, and by filing the record in the office of the Court of Appeals, within ten days after the final judgment of the circuit court." Acts Ex. Sess. 1900, p. 12. In the case of Patterson v. W. 47, it was held that the bond to the clerk of the circuit court made a condition precedent to the appeal, and, unless complied with, the appellant has no standing in the case by the appellants' allegation for a rehearing. While all the appellants signed the body of the bond as required, it did not sign it, yet it is made a condition, and is conditioned for the payment of costs and damages accruing to the reason of the appeal. It was necessary for the appellants to sign the bond, and a surety should have been given, conditioned as by law, for the benefit of all the appellees. The bond, as made, is not done, and is a substantial violation of the statute.

The petition is overruled.

GRUBBS v. PI

(Court of Appeals of Kentucky. April 22, 1903.)

MARRIAGE CONTRACT—APPEAL BOND—SIGNING BY APPELLANTS.

1. A petition for breach of contract, alleging that the parties agreed to marry on the — day of —, and that plaintiff went to the defendant's house during that month, and was ready to marry defendant, but defendant refused to keep his contract to marry plaintiff, and that plaintiff was damaged by the defendant's failure to marry her, a

2. An instruction, in an action for breach of a marriage contract, to find for the plaintiff as will fairly compensate her for the defendant's failure to marry her, a

cation of feelings suffered by her on account thereof, properly states the measure of damages.

3. Evidence that an order on witness in favor of plaintiff was paid at a certain place and time does not tend to show that plaintiff was not then at another place, it not being claimed she was present and received payment of the order.

Appeal from Circuit Court, Boyle County. "Not to be officially reported."

Action by Nannie Pence against W. E. Grubbs. Judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Bagby, R. V. Hume, and R. G. McKee, for appellant. E. V. Puryear, Jno. C. Voris, and W. R. Embry, for appellee.

PAYNTER, J. This action is upon an alleged breach of a marriage contract by the appellant. It is averred in the petition that in June, 1901, the appellant and appellee mutually agreed to marry each other on the — day of July, 1901, at Middlesborough, Ky.; that pursuant to that agreement the appellee went to Middlesborough, and remained there during that month, and was willing and ready to comply with her part of the contract and marry the appellant, but that appellant failed and refused to keep his contract to marry her. Counsel for the appellant contend that the petition was demurrable because it did not state the day in July that the marriage was to take place. Where time and place are not fixed by the agreement of the parties, there can be no breach of the contract, and no action can be maintained by either, unless the party complaining has offered to marry the other, and the averment to that effect must be made. If no time and place has been fixed for the performance of the contract, then, in the contemplation of law, it is to be carried out within a reasonable time. If the time and place have been appoluted for the performance of the agreement, there is no necessity for the averment of an offer to perform. In such a case, if it be averred that the party was there, and was willing and ready to perform her part of the engagement, and the defendant was absent, or refused to do what the agreement required of him, such allegations would be sufficient. *Burks v. Shain*, 2 Bibb, 341, 5 Am. Dec. 616; *Fible v. Caplinger*, 13 B. Mon. 464; *Burnham v. Cornwell*, 16 B. Mon. 284, 63 Am. Dec. 529. In this case the marriage contract was to be performed some day in July at a designated place. It is averred that she was there during that month, and was ready and willing to carry out her part of the agreement, and he had failed to carry out his agreement. We are of the opinion that the petition was sufficiently definite as to the time, and that the facts alleged constituted a cause of action. It was not necessary for her, subsequent to July, to offer to marry defendant, and he refuse, in order to constitute a breach of the contract. He was guilty of a breach of it when he failed

to appear at Middlesborough in that month and marry appellee.

On the trial of the case the evidence tended to support the averments of the petition. The court properly instructed the jury upon the facts of the case as averred and proven. It is urged that the court erred in telling the jury that, if it found for the plaintiff, it should find such a sum as it believed from the evidence would fairly compensate her for defendant's failure to marry her, and for any mortification of feelings suffered by her on account thereof. The plaintiff was entitled to recover, if at all, a sum sufficient to compensate her for the breach of the contract, and for any mortification of feelings suffered by her on account of such failure, not to exceed the amount claimed. It is suggested that the court erred in refusing to allow witness to testify that an order on him in favor of the plaintiff had been paid at his store during July, 1901. The purpose in offering this testimony, we presume, was to show that she was not at Middlesborough during that month. It would not at all tend to show that she was not in Middlesborough during that month to prove the payment of the order, it not being claimed that she was present and received payment of the order.

The judgment is affirmed.

HOSKINS et al. v. SOUTHERN NAT. BANK et al.

(Court of Appeals of Kentucky. April 23, 1903.)

APPEAL BOND—ACTION—PETITION—SUFFICIENCY—DEMURRER TO ANSWER—CARRYING BACK TO PETITION.

1. Demurder to the answer should be carried back to the petition, if the petition be defective.

2. The petition in an action on an appeal bond is defective if it fails to allege that a supersedeas was issued by the clerk following the execution of the bond.

Appeal from Circuit Court, Jefferson County; Common Pleas Division.

"Not to be officially reported."

Action by the Southern National Bank and others against R. H. Hoskins and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Lane & Harrison, for appellants. B. H. Young, M. W. Ripy, and E. C. Waide, for appellees.

SETTLE, J. This is an action upon an appeal bond, which was executed by one Bettie Williams, and appellants R. H. and J. C. Hoskins, as her sureties, to stay proceedings on, and prevent the collection of, a judgment rendered in the Jefferson circuit court, common pleas division, against Bettie Williams, and in favor of the Farmers' & Drovers' Bank, pending an appeal which was brought to this court by Bettie Williams in an effort to reverse the judg-

¶ 1. See Pleading, vol. 39, Cent. Dig. § 542.

ment mentioned. The judgment appealed from was, however, duly affirmed by this court, with damages; and Bettie Williams having thereafter failed to fully pay and satisfy the judgment and damages standing against her, and the same having been assigned by the Farmers' & Drivers' Bank to the Southern National Bank, the latter seeks by this action to recover of the sureties in the appeal bond the sum and balance due it on the assigned judgment. Answer was filed by the sureties, appellants R. H. and J. C. Hoskins, in which several matters of defense were set up and relied on. A general demurrer was filed to the answer by appellees, and, the answer being defective and insufficient, the demurrer was sustained by the court, to which appellants excepted, and thereafter they filed an amended answer, to which appellees filed a reply. The case was then referred to the commissioner to take proof, and to make a report as to the amount due from appellants on the appeal bond. His report was made, and, though excepted to on various grounds by appellants, it seems to have been confirmed by the lower court, and judgment duly entered for the amount shown thereby to be due, and for which appellants are liable on the bond, from which judgment this appeal is prosecuted.

Practically, but one ground is urged for the reversal of the judgment appealed from, and that is that the petition is fatally defective, in that it is not affirmatively alleged therein that the appeal or supersedeas bond was executed before, or taken by or approved by, the clerk of the court rendering the judgment appealed from, and, further, that it is not averred in the petition that a supersedeas was issued by the clerk because and in consequence of the execution of the appeal bond. The record fails to show that a demurrer was filed to the petition, and it must therefore be assumed that none was filed; but as it does appear that a general demurrer was filed by appellees to the answer, which was sustained by the lower court, and that appellants excepted to the judgment sustaining the demurrer, if the alleged defects in the petition are to be regarded as fatal to the cause of action therein attempted to be stated, the demurrer should have been carried back to the petition, and sustained by the lower court, and, as this was not done, the failure of the court to so rule should be treated as error, excepted to at the time, which may be reviewed by this court.

Waiving the question of whether it was necessary for the petition to contain an averment to the effect that the bond sued on was duly executed before or to the clerk of the court, we are constrained, in view of the repeated adjudications of this court to that effect, to hold that the failure to allege in the petition that a supersedeas was issued by the clerk, following the execution

of the bond, was and is fatal to a right of recovery on the bond; in other words, that, without an averment in the petition of that fact, it does not state a cause of action.

In *Reed v. Lander*, 5 Bush, 598, it was held by this court that a judgment is not superseded by the execution of an appeal bond, nor until an order of supersedeas is issued by the proper clerk as provided by the Civil Code; hence in that case the Court of Appeals refused, on the affirmation of a judgment, to award 10 per cent. damages, because an order of supersedeas had not been issued. In *Jones v. Green*, 12 Bush, 127, suit was instituted upon an appeal bond. The petition set out the proper execution of the bond, and that the principal, by executing the bond, "thereby procured a supersedeas from said clerk, superseding plaintiff's said judgment. * * *" The answer filed to the petition was fatally defective. A demurrer was sustained to it, and, no further defense being made, judgment went against the defendants. They appealed, and in this court insisted that the demurrer filed to the answer should have been carried back to the petition. Hence the inquiry was whether the petition set out a cause of action. In discussing that question, this court said: "But it is not averred, as a substantive and specific fact, that a supersedeas was issued at all. The allegation is that the judgment debtor executed the bond sued on, and thereby procured a supersedeas from said clerk, superseding the plaintiff's said judgment. * * * As the mere execution of the bond did not obstruct appellee in the collection of his judgment, as he fails to allege in direct terms that a supersedeas was issued at all, and as his petition shows that all the steps relative to the bond and the supersedeas were taken by the clerk of the circuit court; and as it fails to state facts showing that said clerk had the authority to do more than to accept the bond, and forward a copy thereof to the clerk of this court, it is manifestly insufficient. The judgment must be reversed. The cause is remanded, with instructions to the circuit court to carry the demurrer back to the petition, and to sustain it," etc. It will be observed that the condition of the pleadings in the case *supra* presents a case strikingly similar to the one at bar. It will also be observed that the petition in this case does not even attempt to allege the issuance of a supersedeas, and that this omission is not cured or supplied by any statement or averment in the answer filed by appellants. A more recent deliverance of this court on the question under consideration will be found in the case of *The O. & N. R. Co. v. Barclay's Adm'r*, 43 S. W. 177, wherein it is said: "A further objection urged to the right of appellee to prosecute this action is the averment in the petition that the father of Hugh Barclay, Jr., had, previous to the order appointing appellee ad-

ministrator, applied to the county court to be appointed; that the same order which appointed appellee denied the father's application, and he thereupon took an appeal from the order, executed a supersedeas bond, and took all other necessary steps to bring up the judgment and proceedings of the county court to the circuit court for review and reversal; and that said appeal was then pending in the circuit court. This pleading, however, does not state that a supersedeas was ever issued. Unless a supersedeas was issued, there was no stay of proceedings upon the judgment appealed from. * * * We regard the issuance of the supersedeas as a necessary averment." The foregoing decisions are based upon the well-known provisions of the Civil Code, which remain as they were when the earliest of the cases herein cited was decided. Under these authorities, we must hold that the appellees' petition does not state a cause of action, as it failed to allege that an order of supersedeas was issued to stay proceedings on the judgment from which the former appeal was taken.

The judgment of the lower court in this case is therefore reversed, and the cause remanded, with directions to the lower court to carry the demurrer back to the petition and to sustain it, and for such other proceedings as may not be inconsistent with this opinion.

CLARK v. LEXINGTON STOVEWORKS.

(Court of Appeals of Kentucky. April 23, 1903.)

"Not to be officially reported."

On petition for rehearing. Petition denied.

For original opinion, see 72 S. W. 286.

Geo. C. Webb, for appellant. Forman & Forman and A. M. Baker, for appellee.

SETTLE, J. Appellee petitions for a modification of the opinion here, and complains that the following expressions in the opinion: "So, after all, it may be inferred from the facts adduced upon the trial in the lower court that the note and policy were lost to appellant by the negligence of appellee's general manager;" and further that "the money would immediately have been obtained on it [referring to the life policy], but for the negligence of appellee's agent in putting it into the hands of an unreliable man"—may be construed by the lower court as a judicial assertion on the part of this court that said facts not only establish the negligence of the agent, but are conclusive of the issue on that point.

The language objected to was not intended to have that effect. It merely expresses the views and conclusions of this court upon the evidence adduced upon the trial had in the lower court. It will not prevent that court

from submitting to the jury, under proper instructions, as directed in the opinion, the question of whether the manager of appellee, to whom appellant intrusted the note and policy, was negligent in the performance of the duty required of him in the matter of procuring the money thereon. The obvious meaning of the language complained of is that the record before this court furnished evidence of negligence on the part of appellee's manager, which, upon the state of case presented, would make it liable; but on the trial yet to occur the evidence may not be the same, or evidence may be introduced by appellee that will wholly disprove such negligence.

The petition for modification is overruled.

CANFIELD v. CITY OF NEWPORT.

(Court of Appeals of Kentucky. April 22, 1903.)

CITY STREET—OPEN MANHOLE—WANT OF ACTUAL NOTICE—CITY'S LIABILITY—DURATION OF DEFECT.

1. Boys opened a manhole in a street one forenoon, and a barrel was immediately placed over it by a citizen. This was removed at night by some unauthorized person, and before daylight an accident was occasioned. Held that, in the absence of actual notice, the city was not liable.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by P. J. Canfield against the city of Newport. Judgment for defendant, and plaintiff appeals. Affirmed.

Phil J. Ryan, for appellant. Aubrey Barbour, for appellee.

BURNAM, C. J. The appellant, Patrick J. Canfield, brought this suit against the appellee, the city of Newport, to recover damages for injuries which resulted from falling into a manhole in the gutter at the southeast corner of Saratoga and Fifth streets in the city of Newport, which he alleges the defendant negligently and knowingly permitted to remain open and unguarded. The testimony shows that on a Sunday morning in October, 1899, between 11 and 12 o'clock, some boys took the iron covering from this manhole to release a cat which had fallen into the sewer, and that when they attempted to replace the lid it fell into the hole, which was some nine feet deep; that a citizen who lived in the vicinity immediately placed a barrel over the hole, and weighted it down with rocks, thus furnishing an effectual barricade against accidents; that it remained in this position during the day, but was removed by some unauthorized person during the following night; that the appellant, Patrick J. Canfield, fell into this hole on Monday morning, before daylight, while on his way from his home to the butcher shop. The testimony fails to

¶ 1. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1648.

show at what hour or by whom the barrel was taken from over the hole, or that the city authorities had notice that the covering had been removed.

A city is not responsible for accidents which happen in its streets as the result of defects caused by the acts of persons not connected with its government, unless such defect has existed for such a length of time and under such circumstances that the city, or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of it. See *Elliott on Roads and Streets*, § 628; *City of Covington v. Asman* (Ky.) 68 S. W. 646. There was no defect in the covering of this manhole before it was interfered with by unauthorized persons, and the placing of a barrel over it appears to have been a reasonable precaution against accidents, although not taken by the city, and no injury would have resulted, except for the unauthorized removal of it from the hole some time during Sunday night. The facts in the case do not, therefore, warrant a presumption of negligence on the part of the city of Newport, and we think the trial court properly directed the jury to find a verdict for appellee.

Judgment affirmed.

HATFIELD et al. v. ESTEP et al.

(Court of Appeals of Kentucky. April 23, 1903.)

WILL—CONSTRUCTION—DEVISE—PROPERTY COVERED.

1. Testator divided his realty among his children by what was apparently an equal apportionment. He gave a daughter "all the lands * * * I hold above Elijah Fuller's line on the Bill Allen Branch." Testator owned a tract on this branch, which, however, extended across the ridge onto other branches of the main stream. Testator's other lands did not adjoin the portion beyond the ridge. If the daughter were given the whole tract, it would but make her equal to the other devisees. *Held*, that the clause "on the Bill Allen Branch" would be construed as referring to the Elijah Fuller line, and not to the tract, the whole of which the daughter would take.

Appeal from Circuit Court, Pike county.

"Not to be officially reported."

Suit between Dorcas Hatfield and others and Phoebe Estep and others. Judgment for Estep, and Hatfield and others appeal. Affirmed.

Belcher & Harman, for appellants. J. F. Butler and Roscoe Vanover, for appellees.

O'REAR, J. Joseph Hatfield, deceased, by a will which has been admitted to record, disposed of all his estate, consisting mainly of lands in Pike county, dividing it among his children and widow, by what was apparently an equal apportionment. By the seventh clause of his will he devised to appellee Phoebe Estep, his daughter, as follows: "I give to my daughter Phoebe Estep all the lands and premises I hold above Elijah Ful-

ler's line on the Bill Allen Branch." As a matter of fact, decedent owned a tract of land on the Bill Allen Branch, but it extended across the ridge onto the waters of other branches of the main stream, of which the Bill Allen Branch was a tributary. The remainder of the testator's land did not adjoin the particle beyond the ridge mentioned. The evidence is conclusive that, if all of the land in that tract lying above Elijah Fuller's line is given to appellee Phoebe Estep, it would not more than equalize her with testator's other children. The will manifests no purpose on the part of the testator to discriminate among his children. This fact and the location of the property all tend to confirm the belief that the testator intended by the description to give to appellee all of that tract of land. The expression, "all the land and premises I hold above Elijah Fuller's line on the Bill Allen Branch," in view of the other circumstances of the case shown, is susceptible of the construction, and we are inclined to believe it was the testator's meaning, that he gave to this daughter all of the land that he owned in that vicinity which was above a line on the Bill Allen branch known as "Elijah Fuller's Line." This construction gives to the appellee the whole of the boundary in dispute. Such was the judgment of the learned chancellor who tried this case.

The judgment is affirmed.

LEAK'S HEIRS v. LEAK'S EX'R.

(Court of Appeals of Kentucky. April 22, 1903.)

WILL—PROBATE—CIRCUIT COURT—POWER TO DETERMINE VALIDITY OF DEVISE.

1. Under Ky. St. §§ 4849, 4850, 4859, authorizing the county court to try the question of whether the instrument offered for probate is or is not the will of the deceased, and providing for an appeal to the circuit court and Court of Appeals, the circuit court, on appeal from an order of the county court refusing probate of a will, cannot determine whether certain devises are void for uncertainty.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Proceeding by H. G. Scudday, executor, to probate the will of Victoria Ann Leak, deceased. From a judgment of the circuit court reversing an order of the county court denying probate, the heirs appeal. Affirmed.

O. H. Waddle, for appellants. V. P. Smith, for appellee.

BARKER, J. Mrs. Victoria Ann Leak died intestate, in the county of Pulaski, Ky., which was her residence. By her will, after the payment of her debts and funeral expenses, she devised her entire estate, consisting of some \$4,000 worth of real estate in Texas, to the Rev. H. G. Scudday, in trust for the benefit of several religious and chari-

table purposes therein named. The trustee was appointed sole executor of the testament. On the 16th day of June, 1902, the executor, H. G. Scudday, offered to probate the will in question in the Pulaski county court. This being resisted by the heirs at law of Mrs. Leak, the judge of the county court overruled the motion to probate, because the charitable and religious devises therein made were so indefinite, and uncertain as to be void. From this judgment of the county court, an appeal was taken to the Pulaski circuit court, where, for the purpose of the trial, the following written agreement was entered into by counsel for the contestants and contestee, respectively:

"It is agreed, for the purpose of the trial of the contest of the paper purporting to be the last will and testament of Victoria Ann Leak, that said Leak died in Pulaski county, Ky., and that her estate consists of real estate in the state of Texas of about the value of \$4,000; that at her death she was a citizen and resident of Pulaski county, Ky.; and that Joseph A., Emory P., and Jessie O. Boring all are her nephews and niece and her next of kin and heirs at law."

On the 8th day of July, 1902, the appeal came on for trial in the Pulaski circuit court, and, no jury having been demanded, the law and the facts were tried by the court, and, the case having been heard and submitted, the following judgment was entered:

"This case came on and was heard, and the court, being advised, is of the opinion that the grounds of contest filed by Joseph A. Boring, etc., cannot properly be heard on the motion to probate the will, and the said protest and grounds are overruled and dismissed, and it is adjudged that H. G. Scudday, executor nominated in the said will, recover of the said contestants all of his costs occasioned by this contest. It is now adjudged that the paper filed and offered as the last will and testament of Victoria Ann Leak is the last will and testament of Victoria Ann Leak, and it is now ordered that said paper be delivered to the clerk of the Pulaski county court by the clerk of this court, and the judge of the Pulaski county court is hereby directed and ordered to receive the same as the last will and testament of said Leak, and order that same be put to record in said court as such. To all of which the contestees except, and pray an appeal to the Court of Appeals, which is granted."

The first question presented on this appeal is whether or not the circuit court erred in holding that the only question before it on the appeal was whether the instrument purporting to be the last will and testament of Mrs. Victoria Ann Leak was, or not, her last will and testament, and refusing to go into the question of whether or not the charitable and religious bequests therein made were void for uncertainty. We have been cited to no adjudicated case bearing upon this question, and are therefore relegated for its solu-

tion to the language of the statute relating to the subject-matter.

Section 4849 of the Kentucky Statutes provides that "wills shall be proved before, and admitted to record by, the county court of the county of the testator's residence; if he had no known place of residence in this commonwealth, and land is devised, then in the county where the land or part thereof, lies; if no land is devised, then in the county where he died, or that wherein his estate, or part thereof, shall be, or where there may be any debt or demand owing to him."

Section 4850: "An appeal may be taken from the county court to the circuit court of the same county, and thence to the Court of Appeals, from every judgment admitting a will to record or rejecting it. The circuit court shall try both law and facts unless a jury be required. The Court of Appeals shall not hear any matter of fact pertaining thereto, other than such as may be certified from the circuit court; and the same effect shall be given to the verdict of a jury in a will case as is given to the verdict of a jury in other civil cases. * * *"

Section 4859: "When the proceeding is taken to the circuit court, all necessary parties shall be brought before the court by the appellant; and upon the demand of any of the parties a jury shall be impaneled to try whether or how much of any testamentary paper produced is, or is not, the last will of the testator. If no jury is demanded, the court shall determine that question, and the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question—subject to the right of appeal to the Court of Appeals as herein before named; but nothing in this section shall preclude a court of equity from its jurisdiction to impeach such final decision, for such reason as would give it jurisdiction over any other judgment at law."

It will be observed that these sections of the statute only authorize the court to try the question of whether the instrument offered for probate is, or is not, the last will and testament of the decedent. There is no authority given by the statute to construe the instrument purporting to be the will. If the paper is shown by the evidence to have been executed according to the provisions of the statute, and the testator was of sound mind and disposing memory, and unconstrained by fraud or undue influence, then the instrument must be admitted to probate.

As to whether or not certain devises are void for uncertainty, or for any other reason, that can be determined in a proceeding to put the instrument in execution; but upon an appeal from an order of the county court probating, or refusing to probate, a writing purporting to be a will, the only question is whether or not it was the will of the decedent.

As the learned judge of the circuit court so held in this case, it is affirmed.



in evidence by three or four other witnesses, upon as many occasions, that they heard her demanding of him the deed, and stating to him that, "You know that you promised me that you would return to me the deed after you had shown it to your Virginia people." The appellant would not affirm or deny the statement. After they left Atlantic City they traveled together as far as Cincinnati, she going to her home, and he to Clarksburg, W. Va., and there he remained for two or three weeks, during which time she wrote him some three or four letters, professing excessive love for him, without any reference to property or business matters. It appears that while they were at Atlantic City, and after they had been there but a few days, the appellant placed in the lap of appellee an unaddressed envelope containing a letter, and left the room, which letter is as follows:

"My Dear Wife. You now know that you have married no adventurer, but one whose motives are pure, and only ambition to make you happy. I have most flattering prospects, and, as you well know, it is within my reach to obtain a position of honor and influence. I will admit that from your story of the past, that you have been the most self-sacrificing woman in existence; but while that is true, I feel that the request which I am about to make is not an unreasonable one (and if so, I hope it shall be denied me). It is needless for me to tell you that I am happily married, for you have already placed more love and sunshine into my life than I have ever experienced before, and I shall love and cherish you as long as ever I shall live. My youth and diffidence alone prevents me from saying to you in person what I now write you. You have wealth and honor; I am full of energy and ambitions; two things that go together to bring about the grandest and highest accomplishments in life. And with your love and assistance, I can make the whole community marvel at our advancement and achievements. I am certainly proud of you, and I shall never regret the step I have taken. I shall so conduct my future as to never give you cause to believe me other than you hope me to be. It is within your power to make me the happiest man, as well as place me in a position of influence, which honor I hope you to share with me. I know that it is your intention to do a good part by me sometime, and I perhaps flatter myself, when I tell you that I believe that you have sufficient confidence of doing so now. I am going to ask you to give me one-half of the farm, which will give me a standing before the world, and I shall later prove myself worthy of the trust and generosity. I will get that appointment,

and we will live by ourselves and for ourselves, and in defiance of what the outside world may think. What matter it if I am young, so long as I love you, and is it not better that you should have the love, care and protection of a young man during the hours of sickness and affliction which may come to every one, sometime in their life. In conclusion I will say that it matters not what your decision be, I shall always love you. Scotland."

It appears from the evidence that this letter was typewritten, except the address and signature. And it further appears from the evidence that appellant had but one hand, and there is nothing in the evidence showing that he had a typewriter with him, and it is difficult to understand how he procured this typewritten letter unless he obtained the assistance of some one, and there is no evidence that he had any acquaintances in the city except a brother and a cousin, who was a lawyer, who happened to be visiting in the city at the same time. It is possible that he received aid from one or both of them.

Considering their short acquaintance, the disparity in their ages, that their marriage had occurred only some 12 or 15 days before the letter was handed to appellee by appellant, that he had been with her all the time since their marriage in a strange city, that he had been to see a lawyer to ascertain the rights and interests of a husband in the wife's property in the state of Kentucky, his desire to keep the matter from his wife's Kentucky friends, in getting the deed before she arrived at home, and, in connection with these facts, the language of this letter, and we are impressed with the idea that it emanated from the mind of a cool, calculating, and mercenary person; that his sole object was, if possible, to impress her with his professed great love, and flatter her by appealing to her vanity, and in this way to obtain her property. From the whole record we are impressed with the belief that possibly appellant was mistaken in his letter to appellee in stating that he was not an "adventurer."

We are of the opinion that the deed was obtained from appellee under such circumstances as, in law, amounted to fraud, misrepresentation, and improper and undue influence. We deem it unnecessary and useless to quote and discuss authorities with reference to the issues herein involved, but refer to the cases of *Wilson, etc., v. Winsor, etc.* (Ky.) 71 S. W. 495; *Golding v. Golding*, 82 Ky. 55; *Smith, etc., v. Snowden*, 96 Ky. 36, 27 S. W. 855; and *Todd's Heirs v. Wickliffe*, 18 B. Mon. 908.

For the above reasons, the judgment of the lower court must be affirmed.



defendants, and gave judgment accordingly. Plaintiff appealed.

J. V. Roberts and Ben Isbell, for appellant. S. Brundidge, Jr., for appellees.

RIDDICK, J. (after stating the facts). This is an action to recover damages on account of fraud and deceit. The complaint filed in the case is rather prolix, and does not state the facts very concisely, and this may have led to some confusion in the trial of the case. But no objection is made here either as to the form or substance of the complaint, so we have treated the defects in it as cured by the answer and the subsequent trial.

The facts, briefly stated, are that Hutchinson purchased from defendant Gorman, through his agent, defendant Baugh, a house and lot in the town of Searcy. As part of the consideration for the property, he agreed to assume and pay certain monthly dues or installments on stock which one Audigier, a former owner of the premises, had agreed to pay to the Arkansas Building & Loan Association, to secure the payment of which Audigier had executed a mortgage on the property, which mortgage was still a valid and subsisting lien thereon for the unpaid portion of the debt or dues. Audigier had borrowed \$750 from the association, and had transferred to the association stock of the face value of \$1,000, and gave a bond secured by mortgage, as above stated, that he would pay all subsequent dues on the stock required by the rules and by-laws of the association. He did not, it will be noticed, agree to pay any certain amount, but was to pay the monthly dues until the stock matured. In assuming this contract Hutchinson on his part did not agree to pay any certain sum, but agreed to pay the subsequent installments required to mature the stock. At the time Hutchinson purchased the property this contract of Audigier had been in force nearly six years, and only those familiar with the affairs of the association could tell with any degree of certainty what additional sums would be required to mature the stock. The home office of the association was at Little Rock, but Baugh was a stockholder in the association, and was secretary of the local board at Searcy. The contract with Hutchinson was made at Searcy, and he alleges that he was induced to purchase the property and to assume the contract of Audigier with the building and loan association by reason of a representation made by Baugh that \$160 would be all that was required to pay this debt; or, in other words, that the balance due to the association was not more than \$160. Hutchinson alleges that this representation was false, and he makes it the basis of his action in this case; but the circuit judge held that he was estopped to maintain the action by reason of the fact that he had assumed the debt of Audigier to the build-

ing and loan association as part of the consideration named in the deed.

Now, this being an action to recover damages for fraud and deceit, we think it is clear that the circuit court erred in holding that the acceptance of the deed by plaintiff, and the further fact that he assumed the debt of Audigier to the association, estopped him from bringing this action. Plaintiff is not suing on the contract, nor is he denying his contract. He admits the contract, and that he is bound by it, but founds his action on a tort by alleging that he was induced to make the contract by reason of a false representation made by defendant Baugh. But, although we are of the opinion that the circuit court erred in its declaration of the law, still we are by no means certain that the evidence was sufficient to warrant the recovery by plaintiff in this action. In order to sustain an action for deceit, the plaintiff must show not only that he was misled and damaged by a false representation concerning a material fact, but he must go further, and show that the defendant knew at the time he made it that the representation was false, or that, being ignorant of whether it was true or false, he asserted that it was true, and did so with the intention to deceive the plaintiff. *Hanger v. Evins*, 38 Ark. 334; 14 Am. & Eng. Ency. Law (2d Ed.) 86; 8 Am. & Eng. Ency. Plead. & Prac. 899, 902. Now, Baugh testified that he made no positive statement as to the amount of the debt, but only gave an estimate of the amount; and the facts in proof seem to support his testimony. If Baugh stated to Hutchinson that the balance due the building and loan association was only \$160, it is somewhat strange that this amount was not named in the deed, or in the written agreement indorsed on the bond of Audigier to the association, by which Hutchinson assumed and undertook to carry out the contract of Audigier. The fact that no certain amount was named for this debt either in the deed or in the contract of Hutchinson assuming it tends, as we think, to support the statement of Baugh that the amount was unknown, and that his statement in reference to the balance due on the debt was only an estimate, and so understood by Hutchinson. But, while the weight of evidence seems to us to favor the defendant, there was evidence to the contrary. The testimony of Hutchinson and of Baugh on this point are directly in conflict, and we cannot determine the case here on the weight of evidence as it appears to us. That is a question for the jury. The fact that Hutchinson might have learned the truth by writing to the home office of the association at Little Rock would be no defense if Baugh knowingly made a false representation as to the amount of the debt, with intent to deceive, and thereby misled Hutchinson to his injury.

While, as before stated, we think there is not much evidence to sustain that assertion

of the plaintiff, he had, we think, the right to submit the question to the jury, and we are therefore of the opinion that the court erred in directing a verdict. For this reason the judgment is reversed, and cause remanded for a new trial.

CAMMACK v. ROGERS.

(Supreme Court of Texas. April 23, 1903.)

APPEAL—SUFFICIENCY OF ASSIGNMENT—DISCRETION OF COURT OF CIVIL APPEALS.

1. An assignment of error which is insufficient because it complains of two distinct rulings is not aided by propositions and statements in the brief explaining each of the rulings complained of.

2. The Court of Civil Appeals is not deprived of authority to decide a point defectively raised by an assignment which is not in strict compliance with the statute and the rules of the court, and it is for that court to determine, under all the circumstances, whether a point thus sought to be raised should be considered.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by Mrs. Jennie Rogers against E. E. Cammack. Judgment for plaintiff, and defendant appeals. On certified questions from the Court of Civil Appeals.

J. B. Scarborough and T. A. Blair, for appellant. Prendergast & Sanford, for appellee.

WILLIAMS, J. Certified questions from the Court of Civil Appeals for the Third District, as follows:

"It is a suit brought by the appellee, Mrs. Rogers, against the appellant to recover possession of certain lands, and for damages resulting from an alleged breach of a rent contract, wherein the appellant became bound and liable as lessee. One of the items of damages sought to be recovered by appellee is the alleged failure of the appellant to properly and with reasonable care form and cultivate the premises rented by him from appellee, which it is claimed he was bound under the contract to do with reasonable care and diligence in cultivating and producing a Johnson grass crop on the premises, which it is alleged he, by reason of his want of care and attention and negligence, failed to produce, for which reason the appellee suffered and sustained damages, as she was, under the contract, entitled to a part of the crop produced.

"We find that the appellant was liable under the contract for damages that might arise for his failure to exercise reasonable care and attention in the cultivation and production of the character of crop called for in the contract, and there is evidence in the record tending to show, to some extent, a failure upon his part to observe the requirements of the contract in this respect. His liability or nonliability for the breach of the contract, as stated, was submitted by the charge of the court to the jury. The jury

returned a verdict, upon which judgment was rendered in the plaintiff's favor for the possession of the premises and for the sum of \$400. The jury, in determining that the appellant was liable to the appellee for \$400 damages, evidently considered that the appellee sustained some damages on account of the failure of appellant to properly cultivate and produce Johnson grass crops on the leased premises.

"In response to this issue the appellant pleaded that, if there was a failure or yield of crop, it was not attributable to any want of attention upon his part, but was occasioned by unprecedented dry weather during the year in which the crop was to be produced; and we find that there was much evidence in the record tending to prove the fact that the failure of the crop was, to a great extent, attributable to dry weather. The court, in its charge, did not submit this defense to the jury. Upon this issue the appellant requested the following instruction, which was refused: 'You are instructed that if you find that defendant used proper diligence, as explained herein, in the management and cultivation of said farm, and that the yield therefrom was lessened by dry weather, or other natural causes, you will not charge the defendant with such lessened yield.' The record shows this to be defendant's requested charge No. 1. The court refused to give this instruction.

"The court, on the 7th day of January, 1903, by an opinion then delivered, reversed and remanded this cause for the failure and refusal of the court to give the charge as quoted. On February 11, 1903, this court set aside its former judgment, granted a rehearing, and affirmed the judgment of the trial court, and held in the last opinion delivered in the case that the assignment of error complained of the refusal to give two charges which presented two separate and distinct questions, and for that reason could not be considered. The assignment, while presenting two separate and distinct questions, is followed by appropriate propositions and statements, which present each of the questions raised in the assignment in such a manner that the court can readily ascertain and determine each of the two points intended to be presented and raised by the assignment, and we desire to say that, if the assignment could or should be considered, this court is still of the opinion that the refusal to give charge No. 1 mentioned in the assignment, which is already quoted, is reversible error.

"The assignment is as follows: 'The court erred in refusing to give special charges Nos. 1 and 2 asked by the defendant, respecting the effect of dry weather on said crop and the yield therefrom, and as to the value of one-half of the ungathered hay crop on the farm at the time the plaintiff took possession under the writ of sequestration.' This assignment is numbered in the brief as the

fifth assignment, and is followed by the following propositions and statements:

"Proposition: Defendant was not an insurer of crop as against drought, and should not be compelled to respond in damages for short crop, as the result of dry weather.

"Statement: Plaintiff's suit was largely based on failure to make crop of hay, alleging only 914 bales made, when he should have made 4,000 bales, and her damages \$700. (R. 6.) Defendant requested special charge (R. 42) to the effect that, if he used proper diligence, and the yield was cut short by dry weather, that he would not be responsible for the failure thus caused. This the court refused. (R. 42.)"

"We construe 'R. 42' to mean page 42 of the record, where charge No. 1, as pointed out in the assignment, is stated, which charge is previously in this assignment set out, and which the trial court should have given.

"The appellant continues his statement under this proposition as follows: 'The undisputed testimony is that the year was extremely dry, and the yield was very little on this account. Mr. Cook and Mrs. Boggess, who lived on adjoining grass farms, both testified that their crops were greatly reduced on account of dry weather.'

"Second proposition: Defendant was entitled to credit of one-half the value of the hay crop on the land when he was dispossessed.

"Statement: The testimony shows that when defendant took possession in September, 1900, the uncut grass crops, or second cutting, was on the land uncut; that by agreement plaintiff kept his second crop, and defendant was to have the full crop of grass grown for 1901. Reference is made to record, pages 86, 90, and 20. The defendant asked instruction to the jury to find for him one-half the value of this uncut crop. (R. 42.)"

"We do not hold that the trial court should have given charge No. 2 pointed out in the assignment, and which is explained by the second proposition and statement under it.

"The cases of *Cannon v. Cannon*, 66 Tex. 685, 3 S. W. 36, and *Jackson v. Cassidy*, 68 Tex. 284, 4 S. W. 541, in effect hold that an assignment of error which is too general cannot be aided by propositions. *Craine v. Huntington*, 81 Tex. 616, 17 S. W. 243; *Mitchell v. Mitchell*, 84 Tex. 306, 19 S. W. 477; *Harrison Machine Co. v. Templeton*, 82 Tex. 447, 18 S. W. 601; *Blake v. Ins. Co.*, 67 Tex. 166, 2 S. W. 368, 60 Am. Rep. 16; *Ins. Co. v. Chowning*, 86 Tex. 660, 26 S. W. 982, 24 L. R. A. 504; and *Texas Pacific Ry. Co. v. Donovan & Co.*, 86 Tex. 379, 25 S. W. 10—in effect hold that an assignment of error that presents and raises two or more separate and distinct questions cannot be considered. In the cases above named the only one where the assignment of error was followed by appropriate propositions and statements was *Texas & Pacific Ry. Co. v. Donovan*, 86 Tex.

379, 25 S. W. 10. The opinion of the court, as reported in the official volume of the Reports, where it will be found, does not state that the assignment of error was followed by propositions and statements, but an examination of the record on file in the Supreme Court shows that three of the questions raised by three of the special charges referred to in the assignment were followed by appropriate propositions and statements.

"The reason given and the principle stated in the following cases seem to justify the conclusion that the assignment in question was not too general, as it is, in effect, in these cases held that the rules and the statute concerning assignments of errors should receive a liberal construction; and that, while the assignment of error may be so general that, unexplained, it would be insufficient, yet it might, by appropriate propositions and statements, be aided, explained, and made certain. *Land Co. v. McClelland Bros.*, 86 Tex. 191, 23 S. W. 576, 22 L. R. A. 105; *Bonham Cotton Press v. McKellar*, 86 Tex. 700, 26 S. W. 1056; *Wilson v. Johnson*, 94 Tex. 276, 60 S. W. 242; *St. Louis & S. W. Ry. Co. v. McArthur* (Tex. Sup.) 70 S. W. 317; *G. & C. S. F. Ry. Co. v. Ramey et al.* (Tex. Civ. App.) 24 S. W. 654; *Kidwell v. Carson & Lewis*, 3 Tex. Civ. App. 330, 22 S. W. 534; *Mundine v. Paula*, 3 Tex. Ct. Rep. 862, 66 S. W. 254. In the two cases last mentioned the assignments of errors presented two or more distinct questions, and the Court of Civil Appeals declined to consider them; but they say, in effect, that, if the assignment had been accompanied by appropriate and explanatory propositions and statements, they would have been considered.

"In view of the above statement, the Court of Civil Appeals for the Third Supreme Judicial District certifies to the Supreme Court of Texas the following questions:

"(1) Where an assignment of error complains of two rulings of the trial court, each of which relates to separate and distinct questions, which is followed by appropriate propositions and statements explaining each of the two questions raised and rulings complained of, is the assignment so general that it should not be considered, or may it, under such circumstances, be aided and explained by the propositions and statements; and, if such is the case, should it, by the Court of Civil Appeals, be deemed sufficient so as to entitle the court to pass upon either of the questions raised by the assignment, propositions, and statements?

"(2) Is the assignment of error, in connection with the propositions and statements, as above set out, sufficient to authorize its consideration by this court?"

1. The decisions first cited in the certificate condemn the assignment of error as insufficient, because it complains of two distinct rulings of the court below. The decisions also hold that propositions in briefs do not

supply the place of a valid assignment. The decisions of this court last cited in the certificate do not conflict with the others, the objections to the assignments considered being of a different character. Further discussion of the subject of assignments of error than is found in *Land Co. v. McClelland Bros.*, 86 Tex. 191, 23 S. W. 576, 22 L. R. A. 105, would not, in our opinion, be useful.

2. The fact that an assignment of error is not in strict compliance with the statute and the rules of court does not deprive the Court of Civil Appeals of authority to decide a point thus defectively raised. While a party who has not complied with the rules of practice in presenting errors complained of may not be entitled to demand, as a right, that they be noticed, the court, in the exercise of sound discretion, has the authority to pass upon them. Whether or not, in such cases, the point sought to be made should be considered, is a question for the Court of Civil Appeals to determine under all the circumstances.

CLARK v. WEST et ux.

(Supreme Court of Texas. April 20, 1903.)

ADOPTION—EFFECT—PROPERTY RIGHTS—INSTRUCTION.

1. In an action to recover for services performed by plaintiff for defendant during her minority, the evidence showed that when about 12 years of age plaintiff was placed in defendant's hands by her father under an agreement by defendant, as she testified, that he would adopt her, or fix it in some way so that she would get his property after his death. Defendant adopted plaintiff when she was 18 years of age, and then repudiated his alleged agreement as to providing for plaintiff in the disposition of his property. The court charged, in effect, that if defendant agreed to "adopt" plaintiff, and did not provide for her in the disposal of his property, and did not intend to do so, she could recover. *Held*, that the charge was erroneous in that it did not base a recovery on the alleged agreement of defendant to provide for plaintiff in his will, but on the agreement to adopt, which of itself could invest plaintiff with no rights except those provided by Rev. St. 1895, art. 2, conferring on adopted children the status of legal heirs.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. R. and Louisa West against G. W. Clark. There was a judgment for plaintiff, affirmed on appeal to the Court of Civil Appeals (72 S. W. 100), and defendant brings error. Reversed.

Parker & Carlton and Martin & George, for plaintiff in error. Daniel & Keith and Eli Oxford, for defendants in error.

BROWN, J. J. R. and Louisa West, husband and wife, sued G. W. Clark in the district court of Erath county to recover the value of services rendered by Louisa West to Clark and his wife while living in their family, extending from her early childhood until her marriage. The honorable Court

of Civil Appeals failed to file conclusions of fact in this case, and we make the following statement from the undisputed evidence as we find it in the record:

G. W. Clark and L. C. Clark were husband and wife and without a child, living in Jack county, Tex. Louisa Hetchcock was then of the age of about 2 years and 6 months, living from place to place in the neighborhood. Mrs. Clark took the child to her house, and kept her for about six months, when she was taken by a half sister of Louisa, who, after keeping her for a short time, returned the child to Mrs. Clark. Louisa continued in the family of defendant Clark by the consent of her father, who was about 75 years old and quite poor, until she was about 12 years old, when Clark and his wife, having removed from Jack county to Erath county, took the girl Louisa to see her father, and again obtained his consent to keep her in their family. Louisa continued to live in the family of Clark and his wife until she was 24 years old, at which time she married J. R. West. During her stay she was clothed and cared for by Clark and his wife as people in their circumstances ordinarily care for their children, and it seems from the testimony that there was entire harmony and agreement between her and Clark and his wife. When Louisa was about 18 years old, to wit, the 30th day of June, 1900, Clark and his wife adopted her in due form as prescribed by the statute. Afterwards Mrs. Clark made a will in which she gave Louisa one dollar, and the remainder of her property she gave to others.

In their petition the plaintiffs claim, in substance, that Clark and wife agreed with the father of Louisa, and with her after she had attained years of understanding, that "if she would live with them as their child they would adopt her and take her to their home, would educate and maintain her, and fix things so that she would get their property at their death, the same as if she was their child; that they would either adopt her or will their property to her." The allegations were denied by the defendant in so far as they related to the agreement made between the parties.

The Court of Civil Appeals copied into its opinion the evidence of Louisa West as constituting their finding of fact, which is as follows: "When I was twelve years old, Clark and wife took me back to Jack county to see my father, and when we got there my father wanted me to stay with him, but Clark and wife told my father, and agreed with him, that if he would allow me to go back with them, and let them keep me as their child, that they would in some way fix things so that I should have their property at their death; that they would either adopt me or will their property to me; that they would make me their heir." Clark testified, denying any agreement with Louisa or her father.

Upon the trial in the district court the judge charged the jury as follows: "Now, if you believe and find from the evidence in this case that at the time G. W. Clark and his wife took plaintiff Louisa West to see her father in Jack county, Texas, the said defendant and his wife jointly agreed with plaintiff's father that if he, the father of plaintiff, would permit plaintiff Louisa West to return home with defendant G. W. Clark and his wife, and remain with them and work for and perform services for them as their own child till she, the said plaintiff, was grown, and until she married, that they, the said defendant and wife, would adopt her; * * * and if you further believe and find from the evidence in this case that by virtue of this agreement, or agreements, if any, or of said conduct and language, if any, of the said defendant G. W. Clark, that the said plaintiff Louisa West was induced to remain and perform services for the said G. W. Clark and his wife until she, the said Louisa West, was twenty-one years old, and until she married; and if you further find and believe from the evidence in this case that defendant G. W. Clark has renounced and repudiated said agreement, if any, and that he does not now intend to carry the same out; and you further believe and find from the evidence in this case that the services so rendered by the plaintiff Louisa West to defendant G. W. Clark and his wife were of some value, and that they were such as set out and described in plaintiff's petition—then in such event, if you so find and believe from the evidence in this case, you will find for plaintiffs, and assess their damages as hereinafter directed." "If you believe from the evidence that the defendant G. W. Clark voluntarily adopted said plaintiff, and that said act was not induced by any previous agreement or understanding that he would do so in consideration of services that she had or would perform for him, and if he did not hold out said articles of adoption as an inducement to her to perform services for him, then he had the right to thereafter disinherit her, if he desired to do so."

The jury rendered a verdict in favor of the plaintiffs for \$1,680, upon which judgment was entered. The Court of Civil Appeals affirmed the judgment of the district court.

The charge given by the court, first copied above, may be best understood by stating its terms in this form, so as to show the grammatical connection thereof: "Now, if you believe and find from the evidence in this case that at the time G. W. Clark and his wife took Louisa West to see her father in Jack county, Texas, the said defendant and his wife jointly agreed with plaintiff's father that if he, the said father of the plaintiff, would permit plaintiff Louisa West to return home with defendant G. W. Clark and his wife, and remain with them and work for and perform services for them as their own child until she, the said plaintiff,

was grown and until she married, that they, the said defendant and wife, would adopt her; * * * and if you further believe and find from the evidence in this case that by virtue of this agreement * * * of the said defendant G. W. Clark that the said plaintiff Louisa West was induced to remain and perform services for the said G. W. Clark and his wife until she, the said Louisa West, was twenty-one years old and until she married; and if you further find and believe from the evidence in this case that defendant G. W. Clark has renounced and repudiated said agreement, if any; that he does not now intend to carry the same out; and you further believe and find from the evidence in this case that the services so rendered by plaintiff Louisa West to defendant G. W. Clark and his wife were of some value, and that they were such as set out and described in plaintiff's petition—then in such event, if you so find and believe from the evidence in this case, you will find for plaintiff, and assess their damages as hereinafter directed."

The portion of the charge omitted consists of three distinct grounds, upon either of which a recovery might have been based, but they do not limit or qualify the first proposition. The effect of the charge was to tell the jury to find for the plaintiffs if Clark and wife agreed with the father of Louisa, or with her, to adopt her, and such promise induced her to live with them; in other words, it gives to her, as an adopted child, an absolute right of inheritance without any promise by Clark that she should have his property at his death. That the court intended to present this view of the law is emphasized by the second charge given as quoted above, in the use of this language: "If you believe from this evidence that defendant G. W. Clark voluntarily adopted said plaintiff," etc. The affirmative charge authorizes a recovery if he agreed to adopt the plaintiff, and the charge to find for defendant is based upon his act of adoption if it was voluntary: that is, not in pursuance of any agreement. Looking at the charge from the standpoint of the jury, we are of opinion that the jury must have understood the law to be that if Clark agreed to adopt Louisa if she would live with him, and did adopt her, she was entitled to inherit his property, and if Mrs. Clark made a will giving her property to other people, and Clark did not intend to give Louisa his property, then she was entitled to recover from the defendant the value of her services rendered during her stay in the family. Article 1 of the Revised Statutes of 1895 prescribes the proceeding of adoption, and article 2 the effect of it. Article 2 is in this language:

"Art. 2. Such statement in writing, signed and authenticated or acknowledged, and recorded as aforesaid, shall entitle the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of

the party so adopting him; provided, however, that if the party adopting such heir have, at the time of such adoption, or shall thereafter have a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the party adopting him."

The effect of the adoption of Louisa was to put her in the same attitude towards the adopting parents as if she had been their child. The charge under examination did not make the right to recover depend upon a promise by Clark that he and his wife would leave their property to Louisa, but upon the effect a promise to adopt her may have had upon her mind in inducing her to live with and to serve them. In the absence of an agreement to leave their property to the adopted child, the promise to adopt would not support a claim beyond the statutory provisions.

The court erred in giving the charge complained of, for which error the judgments of the trial court and of the Court of Civil Appeals are reversed, and this cause remanded to the district court of Erath county.

WOOTEN v. ROGAN, Commissioner.

(Supreme Court of Texas. April 20, 1903.)

MANDAMUS—DISPUTED QUESTIONS OF FACT—JURISDICTION.

1. Mandamus will not lie to compel the Commissioner of the General Land Office to reinstate a sale of school lands, when it appears that a determination of relator's rights would involve disputed questions of fact.

Mandamus by A. T. Wooten against Charles Rogan, Commissioner of the General Land Office. Petition dismissed without prejudice.

Matlock, Miller & Dycus, for relator. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondent.

WILLIAMS, J. This proceeding was begun by Wooten for a mandamus to compel Rogan, then Commissioner of the General Land Office, to reinstate a sale of four sections of school land which had been canceled. J. J. Terrell, the successor in office of Rogan, has become a party, and is now the respondent.

The petition states that on April 3, 1899, C. R. Scott made applications, complying in form with the law, for the purchase of the sections, and made the required payments, and that, in due time, the land was awarded to him by the Commissioner; that at the time of his purchase Scott lived in a dwelling house on the land, and was an actual settler thereon, intending to make it his home, but that he was paralyzed in his hips and legs, was unable to walk without assistance, and was almost blind; that the land was in a sparsely settled country, distant from any town where he could obtain necessary medicines and medical advice and treatment; that

he, therefore, upon advice of friends and physicians, temporarily left the land and went to Hot Springs, Ark., where he remained until December 3, 1899, intending, not to abandon the land as his home, but to return to it; that during his absence he left in charge of the land a tenant to cultivate it, who remained until November 1, 1899, and was succeeded by another tenant, who continued to live upon the premises; that about the 7th day of December, 1899, being called upon by the Commissioner to explain his absence, he filed in the General Land Office his affidavit, supported by two credible persons, stating the facts, which was accepted by the then Commissioner as a sufficient explanation; that about December 7, 1899, he returned to the land to make his home thereon, but that, on April 27, 1900, finding that his health and strength again failed him, and that he could not live upon the land, but had to leave it in order to prolong his life, he sold and conveyed it to A. G. Patty; that Patty recorded his deed and filed it and his obligations in the Land Office as required by law, and thereafter occupied the land as an actual settler in good faith, as required, until September 9, 1902, when he sold and conveyed it to relator; that on the 9th day of October, 1902, Patty made proof of three years' occupancy by Scott and himself, which, with the deed to relator and his obligations as required by law, was filed in the Land Office; that on November 14, 1902, relator paid the whole of the purchase money, and demanded the issuance of a patent, but that the Commissioner refused to issue it, and canceled the sales, because of the facts stated in the affidavits which had been filed by Scott in 1900. The petition also states that there is no contested question of fact, and that the action of the Commissioner is based solely on his opinion that more than six months' absence from the land operated a forfeiture of it, without regard to the intention of the party to abandon or return.

The answer of the Commissioner does not concede that Scott was ever a settler in good faith for the purpose of making his home upon the land, or that he never intended to abandon it, but insists that the allegations raise questions of fact as to the existence of such intent and as to evasions of the law, and that these questions should not be determined in this proceeding, but in the ordinary way in some tribunal having power to try and determine questions of fact. It further denies that the affidavits filed and proof of occupancy were ever accepted as satisfactory.

It will be observed that the time of occupancy by Scott and Patty must be added together to make up the three years required by law to perfect relator's right. The character of Scott's settlement and holding is therefore necessarily involved, and it depends upon a question of fact not admitted. In order to grant the relief asked by relator, this

court would have to determine, not only the question of law whether or not the more than six months' absence of Scott, regardless of his intent, would work a forfeiture, but, if that were decided in relator's favor, the further questions of fact whether or not Scott's settlement was made in good faith with intent to make a home upon the land, and whether his absence was with the intent to abandon or resume occupancy. Upon these questions the state would have the right to introduce other testimony, and, even if they were to be determined from the acts and facts stated, alone, they could only be determined by drawing inferences which only triors of facts could draw. We are therefore of the opinion that this court is without jurisdiction of the case as made, and that the proper disposition to make of it is to dismiss the application without prejudice to the rights of either party. *Teat v. McGaughey*, 85 Tex. 488, 22 S. W. 302.

Dismissed without prejudice.

J. S. BROWN HARDWARE CO. v. INDIANA STOVEWORKS.

(Supreme Court of Texas. April 23, 1903.)

CONTRACT OF SERVICE—INDUCING PARTY TO BREAK—TORT—LIABILITY.

1. It is an actionable wrong to induce the servant of another to break his contract of employment.

Error to Court of Civil Appeals, First District.

Action by the J. S. Brown Hardware Company against the Indiana Stoveworks. From a judgment of the Court of Civil Appeals (69 S. W. 805) affirming a judgment for defendant, plaintiff appeals. Reversed.

L. E. Trezevant and Frank M. Spencer, for plaintiff in error. Mott & Armstrong, H. W. Rhodes, N. L. Lindsley, and J. E. Williamson, for defendant in error.

GAINES, C. J. This suit was brought by the J. S. Brown Hardware Company against the Indiana Stoveworks. The petition alleged, in substance, that the plaintiff is a corporation chartered under the laws of Texas, and that it is and has been engaged for many years in the business of selling stoves, stove fixtures, and attachments, and other hardware, by wholesale, throughout the state; that it had employed one Nash as a traveling salesman to sell its wares, and that Nash had agreed to serve it exclusively; that, while he was so engaged, the defendant the Indiana Stoveworks, also a corporation, and engaged in the business of manufacturing and selling stoves and stove attachments, and knowing Nash's contract with the plaintiff, induced him to enter its service; and that the said Nash, while under contract with plaintiff, and engaged in its employment, did,

without plaintiff's knowledge, engage in the sale of the defendant's products, and so continued for the term of five years. The plaintiff further alleges, in effect, that, by reason of the conduct of the defendant, it lost trade and was damaged many thousand dollars. A demurrer to the petition was sustained, and on appeal the judgment was affirmed by the Court of Civil Appeals.

In the case of *Raymond v. Yarrington* (this day decided) *infra*, we have held that to induce a party to a contract to break it, to the damage of the other party thereto, is an actionable wrong. That ruling is decisive of the question in the present case. It was, in our opinion, error to sustain the demurrer to the petition.

The judgment of the district court and that of the Court of Civil Appeals are therefore reversed, and the cause remanded.

RAYMOND v. YARRINGTON et al.

(Supreme Court of Texas. April 23, 1903.)

CONTRACT BY PARTNERS—CONSTRUCTION—INDUCING BREACH—DAMAGES.

1. Provision in a contract by which partners sold their business to plaintiff, "We agree and bind ourselves" not to engage in such business in such territory, binds them that neither shall engage in the business.

2. For persons to knowingly induce one to break his contract with another gives the latter a cause of action against them for any damages from the breach.

3. Where one sells his business, and agrees with the purchaser not to re-engage in the business in that territory, the purchaser is entitled to nominal damages for breach thereof, if actual damages be not shown.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by J. H. Raymond, Jr., against A. H. Yarrington and others. Judgment for defendants was affirmed by the Court of Civil Appeals (69 S. W. 436), and plaintiff brings error. Reversed.

See 72 S. W. 580.

J. W. McClendon and Fiset & Miller, for plaintiff in error. D. W. Doom, D. H. Doom, and West & Cochran, for defendants in error.

GAINES, C. J. This suit was brought by plaintiff in error against defendants in error. General and special demurrers to the petition were interposed by all the defendants, and all were sustained except those of defendant Harwood. His exceptions were overruled, but upon the trial a verdict was instructed in his favor. A judgment was accordingly entered for all the defendants, and it was affirmed on appeal to the Court of Civil Appeals.

We shall set out in substance, and as briefly as practicable, the facts alleged in the petition. In the first paragraph Yarrington, Harwood, McDowell, Kaufman, and the E. O. Stanard Milling Company, a corporation, are

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 1282.

made defendants in the suit, and their respective residences are stated. In the second paragraph it is alleged that Yarrington and Harwood were partners engaged in a brokerage or agency business, and had built up a profitable trade selling flour, meal, bran, and other milling products for the defendant corporation and others engaged in a like business; that the firm had contracts with such corporations and others, which gave them an exclusive right to sell the products of their employers in a certain designated territory, of which the city of Austin was a part, but that the contracts were for no definite period of time, and were terminable at the pleasure of either party upon notice to the other. It was further alleged that for the consideration of \$1,000 the defendants Yarrington and Harwood sold to the plaintiff and to his brother, one Frank Raymond, as partners, such agency business in such territory, and bound themselves not to conduct at any time thereafter, either individually or as partners, a milling agency business therein, and that the defendant milling company knew of said contract, and agreed that the plaintiff and his brother should take the place of Yarrington and Harwood as their agents in the designated territory, and should there represent them exclusively in the sale of their products. It was also averred in such paragraph that in the agreement it was stipulated in behalf of the defendant milling company that the plaintiff and his brother should retain defendant Yarrington to assist them in their business for the period of 90 days, and that thereby the defendant milling company impliedly agreed to retain the plaintiff and his brother as their agents in the designated territory for a reasonable time, provided they should prove to be satisfactory agents; and that, but for the conduct of the defendants as thereafter alleged, the agency would have continued for a period of five years. In the third paragraph it is further averred that, in order to deprive the plaintiff and his brother of the advantages to accrue to them under their contract with Yarrington and Harwood, the defendants conspired to break up the agency business of plaintiff and his brother in the following manner: That, to obtain the \$1,000 paid for the business, Harwood entered into the contract with the intention of not carrying out his obligation, and with the purpose of again entering upon the business of an agency for the sale of mill products in the territory named in the agreement; that "in pursuance of said conspiracy" he began, in August, 1898, to sell the products of other mills in such territory, and that about December of that year the defendant milling company limited the territory of Raymond & Bro., as their agents, to the city of Austin; that prior to February 1, 1899, defendants McDowell and Kaufman, acting in their own behalf and as agents of the defendant milling company, took part in the original illegal purpose of

Harwood to violate said contract, and with full knowledge of the rights of the Raymonds conspired and agreed with him that McDowell and Harwood should take the place of the Raymonds as the agents of the defendant milling company in the territory designated in the original contract between the Raymonds on the one part and Yarrington and Harwood on the other; and that thereupon the defendant milling company did employ McDowell and Harwood as their agents for such territory, and did discontinue the employment of the Raymonds. It is also alleged in this paragraph that about December 1, 1898, the defendant milling company limited the agency of the plaintiff and his brother to the city of Austin, and that they continued to act as agents for such restricted territory until February 1, 1899. Then follow allegations of a loss of profits from the conduct of defendants in the sum of \$10,000, and that their acts were done knowingly and over the protests of the Raymonds, with a claim for exemplary damages. In the fourth paragraph are found similar allegations as to the destruction of the business of the plaintiff and his brother, and the damages which resulted therefrom, all of which are alleged to have accrued from a conspiracy on part of defendants McDowell, Kaufman, the milling company, and Harwood to cause Harwood to break his contract with the Raymonds. The fifth paragraph repeats the allegations as to the damages. The sixth alleges an assignment for value by Frank Raymond of his interest in the cause of action to the plaintiff.

Were the demurrers of the defendants other than Harwood properly sustained? A copy of the written contract between the plaintiff and Yarrington and Harwood is made an exhibit to the amended petition, and contains this provision: "We specially agree and bind ourselves not to enter into or conduct a milling agency business in the city of Austin or the territory above designated without the written permission of J. H. Raymond, Jr., or his assigns." It appears from the averments in the petition that Harwood only engaged in a milling agency business in the prohibited territory after the contract was executed. Therefore, unless the contract properly construed bound each of them not to conduct such business, no cause of action is shown against either of the defendants. Do Yarrington and Harwood, by the contract, bind themselves that neither of them shall sell mill products in the prohibited territory, or merely that both shall not? This question we referred back to the counsel for written arguments, and the arguments have been filed. From the cases there cited we feel constrained to hold that it was a breach of the contract for either Yarrington or Harwood to again engage in the business in question in the designated territory. In the case of *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, a partnership known as "Welsh

Bros." sold out a business as undertakers to the plaintiff, Morris, and bound themselves "not to start the undertaking business in Denison City, Texas, so long as said S. B. Morris is in the business." Subsequent to the execution of the contract one of the partners only engaged in the prohibited business, and it was contended that this was no breach of the stipulation. It was held, however, that the action of the one was a breach of the contract. The contract was signed "Welsh Brothers"; and counsel for defendants in error frankly concede that, unless this case can be distinguished by the fact that the contract of Yarrington and Harwood is signed by each of them in their individual names only, it is conclusive of the question against them. We do not think the cases can be distinguished. The contract of Yarrington and Harwood, though signed by them individually, is as much a contract as partners as if it had been signed in the partnership name. The decision in *Welsh v. Morris* is in accordance, as we think, with the weight of authority. See opinion of Alvey, C. J., in *Love v. Stidham*, 53 L. R. A. 397, and cases there cited. Contra, *Streichen v. Fehleisen*, 112 Iowa, 49, 84 N. W. 715, 51 L. R. A. 412. The case, then, made by the petition is that the defendants, other than Harwood, conspired to induce and did induce the latter to break his contract to the damage of the plaintiff. The important question is, does this show a cause of action? The point has never been decided in this court, and the authorities upon it elsewhere are in conflict. We think, however, the great weight of authority is in favor of an affirmative answer to the question.

We will first review briefly the cases in the English courts in which the point has come up for consideration. The first is the leading case of *Lumley v. Gye*, 2 El. & Bl. 216, which was decided in 1853. In that case the plaintiff, the lessee of a theater, sued the defendant, alleging that a certain singer had been engaged by the plaintiff to sing at his theater, and none other, and that while she was under such contract the defendant maliciously induced and enticed her not to perform for him, as she had agreed to do. Upon demurrer to the declaration it was held by three of the judges that it showed a good cause of action. Justice Coleridge, one of the four judges who sat in the case, dissented. Practically the same question came before the court in the case of *Bowen v. Hall*, L. R. 6, 2 B. Div. 333. It was again held that an action would lie for inducing one under contract of service to another to leave the service. Lord Coleridge, then the chief justice of the common pleas, dissented from the opinion of the majority. Again, in 1893, the case of *Temperton v. Russell* [1893] 1 Q. B. Div. 715, came up for decision. There the plaintiff was a contractor and builder, and had made contracts with third persons to supply him with material to be used in his business. The defendants were a committee

of certain trade unions, and for the reason that plaintiff would not comply with certain rules laid down by the unions they induced those who had contracted to deliver him material to break their contracts, and also conspired to prevent others from entering into contracts with him. It was held that they were liable both for inducing a breach of the existing contracts and also for conspiring to prevent others from entering into contracts with the plaintiff. A similar case came before the House of Lords in 1897. *Allen v. Flood* [1898] L. R. App. Cas. 1. In that case the plaintiffs were employed by the job at work upon a ship, but were subject to be discharged at the will of their employer. Allen, the defendant, representing a boiler makers' society, called upon the agents of their employer, and stated to them that, unless the plaintiffs were discharged, the members of the boiler makers' society, about 40 in number, then at work on the ship, would be "called out" or "knock off" work on that day. Thereupon their employer discharged the plaintiffs, and they brought suit against the defendant, alleging, in effect, that he had unlawfully and maliciously caused their discharge. It was held by the court—four of the nine law lords dissenting—that, since the employer had a right to discharge the plaintiffs, and since the discharge was lawful, the defendant was not liable for having procured it, although, as found by the jury, he acted from a malicious motive. In the numerous opinions which were given in the case, the previous cases of *Lumley v. Gye* and *Bowen v. Hall* were discussed. After that decision it became a question whether their authority had not been shaken, if not overruled, thereby. But in 1901 the important case of *Quinn v. Leatham* [1901] App. Cas. 495, arose, and it was there held that: "A combination of two or more without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable." All the judges concurred in the judgment, and the effect of the decision is to distinguish *Allen v. Flood*, and to hold the cases of *Lumley v. Gye*, *Bowen v. Hall*, and *Temperton v. Russell* were correctly decided. In *Lumley v. Gye* the contract was one for personal services, and the insistence of Mr. Justice Coleridge was that it was not actionable to induce the breach of such a contract except where it created the relation of master and servant in the technical and restricted sense of those terms. The majority, however, held that the rule applied to any contract for service. The decision, therefore, goes no further than to hold that a cause of action lies for procuring the breach of any such contract. It may be doubted whether the contract the breach of which was induced in *Bowen v. Hall* should be classed as a contract for service. However that may be, the contract in *Temperton*

v. Russell was for the delivery of material, and it does not come under that class. It seems to us, therefore, that the law is now settled in England that it is an actionable wrong knowingly to induce one to break his contract with another to the damage of the latter, and that it is also wrongful and actionable for two or more to accomplish such end by conspiring with each other.

Numerous decisions affirming the same rule may be found in the courts of this country. We will briefly refer to some of the more prominent cases. In *Angle v. Railway Company*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, the contract under consideration was for the construction of a railroad, and it was held that: "If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." The opinion of Mr. Justice Brewer reviews *Lumley v. Gye* and other English cases, which had been decided at that time, and was concurred in by all the judges save one, who dissented upon grounds not in conflict with the decision upon that point. The case of *Walker v. Cronin*, 107 Mass. 555, holds that an action lies against one who procures the violation of his contract of service by the servant, and that the rule is not confined to contracts for menial services. It was argued by the dissenting judge in *Lumley v. Gye* that the rule applied only in case of servants in the strict sense of that term, and that the action in such a case was given by the statute of 23 Edw. III, and was "limited by it." Since the Massachusetts court holds that the action is not confined to contracts such as are referred to in that statute, and since we see no sufficient reason for making a distinction in such a case between contracts of service and other contracts, it seems to us that that court would hold that it would be actionable knowingly to procure the violation of any contract to the damage of one of the contracting parties. In *Jones v. Stanly*, 76 N. C. 355, it is distinctly held that the rule applies to any contract. On the other hand, it is decided by the Supreme Court of California that "maliciously inducing another to break a contract with a third person will not create a liability to the latter when it is done without threats, violence, falsehood, deception, or benefit to the person inducing the breach." *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. The same principle was applied in *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171. That was a case strikingly like *Lumley v. Gye*. The plaintiffs had entered into a contract with the manager of the distinguished actress Mary Anderson to perform on certain nights at their theater, and afterwards the defendant procured a breach of the contract with plaintiffs, and procured the actress to appear at his, a rival house. It was held

that these facts constituted no cause of action.

There are many other cases of a somewhat similar nature, but in most of them there was some element of fraud, threats, intimidation, or conspiracy, and for that reason are probably not direct authority upon the question before us. We are of opinion that the rule that, where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing the breach for any damages resulting to him by such breach, is supported by a decided preponderance of authority and by the better principle. The principle is well stated by Lord Justice Lopes in his opinion in the case of *Temperton v. Russell* in the following extract: "The case which I think must govern our decision as to the first head of claim is *Bowen v. Hall* (1), which I understand to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person, or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case, which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation." It seems to us that, where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal; and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he has a remedy against the party who has broken the contract. In the first place, such remedy is ineffectual unless he who has made the breach has property or credits which may be applied by process of law to the satisfaction of a judgment that may be obtained against him. In the second it sometimes occurs that in case of joint tortfeasors the liability of the one may be secondary to that of the other, and that, in the event of a recovery against one, he may have a claim for indemnity against the party jointly liable. For example, a master may be sued for the wrong of his servant while acting in performance of the master's business and within the scope of his employment, although the wrongful act may have been done, not only without any participation on part of the master, but even against his express orders. We understand the rule in such a case to be that, though either or both may be held liable to the injured party, as between the master and servant the latter is primarily

responsible. We have said that the point has never been decided in this court. But in *Delt v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755, the plaintiff, a butcher, alleged in his petition that the defendants, a firm dealing in live stock, had not only refused to sell to him, but had combined with other such dealers, and had induced them also to refuse to deal with him. It was held that the defendants had the absolute right to deal or not with the plaintiff, as they saw fit, but that it was an actionable wrong to induce others to do so. Clearly, the substance of the wrong in that case was the inducements of third parties not to deal with plaintiff, which was a mere obstruction of his right to buy from dealers, without officious interference on part of others. If it be actionable for one to intermeddle in another's affairs, and thereby prevent him from making contracts, to the damage of his business, for a stronger reason it is actionable to induce the breach of a contract already made.

Our conclusion upon this branch of the case is that the court erred in sustaining the demurrer to the petition. Just here we will add, however, that it is not quite clear to us whether the allegations in the petition should be construed as charging defendant Yarrington as being a party to the agreement to induce Harwood to break his contract. But this is unimportant, since, as we have seen, he was responsible for Harwood's engaging again in the milling agency business, whether he induced him to do so or not.

We are also of the opinion that the court erred in instructing a verdict for the defendant Harwood. The charge is as follows: "In this case there is no evidence tending to show what part of the decrease in the business of Raymond & Bro. below that done by Harwood & Yarrington was caused by the competition of Harwood, if any, in violation of his contract, what part was due to competition of Harwood under his written permission, what part was due to lack of experience in the business on the part of Raymond & Bro. as compared with Harwood & Yarrington. * * * The jury will therefore return a verdict for the defendant." In view of the fact that the case will be remanded for a new trial, we must refrain from discussing the testimony. We may say, however, that the evidence does not show how much, if any, the plaintiff was damaged, and it may be that if, under the testimony and a proper instruction, the jury had given only nominal damages, the court should not have disturbed the verdict. From the nature of the case it is impossible to show the damages with accuracy, and to require accuracy in such a case would be to deny a remedy for a wrong. In *Welsh v. Morris*, previously cited, a judgment for substantial damages was sustained upon testimony quite as unsatisfactory, to say the

least of it, as that introduced in the present case. If Harwood violated his contract, the plaintiff was entitled to recover, at all events, nominal damages. *Davis v. Railway Co.*, 91 Tex. 505, 44 S. W. 822.

The judgments of the district court and that of the Court of Civil Appeals are reversed, and the cause remanded for a new trial.

GODWIN v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

CRIMINAL LAW—HORSE THEFT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CONTINUANCE—BILL OF SALE—ADMISSIBILITY—CONFESSION.

1. On a prosecution for horse theft and for theft as a bailee it appeared that defendant and another hired the horse in question, to be driven out into the country, and also secured a hack; that they traded the hack for a buggy; that subsequently they sold the horse and buggy, and defendant received part of the purchase price. Defendant moved for a continuance to secure the testimony of a witness that defendant stated he was going to get a rig and go into the country, selling patents, etc., and of another witness that he was the one who traded for the hack, and that at that time defendant's associate traded the horse, and that he was exercising the control and management, and that defendant did not exercise any control. Held not prejudicial to have refused the continuance, as the evidence would have militated against defendant rather than in his favor.

2. It was not error to refuse a continuance because of the absence of accused's codefendant, then a fugitive from justice.

3. On a prosecution for horse theft a bill of sale of the horse, executed by a third party, and offered in evidence by defendant, was inadmissible, in the absence of proof of its execution by its attesting witness.

4. Where, on a criminal prosecution, the court refused to admit a bill of sale of the horse executed by a third party, and offered in evidence by defendant, because its execution had not been shown by the attesting witness, and it appeared the attesting witness was 150 miles distant, it was not error to refuse to issue a subpoena for him; if accused thought the bill of sufficient importance, he should have asked a postponement until the witness could be brought in.

5. It would not have been error to have refused a postponement, the contents of the bill of sale having been before the jury, and it appearing that it was given by defendant's codefendant under an assumed name, and that defendant was present at the time, and there being evidence that defendant and his codefendant were acting together.

6. On appeal in a criminal case appellant claimed that his case had been called peremptorily, and that he was forced to trial before it was reached on the docket. The trial court explained that the case had been passed at the request of defendant, and that on the day set for it the court was engaged in the trial of another case, which was not concluded that day, and that on the next day all of the cases on the docket in advance of accused's had, by orders of the court entered several days prior to that day, been disposed of by setting them for a later day. Held, that there was no error.

7. On a criminal prosecution a sheriff who had had defendant in charge testified that after defendant had been "warned" as required by statute he made a statement regarding the

crime, after which the sheriff told him that in his opinion it would be better for him if a certain other person associated with defendant in the crime could be arrested. *Held*, that the statement made by defendant was admissible.

8. The admission in evidence of the confession made by accused to the sheriff would not have been erroneous, though an inducement to make it had been made, it appearing that defendant had previously stated the same facts to the sheriff and another, after proper warning, and without any inducement.

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

J. E. Godwin was convicted of crime, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment contains two counts, the first charging theft, and the second theft as bailee under a contract of hiring. The conviction was under the second count.

Application for continuance was properly refused. Conceding the diligence sufficient, which is not a fact, still, viewed from the standpoint of the motion for new trial, the testimony, if it had been adduced, could not have possibly benefited appellant. On the contrary, it would have been of a damaging character. By the witness Mrs. Garrett it was expected to be shown that appellant and Edwards, who was associated with him in hiring the horses and hack at Stamford, in Jones county, informed her that he owned and was in possession of certain patent receipts, and was going to procure a conveyance and get out in the country and engage in the business of selling said receipts and patents; that at the time appellant left her boarding house, where he and Edwards were boarding, they left a portion of their clothing at said house, with the understanding they would return in a few days. The second witness, whose name is not known, is said to reside near Nugent, in Jones county, and is the man to whom Edwards traded the hack obtained from the "Ice-Man" in Stamford, whose name is unknown, and because name is unknown he has been unable to procure process. He expected to prove by this witness that he traded for the hack in which defendant and Edwards left Stamford, and to which the horse defendant here stands charged with stealing was being worked, and that Edwards was the man who traded the horse, and who was exercising control and management of the horse, and at the time appellant did not exercise any such control over the hack or horse; and set up no claim in and to said horse. He also sought a continuance on account of the absence of Edwards, his codefendant, who, from the statement of the judge in his qualification to the bill, is a fugitive from justice, and under indictment in a separate bill for the theft of the same horse. The testimony shows that Edwards and appellant went into the wagon yard of T. M. Spindle, alleged

owner, in Stamford. Edwards, and secured the horse Spindle, to be driven out. Appellant was with him, went off with the horse. Edwards horse about the town, party termed the "Ice-Man" left, going south, or a little till they reached the neighborhood called "Nugent." They gathered in the hack. At Nugent they hired a buggy. Then they way down the country the route is given, but it is repeated—until they reached Comanche, where the horse trade was sold to a man named Ross, who did most of the talking. Ross and Holcomb bought the buggy, and defendant during the trial stated that the title to the buggy was all right. After the trade money paid over, \$12.50 of appellant's possession. Then they went to Ft. Worth, where they set out going to the residence of his brother in Jones county, and Edwards testified that the evidence of the unknown witness, to whom the hack was given before the jury as still being in the possession of appellant, had a tendency to strengthen the case because appellant had traded the hack to that point with Edwards, and had not known before of the sale of Edwards he then did, and Edwards was trading off property that belonged to him, and as bailee for his own use. This would have a tendency to show not only a conspiracy, but an actual acting in concert between Edwards, in the sale of the horse to the witness Ross, and the fact, if Spindle had testified to the acts set out in the motion for continuance, would have the time of getting the horse out of its final disposition in Comanche, and being put together by these parties. This testimony had a decided effect, and that it was probable it would have strengthened the state's case at no point have militated against the state, therefore could not have benefited appellant. It could not be expected to bring about a new trial or an acquittal. Of course, the presence of Edwards was seriously considered. Therefore, not err in refusing to grant continuance.

By bill of exceptions it is shown that defendant offered the testimony with effect that he bought the horse from Edwards charged with stealing, and that he then sold him the horse executed and the following bill of sale, given by the party making "Comanche, Texas, July 7th 1891. I hereby certify that I have this day

ed unto D. W. Ross one bay mare branded 'E' on right shoulder; also one gray mare branded 'A B' on left shoulder; also one saddle and one red bottom open buggy and harness. [Signed] J. C. Stacy. Witness: B. B. Holcomb." The state objected to the introduction of the bill of sale, because its execution was not proven by the attesting witness Holcomb. Appellant immediately asked for a subpoena for Holcomb, which was refused by the court. Appellant asserts that he was unaware of the fact that the bill of sale was in existence until spoken of by the witness Ross, while testifying, and that in the opinion of counsel this bill of sale was highly material and necessary. The court qualifies this bill by stating, in substance, that Ross testified, when he purchased the horse from Edwards, or Stacy, as he signed the bill, he received this bill of sale, and Holcomb signed it as a witness; that the bill of sale was then offered in evidence, and was ruled out on objection by the state, because its execution had not been proved, and the court refused a subpoena for the witness Holcomb. The bill is further qualified by stating that the evidence showed that Holcomb was in Concho county, some 150 miles southwest from Comanche county, where defendant was being tried. The court, after hearing the evidence as to where witness was, would not order subpoena, because it was impossible to get witness for four or five days, and he would not delay the case to send for him, and defendant did not ask to withdraw his announcement and continue the case on account of the absence of said witness, and the trial was concluded within a few hours. The ruling of the court was correct in regard to the exclusion of the bill of sale. *Morrow v. State*, 22 Tex. App. 239, 2 S. W. 624; *Graves v. State*, 28 Tex. App. 354, 13 S. W. 149; *Williams v. State*, 30 Tex. App. 153, 16 S. W. 760. There was no error in the further action of the court refusing to issue the process under the circumstances stated. If appellant thought the bill of sale was of sufficient importance, it was incumbent on him to ask a postponement or continuance of the case in order to have the witness brought in. But, as we view the case, had this been sought it would not have been error to have refused it. There is no question in the record. It is proven beyond peradventure that the bill of sale was given by Edwards under the name of Stacy. Ross details all the facts and circumstances, both with regard to the trade, the entire transaction, and the bill of sale. The contents of the bill of sale was completely before the jury, and we do not believe the fact that had the bill of sale gone before the jury it could have added anything to Ross' testimony or to the fact that Edwards, under the name of Stacy, signed the bill of sale and made the trade.

Bill of exceptions was reserved to the action of the court calling the case peremptorily, and forcing defendant into trial before reach-

ing his case regularly on the docket, and states in the bill that the cases of *State v. McDaniel*, *State v. Hardin*, *State v. Van Cleave*, and *State v. Montgomery* were in advance of this case. The court explains this by stating that this case had been passed by the court until September 5th at the request of appellant's counsel; that on the 5th the court was engaged in the trial of another case, which was not concluded until the forenoon of the following day. On September 6th, when the case was called, all of the cases on the docket in advance of this case had then, by orders of the court entered several days prior to the 6th, been disposed of by setting said cases for a later day of the term, and the case against appellant was the first on the docket on the regular call undisposed of on said 6th day of September, at which time appellant was required to announce. As explained, there is no error in this. *McGrew v. State*, 31 Tex. Cr. R. 336, 20 S. W. 740; *Shehane v. State*, 13 Tex. App. 533; *Jones v. State*, 8 Tex. App. 648; *Nichols v. State*, 3 Tex. App. 546.

Appellant's confessions made to Robinson, sheriff of Smith county, and Swan, sheriff of Jones county, were introduced over his objection. It is made to appear from the bill, and the qualification of the court to the bill, that Robinson, sheriff of Smith county, and Swan, sheriff of Jones county, accompanied by a deputy sheriff of Cherokee county, went to the residence of appellant's father, and arrested appellant. While under arrest, Robinson, in the presence of Swan, warned appellant in regard to any statement he might make as required by the statute. He then made a statement or confession to the officers, giving a history of the entire transaction from the time they secured the horses and hack in Stamford, Jones county, until final disposition of the property in Comanche county. When the officers separated, Swan, with defendant, reached Tyler, and took the train on the Cotton Belt, going thence to Waco. Some time between 2:30 a. m. and daylight appellant began talking to Swan again with reference to his case, when Swan reminded him of the warning Robinson had given him, and asked him if he recalled it. Defendant replied that he understood it fully. He then practically went over the same statement to Swan. This testimony was properly admitted. The bill, as prepared by counsel, makes the witness Swan state "that he then told appellant it would be far better for him to tell witness the whole truth about the matter, so that the other man, Edwards, could be caught, and that it would be the easiest way for him [appellant] to get out of the entire matter." But the qualification to the bill, which was accepted by appellant, eliminates this, for the court says: "That after defendant had made this statement witness Swan told defendant in his opinion it would be better for him if Edwards could be arrested." If, under appellant's view of it, there

could have been any inducement to make the second statement to Swan, the court has eliminated that view of it by the qualification. But in no event do we believe it would amount to anything had the statement been made by the sheriff, as contended for by appellant, because the same statement, without any inducement whatever, had been previously made to Robinson and Swan.

No error appearing in the record, the judgment is affirmed.

FAUCETT v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE—SUFFICIENCY.

1. Testimony that witness "drank some stuff they called 'Tin Top.' I did not drink enough to feel it; it did not have any effect on me. I think if a person would drink enough of it, it would make him drunk"—does not show that the liquor sold is intoxicating, if drunk in reasonable quantities, and does not sustain conviction for violating local option law.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Walter Faucett was convicted of crime, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100, and 60 days' confinement in the county jail.

The only question we deem necessary to pass upon is the sufficiency of the evidence. The following is all the evidence adduced on the trial. Stoneham Beal testified: "I was in the Waukeshaw Joint, in the town of Colorado, Mitchell county, Texas, on December 22, 1902, and drank some stuff they called 'Tin Top.' I did not drink enough to feel it; it did not have any effect on me. I think if a person would drink enough of it, it would make him drunk; but I don't know how much it would take. It was colored sortie red." We do not think this evidence is sufficient, since it does not show that the liquor sold was intoxicating liquor if drunk in reasonable quantities, which has heretofore been held by this court to be necessary.

The judgment is reversed, and the cause remanded.

WINN v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—AFFIDAVITS.

1. A new trial will not be granted on the ground of newly discovered evidence, where no diligence in endeavoring to secure the evidence is shown.

2. On a motion for a new trial in a criminal case, on ground of newly discovered evidence,

accused did not attach the affidavits showing what the testimony would be, but attempted to excuse himself on the ground that it was the last day of the term when the motion was presented. *Held*, that if between the trial and the application he had discovered the testimony he could have procured the affidavits of the witnesses or of his informant, and hence the excuse was of no merit.

Appeal from District Court, Sabine County; Tom C. Davis, Judge.

Tid Winn was convicted of an assault to murder, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant insists the court erred in overruling his motion for new trial predicated on newly discovered evidence. We find in the record what purports to be an application for new trial based on this ground. However, no diligence is shown, and no reason appears why said testimony was not discovered before the trial. Moreover, appellant did not attach the affidavits of the witnesses showing what their testimony would be, but excuses himself by stating it was the last day of the term of court when the motion was presented, and he did not have time. Certainly if, in the interim between the trial and the application for new trial, he discovered said testimony, either through the witnesses or some other person, he could have procured the affidavits of said witnesses or his informant. The application is totally insufficient.

There being no error in the record, the judgment is affirmed.

RACER v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EVIDENCE—SUFFICIENCY.

1. Testimony that witness bought "from defendant one bottle of Wakeshaw; that he has drank the stuff called 'Wakeshaw'; that he thinks it will, if enough is drank, make a man drunk"—is insufficient to justify a conviction for violating the local option law.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Walter Racer was convicted of crime, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law, the penalty assessed being a fine of \$25, and 20 days' confinement in the county jail.

We have examined the evidence, and do not think it sufficient. In regard to the intoxicant, the following is the entire testi-

mony: The witness Beal testified "that on December 24, 1902, he did buy from defendant one bottle of Wakeshaw; that he has drank the stuff called 'Wakeshaw'; that he thinks it will, if enough is drank, make a man drunk."

The judgment is reversed, and the cause remanded.

DAVIDSON v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—ORDERS OF COMMISSIONERS' COURT—VALIDITY—EVIDENCE—INSTRUCTIONS—LOCUS OF SALE.

1. Orders appearing in the minutes of the commissioners' court, ordering a local option election, counting and declaring the vote, and ordering publication, were valid, though such minutes were not signed.

2. On a prosecution for violation of the local option law, it was not error to allow the one who delivered the whisky to testify that, taking the letter of instruction in connection with the shipment, he considered it a C. O. D. shipment.

3. Where the court charged the jury to convict if they found that the whisky was sent into the local option precinct C. O. D., it was not error to refuse to charge them to acquit unless they found that it was so sent.

4. Where liquor was sent to a third person with instructions not to deliver it without receiving the pay therefor, he was the agent of the consignor, and the sale was consummated at the place of delivery.

Appeal from Knox County Court; G. B. Landrum, Judge.

B. F. Davidson was convicted of violating the local option law, and appeals. Affirmed.

Glasgow & Kenan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

Appellant excepted to the action of the court instructing the jury that local option was in force in said precinct No. 1 of Knox county. He claims that this matter was in issue on the trial of the case, and the court could not assume the existence of local option and so instruct the jury. We find in the record an order passed by the commissioners' court ordering said election. We also find the order counting the vote and declaring the result of said election, and also the order of publication, putting local option in force. All these orders appear to be regular in form. Appellant by bill of exceptions, however, says he objected because the minutes of the commissioners' court, in which said orders appeared, had never been signed by the judge or the commissioners, and had not been attested by the clerk, and that said objection put said matter in issue, and that the judge was not authorized to charge, as he did, that local option was in force in said precinct.

If it be conceded that the objection stated in the bill of exceptions is equivalent to a certificate of the judge that the ground existed, to wit, that the minutes were not signed, then this was not necessary to give validity to said orders. Being found in the minutes of the commissioners' court, it was not necessary that the county judge and commissioners should sign said orders. *Lillard v. State* (Tex. Cr. App.) 53 S. W. 125. We do not believe that the validity of the local option election or orders of the court were put in issue, and the court was authorized to instruct the jury as it did. *Chapman v. State* (Tex. Cr. App.) 39 S. W. 113; *Williams v. State* (Tex. Cr. App.) 39 S. W. 664; *Benson v. State* (Tex. Cr. App.) 44 S. W. 167.

On the trial of the case, while Dan Berry was on the stand, and after he had testified to having received the whisky and turned it over to Dan Roberts, and having received the money from Dan Roberts, paying the freight, and paying the balance to appellant, and also having testified to a letter received from appellant, and exhibiting it in evidence, he was asked by defendant's counsel the following question, "Do you handle the express at the drug store that comes on the mail hack?" to which he replied, "I do." He was then asked, "Did you consider the whisky a C. O. D. shipment?" Here counsel for the state objected, and the witness was permitted to answer, stating, "I did not," whereupon counsel for the state asked the following question, "Taking the letter of instruction to deliver the whisky and collect for the same, in connection with the shipment, did you not consider the whisky a C. O. D. shipment?" to which witness answered, "I did." This last question and answer was objected to on the part of appellant because it elicited an opinion of the witness. It would seem that this last answer was an opinion which both the state and appellant were seeking to obtain of this witness as to how he considered said package. He had previously answered that having received the whisky marked as it was, as an express agent, he did not consider it a C. O. D. shipment. He was then asked that receiving the package, in connection with the letter which was sent him, how he considered it. And this was objected to as stated, because it elicited the opinion of the witness. We think the letter of instructions which accompanied the package shows very clearly that it required the witness to whom the package was consigned to collect the money in connection with the delivery of said package, and, whether or not it be considered as an opinion of the witness, it is a very clear interpretation of said letter which had been introduced in evidence, and the testimony given by the witness on this point was not error.

Appellant contends that the sale was not in precinct No. 1 of Knox county, but was consummated at Guthrie, in King county; and he complains in this connection that the

court gave the following charge: "If you find from the evidence that defendant B. F. Davidson sent the whisky by the mail carrier, addressed to Dan Roberts, in care of Dan Berry, and at the same time sent Dan Berry a letter or note requesting the said Berry to deliver the whisky and collect the money for the same, and then, in pursuance of the request to deliver the goods, said Berry did deliver the goods and did collect the money; or if you should find from the evidence that defendant shipped the whisky into precinct number one to Dan Roberts, the witness, in care of Dan Berry, to be delivered C. O. D. by said Berry, or collect on delivery; and if you so find from the evidence—then the sale would be a sale at the place of delivery, and you will convict defendant," etc. And he insists that the court, in lieu of said charge, or at least as expressing his theory, should have given the following requested charge, to wit: "The jury are charged that, before you will be warranted in convicting the defendant, you must find from the evidence in this case that defendant sent the whisky to Dan Berry to be delivered to the witness Dan Roberts, C. O. D., cash on delivery, and if you do not so find you will acquit defendant." We think that the charge as given differed but little in effect from the requested charge; that is, the charge given instructed the jury to convict if they found that the whisky was sent to precinct No. 1 C. O. D., whereas the requested charge instructed the jury to acquit unless they did find that the whisky was sent into precinct No. 1 as a C. O. D. package. However, the charge as given was a little fuller, in that it referred to the letter of instructions accompanying said package. We do not believe that it was necessary to give the requested instruction, because the jury in the charge given was instructed as to the only grounds upon which they were authorized to convict, and if they did not so find an acquittal followed as a matter of course.

We have examined the record carefully as to the question of sale, in connection with the locus of its consummation. While the witness Berry disclaims any agency from appellant, yet the letter of instructions which accompanied the whisky and was delivered to him, and under which he acted, clearly constituted him the agent of appellant in delivering the whisky and receiving pay therefor. The acts of Berry were performed at Benjamin, in precinct No. 1 of Knox county. He was evidently not authorized to deliver the whisky without receiving pay therefor, as the letter of instructions directed to him clearly indicates; that he acted in that matter for appellant, who lived at Guthrie, King county, and who sent the whisky to Dan Berry to be delivered to Dan Roberts, when he paid for the same; that is, as we understand the letter of instructions to Berry, appellant was not willing to intrust the matter to Roberts, the purchaser of the whisky, nor

was he empowered to deliver the same to him, unless the money therefor was paid to Berry, who was authorized to receive and remit it to appellant, the consignor of the whisky. This, as we understand it, was a sale consummated at Benjamin. It was not like the case of *Bruce v. State*, 36 Tex. Cr. R. 53, 39 S. W. 683, which depended on its own peculiar circumstances. Nor is it necessary to discuss whether a C. O. D. package of whisky is a sale at the point of destination or to determine how far the Legislature is authorized to go in defining a sale, as in the act of the Twenty-Seventh Legislature, p. 262, c. 96, amended art. 402a. We are inclined to the opinion, however, that the Legislature cannot change the rule of law with reference to what it takes to constitute a sale or to fix the locus of such sales. Under the facts here as shown above, this sale was not consummated until the money should be paid to appellant's agent, and this was done, as above stated, at Benjamin, when the title to the whisky was transferred. This, as we understand it under the authorities, constituted the transaction a sale at the above-named place. See *Northcutt v. State*, 35 Tex. Cr. R. 584, 34 S. W. 946; *Bogel v. State* (Tex. Cr. App.) 55 S. W. 830. In the last case we would remark that the question did not seem to turn upon the question as to whether a C. O. D. package is a completed sale at the point of shipment or at the point of delivery, but rather involved the question as to an actual sale by an agent in the local option precinct.

We have carefully examined the record, and, finding no error, the judgment is affirmed.

DOUTHIT v. STATE.

(Court of Criminal Appeals of Texas, Feb. 11, 1903.)

GAMING—EVIDENCE—SUFFICIENCY—APPEAL—DEFECTIVE RECORD.

1. Where the term of the county court in which the trial was had began May 5 and adjourned May 25, 1902, as shown by the caption of the transcript, and according to the record appellant entered into a recognizance in said court on February 22, 1902, over two months before the convening and adjourning of said term, the appeal must be dismissed.

On Rehearing.

2. The information charged defendant with having permitted a game of cards to be played on his premises, said premises being appurtenances to a public place used for the sale of hop ale. The statement of facts prepared by the trial judge showed that defendant was engaged in selling hop ale and intoxicating liquor, and permitted a game of cards to be played in a room adjoining the saloon, and cut off from it by a partition wall. *Held* to make defendant guilty under the information.

Appeal from Somervell County Court; J. G. Adams, Judge.

A. L. Douthit was convicted of permitting gaming on premises under his control, and appeals. Affirmed.

J. Elbert Pearce, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General moves to dismiss this appeal because the term of the county court in which this trial was had began on the 5th day of May, 1902, and adjourned on the 25th day of May, 1902, as shown by the caption of the transcript; and the record further shows that appellant entered into a recognizance in said court on February 22, 1902, over two months before the convening and adjourning of said term of court. We find the record in the condition stated in the motion.

The motion is sustained, and the appeal is accordingly dismissed.

On Rehearing.

(March 25, 1903.)

Appellant was convicted of permitting gaming on premises under his control, and his punishment assessed at a fine of \$25. The appeal was dismissed at a previous term of the court because of certain defects in the transcript, and it now comes before us on motion for rehearing, the defects in the transcript having been cured.

Appellant insists there is a variance between the allegations in the information and the proof herein, in this: "The information charges defendant with having permitted a game of cards to be played upon premises under his control and belonging to him, said premises being then and there appurtenances to a public place, to wit, a storehouse and a house for retailing spirituous liquors, and a house used as a place for the sale of hop ale, and to which the public is generally admitted for the purpose of buying said hop ale, it being a drink put up in bottles, and kept in said house for sale to the public, etc.; and the proof in this case fails to show that said place was a public place, or that the public had access thereto, or that same was frequented by the public, or that any hop ale or other liquors were kept there for sale, or that any of said hop ale or other liquors were sold to any person or persons, or that said hop ale, if sold, was an intoxicating liquor, but the proof does show that the part of the house in which the game was permitted to be played was a part and parcel of the same room in which the business of defendant was conducted, and was a part and parcel of the room in which said business was run, and that same was used in connection therewith."

By the statement of facts it is shown that John Hankins testified: "I know where defendant's place of business was on the 24th day of July, 1901. It was on the south side of the square, in Glen Rose, Somervell county. Defendant at the time was engaged in the business of selling hop ale. I was in defendant's place of business on the 24th day of July, 1901, and saw Mitchell, Bradford Mitchell, Tilford Belt, and Coon Woods drinking hop ale

together in the hop-ale joint. I saw defendant on that day. He was playing at a game with cards, with Walker Hardy in a room in the southwest corner of the building. The room is in the southwest corner of the building in which defendant's hop-ale joint is situated. I walked from the bar in the rear room of the building into the room where they were playing cards. There was a partition wall between the hop-ale joint and the room in which they were playing. The wall does not run up to the ceiling." After seeing the game of cards witness returned to the room in which the hop ale was being drunk, and it was then he saw said parties drinking the hop ale at the bar. After this testimony was introduced the statement of facts proceeds as follows: "At this stage of the trial, for the purpose of saving time and trouble, counsel for defendant admitted that defendant on the date charged in the information permitted a game of cards to be played in the room and upon the premises described by witness Hankins, and that said room and house described by Hankins, and shown by map in this statement of facts, were at the time and date, as charged in the information, owned by and under the control and management of defendant; and counsel for defendant also agreed, in this connection, that the only question they would raise or contend for should be as to the relation of the room in which the game of cards was played by defendant to the main building." Then follows the statement of the county judge to the effect that, the parties having failed to agree to a statement of facts, the above and foregoing was prepared by him and certified as required by law. We understand this statement of facts shows that appellant was selling hop ale and intoxicating liquor, and engaged in that business, and while so engaged he permitted a game of cards to be played in a room adjoining said building or saloon, which room was cut off from the saloon by a partition wall running up near the ceiling. This we understand makes appellant guilty under this information, and hence appellant's contention that the evidence is not sufficient is without merit.

Appellant also insists that the county attorney did not properly substitute the complaint. This is presented in several ways by bills of exception. It appears that appellant was convicted at the February term, 1902, of the court, the prosecution having been instituted during the previous November. After trial and conviction, the complaint was lost. Subsequent to the adjournment of court, to wit, at the May term following, the county attorney, by proper suggestion under the statute, indicated to the court that the complaint upon which the prosecution was predicated and conviction had was lost, and the court, as is authorized by the statute, permitted said complaint to be substituted, and it so appears in this record. While

the proceedings are not as formal in the substitution as might have been, we think all the legal requirements were complied with.

No error appearing in this record, the judgment is affirmed.

Ex parte LEWIS.

(Court of Criminal Appeals of Texas. March 25, 1903.)

MUNICIPAL CORPORATIONS—MAYOR AND ALDERMEN—APPOINTMENT BY GOVERNOR—CONSTITUTIONALITY OF CHARTER—LOCAL SELF-GOVERNMENT—RIGHT TO HOLD OFFICE—COLLATERAL ATTACK—HABEAS CORPUS—PROPRIETY OF REMEDY.

1. Notwithstanding *Sayles' Ann. Civ. St.* 1897, art. 4343, authorizing quo warranto as against one who usurps, intrudes into, or unlawfully holds or executes any office or franchise, the power of the Governor to appoint members of the legislative body of a municipality may be determined in habeas corpus by one charged with violating an ordinance; the acts of an officer holding by an absolutely void commission being open to collateral attack.

2. Bill of Rights, § 1, provides that the maintenance of free institutions, etc., depends on the preservation of the right of local self-government to all the states. Section 2 provides that all political power is inherent in the people, and all free governments are founded on their authority. Const. art. 6, relating to suffrage, provides in section 2 the qualifications of urban voters, who "shall have the right to vote for mayor and all other elective officers." Article 11, relating to municipal corporations, provides (section 5) that cities of over 10,000 may have their charters granted or amended by special act of the Legislature. By Laws 1875, p. 113, c. 100, and subsequent acts governing the incorporation of cities in general, the mayor and aldermen were made elective. Act of April 19, 1901 (*Galveston Special Charter*), creates a board of five commissioners, two to be locally elected, and three appointed by the Governor, one of whom he shall designate as president. This board is virtually a board of aldermen, and its president a mayor; he having also the right to vote with the board. The successors of the gubernatorial commissioners are to be appointed by the Governor, and vacancies filled by him. *Held*, that the special charter violated the principle of local self-government embodied in the Constitution, and hence an ordinance passed by the board of commissioners was void.

Brooks, J., dissenting in part.

Appeal from District Court, Galveston County; J. K. P. Gillaspie, Judge.

Habeas corpus by Charles Lewis against the sheriff of Galveston county. From a judgment remanding relator to the sheriff's custody, he appeals. Reversed.

Marsene Johnson, for appellant. J. Z. H. Scott, City Atty., C. K. Bell, Atty. Gen., and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted in the recorder's court of the city of Galveston for violating an ordinance of said city, and fined \$25. Said ordinance was of a sanitary character, and prohibited the removal of the contents of any privy or water-closet, etc., except between certain hours,

with the permission of the health physician, and in accordance with certain prescribed rules. This ordinance was passed by what are termed in the charter the "board of commissioners," who are in fact the board of aldermen of said city. For failing to pay said fine, appellant was committed to jail. He sued out a writ of habeas corpus before the criminal district judge of Galveston county, who, after hearing the evidence in said case, remanded applicant to the custody of the sheriff until said fine and costs should be paid. From this judgment, applicant prosecuted an appeal to this court.

No question has been made as to the regularity of the proceedings which led up to and included the conviction; but appellant contends that said conviction was null and void, because the charter of the city of Galveston passed by the Twenty-Seventh Legislature, and approved April 19, 1901, provides that the board of aldermen of the city of Galveston, called "board of commissioners," shall consist of five commissioners, three of whom are required to be appointed by the Governor; that, in accordance with said charter provision, the Governor did appoint said three officers, one of whom was named as the president of said board of commissioners, and that these three constituted a majority of the board of aldermen of said city; that said board passed the ordinance in question, under which appellant was tried and convicted. The insistence is that the Governor has no authority, under the Constitution of this state, to appoint the members of said board, and that the charter provision authorizing him to do so is null and void, and that said ordinance, and all proceedings thereunder, are without authority of law. As the case turns upon the provisions of the charter with reference to the selection of the board of commissioners, who stand for the aldermen of said city, the provisions of the charter bearing on this subject will be quoted substantially: Section 5 provides: "There shall be appointed by the Governor of the state as soon as possible after the passage of this act, three commissioners, one of whom he shall select and designate as president of the board of commissioners provided for herein, and within ten days after the passage of this act, it shall be the duty of the commissioners' court of Galveston county to order an election to be held in the city of Galveston, at which election the qualified voters of the city of Galveston shall select two other commissioners, who, together with the three commissioners appointed by the Governor, shall constitute the board of commissioners of the city of Galveston. In ordering such election, the commissioners' court shall determine the time and the places in the city of Galveston for holding such election; and the manner of holding the same shall be governed by the laws of the state regulating general elections. Each of said five commissioners shall be

over the age of twenty-five years, citizens of the United States, and for five years immediately preceding their appointment or election, residents of the city of Galveston. Each of said five commissioners shall hold office for two years from and after the date of his qualification, and until his successor shall have been duly appointed or elected, as the case may be, and duly qualified. Said board of commissioners shall constitute the municipal government of the city of Galveston." Section 9 provides for the removal of appointees; authorizing the Governor to remove the commissioners appointed by him, but withholding from him the power to remove others. Section 10 provides for filling vacancies in the board occurring during the term of office, giving the power to the Governor to fill vacancies occasioned by the resignation, etc., of his appointees; but others are to be filled in the same manner as state or district offices. Section 25 provides that the tenure of the board of commissioners shall be two years, and until their successors qualify, and that vacancies in said board are to be filled as provided in section 10. Certain sections make the president the executive officer of the city, and give him the right to vote on all questions which may arise. Other sections constitute the president and board of commissioners the successors of the mayor and board of aldermen of the city of Galveston, and fix their salaries; and said board is given plenary powers, such as are usual with reference to the government of said city, authorizing them to pass all ordinances, etc.

We understand the respondent to contend, first, that the matter of the appointment of said members of the board of commissioners by the Governor can only be inquired into by quo warranto, and that this question cannot be raised collaterally; second, that the Legislature is omnipotent in the creation of municipal corporations, unless restrained by the Constitution, and that there is nothing in the Constitution prohibiting the Legislature from granting to the Governor the power to appoint any or all of the members of the board of commissioners; third, that the appointment of the president of the board and two of the members was temporary, and, even if it be conceded that the Governor could not appoint the mayor and board of aldermen as permanent officers, it was competent to make a temporary appointment of such officers. We would observe, in this connection, that the appointments here authorized by the charter were not temporary in their character, but permanent, and that, when the time of the appointees of the Governor expired, their successors are to be appointed by the Governor. We understand this to be the plain reading of the charter provisions.

Is it necessary, in order to question the legality or constitutionality of an ordinance passed by the board of commissioners, to resort to a quo warranto proceeding? Our stat-

ute (Sayles' Ann. Civ. St. 1897, art. 4343) provides for writs of quo warranto as against one who usurps, intrudes into, or unlawfully holds or executes any office or franchise. This is in consonance with the general nature of the writ of quo warranto; that is, it furnishes a remedy or mode to try the right to an office or franchise. High on Extraordinary Remedies, §§ 591 to 621, inclusive. In State ex rel. John H. Spaulding v. Smith, 55 Tex. 447, it seems to have been held, where the question involved was simply the right to collect taxes, and not a contest for the office, that proceedings by quo warranto was not the proper remedy. In this particular case there is no contest pending for the office of alderman. Nor is this a suit to forfeit the entire charter of the city of Galveston because it is unconstitutional, nor because of nonuse or abuse of its franchise. For aught that appears, it is conceded that all the provisions of said charter are in accordance with law, except the appointment of the three commissioners. It would not necessarily follow that because the appointment of some officer of a corporation was void, being unconstitutional, the whole charter must necessarily fail. In city of El Paso v. Ruckman, 92 Tex. 86, 48 S. W. 25, it was held that the validity of the organization of the school board of the city of El Paso could only be inquired into by quo warranto. In that case it was held that the election was irregular, merely, and for those reasons might have been properly set aside in a proceeding instituted for that purpose. But we do not know that it has ever been held, where a pretended officer is acting by virtue of a commission which is absolutely void, his acts cannot be questioned in a collateral proceeding. If such should be the case, the result would follow that if one assumed to act as judge, and undertook to try a person, although his commission be absolutely void, a person so arraigned and tried would be driven to some procedure to stay the trial, in order to enable him to resort to a writ of quo warranto to question the authority of the officer trying him. In such case he would be compelled to seek the aid of the district attorney, who is authorized to prosecute writs of quo warranto, in order to stay the hand of that same district attorney in the prosecution. As we understand the rule as applicable both to civil and criminal matters, if a judgment is absolutely void, either because there is no constitutional tribunal, or because such tribunal has no jurisdiction of the subject-matter, its action can be questioned whenever and wherever it is invoked, either collaterally or otherwise. This is especially the rule in this court. See ex parte Cross, 71 S. W. 280—a recent case where an ordinance was held void because of the invalidity of the corporation. See, also, ex parte Tummins, 32 Tex. Cr. R. 117, 22 S. W. 409. In People ex rel. v. Whitcomb, 55 Ill. 172, it was said: "The proceeding in quo warranto will not lie

to determine the constitutionality of a municipal law; but the proper mode to challenge such law would be to interpose an objection as a defense to the enforcement of the ordinance." And that rule, it occurs to us, accords in principle with the proper practice. And see *High on Extraordinary Remedies*, 618, and *Stultz v. State*, 65 Ind. 492. We accordingly hold that appellant was not required to resort to the writ of quo warranto, but he could question the constitutionality of the ordinance in his defense when he was prosecuted thereunder. If the ordinance was merely irregular, he could not set it aside; but, if it is void (that is, if we should hold that the appointment by the Governor of the mayor and two of the board of aldermen was unconstitutional, and that this rendered the ordinance, the passage of which was participated in by them, void, as being against the Constitution of the state), then he can interpose the defense on the trial, and can avail himself of it here, and he would not be compelled to await the action of those who might be prosecuting him, in order to avail himself of the writ of quo warranto.

In discussing the constitutionality of the appointment of the mayor and two of the aldermen by the Governor, it may be conceded: First. That the burden is on relator to show, by the express terms of the Constitution, or by strong implication, that the exercise of the power of appointment is against the Constitution. What we mean by "strong implication" is: "When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the Constitution. The implied restrictions of the Constitution upon legislative power may be as effectual for its condemnation as written words, and such restrictions may be found either in the language employed, or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law." *State of Ind. ex rel. v. Fox* (Ind. Sup.) 63 N. E. 19, 56 L. R. A. 893, and authorities there cited. Second. The wisdom of the law is not a question; nor does it become the judiciary to try the issue as to whether the same appears expedient, politic, or necessary, these matters being exclusively within the province of the Legislature.

The Constitution of this state has never been construed as to the question here presented, but the subject has been thoroughly discussed in other jurisdictions—particularly in New York, Michigan, Indiana, and Tennessee, and in some other states. New York, as was observed by Mr. Cooley, is the only state of the original 13 colonies in which the mayor was appointed by the Governor. But this was changed at an early date, after the Revolution, and the Constitution in that state was made expressly and strongly pro-

hibitive as to the appointment by the Governor or Legislature of purely municipal officers. The discussion in that state, as in some others, turned upon the proposition as to whether the appointive officers were municipal or state officers; the decisions holding that certain classes of officers, as health, quarantine, and peace officers, were state, and not purely municipal, officers, and that it was not an invasion of local self-government to appoint such officers through the Governor or Legislature. *State ex rel. Wood v. Draper*, 15 N. Y. 532; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. And to the same effect, see *Board of Health v. Helster*, 37 N. Y. 661; *Davock et al. v. Chas. W. Moore* (Mich.) 63 N. W. 424, 28 L. R. A. 783. No question is or can be made here that the officers appointed were not municipal officers. Indeed, they were both executive and legislative officers of the city of Galveston; and the Legislature, in making these appointive, went further than the Legislature of any state ever attempted to go before.

In Michigan and Indiana the question has been discussed as applied to their Constitutions, both of which provide, in substance, "that all officers whose appointments are not otherwise provided for in their Constitutions, shall be elected or appointed in such manner as now is, or hereafter may be, prescribed by law." The decisions appear to be predicated in the proposition as to whether the appointing power, under said Constitutions, referred to the power of the Legislature or Governor, to appoint, or to the particular localities, and it was held that it referred to the localities. See *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Altor v. Wayne Co. Auditors*, 43 Mich. 76, 4 N. W. 492; *Davock v. Moore* (Mich.) 63 N. W. 424, 28 L. R. A. 783; *Geake v. Fox* (Ind. Sup.) 63 N. E. 19, 56 L. R. A. 893; *State ex rel. Holt v. Denny, Mayor, et al.*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. And to the same effect, see *Luehrman v. Taxing Dist. of Tenn.* 2 Lea, 425. This last case followed *People v. Hurlbut*, supra, in holding that the Governor was authorized to make temporary appointments of municipal officers. But the reasoning in all of the cases—those referred to as well as all others—to which our attention has been called, except *State of Nevada v. Swift*, 11 Nev. 134, strongly supports the proposition that, even without some express constitutional provision, neither the Legislature nor the Governor has the power to appoint the permanent officers of a municipality. In the cases cited it occurs to us that the real effect of the decisions was to establish the doctrine that, in the absence of a grant of authority in the Constitution authorizing the appointment of such local officers by the Legislature or the Governor, this power was denied by implication arising from the history and traditions which time out of mind

had conferred local self-government on municipalities. This question is presented so forcibly by the distinguished judges who decided the *Hurlbut Case*, and in language so much better than we can use, that we here present excerpts from the same, both on account of the historical facts recited, and because of the eloquent language in which the opinions are couched, and, moreover, because, in our judgment, it will afford good reading to those who would ascertain the underlying principles which uphold our republican institutions, and also serve to bar the way of those who desire to overthrow the principles of local self-government, and to establish in lieu thereof a strong central power.

Chief Justice Campbell uses this language: "Incorporated cities and boroughs have always, both in England and in America, been self-governing communities, within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than 'investing the people of the place with the local government thereof.' Saik. 193. In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings. Comyn, Dig. Franchises (F) 25. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience, or by encroachment. In modern times cities have generally acted in ordinary matters by such a select body. But townships still act by vote at town meetings, and for many purposes connected with taxation the people of cities usually have the same privilege. But whether acting directly or by their representatives, the corporation is, in law, the community, and its acts are their acts, and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation. Kyd, Corp. c. 3, § 8. This has been, from time immemorial, settled law. By articles 15 and 16 of the Great Charter, it was stipulated that the liberties and free customs of London, and all other cities, boroughs, towns and ports, should be preserved. Those liberties were all connected with and dependent upon the right to choose their own officers and regulate their own local concerns. The sole motive of the infamous proceedings of Charles II. to procure the forfeiture of these corporate charters was to enable him to interfere in the selection of corporate officers. When he had secured a decision against the city of London, adjudging the charter forfeited on trumped-up charges of sedition and illegal tolls, he offered, through Lord Keeper North, to respite the judgment if the city could give him such a right of control over

its selection of officers as to enable him to exclude persons not acceptable to the crown. 8 State Trials, 1281; Lives of Lord Chancellors, vol. 4, pp. 318, 319. These interferences with both the English and the American colonial charters were always regarded as legal outrages, and contrary to all constitutional principles, and one of the first acts of Parliament, after the revolution of 1688, was passed to prevent any future action of that kind. Our Constitution cannot be understood or carried out at all, except on the theory of local self-government, and the intention to preserve it is quite apparent. In every case where provision is made by the Constitution itself for local officers, they are selected by local action. All counties, towns, and school districts are made to depend upon it. All elections are required to be in local divisions where electors reside. Cities are represented in the board of supervisors, and it is quite possible for their members to outnumber the rest. It certainly cannot be that the state can control those bodies by sending its own agents there, and it cannot be possible that it was contemplated that any members of that board should be selected by a different mode of election or appointment from the rest. Cities may become counties, and surely there can be no county without popular institutions. Cities have been judiciously declared to come within the denomination of 'townships,' so far as to be entitled to library money; and, unless they are made to include school districts, they need not be compelled to have free schools. No one would venture to assume that the Constitution was designed to leave them in such a position. It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people. This is no mere political theory, but appears in the Constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is that, when the Legislature has designated the time and manner of appointment or election, the local authority shall fill the offices as so ordained."

We quote from Judge Christy as follows: "But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this Constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power

in the mere administration of such local affairs, and ask ourselves the question whether it was probably the intention of the convention in framing, or the people in adopting, the Constitution, to vest in the Legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent and even in defiance of the wishes of the proper officers, who would be accountable rather to the central power than to the people over whose interests they are to preside—thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state—when we take all these matters into consideration the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this Constitution went far in advance of the old one in giving power to the people which had formerly been exercised by the executive, and in vesting or authorizing the Legislature to vest in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of the like benefit of the principle of local self-government enjoyed by other political divisions of the state. The convention must be supposed to have recognized to some extent existing things, and to have had reference to cities and villages with substantially such organizations or upon such principles of self-government as had generally become customary. And in this view, when they provide that officers in cities and villages should be elected or appointed, we must understand that they referred to appointments of such nature (though not necessarily of the same officers) as had been sometimes, at least, made by the common councils of cities, or by village authorities, as has been quite generally the case with marshals, collectors, city attorneys, treasurers, etc., and such others as the Legislature might see fit to vest in such council or some other local boards, and resting upon similar principles. While, therefore, I have no doubt of the power of the Legislature to abolish or discontinue any of the separate boards previously existing in the city, and to consolidate all the powers and duties in this new board, which I think was the main purpose of this act, and to add all the new duties which have been imposed upon them, I concur in the opinions of the Chief Justice and my Brother Cooley that the Legislature had no power to make the appointment of the members of that board, as permanent officers for the full term, or the specific portions of such terms provided by this act for the respective members of the board. And to their full and exhaustive discussion of this point I refer without repeating it."

Judge Cooley, noted as a great constitution-

al lawyer, and the author of the work on that subject, states the question thus: "Whether local self-government in this state is or is not a mere privilege, conceded by the Legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right." He then traces the history of township or municipal corporations in some of the American colonies, and shows clearly that these formed the nucleus around which the patriots rallied during the American Revolution, and that they subsequently formed the basis of local self-government in the republic, which neither King nor Legislature were permitted to overthrow or destroy. He then proceeds to discuss the question as follows: "In view of these historical facts and of these great principles, the question recurs whether our state Constitution can be so construed as to confer upon the Legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid, on the one side, and drawn, on the other. As the Legislature could not be compelled to regard the local political sentiment in their choice, and would in fact be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere

abuses of power, such as may creep in under any system of constitutional freedom, but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but, if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a 'constitution' were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts which have come from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon King or Legislature at a distance to do so— If a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted. It consists in the civil and political rights which are absolutely guaranteed, assured, and guarded; in one's liberties as a man and a citizen; his right to vote; his right to hold office; his right to worship God according to the dictates of his own conscience; his equality with all others who are his fellow citizens—all these guarded and protected, and not held at the mercy and discretion of any one man or of

any popular majority. *Story, Miscellaneous Writings*, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest; and they have never questioned or doubted that the corporators in each municipality were exercising their franchises under the protection of certain fundamental principles which no power in the state could override or disregard. The state may mold local institutions according to its views of policy or expediency, but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty, where the state not only shaped its government, but, at discretion, sent in its own agents to administer it, or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all. What I say here is with the utmost respect and deference to the legislative department, even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be ward off. Nevertheless, when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established." *People v. Hurlbut*, 24 Mich. 104-108, 9 Am. Rep. 103.

We might pursue the subject further, and quote from the exhaustive opinion of Judge Hadley in *Geake v. Fox*, supra, and from the Reports in other states. But the views quoted, we apprehend, are sufficient, and will serve to indicate the reasoning upon which great judges who have considered this question base their views, and that they regard the attempt on the part of the Legislature to make this innovation, giving the appointing power of municipal officers to the Legislature and Governor, as unwarranted, in the face of our American system of municipal

government, and as destructive of the rights of the people in municipalities to select their own officers.

In *State ex rel. v. Moores* (Neb.) 76 N. W. 175, 41 L. R. A. 624, there was nothing in the Constitution of Nebraska especially restrictive of the authority of the Legislature to make local municipal officers appointive by the Governor, and so the question was here fully and fairly made. The distinguished jurists who wrote that decision were not content to rest the case on what had been said on the subject by other courts, but went into the question again; and, both on principles and authority, it was determined that the appointment and selection of municipal officers by any other than the local authorities was subversive of the principles of local self-government, which belonged to the people of the state, and inheres in every part of the Constitution. A perusal of these opinions is like sounding a new note on the old Liberty Bell, and must inevitably thrill the heart of every patriotic American who loves the free institutions of our country.

Now let us look to our own Constitution on the subject. Bill of Rights, § 1, provides:

"Texas is a free and independent state, subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the states.

"Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government," etc.

Article 2 divides the powers of government into three distinct departments—the legislative, executive, and judicial—and the powers thereof are reserved to each department, independent of the others. These powers are defined in subsequent articles. Article 6 relates to suffrage. Section 2 thereof prescribes who are suffragans in the state. Section 3 prescribes the voters in towns and cities, and uses this language: "All qualified voters of the state as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town," etc. Article 11 relates to municipal corporations. Section 4 thereof provides: "Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law," etc. Section 5: "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature,"

and then provides for taxation. Section 9 provides that the property of counties, cities, and towns, owned and held only for public purposes, such as public buildings, etc., shall be exempt from forced sale and taxation, etc. Section 10 authorizes the Legislature to constitute any city or town a separate and independent school district.

Granting, as was said, that the Legislature is omnipotent unless restrained by some express provision of the Constitution, or some clearly implied restriction, yet it occurs to us that we not only have a strong implied inhibition against the appointment of local municipal officers by the Governor, but our Constitution furnishes express prohibition as against this authority. In *State v. McAllister*, 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523, it was said that municipal governments had existed before the formation of the Constitution, and the well-known and common method of city government was recognized as pre-existent. It was further said "that a purpose to destroy a system of municipal government so common in the state will not be attributed to the convention that framed the Constitution unless the language used is so certain as to compel such a construction by the courts." This, as we have seen, is in consonance with the views expressed by Judge Cooley and other jurists. The fact that a system of municipal government was long in vogue prior to the enactment of the Constitution, and that under this system, from time immemorial, local self-government was recognized, and the power of the suffragans in cities to elect their own municipal officers was conceded, and that nowhere and at no time had the power ever been claimed on the part of the Legislature to interfere by authorizing the Governor to appoint local municipal officers, must afford strong evidence of an existing condition which would indicate that there was no purpose on the part of those who framed our organic law to destroy a system of municipal government which had always heretofore been recognized. We do not understand that the Constitution grants all power which is not expressly reserved to the legislative body of the government. This is reserved to the people. Only the lawmaking power belongs to the Legislature, and this must be in accordance with the Constitution and with the principles of local self-government reserved to the people of the state, because the Constitution says that all political power is inherent in the people, not in the Legislature, and the right of local self-government is reserved to the state. Local self-government is not the mere whim and caprice of the legislative department, nor does it appertain to any distinctive locality of the state, but to the whole state, and as it had aforetime existed in the state. The principle of local self-government is applicable to every organized portion of the state; and if in the history and traditions of

our commonwealth, as well as that of other states, municipalities always exercised the right to select their own local municipal officers, then it would seem to follow that this was a part of the local self-government which remains unimpaired to the state. The Legislature is the lawmaking power, and to it alone is referred the authority to make laws; but it has no right, under the guise of its lawmaking authority, to overturn the principles of local self-government which have been handed down to us from our fathers. Nor will it be conceded that the right to make laws on the part of the Legislature carries with it the right to appoint to office, either by themselves or through an agent. They undoubtedly have the right to create offices and prescribe their duties, but here their lawmaking functions cease, and the filling of the offices belong to the locality. As was said by Judge Hadley in *Genke v. Fox*, supra: "To thus deprive the people of a locality of the right to choose their own immediate officers is to rob them of their freedom, and to defeat one of the great ends for which the government was established."

However, it is not necessary to rest this decision upon implication, as, in our opinion, the Constitution expressly prohibited the Legislature to either appoint directly, or through the Governor, the local municipal officers of cities and towns, inasmuch as the Constitution expressly confers the power on the citizen voters of the municipality "to elect the mayor and other elective officers." It is said that the article in question is merely to define the right of suffrage in cities. By this it would appear to be conceded that, if the suffrage section relating to cities had occurred in article 11, instead of article 6, there would be no question but that the office of mayor, at least, should be elective; that is, the contention is, because this particular clause of the Constitution does not occur under the head of municipal corporations, it has not the same meaning as if it occurred there. We cannot agree with this contention. We believe if the clause confers the right on the voter in cities to vote for the mayor and other elective officers, it is effective, no matter where it may have been placed by the Constitution builders. The language of said provision is not dubious. It is clear and unequivocal. The terms used are strong. The language is that the suffragan "shall have the right to vote for mayor and other elective officers." If this right is conferred, by what power can the Legislature deny it? If they cannot do it directly, can they accomplish it by indirection? To hold that the Constitution makers undertook the task of defining qualifications of voters in cities, and providing that persons possessing the enumerated qualifications should have the right to vote for mayor and other elective officers, and then to decide, without any express provision of the Constitution on the subject, that the Legislature

should have the power to withhold this right to vote in cities, would, in our opinion, be a travesty on constitutional construction. Certainly, after the right to vote had been conferred, it would be a strange doctrine that the Legislature, without some constitutional warrant, would be authorized to limit or deny the right of suffragans to vote in cities.

It is insisted that the Legislature are potential in the matter of granting charters to cities; they may grant a charter, or abolish it at pleasure. However, it does not follow that they can grant any sort of a charter, but only that character of charter which under our system of government pertains to towns and cities. They cannot refuse to create the office of mayor or the board of aldermen. *People v. Detroit*, 29 Mich. 108. And so, if in creating a municipal corporation the Legislature is constrained to create the office of mayor, this office must be elective, because the Legislature cannot withhold from the municipal voter the right to vote for mayor, inasmuch as the Constitution confers this right; and it also confers the right upon the suffragans of the municipality to vote for other elective officers. What other elective officers? Evidently those that aforetime the voters in the municipality had been accustomed to select at the ballot box.

But if it be conceded that "other elective officers" means only such as the Legislature may make elective, it would by no means follow that the ordinance in question was a valid ordinance, as is insisted by the respondent here, for we must confess we are not able to exercise that subtlety of distinction which differentiates between the office of mayor in his executive and legislative capacity. The charter itself gives the mayor not merely the right to vote where there is a tie, but the right to vote on all occasions, and as it is impossible to determine whether or not there was a tie in the passage of this ordinance, and that the mayor by his vote cut the Gordian knot of legislation by voting for it, we cannot ascertain whether the ordinance was passed by a constitutional vote: that is, by one who had the constitutional right to vote for the ordinance. We think it follows, unquestionably, if the president of the board of commissioners did not have the right to vote on said ordinance, that said ordinance is tainted, and in consequence is null and void. However, we would not be understood as intimating that the board of aldermen, not being named in the Constitution as elective officers, might be appointive, for, as stated, in all of our municipalities these officers had always been elected by the suffragans in the municipal locality, and the expression in the Constitution was but a recognition of existing conditions, and was passed with reference to the status of municipalities theretofore in vogue. Moreover, if we had need of contemporaneous construction as to the elective character of these officers—mayor and board of aldermen—we have

but to refer to the incorporation of cities and towns in the general act of 1875 (Laws 1875, p. 113, c. 100), and acts subsequent thereto, as evidence of the fact that the Legislature itself regarded these offices as elective, inasmuch as they created them so under the Constitution. We hold that the mayor and board of aldermen of said city were elective officers under and by virtue of our Constitution, and that the majority of these, in the face of our traditions and of the organic law itself, having been appointed by the Governor, any law or ordinance passed by them was without authority, inasmuch as they were not officers of the municipality, and could not, under our Constitution, be such.

In what has been said, we have refrained from any expression of criticism of either the Legislature or the Governor. Undoubtedly, as is urged by counsel for respondent, they believed that a great emergency had arisen, with which ordinary methods were unable to cope. However, we believe, if the remedy adopted is to stand as a precedent, it would be productive of more serious ills than those which were attempted to be overcome by this species of legislation. A great writer has said that "we had better bear the ills we have than fly to those we know not of." And this is true in governments, and perhaps more so than any other of the affairs of life. It may be that here and there, under our American system, cities may be given over to corruption, and lawless elements permitted to run riot over the best interests of the municipality, but this can only be temporary. If we adhere rigidly to the principles of local self-government, in the end conservatism and enlightenment and American citizenship will triumph. But if this incentive on the part of the better classes for good government is removed, and localities taught to depend on some central power to take care of them, we may never expect an improvement. On the contrary, the seeds of our free institutions, planted by the fathers in the townships and municipalities, will be scattered to the winds, anarchy will run riot throughout the entire body politic, while we look in vain for some strong central power to arrest the destruction of our liberties which have rested hitherto upon that vital and essential principle of the republic—local self-government by the people.

The judgment is reversed, and appellant ordered discharged.

(April 14, 1903.)

BROOKS, J. (dissenting). At the recent Dallas term the opinion of the majority of the court was delivered, and I dissented therefrom, using the following language: "I do not believe that either the letter or spirit of the Constitution authorizes the opinion of the majority of the court. Charters of cities of over 10,000 inhabitants are within the sound discretion of the Legislature. All mu-

nicipal charters are mere creatures of the Legislature, and there is no limitation in the Constitution upon the power of the Legislature to create municipal charters; hence I cannot hold that there are some things so plainly unconstitutional that they need not be written therein. If I deem it necessary, I will write my views on this question later." And I proceed now to do so.

The Legislature of Texas granted a special charter to the city of Galveston, one provision of which was that said city should have five commissioners, whose duties should be practically the same as aldermen, three of whom were to be appointed by the Governor; and one of the three being designated by him as president of the board of commissioners, having the rights, duties, and privileges of mayor. The majority opinion holds that, the people of the city of Galveston having innate and inherent right of local self-government, the act is unconstitutional, and also that the Constitution contains express provision inhibiting the Legislature from passing a law authorizing the Governor to appoint any part of the officers of the city. I shall proceed to discuss the first proposition, and then the second.

As to whether it is good policy for a state, through its Legislature, to appoint the respective officers to govern a city, through an appointment by the Governor under the act of the Legislature, or whether this right should be contained in the charter, and the people alone elect said officers, is a proposition purely political, with which courts have nothing to do. If there is nothing in the Constitution placing a limitation on the power of the Legislature in this respect, the act is constitutional. Speaking in reference to the policy of statutes as to whether or not such statutes are constitutional, Judge Cooley uses this language: "Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution. It is true, there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative

power in directions in which the Constitution had imposed no restraint." Cooley's Const. Lim. p. 197. "If the Legislature should pass a law, in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of national government." Per Rogers, J., in *Com. v. McCloskey*, 2 Rawle, 374. "All the courts can do with odious statutes is to chasten their hardness by construction. Such is the imperfection of the best human institution, that, mold them as we may, a large discretion must at last be reposed somewhere. The best and in many cases the only security is in the wisdom and integrity of public servants, and their identity with the people. Governments cannot be administered without committing powers in trust and confidence." *Beebe v. State*, 6 Ind. 501, 528, 63 Am. Dec. 391, per Stuart, J.; citing *Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *State v. Kruttschnitt*, 4 Nev. 178; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24. "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights." Cooley's Const. Lim. p. 200. And on page 206, *Id.*, it is said: "It is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the Constitutions of the states, as regards the powers which may be exercised under them. The government of the United States is one of enumerated powers. The governments of the states are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but, when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United

States or of the state we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative power, but in the Constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the Legislative department of the state was vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication, while the state Legislature has jurisdiction of all subjects on which its legislation is not prohibited. 'The lawmaking power of the state,' it is said in one case, 'recognizes no restraints, and is bound by none, except such as are imposed by the Constitution.' That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute." Cooley's Const. Lim. p. 206. If a state Constitution is an instrument of limitations upon the power of the Legislature, and the federal Constitution is an instrument of delegated power, as stated, then it follows from the above quotation that the Legislature can create a municipal charter with such clauses, conditions, and provisions as they see fit, provided said Constitution contains no direct inhibition, or some clause of the federal constitution is not violated.

The opinion of the majority is predicated in the main upon the case of *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and about 10 pages of the opinion is practically a copy of the opinions of the several judges who wrote in said case, and it is so stated by the majority. However, a careful reading of said opinions in the *Hurlbut* Case will show that they were not attempting to decide the act unconstitutional on the ground that the people had an inherent right of local self-government, but, as Judge Cooley indicates in the above extract, the learned judges were merely fortifying their conclusions that a direct express constitutional provision in the Michigan Constitution inhibited the appointment of local officers for cities; and said case was decided on the bare proposition that the Constitution did prohibit the appointment of officers for a city. While it is true they go further in said opinions, and hold that peace officers might be appointed by the Governor, under authority of the Legislature, to act within said city, on the theory that peace officers were preservers of the peace of the city, still in the opinion of Judge Cooley we find this language: "But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the Constitution. That instrument provides (article 15, § 14) that 'judicial officers of cities and villages shall be elected; and all other officers shall

be elected or appointed, at such time and in such manner as the Legislature may direct.' And then he deduces a very logical conclusion from said provision that the Constitution of the state of Michigan expressly inhibits the appointment of the officers under consideration. So, clearly, the case of *People v. Hurlbut*, supra, cannot be justly regarded as authority for the opinion of the majority. To show that the learned writer of said opinion did not mean to uphold the opinion of the majority, I will quote from his work on *Constitutional Limitations*, as follows: "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the Legislature of the state of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purpose of government, can never become such vested rights, as against the state, that they cannot be taken away; nor does the charter constitute a contract, in the sense of the constitutional provision which prohibits the obligation of contracts being violated. Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion." Page 228. "Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of state policy or local necessity, it should seem important for the state to overrule the opinion of the local majority." Page 139. So I take it that the opinion of the majority of the court is without support in the *Hurlbut* Case, and is in direct conflict with every clause of Judge Cooley's work on *Constitutional Limitations*.

A municipal charter is a bare creature of the Legislature, and the Legislature can make, abrogate, or amend the same as it deems proper. Being a creature of the Legislature, the question of local self-government does not enter into, nor can it be considered in passing on, the constitutional right of the Legislature to grant the charter. For, as stated, it can incorporate a city without its consent, place

upon it such obligations as the Legislature sees fit, and these obligations can be carried out by any agencies the Legislature prescribes.

The majority opinion of the court contains this language: "In *State ex rel. v. Moores* (Neb.) 78 N. W. 175, 41 L. R. A. 624, there was nothing in the Constitution of Nebraska especially restrictive of the authority of the Legislature to make local municipal officers appointive by the Governor, and so the question was here fully and fairly made. The distinguished jurists who wrote that decision were not content to rest the case on what had been said on the subject by other courts, but went into the question again; and, both on principles and authority, it was determined that the appointment and selection of municipal officers by any other than the local authorities was subversive of the principle of local self-government, which belonged to the people of the state, and inheres in every part of the Constitution. A perusal of these opinions is like sounding a new note on the old Liberty Bell, and must inevitably thrill the heart of every patriotic American who loves the free institutions of our country." But, unfortunately for the opinion of the majority, the note was fearfully discordant, and so utterly at variance with all constitutional rules of construction that the same court which rendered the opinion expressly overruled the same in *Redell v. Moores*, 88 N. W. 243, 55 L. R. A. 740 (decided in 1901), where the following language was used: "But in view of those rules we have been led to re-examine the majority opinion in *State ex rel. v. Moores*, 55 Neb. 480, 78 N. W. 175, 41 L. R. A. 624, which up to this point we have assumed to be the final expression of this court on the questions therein involved. After a careful examination of that opinion, and with due appreciation of the learning and ability of the members of the court who concur therein, we beg to say it does not commend itself to our judgment. It holds that the provisions of the statute placing the power to appoint members of the board of fire and police commissioners in the hands of the Governor are invalid, not because it is in conflict with any express provision of the state or federal Constitution, but because it is repugnant to the inherent right of local self-government, which, it is claimed, was retained by the people at the time of the adoption of the organic law. So far as the individual members of society are concerned, in the nature of things, there can be no such thing as an inherent right of local self-government. The right of local self-government is purely a political right, and all political rights, of necessity, have their foundation in human government. For an individual to predicate an inherent right—a right inborn and inbred—on a foundation of human origin, involves a contradiction of terms. So far as a city is concerned, considered in the character of an artificial being, it is a creature of the Legis-

lature. It can have no rights save those bestowed upon it by its creator. As it might have been created lacking some right bestowed upon it, it is in no position to complain should the power that bestowed such right see fit to take it away. In other words, the power to create implies the power to impose upon the creature such limitations as the creator may will, and to modify or even destroy what has been created. The power to create a municipal corporation which is vested in the Legislature implies the power to create it with such limitations as the Legislature may see fit to impose, and to impose such limitations at any stage of its existence. That such power may not always be exercised most wisely is among the possibilities, but that does not warrant this court in wresting it from the hands to which the people, by the fundamental law of the state, have confided it. We shall not attempt to review the authorities bearing on this question. The majority opinion leaves nothing to be said on one side, while the minority opinion is equally exhaustive on the other. To those opinions we must refer the court. The majority opinion, to our minds, introduces a new principle in our system of jurisprudence, and one pregnant with mischievous consequences. We have been taught to regard the state and federal Constitutions as the sole tests by which the validity of the acts of the Legislature are to be determined. If the majority opinion in that case is to stand as the settled law of the state, then, in addition to such tests, there is another—an elusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will. We cannot believe that such principle should receive the final sanction of this court. The case of *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330, adds strength to our convictions on this point. In that case, after a critical review of the authorities, the court arrives at the conclusion that the case of *State ex rel. v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, is unsupported by a single authority." If, as stated, it is true that the case of *State v. Moores*, supra, "is unsupported by a single authority"—and, after a most searching investigation, I have been unable to find any authority supporting the opinion of the majority opinion of this court—then the opinion of the majority in this case is the only authority extant to-day supporting the position that the unwritten law of the land gives municipal corporations the right of self-government. Sullivan, J., concurring in the overruling of *State v. Moores*, supra, and *State ex rel. Smyth v. Kennedy*, 60 Neb. 800, 83 N. W. 87, which followed the former, in the case of *Redell v. Moores*, supra, uses this language: "I said with respect to the decision in the *Moores* Case: 'The *Moores* Case lays down the doctrine that whatever the court may conceive to be the spirit of the Constitution is to be regarded as part of the paramount law.

While the decision, by recognizing and enforcing the asserted right of local self-government, is conceded to rest upon a sound political principle, it was rendered by a divided bench, and, as a judicial pronouncement, has been much criticised. If it is to be acquiesced in and accepted as a rule of construction, the Constitution of the state is to be fully known only by studying the theory of the judges who are chosen to expound it. It will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court, and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the chancellor's conscience was the law of the land. It is the opinion of the writer that the decision is thoroughly vicious; that it strikes a lethal blow at a co-ordinate branch of the government, and ought to be repudiated and condemned.' Still entertaining these views—still believing that all the governmental powers of municipal corporations come from the Legislature, and are to be found only in living statutes—I could not, of course, do otherwise than give my approval to the conclusion reached by the department." In *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 337, the following language is used: "The Supreme Court of Michigan has been specially favored with this class of cases. In *People ex rel. Drake v. Mahaney*, 13 Mich. 481, an act constituting certain persons a police commission for the city of Detroit, embracing the powers conferred in the act before us with others much more extensive, was held to be constitutional. After considering objections not applicable to this case, Judge Cooley took up the objection to the act 'on general principles, and especially because violating fundamental principles of our system, that governments exist by the consent of the governed, and that taxation and representation go together.' The court held that the objection was answered by the representation of the people of Detroit in the Legislature which passed the act, and in the election of the Governor who appointed the board. Judge Cooley said: 'There is nothing in the maxim that taxation and representation go together, which requires that the body paying the tax shall alone be consulted in its assessment; and, if there were, we should find it violated at every turn in our system. The state Legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty.'" And the opinion proceeds, after reviewing the cases of *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Com'rs v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. v. Draper*, 15 N. Y. 532; *People ex rel. v. Porter*, 90 N. Y. 68; *Rathbone v. Wirth*, 150

N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *State ex rel. v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; and *Smyth v. Kennedy* (Neb.) 83 N. W. 87: "These include all the cases relied on by the petitioners in support of the principle that an act of the Legislature establishing a police commission for a city takes away its right of self-government implied in the Constitution. In all of them there have been very vigorous and cogent arguments in favor of the protection of that right, with which, in the main, we do not disagree. But it is evident from the points decided that, excepting in Nebraska, they have all involved a purely municipal office, or have turned upon some express prohibition in the Constitution. With the exception stated, not one has denied the general power of the Legislature to assume the control of the local police. In the cases cited, Michigan has affirmed the power. Nebraska has denied it. The uniform decisions in other states, so far as they have come to our notice, have sustained the power." Citing many cases authorizing the Governor to remove a member of the fire and police board, and concluding with this language: "The clear weight of authority sustains the right of the Legislature to control police, and equally is it sustained by sound reason."

If the Legislature can appoint a police board without the will, wish, or knowledge of the municipal government, it can appoint any or all of the officers. It is true, a great many of the authorities proceed on the idea that the police are quasi state officers, or, rather, they enforce state laws as well as local municipal laws. The same can be said of the mayor of the city and of the city council, in that in many, if not most, instances they re-enact the state laws by passing ordinances punishing persons for offenses inhibited by state law, and to that extent they are making laws for the state, and the mayor is called upon to enforce the laws of the state. I dare say that in the police court to-morrow 90 per cent. of the defendants before said court will be under a charge of violating state laws within the municipality. And no sound reason, public policy, or decision of any court can ever justify a distinction between the right to appoint the police and the right to appoint any other officer in the city. See, also, *Americus v. Perry* (Ga.) 40 S. E. 230, 57 L. R. A. 230, decided in 1902.

In *People v. Pinckney*, 32 N. Y. 377, the court said: "The Legislature," said Denio, J., in *Darlington v. Mayor* (MS. Op.), 'have plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the Constitution of the United States, or by some provision or arrangement of the Constitution of the state.' And he condenses with approbation the views expressed by Justice Washington in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629: 'That there were two kinds

of corporations aggregate, viz., such as were for public government, and others of a private character. The first are those for the government of towns and cities, or the like, and, being for public advantage, are to be governed according to the laws of the land. That these were mere creatures of a public institution, created exclusively for public advantage. That it would seem reasonable that such a corporation may be controlled, and its Constitution altered and amended, by the government in such manner as the public interest may require. That such legislative interference cannot be said to impair the charter by which the corporation was formed, because there is in reality but one party to it; the trustees or governors of the corporation being merely the trustees for the public, the cestui que trust of the corporation. * * * In *People v. Morris*, 13 Wend. 325, the Supreme Court held: " * * * It is an unsound and even absurd proposition," says Nelson, J., in an opinion of signal ability, 'that political power conferred by the Legislature can become a vested right, as against the government, in an individual or body of men. It is repugnant to the genius of our institutions and the spirit and meaning of the Constitution, for by that fundamental law all political rights not there defined and taken out of the exercise of legislative discretion were intended to be left subject to its regulation.' " In *Barnes v. Dist. of Columbia*, 91 U. S. 540, 23 L. Ed. 440, Justice Hunt, delivering the opinion of the court, said: "An elected mayor or an appointed mayor derives his authority to act from the same source, to wit, that of the Legislature. The whole municipal authority emanates from the Legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers, as well as the manner of selecting and compensating its agents. The judges of the Supreme Court of a state may be appointed by the Governor, with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the Governor with the consent of the senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election." It may be said, however, that this case is not analogous to the question under consideration, in that the mayor in the District of Columbia was appointed by the federal government. But if any locality in the United States has an innate and inherent right of local self-government, then the mere fact that it is a political subdivision of

the United States, as contradistinguished from the states, would not change the inherent right of local self-government. In *Com., etc., v. Lucas*, 93 U. S. 114, 23 L. Ed. 822, this language is used: "But between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the Legislature. Their tenure of property, derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize—that is, taxation—is so far subject to the control of the Legislature that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence." In *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566, Morton, C. J., says: "There can be no doubt that the power to create, change, and destroy municipal corporations is in the Legislature. This power has been so long and so frequently exercised upon counties, towns, and school districts, in dividing them, altering their boundary lines, increasing and diminishing their powers, and in abolishing some of them, that no authorities need be cited on this point. The Constitution does not establish these corporations, but vests in the Legislature a general jurisdiction over the subject by its grant of power to make wholesome laws, as it shall judge to be for the general good and welfare of the Commonwealth." It 'may amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, and abolish them altogether, at its own discretion.' *Weymouth & Braintree Fire Dist. v. Co. Com.*, 108 Mass. 142. The several towns and cities are agencies of government largely under the control of the Legislature. The powers and duties of all the towns and cities, except so far as they are specially provided for in the Constitution, are created and defined by the Legislature; and we have no doubt that it has the right, in its discretion, to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the Governor, if, in its judgment, the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities."

This excerpt appears to settle this question, but, in deference to the opinion of the majority of the court, I will review other authorities: In *Philadelphia v. Fox*, 64 Pa. 169, Justice Sharswood, delivering the opinion, says: "The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and

agents into its own hands, for the power which can create and destroy can modify and change. Indeed, the Legislature of this commonwealth, under the Constitution, could not by contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It cannot alienate any part of the legislative power which by the Constitution is vested in a General Assembly annually convened. * * * If the Legislature were to attempt to erect a municipality with a special provision that its charter should be unchangeable or irrevocable, such provision would be a nullity, for acts of Parliament derogatory from the power of subsequent parliaments bind not. 1 Blacks. Com. 90. That such political institutions have not, and cannot have, any vested rights as against the state, is strikingly illustrated and exemplified in the *Borough of Dunmore's Appeal*, 52 Pa. 374, where it was held by this court that municipal corporations, being creatures of legislation, have no constitutional guaranty of trial by jury, and such trial may be denied them." "A public corporation is one that is created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government—an instrument of the government subject to the control of the Legislature, and its members, officers of the government for the administration of the public good." *Regents' Case*, 9 Gill & J. 365, 397, 401, 31 Am. Dec. 72, and in the same case it is said, 'Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation.'"
Pumphrey v. Mayor & C. C. of Baltimore, 47 Md. 145, 28 Am. Rep. 446. In *Burckholter v. McConnellsville*, 20 Ohio St. 308, it said: "Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns which the more sparsely settled portions of the country would find unnecessary. And it is for legislative discretion to determine, within the limitations of the Constitution, to what extent city or town councils shall be invested with the power of local legislation." Where a charter of a city "provides for the appointment of officers connected with the constabulary of the state, there is no invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the state." *State ex rel. v. Kolsem et al.*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566. If the city, as indicated above, has no right of local self-government that precludes the Legislature, through the Governor, appointing police, as this authority holds, then, it follows as a legal sequence which cannot be successfully combated, that the Governor can appoint all the officers to govern a city. A

municipal corporation is a creature of legislation, and its modes of government, and the officers conducting the same, may be changed by the Legislature. By an act of the Legislature of the state of Georgia, county commissioners were appointed to govern a county in which was located the town of Darien, and one of the duties put upon said commissioners was the exercise of corporate authority of such town. The court, in *Churchill v. Walker*, 68 Ga. 681, held said act was entirely constitutional, since, as stated, the municipal corporation is the bare creature of the Legislature, and they can provide such officers for it as they see fit. The power of the Legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited, except so far as they are invested with rights incident to a private corporation. Public parks, the supply of gas, water, and sewerage in towns and cities, may ordinarily be classed as private objects; but they often become matters of public importance, and whether they are the one or the other is a fact which may be decided by the Legislature. And in considering an act to supply the city of Portland with water, the court may take judicial notice of the fact that said city is the metropolis of the state, having important commercial and business relations with all its citizens, and that the entire community have, therefore, a direct interest in the city's welfare." *David v. Portland Water Co.*, 14 Or. 98, 12 Pac. 174. In this case the court upholds unqualifiedly the legislative right of absolute supervision and appointment of officers of a city whenever the Legislature may deem it necessary, and it is for the Legislature alone to decide when it is necessary. To support this position, an array of authorities is cited in 14 Or. 101, 12 Pac. 174, covering the page. In *Meriwether v. Garrett*, 102 U. S. 511, 26 L. Ed. 197, the court uses this language: "The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text-writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. * * *

By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the state. A portion of them the state immediately vested in the new government of the taxing district, with

many restrictions on the creation of indebtedness. A portion of them the state retained. It reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the state to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities."

This last-cited authority merely fortifies the long array of authorities cited above, and adds additional force, in that the city of Memphis, by improvidence and mismanagement, had become so seriously involved in debt that some economic administration of its government was necessary in order to prevent the city from becoming hopelessly bankrupt. The Legislature of the state of Tennessee, in order to meet this exigency and unfortunate condition, repealed the charter of Memphis, and provided for it what was denominated the Shelby County Taxing District; and in said act provided, as the quotation indicates, for its control, management, and direction. The Supreme Court of the United States upholds this right. And it can be added with peculiar and pathetic force that the stricken city of Galveston had been previously mismanaged to such an extent that its revenues had been squandered and improvidently expended; and the Legislature of the state of Texas, with full understanding and sympathy with the stricken city, a few months before inflicted with a storm and cyclone that nearly decimated it, passed the charter in question, placing, as the Legislature thought, the government of Galveston upon a safer and more economic basis. Whether or not they acted wisely is not for us to decide. They had the legal and constitutional right to decide. With the policy of laws we have nothing to do. With the injustice of law we have no complaint to make, unless there is some constitutional inhibition, some direct clause, either expressed or by implication, that necessarily makes the act of the Legislature unconstitutional; and in this instance its acts are both humane, just, legal, and constitutional.

In the view I have taken up to this time, I have proceeded upon the assumption that there is nothing in the Constitution against this character of legislation. But my Brethren in the majority opinion insist that there is, and, to sustain them, cite certain clauses of the state Constitution. The first provision relied upon by the majority is section 1 of the Bill of Rights. In order that we may have a comprehensive conception of said provision, I quote it in its entirety: "Texas is a free and independent state, subject only to the Constitution of the United States; and the

maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the states." It will be noted that this provision only attempts to lay down the proposition that the right of local self-government remains unimpaired to all the states—not unimpaired to all the "state," not unimpaired to all the counties, precincts, and cities, but the right of local self-government remains unimpaired to all of the "states" as contradistinguished from the federal government. In other words, the federal government cannot interfere with the local management of state affairs, or, to put it differently, they cannot interfere with any governmental agency of the state, or any government of the state, unless such government in some respect infringes some constitutional provision of the federal government. There is no thought in this clause of the Constitution guarantying to a municipality—a mere creature of the Legislature—the right of local self-government. The next clause cited is section 3 of article 6, entitled "Suffrage," which reads as follows: "All qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town: provided, that no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto." It will be seen from a perusal of this section that the Constitution builders had but one purpose in view, to wit, to define the qualifications of electors. If one has a constitutional right to vote for "mayor and all other elective officers," then what becomes of this constitutional right, when the Legislature abrogates the charter, as all writers on constitutional law concede it has the right to do? And even the construction insisted upon by the majority could not possibly apply to the latter clause of this section, for if this clause makes it absolutely necessary to elect the mayor, it does not guaranty to the elector the right to vote for other officers, but merely says he has a right to vote for all other elective officers. If they are not elective, he certainly cannot have the right to vote for them under this clause. But it is a strained construction, utterly at variance to the subject under consideration, to say that the mere fact that the Constitution says, "who shall have the right to vote for mayor and all other elective officers," makes the mayor necessarily elective. Under the previous clauses in the same article, he has the right to vote for officers in the state, but must all these officers be elective? Certainly not. In article 11, entitled "Municipal Corporations,"

section 4 provides that "cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law." And then follows a limitation upon their taxing power. Section 5 provides: "Cities having more than ten thousand inhabitants may have their charter granted or amended by special act of the Legislature." And then follows a limitation upon their taxing power, different from section 4. There is nothing in article 11 providing who the officers of a city should be. If the Constitution intended that the officers of a city should be elected by the citizens of the cities, certainly there would have been some provision, under the head of "Municipal Corporations," from which such construction or conclusion could have been reached. But there is a total absence of anything in said article as to who the officers shall be, how many officers cities should have, or whether they should be elected or appointed. It follows, therefore, that, in the absence of such a provision, the Constitution of this state being an instrument of limitation upon the power of the Legislature, the courts of this country cannot sit idly by and hold the acts of the Legislature unconstitutional upon the unwritten law of the land. The above-cited clauses are all that the majority insist upon in the Constitution inhibiting this character of legislation.

However, the majority say the charter is unconstitutional anyway, whether or not there is a clause in the Constitution on the subject. If this be true, then we have no guide left for our judicial footsteps, and the division of this court on this question in itself shows absolutely the instability and lack of foundation for any such opinion. They say this matter is so plain it need not be written in the Constitution. I do not think it is so plain. And the question as to whether the next case that comes before us is so plainly unconstitutional as need not be written in the Constitution will not depend upon the solid rock of the Constitution, but upon the caprice and conceptions of the personnel of the court deciding the case. This is not construction. This is absolute destruction of our form of government. It is the duty of this court to support the Constitution, and to construe laws solely with reference to the Constitution; and if there is no clause in the Constitution that prohibits the Legislature from passing an act, or unless there is implication from some clause in the Constitution that prohibits an act, this court has no warrant in law or custom to hold said act unconstitutional.

In the *Hurlbut Case*, supra, Judge Cooley says that state government preceded town government. 24 Mich. 99, 9 Am. Rep. 103. Whether it did, or not, makes no difference, inasmuch as every writer in the United States says that municipal governments are the bare creatures of the Legislature. The legislative breath has made them, and the legislative breath can unmake them. If the

creature can dictate to the creator, and insist upon local self-government for the creature, and the creature alone can say to what extent it shall have local self-government, then the creator ceases to be the creator and becomes the creature.

It is sagely suggested in the majority opinion that the decision of the question is not meant as a reflection upon the Legislature, and Governor who signed the bill. This may be the individual feelings of the majority, but their opinion is a bill of indictment upon the patriotism of the Legislature as well as the Governor, because, when the legislative body, as the majority insist, have deliberately destroyed the right of free government—an innate constitutional right—this fact must necessarily reflect upon them; and, however kindly the court may feel towards the personnel of the Legislature, it still remains that, if this act is unconstitutional, it is, as stated, a bill of indictment upon the patriotism of the Legislature that passed it. Be this as it may, for this court to lay down the broad proposition that the Legislature of Texas is impotent to change any clause or provision of a charter as they have heretofore existed is such an innovation and construction of our Constitution and form of government, so at variance with the rules heretofore laid down, and so hampering upon the material and political prosperity of our state, I desire now to enter my most solemn protest against it. It follows from what I have said that there is nothing so plain that need not be written in the Constitution, and, whether or not the right of local self-government is invaded by this grant, it is constitutional, and there is nothing in the letter or spirit of the Constitution that remotely infringes upon the legislative right to create the charter with appointive officers for the stricken city of Galveston.

GIDCUMB v. GIDCUMB et al.

(Court of Civil Appeals of Texas. April 8, 1903.)

APPEAL—ASSIGNMENT OF ERRORS—FILING—CONSIDERATION.

1. Assignments of error in a case appealed on a statement of facts made up by the trial judge will not be considered where it does not appear that they were filed in the court below.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action between B. Gidcumb and J. T. Gidcumb and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kearby & Kearby, for appellant. R. O. Porter, for appellees.

FISHER, C. J. Appellant's brief contains what purports to be his first, second, third, and fourth assignments of error. These assignments of error are not propositions within themselves, nor are any propositions sub-

mitted in connection with them. It is impossible to understand the points presented by the assignments of error without an investigation of the entire record. But the most serious objection to considering these assignments is the fact that it does not appear that any assignments of error were filed in the court below. The record does not disclose any assignments, and we suppose that, if any had been filed, they would have been placed in the record. This is not an agreed case under the statute, but the case is here upon a statement of facts which was not agreed to in the court below, but was made up by the trial judge.

The appellees object to our considering the assignments of error on account of the objections pointed out, and ask that the judgment be affirmed on their briefs filed in this court, which request is granted, and judgment affirmed. Affirmed.

AMERICAN CENT. INS. CO. v. WHITE.

(Court of Civil Appeals of Texas. April 8, 1903.)

INSURANCE—ACTION ON POLICY—SUFFICIENCY OF PETITION—INTEREST OF INSURED—DEMURRER—OWNERSHIP—SUFFICIENCY OF EVIDENCE.

1. A petition alleged that defendant executed and delivered to plaintiff a policy of insurance insuring plaintiff against loss by fire on his household and kitchen furniture (describing it), and that, while the policy was in full force, "all of plaintiff's said household and kitchen furniture * * * was totally destroyed by fire, and was the property of plaintiff at the time of loss." Held to sufficiently allege ownership of the property as against a general demurrer.

2. Testimony of the insured that the property described in the policy sued on was in his private dwelling occupied by him and his family, when destroyed by fire, was prima facie proof of ownership.

Error from District Court, Lamar County; Ben H. Denton, Judge.

Action by J. H. White against the American Central Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Burdett & Connor, for plaintiff in error. Dudley & Sturgeon, for defendant in error.

STREETMAN, J. Defendant in error recovered judgment on a fire insurance policy on certain furniture and household goods, from which this writ of error is prosecuted.

The first assignment complains that the court erred in overruling a general demurrer, because the allegations of the petition did not show that the defendant in error had an insurable interest in the property at the time the policy was issued; and the fourth and fifth assignments complain that there was no evidence to show that either at the time the policy was issued, or at the time the loss occurred, the defendant in error owned

¶ 1. See Insurance, vol. 23, Cent. Dig. § 1533.

an insurable interest in the property. The petition alleged that on the 29th day of October, 1901, the defendant executed and delivered to plaintiff a policy of insurance, by the terms of which it insured plaintiff against loss by fire on his household and kitchen furniture (describing it). It further alleged that, while the policy was "in full force and effect, * * * all of plaintiff's said household and kitchen furniture * * * was totally destroyed by fire, and was the property of plaintiff at the time of loss." The policy was introduced in evidence, and, by its terms, insured plaintiff against loss by fire "on his household and kitchen furniture," etc. The plaintiff testified: "The property described in the policy was totally destroyed by fire while in my house where I resided with my family, consisting of my wife and two children, which was situated at No. 620 east side North Main St., Paris, Texas, on the night of the 4th of November, 1901, after the policy was delivered to me by agents of defendant, and while same was in full force." No evidence was offered to contradict this. We conclude that the allegation in the petition that the policy was issued on his property, and that the policy was in full force at the time of the loss, as against a general demurrer, sufficiently alleges the ownership of the property (*N. W. N. Ins. Co. v. Woodward* [Tex. Civ. App.] 45 S. W. 185; *Ger. Ins. Co. v. Pearlstone* [Id.] 832); and the evidence of plaintiff that the property was in his private dwelling, occupied by him and his family, is prima facie proof of ownership (*L. L. & G. Ins. Co. v. Nations* [Tex. Civ. App.] 59 S. W. 817).

Finding no error in the judgment, it is affirmed.

HOWE GRAIN & MERCANTILE CO. v. GALT.

(Court of Civil Appeals of Texas. April 8, 1903.)

VENUE—ACTION FOR FRAUD—BREACH OF CONTRACT.

1. Rev. St. 1895, art. 1194, provides that no citizen shall be sued out of the county in which he has his domicile except " * * * (7) in all cases of fraud, * * * in which cases suit may be instituted in the county in which the fraud was committed," etc. Plaintiff alleged that certain hogs formerly owned by defendant were diseased, and this fact was known to defendant and unknown to plaintiff; that defendant fraudulently represented they were sound, and plaintiff, relying on such representations, bought and paid for said hogs; that afterwards all of said hogs died. Plaintiff sued to recover the price paid and expenses incurred. Held to be an action for deceit, and not for breach of contract, and accordingly within the exception of the statute.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by the Howe Grain & Mercantile Company against W. J. Galt. Judgment for defendant, and plaintiff appeals. Reversed.

E. C. McLean, for appellant. Todd & Armistead, for appellee.

STREETMAN, J. Appellant brought this suit in the county court of Grayson county against appellee, whose residence was in Franklin county, Tex. Appellee filed a plea of privilege, which was sustained by the court. The cause of action alleged was, in substance, that the defendant represented to plaintiff that he owned 48 head of sound, healthy hogs in Grayson county, Tex., which he offered to sell to plaintiff; that said hogs were diseased, and this fact was known to defendant, but unknown to plaintiff, and defendant, knowing said fact, fraudulently represented to plaintiff that the hogs were sound and healthy, and plaintiff, relying upon said representation, bought and paid for said hogs; that afterwards all of said hogs died. Plaintiff sought to recover the price paid for said hogs and his expenses in treating them. The entire transaction and all the representations with reference to it were alleged to have occurred in Grayson county.

Appellee insists that the cause of action is simply for breach of a contract not in writing, and that the defendant could not be sued out of the county of his residence. We cannot agree with this contention. We think it quite clear from the pleadings that the plaintiff alleged a case of deceit, which is but a form of fraud, and that it falls clearly within the class designated by the statute as cases of fraud (Rev. St. 1895, art. 1194), in which suit may be brought in the county where the fraud was committed. *Am. & Eng. Ency. Law*, 1st Ed. Vol. 5, p. 318; *Wintz v. Morrison*, 17 Tex. 384, 67 Am. Dec. 658. In the case cited is contained a full discussion of the law of such cases, and it is there said, "The ground of the action is the deceit practiced upon the buyer to his injury."

We are of opinion that the court erred in sustaining the plea of privilege, and the judgment is therefore reversed, and the cause remanded. Reversed and remanded.

SAFFROI v. COBUN et al.

(Court of Civil Appeals of Texas. April 11, 1903.)

INTOXICATING LIQUOR—LICENSE—CHANGE OF PLACE—BOND—LIABILITY OF SURETIES.

1. Rev. St. 1895, art. 5060c, provides that the particular place at which liquor is to be sold shall be designated in the license, and no license shall authorize a sale at any other place, but that, if one desires to change his place of business, the change may be made by the clerk of the court. *Pen. Code*, art. 411b, provides that any person who shall sell liquor in any other place than designated by his license shall be guilty of a misdemeanor. Held, that where a liquor license, issued on the giving of the required bond, designated a certain corner as the place where the business would be conducted, and the holder of the license, by false statements to the clerk, induced him to change

the place named in the license to another corner, at which latter place the holder of the license engaged in business, the bond was not binding on the sureties as to sales at the latter place.

Error from District Court, Dallas County; Richard Morgan, Judge.

Action by Elizabeth Saffroi against S. W. Cobun and others. From a judgment for defendants, plaintiff brings error. Affirmed.

P. A. Sidell and Curtis Hancock, for plaintiff in error. J. J. Eckford and T. L. Camp, for defendants in error.

BOOKHOUT, J. Plaintiff in error instituted this suit in the district court of Dallas county against defendants in error, S. W. Cobun, as principal, and S. T. Morgan and the Dallas Brewery, a corporation, as sureties upon a liquor dealers' bond given by said Cobun as principal, and Morgan and the Dallas Brewery as sureties, alleging that said Cobun did engage in the sale of intoxicating liquors, to be drunk on the premises, at the corner of Main street and Trunk Railroad in the city of Dallas, state of Texas, and executed a liquor dealer's bond therefor, and there was issued to him a license to sell intoxicating liquors to be drunk on the premises at said place, on the corner of Main street and the Trunk Railroad in the city of Dallas, Texas; that afterwards, on the 1st day of June, 1900, said license was transferred by said Cobun presenting same to the clerk of the county court of Dallas county, Tex., the intent being to transfer the same to a new place, to wit, the corner of Elm and Preston streets in the city of Dallas, Texas, but by mistake of the clerk, or on account of a false, misleading, or deceitful representation of the licensee, the transfer was made to the corner of Pearl and Elm streets, instead of to the corner of Elm and Preston streets; and that thereafter said Cobun did pursue his said business of selling intoxicating liquors to be drunk on the premises at the place on the corner of Elm and Preston streets in the city of Dallas, state of Texas. The acts claimed by plaintiff to be infractions of the bond were sales made by Cobun to her husband, Ernest Saffroi, who was alleged to be an habitual drunkard, at the place on the corner of Elm and Preston streets in the city of Dallas, Texas, while there engaged in said occupation. The defendants answered by general demurrer and special exceptions, and a general denial and special answers. The court sustained special exceptions numbered 3 and 3½, and thereafter sustained defendants' general demurrer. Plaintiff having declined to amend, the cause was dismissed, and judgment entered to that effect, to which plaintiff excepted, and prosecuted a writ of error to this court.

The special exceptions sustained by the court are to the effect that the obligees in the bond are not liable to plaintiff, for that it is shown by the petition that the bond sued up-

on, and the license issued thereon, designated Main street and the Trunk Railroad in the city of Dallas as the place where S. W. Cobun & Co. were to conduct their business, and that said place designated in said license was afterwards changed to the corner of Pearl and Elm streets in the city of Dallas; and it further affirmatively appears that the acts complained of in the petition as constituting a breach of said bond occurred at a place other and different from Main street and the Trunk Railroad, or Elm and Pearl streets, in the city of Dallas, Tex.

By the terms of article 5000e of the Revised Statutes of 1895 of Texas, it is provided, among other things, that "the particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous or malt liquors, or medicated bitters, at any other place or house than that designated in the license: provided, that if any person or association of persons having a license to sell such liquors, desires to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having a new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place." Article 411b of the Penal Code stipulates that "any person or persons who shall sell spirituous, vinous or malt liquors, or medicated bitters, in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from fifty to one hundred dollars, or imprisoned in the county jail from ten to thirty days, in the discretion of the jury." The Court of Criminal Appeals have held that it is an offense against this law to sell intoxicating liquors under a license for selling such intoxicants in any other place than that set out in the license. *Travis v. State*, 36 S. W. 589. Plaintiff in error insists that as the county clerk was induced by "false, misleading, or deceitful representations" to insert in the license "the corner of Elm and Pearl streets," instead of "Elm and Preston streets," as the place where the licensee was to carry on the business of selling intoxicating liquors, the bond was binding on the sureties. This contention is not tenable. If S. W. Cobun & Co., the licensees, fraudulently induced the county clerk to insert the "corner of Elm and Pearl streets," instead of the "corner of Elm and Preston streets," as the place where they intended to carry on the business, and the clerk, relying on their statements and representations, made the change in the license to the corner of Elm and Pearl streets, such license would not protect S. W. Cobun & Co. from pursuing said business of selling intoxicating liquors, in quantities of less than one gallon, to be drunk on the premises, at an-

other and different place. In other words, if S. W. Coburn & Co., by "false, misleading, and deceitful representations" made to the county clerk to induce said clerk to change the place designated in the license for conducting their business from Main street and the Trunk Railroad to the corner of Elm and Pearl streets in the city of Dallas, said license so changed would not protect them in the business conducted by them at the corner of Elm and Preston streets in the city of Dallas—a place distinct and different from Elm and Pearl streets in said city. The record does not disclose the purpose of the licensee in making said fraudulent representations, and causing their license to be transferred to Elm and Pearl streets, instead of to Elm and Preston streets, in the city of Dallas, Tex. For all that appears in the record, it may be that the licensees conducted a business at both the corner of Elm and Pearl streets in the city of Dallas and at the corner of Elm and Preston streets in said city. However this may be, the statute provides that the license shall state the particular place and house in which the liquors are to be sold. As stated, it is made an offense punishable by fine or imprisonment to conduct a business at a place other than that designated in the license. It is true that the Supreme Court have held that where the license designated the place of business as "in the city of Gordon, county of Palo Pinto, Texas," the license was not void, and would support a recovery against the obligees in the bond. *Green v. Southard*, 94 Tex. 470, 61 S. W. 705. This case is clearly distinguishable from that case. There it did not appear that the houses were numbered. Nor was there any contention in that case of any fraudulent purpose in having the license name the place where the business was to be conducted.

We conclude that there was no error in sustaining the exceptions to the petition and dismissing the cause. Rev. St. 1895, arts. 5060c, 5060d, 5060e, 5060g; Pen. Code, arts. 411a, 411b; *Carter v. Nichol* (Iowa) 90 N. W. 352; *United States v. Henry Boecker*, 88 U. S. 652, 22 L. Ed. 472; *Schloss v. A., T. & S. F. Ry. Co.*, 85 Tex. 603, 604, 22 S. W. 1014; *Johnson v. Erskine*, 9 Tex. 910.

The judgment is affirmed.

WATSON et ux. v. TEXAS & P. RY. CO.
(Court of Civil Appeals of Texas. April 8, 1903.)

JUDGMENT—SETTING ASIDE—FRAUD OF ATTORNEYS—LIMITATIONS—DISCOVERY OF FRAUD.

1. A judgment against one may be set aside on the ground of fraud on the part of his attorneys representing him at the time of its rendition, after the term at which it is rendered, where he was not chargeable with notice of the attorneys' fraud in time to have applied at the term for a new trial.

2. An action to set aside a judgment, on the ground of fraud on the part of the judgment

debtor's attorneys representing him at the time the judgment was rendered, is governed by Rev. St. 1895, art. 3358, prescribing that all cases not specially provided for shall be barred in four years.

3. As a general rule, courts of equity will adopt the length of time to bar causes of action that prevails in analogous cases in actions at law.

4. Limitations commence to run against an action to set aside a judgment, on account of the fraud of plaintiff's attorneys representing him at the time it was rendered, from the time when the fraud is discovered or should have been.

Appeal from Dallas County Court; T. T. Holloway, Special Judge.

Action by Sam Watson and wife against the Texas & Pacific Railway Company. From a judgment dismissing the action, plaintiffs appeal. Reversed.

R. H. Capers, for appellants. T. J. Freeman, W. S. Hall, and W. H. Flippen, for appellee.

FLY, J. This is an action on the part of appellants to set aside a judgment rendered against them in September, 1899, on the ground of fraud, on the part of the attorneys representing them at that time. The court held that the petition showed on its face that appellants had been guilty of laches in the prosecution of their suit, and dismissed their cause of action.

While the allegations in the petition are not as clear and explicit as might be desired, they make out a case of fraud upon the part of appellants' attorneys in dismissing the suit in 1899. Under the allegations, appellants may not have shown proper diligence in failing to discover the fraud in two years, but it sufficiently appears that they were not chargeable with notice of the acts of their attorneys in time to have applied for a new trial at the term the judgment was rendered, and the cause should not have been dismissed unless two years will bar such causes. It is the general rule that courts of equity will adopt the length of time to bar causes of action that prevails in analogous cases in actions at law. *McLane v. Bank* (Tex. Civ. App.) 68 S. W. 63, and *San Antonio Nat. Bank v. McLean* (Tex. Sup.) 70 S. W. 201. It has been held, in the above-cited cause and in others, that in actions similar to the one under consideration, Rev. St. 1895, art. 3358, which prescribes that all cases not provided for specially shall be barred in four years, will control. *Heldenhimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99; *Cetti v. Dunman* (Tex. Civ. App.) 64 S. W. 787. It follows that appellants' cause of action could be prosecuted at any time within four years from the time when the fraud was discovered or should have been discovered.

None of the exceptions to the petition was well taken, and the judgment is reversed and the cause remanded.

¶ 2. See Equity, vol. 19, Cent. Dig. § 242.

WILLINGHAM v. FLOYD.

(Court of Civil Appeals of Texas. April 4, 1903.)

SCHOOL LANDS—SETTLEMENT—SUFFICIENCY.

1. Where a husband, after having school land surveyed, sent out his wife, with a tent, provisions, and household furniture, to the spot selected, but stayed in town himself to make his application and have the same filed, with the intention of going out as soon as he had done so, there was a settlement by both, and not by the wife alone.

Appeal from District Court, Midland County; W. R. Smith, Judge.

Trespass to try title by O. A. Willingham against B. W. Floyd. Judgment for defendant, and plaintiff appeals. Affirmed.

Camp & Caldwell, for appellant. A. S. Hawkins, for appellee.

STEPHENS, J. This controversy arose out of conflicting applications to purchase two sections of school land in Midland county, and resulted in a judgment for appellee (defendant below), whose application was prior. Unless the evidence required the jury to find that appellant was an actual settler, and that appellee was not, the judgment must stand. We find no difficulty in holding that the evidence was sufficient to warrant the conclusion that appellee was an actual settler when he made his application, which renders it unnecessary to consider the evidence affecting the other issue. The main objection of appellant to appellee's settlement seems to rest upon the fact that appellee was fortunate enough to have the assistance of his wife in making it, as will be seen from the following quotation from his testimony: "After I returned from having the land surveyed, I hired a dray wagon, purchased a tent, and sent the wagon, the tent, a lot of provisions, and household furniture, to be placed on section 14, at the spot I had selected for my home. I also sent my wife out in a separate conveyance, along with B. W. Lee and his family, who went out the same day to take up some land near by. All these went out on the evening of the 29th of July. I did not go out with my wife to the land, because there was a great demand and rush for this land, and I stayed in town for the purpose of making my applications and getting same filed first; and it was my intention to go out to section 14 as soon as I made my application, and this I did. I sent my wife to this section on said day, because I considered it my home at that time, and thought that my wife should be at her home." Appellant, however, treats this as a settlement by the wife, and not by, but for, the husband; but we consider it a settlement by both, the wife kindly aiding the husband in the establishment of a home for the family.

Judgment affirmed.

CURLLEE v. TEXAS HOME FIRE INS. CO.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

FIRE POLICY—BREACH OF CONDITION—WAIVER.

1. A fire policy covering a house and personal property declared that it should be void if the subject of insurance, or any part thereof, be incumbered. At the time the policy was issued the house was on land incumbered by a vendor's lien. Held a breach of the policy, though the contract which created the lien was made before the house was built.

2. A fire insurance company did not waive insured's breach of a condition in the policy by causing him to have proofs of loss prepared, where the proofs of loss expressly stipulated that "the furnishing of this proof of loss blank to the assured, or making up proofs by an adjuster, * * * is not a waiver of any rights of said company."

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by J. A. Curlee against the Texas Home Fire Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Henderson & Freeman and Morrison & Wallace, for appellant. G. W. Allen and D. A. McFall, for appellee.

KEY, J. Appellant brought this suit upon an insurance policy covering a house and certain personal property. After hearing all the testimony, the court directed a verdict for the defendant, and the plaintiff has appealed. The policy contains a provision to the effect "that this entire policy shall be void if the subject of the insurance, or any part thereof, be or become incumbered by mortgage or otherwise." The undisputed testimony shows that the house which was insured was situated upon land incumbered by a vendor's lien, and that this condition existed at the time the policy was issued. It is true that the contract which created the lien was made before the house was built, but when the house was built became, in law, part of the land, and the lien attached to it as much as it did to the soil itself. Hence there is no escape from the conclusion that a portion of the subject of insurance was incumbered by a valid lien at the time the policy was issued. And, if the clear and unambiguous terms of the contract are to be given force and effect, it must be held that the policy is void, unless the insurance company has waived its rights under the provision of the contract referred to. This case is distinguishable from *Bills v. Insurance Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121, in which the stipulation was: "This policy shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple." The policy covered a building and various articles of personal property, and it was held that all these

*Rehearing denied April 22, 1903, and writ of error denied by Supreme Court.

together—the building and the personal property—were the subject of insurance, and that, as the stipulation quoted was limited to buildings, and did not include personal property, the policy was not void, although the building was upon land not owned in fee simple by the insured. In the case at bar, the forfeiture is not made to depend upon the condition of the entire subject of insurance; for by the terms of the contract the forfeiture results “if the subject of insurance, or any part thereof, be or become incumbered by mortgage or otherwise.” The phrase italicized was no part of the contract in the Bills Case, and it unmistakably manifests the purpose to make the contract void and inoperative if any part of the subject of insurance was incumbered by mortgage or otherwise.

We also hold that the testimony was not such as entitled plaintiff to have submitted to the jury the question of waiver. It is true that after the company was informed of the incumbrance on the property, which was after the fire occurred, it and the plaintiff together prepared proofs of loss, and the plaintiff expended the sum of \$5 in so doing. It is also true that the plaintiff testified that the proof of loss was furnished at the defendant's request, and that the defendant's adjuster wrote the proof of loss, which was signed and sworn to by the plaintiff. However, the proof of loss contains this provision: “It is expressly understood and agreed that the furnishing of this proof of loss blank to the assured, or making up proofs by an adjuster, or any agent of the company or companies named herein, is not a waiver of any rights of said company.” It is not denied that the stipulation quoted constituted a binding contract, and, giving effect to its plain import, we think it must be held that what was done in reference to making proofs of loss did not constitute a waiver of any right the company had under the contract of insurance. *Roberts, Willis & Taylor Co. v. Sun Mutual Fire Insurance Co.* (Tex. Civ. App.) 35 S. W. 955.

All the questions presented in appellant's brief have been considered, and our conclusion is that no error is shown, and therefore the judgment will be affirmed. Affirmed.

STREETMAN, J., being of counsel, did not sit in this case.

JACKSON v. MARTIN.*

(Court of Civil Appeals of Texas. March 25, 1903.)

VENDOR AND PURCHASER—CONTRACT—MUTUAL MISTAKE.

1. A written contract for the sale of land provided in express terms that in case a loan were not procured on the land by reason of imperfect title the vendee was to be released from liability. The vendee claimed that there

was an agreement that the vendor should furnish a perfect abstract of title before the vendee should be held to the purchase, which stipulation was omitted by mutual mistake. It appeared that the contract was read to the vendee, and the substance of his testimony was that he thought the provision as to the abstract was to go into the contract, but the draftsman and other witnesses testified positively that nothing was said about an abstract, and vendee did not testify that he did not know the agreement as to the abstract was omitted from the writing. *Held*, that no mutual mistake was shown.

Appeal from District Court, Johnson County; W. P. Indexter, Judge.

Action by B. F. Jackson against H. W. Martin. From a judgment for defendant, plaintiff appeals. Reversed.

Henry & Patton and J. W. Moore, for appellant. H. P. Brown, D. W. Odell, and Ramsey & Odell, for appellee.

FLY, J. Appellant instituted this action to recover the sum of \$1,500, liquidated damages, alleged to have accrued by reason of the breach of a contract for the sale of land. The suit was based on the following contract: “On or before the 25th day of December, 1894, for value received I promise to pay to B. F. Jackson with 9% interest per annum from maturity until paid. This note is conditioned as follows, viz.: Whereas the said B. F. Jackson has this day deeded to said H. W. Martin 350 acres of land in the Jo Fisher survey and the William Eastham survey in Johnson county, Texas, and the said H. W. Martin has executed his several promissory notes therefor amounting in the aggregate to \$13,340.00 payable to the order of B. F. Jackson in a series of years. Now therefore the said B. F. Jackson hereby agrees to procure an advance or loan of \$1,000.00 or \$5,000.00 upon said notes so given for the unpaid purchase money for said land above mentioned, and will thereafter advance thereon extension of time equivalent to six or seven years inclusive of the time of which said loan is or shall be procured, the said difference between the amount of loan and full consideration for said land to be divided into equal installments, and the said H. W. Martin thereby firmly binds himself that he will well and truly execute and pay the said notes as shall severally become due and payable. Now if the said Jackson shall procure said loan upon the notes to be executed as vendors' liens upon said land, then the said Martin shall proceed to pay said notes as the same become due and payable, and the above note shall become null and void; otherwise to remain in full force and effect. But if the said Jackson shall fail to procure the proposed advance or loan, upon said notes by reason of the imperfect title to said land so deeded as aforesaid, then said Martin shall be released from all liability thereon and shall reconvey same to said Jackson without delay. The said H. W. Martin further agrees to execute one \$1,000.00 note with

*Rehearing denied April 22, 1903.

approved security as collateral security, for the prompt payment of each and all of the above mentioned vendor's lien notes, the same to be applied in lieu of rents; in case of failure to pay said vendor's lien notes; but if he shall well and truly pay said vendor's lien notes, as they shall severally become due, then the said \$1,000.00 note shall become void. Witness our hands this the 10th day of October, 1894. H. W. Martin. B. F. Jackson."

It was alleged on the part of appellee that the written contract did not represent the real contract between the parties, in this: that it was the positive agreement between the parties that appellant should furnish appellee with a perfect abstract of title, and that the abstract should show a good and perfect title, before appellee would be held to the purchase of the land, and that this stipulation was omitted from the written contract by mutual mistake or accident. The evidence was amply sufficient to establish that this was the understanding of the parties entered into some days before the execution of the written contract.

The evidence is totally insufficient, however, to establish that the agreement was omitted from the written contract by mistake. The contract was read to appellee, and there is no claim that he did not know what was in the contract. All that his testimony amounted to was he thought it was to go into the contract. The draftsman and other witnesses swore positively that nothing was mentioned as to an abstract being furnished, and the draftsman swore that he put all into the contract as to the title that was required by him by the parties, and the language of the contract, of which appellee was fully cognizant, indicated that the obtaining of a loan on the land by appellant was to be the test of title. Appellee did not swear that he did not know that the agreement as to the abstract of title was omitted in the written contract.

It is not alleged in the answer that the agreement as to the abstract was omitted through fraud on the part of the appellant or the draftsman, but the correction of the instrument was asked on the ground of mutual mistake. Under the facts in this case, if there was any mistake made in the terms of the contract, it was made by appellee alone. It is true that appellee swore that the matter as to the abstract was agreed on some time before the contract was written, but he did not swear that the draftsman was instructed to put it in the contract or produce a single circumstance that tended to show that it was omitted by mistake. Appellee does not swear that it was, and the circumstances tend to show that it was not omitted by mistake. If there was any mistake—which does not clearly appear—it was altogether unilateral. "A court of equity may grant relief in case of mutual mistake, but not on account of one entirely unilateral

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and in the absence of fraud." *May v. Town Site Co.*, 83 Tex. 502, 18 S. W. 959.

It was expressly provided in the written contract in case a loan was procured on the land the notes should be paid, but otherwise appellee was to be released from liability. That stipulation is inconsistent with an agreement that an abstract should be furnished showing a perfect title, and it was the only condition precedent to payment of the note expressed in the written contract. Appellee was fully acquainted with the stipulation.

In the case of *Land Mortgage Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377, one party denied the mistake, and the other affirmed it, and it was held that a jury might find the mistake on the testimony of one of the parties; but it is noticeable that the court put stress upon the fact that the party denying the mistake testified in such a manner as to throw doubts on his testimony. Admitting that the rule is as stated in that case, still the evidence in this case does not meet it, because neither the testimony of appellee nor the circumstances surrounding the transaction establish that there was a mistake in drawing the written instrument. The farthest to which the evidence goes is that in a conversation had some time before the instrument was drawn appellant had agreed to furnish an abstract of title, and upon that must be based a presumption that it was omitted by mutual mistake from the contract. Whether the rule be that equity will rectify an instrument on the ground of mistake only, when the testimony is of the "clearest and most satisfactory" character, as stated in *Railway v. Shirley*, 45 Tex. 355, and in *Moore v. Giesecke*, 76 Tex. 543, 13 S. W. 290, or as modified and explained away in *Mortgage Co. v. Pace*, above cited, there must be some evidence, direct or circumstantial, that such a verbal agreement was made, and that it continued concurrently in the minds of the parties, down to the time of the execution of the written contract, and was omitted therefrom by a mutual mistake. The charge is not open to the criticism embodied in the first assignment of error, and it was not error to permit the trial amendment to be filed. The exception setting up limitation was properly overruled.

On account of the error indicated the judgment is reversed, and the cause remanded.

TEXAS SOUTHERN RY. CO. v. HART et al.

(Court of Civil Appeals of Texas. April 8, 1903.)

RAILROADS—FIRES—ESCAPING SPARKS—NEG-
LIGENCE—PRESUMPTION—APPARATUS—
OPERATION—WITNESSES—EXPERT.

1. Where, in an action against a railroad company for damages from fire communicated by a spark from defendant's locomotive, the evidence shows without conflict that the fire

was so communicated, there is a presumption of negligence in defective equipment or management of the engine; and, to overcome such presumption, it devolves on defendant to show proper equipment and management.

2. Though it be shown that there was no negligence in equipment, the burden is still on defendant to prove no negligence in management.

3. In an action against a railroad for damages from fire communicated by a spark from a locomotive, one who was fireman on the engine at the time, and who had been a fireman for some time on the road, and for two years on other roads, was competent to give an opinion as an expert as to whether the locomotive was properly handled when passing plaintiff's premises.

4. In an action against a railroad company for damages from fire communicated by a spark from defendant's locomotive, a question put to the fireman on the locomotive as to whether it was being properly handled when passing plaintiff's premises was not objectionable, as leading.

5. It was not improper on the ground that it was one that the engineer could have answered.

Appeal from District Court, Upshur County; Richard B. Levy, Judge.

Action by S. C. Hart and others against the Texas Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

This suit was brought by S. C. Hart against the Commercial Lumber Company and the Southern Railway Company to recover \$800 damages for setting fire to and burning a dwelling house and its appurtenances, the property of appellee, by a locomotive operated by the defendants. It was alleged that they negligently permitted the fire to escape from the engine which destroyed the building. The case was discontinued as to the lumber company, and the railroad company answered by a general denial, and pleaded specially that "its engines were properly equipped with the best and most approved appliances for preventing the escape of sparks and cinders; that said engines were properly and carefully handled and managed by defendant, its agents and employes; and that defendant was guilty of no negligence that would make it liable for damages in this cause. The trial of the case, which was before a jury, resulted in a judgment against the appellant for the sum of \$275.

Barnwell & Eberhart, for appellant. Kerns & Stephens, R. W. Simpson, F. J. McCord, and Briggs & Briggs, for appellees.

NEILL, J. (after stating the facts.) The uncontradicted evidence shows that the property was destroyed from fire communicated by sparks escaping from appellant's engine No. 4. This raised a presumption of negligence on the part of defendant, consisting in the defective equipment or management of the engine. In order to escape the consequences of this presumption, it devolved upon the defendant to show a proper equipment and management of the engine. There was evidence that it was equipped with the best

and most approved appliances for the prevention of the escape of sparks and cinders. If this evidence were sufficient to show that there was no negligence in the equipment of the engine, it still devolved upon the defendant to prove that there was no negligence in its management. Upon this issue the defendant asked the witness Freeman, who was the fireman on the engine at the time the fire was communicated, to state whether engine No. 4 was properly handled while passing plaintiff's premises. The witness would have answered that at that time he believed said engine was properly handled by the engineer in charge. But the question was objected to by plaintiff's counsel upon the grounds that it was leading, and one the engineer could answer. Upon these objections being sustained, the defendant excepted to the action of the court, and assigns it as error.

The relevancy and materiality of the answer which would have been given in response to the question cannot be doubted. The objections are not good. The witness had, when asked the question, been a locomotive fireman and engineer on the roads of the Commercial Lumber Company and of appellant since the 1st of January, 1901, and before that date had been a fireman on two other railroads. From his observation and experience in his vocation during that time, he must have acquired sufficient knowledge of it to give an opinion upon the question as to whether the engine was properly handled at a time when he was on it, and in an attitude to observe the way it was operated. In fact, the objection did not go to his qualification as an expert. It was that the question was leading, and could be answered by the engineer. The witness having been shown to be an expert, it was proper to show his opinion as to the manner the engine was handled, and the form of the question by which it was sought to prove it was not objectionable. That the engineer could answer the question is no reason why the fireman should not be allowed to answer it also. Besides, it appears from the record that the engineer was not present at the trial, and the only witness by whom it could be shown how the locomotive was handled was the fireman.

On account of the error indicated, the judgment of the district court is reversed, and the cause remanded.

LYNCH v. WHITE.

(Court of Civil Appeals of Texas. April 8, 1903.)

CONVERSION—MEASURE OF DAMAGES.

1. The measure of damages for the conversion of a house is the value of the material therein at the time of the appropriation.

Error from Milam County Court; R. B. Pool, Judge.

Action by T. L. White against I. L. Lynch. Judgment for defendant, and plaintiff brings error. Affirmed.

Nelson & Little and Hefley, McBride & Watson, for plaintiff in error. Henderson & Freeman, for defendant in error.

FISHER, C. J. A close inspection of the facts in the record leads to the conclusion that the peremptory instruction of the court to find against the plaintiff was correct. Under the facts, the plaintiff could not hold the defendant liable for the purchase price due for the goods; and, when this item is eliminated, our calculation of the different items due by the respective parties really shows a balance due the defendant by the plaintiff.

The measure of damages for the house that was converted by the defendant was the value of the material at the time that it was appropriated, and not what the house originally cost, or what it would cost to rebuild a house of that character. The value of the material is not shown to be over \$100.

We do not deem it necessary to discuss the other items. We have carefully considered all of the evidence bearing upon this subject, and have reached the conclusion that the plaintiff is not entitled to recover from the defendant.

Judgment affirmed.

STREETMAN, J., did not sit in this case.

J. I. CASE THRESHING MACH. CO. v. HALL et al.

(Court of Civil Appeals of Texas. April 8, 1903.)

SALES—CONTRACT—WARRANTY—BREACH—NOTES—DEFENSES.

1. A written warranty on the sale of a machine excludes any proof of a different parol one.

2. While the acceptance and retention of goods are not necessarily conclusive against the buyer's right to rely upon a warranty, parties may, by express terms, agree, if the article does not conform to the warranty, it may be returned, and another substituted in its place.

3. Where a contract for the sale of a machine provides that a retention of the property without complaint or a failure to give a stipulated notice of defects shall amount to a satisfaction of the warranty, such retention without complaint satisfies the warranty.

4. A contract for the sale of a machine contained a warranty of quality, and it was provided that, if the machine failed to work, and written notice were given, the seller would send a person to remedy the defect, and, if it could not be made to work, it would be taken back, and the consideration returned. Held, that sending of a man to remedy the defect on notice from the purchaser was not a waiver or excuse for any failure of the purchaser to perform the conditions of the warranty.

5. The purchaser of a note given by the purchaser of a machine to the seller for the purchase price, who knows of any breach of warranty in the contract of sale, takes the note

subject to any defense that could have been made to a suit on it by the seller of the machine.

Appeal from Dallas County Court; Ed S. Lauderdale, Judge.

Action by the Keating Implement Company against E. B. Hall, to which the J. I. Case Threshing Machine Company was made a party. There was judgment in favor of plaintiff against defendant Hall, and in his favor against the Case Company, from which the latter appeals. Judgment against Hall affirmed, and the other reversed, and judgment rendered for the Case Company.

McCormick & Spence and Edw. M. Browder, for appellant. Miller & Fouraker, for appellee.

NEILL, J. For convenience the appellant company will hereinafter be called the "Case Company," and the appellee company the "Keating Company."

This suit was brought in the justice's court by the Keating Company against E. B. Hall upon a promissory note made by the latter to the Case Company for \$150, and to foreclose a chattel mortgage given by Hall on a certain "self-feeder" to secure the payment of the note. Hall answered by pleading a total failure of consideration, alleging that the note was given for the purchase money of a "self-feeder" for a threshing machine; that he purchased the feeder from the Keating Company, as the agent of the Case Company; that the last-named company, by its agent, the Keating Company, warranted the machine to do the work of a self-feeder as well as any made in the United States, but that the machine failed to work that way, and was wholly without value, and was of no benefit to him; that he had paid \$75 on the note, which was credited thereon, and that when the machine was delivered to him he paid \$7.06 freight thereon. He made the Case Company a party to the suit, alleging a breach of its warranty of the machine, and prayed judgment against it by reason thereof for the sums of \$75 and \$7.06, with interest thereon, and, in the event of a recovery by the plaintiff against him, that he have judgment against the Case Company for the full sum of \$157.06, with interest, etc.

The Case Company, after answering by a general denial, pleaded that Hall purchased the machine under a written contract, which fully set forth the only warranty given with the machine, which provided that, if the feeder failed to operate in accordance with the warranty. Hall should give certain notices therein set forth; but that Hall kept and used the machine without giving such notices of its failure to operate as is required by the terms of said contract, and that thereby his liability became fixed, and concluded him from recovering on the alleged breach of warranty. It also pleaded that Hall was estopped from setting up the alleged failure of consideration of the note, for that, after he knew

of the alleged defects in the machine, if any there were, he paid the sum of \$75 on the notes, and obtained from appellant an agreement extending the time of payment of the balance owing until August, 1900.

From a judgment in favor of Hall in the justice court, the other two parties appealed to the county court, where the cause was tried before a jury, and the trial resulted in a judgment in favor of the Keating Company against Hall for the sum of \$109.05, with interest and costs, together with a foreclosure of the chattel mortgage on the feeder; and in favor of Hall over against the Case Company for the sum of \$157, with interest and costs. From this judgment the last-named company has appealed.

Conclusions of Fact.

These facts are undisputed, and are established by the uncontradicted testimony: On June 7, 1899, E. B. Hall executed and delivered to appellant the note sued on, which is as follows: "\$150.00. Duncanville, Texas, June 7th, 1899. On or before the 1st day of September, 1899, fixed I, we, or either of us, promise to pay to J. I. Case Threshing Machine Company, or bearer, One Hundred Fifty & ⁰⁰/₁₀₀ Dollars, at City National Bank, Dallas, Texas, for value received, with 8 per cent. interest from date if paid at maturity, and 10 per cent. interest after maturity, and if not paid when due, then to become payable at Dallas, Texas, with 10 per cent. attorney's fees if sued. E. B. Hall. [Seal.]" This note was given for the purchase money of a self-feeder to a threshing machine, upon which a chattel mortgage was made by Hall at the same time to secure its payment. Hall, who resides in Dallas county, purchased the feeder from the Case Company, a Wisconsin corporation, with its habitat at Racine, through its agent, the Keating Company, which carried on its business in Dallas, Texas. At the time Hall bought the machine, May 17, 1899, he executed a written contract order to the J. I. Case Threshing Machine Company therefor, and the contract was accepted and filled by the Keating Company, acting as agent for the Case Company. This contract contains the following warranty of the seller and agreement between the parties in regard to it, viz.: "Said machinery is warranted to be of good material, to perform well, if properly operated by competent persons, and the printed rules and directions of the manufacturers are intelligently followed. Upon starting, if the purchasers, by so doing, at any time within ten days, are unable to make same operate well, written notice stating wherein it fails to conform to the warranty, is at once to be given by the purchasers to J. I. Case Threshing Machine Company at Racine, Wisconsin, and also to the agent of whom purchased, and reasonable time shall be given said company to send a competent person to remedy the difficulty, the purchaser rendering all necessary and friendly assistance; the company reserv-

ing the right to replace any defective part or parts, if any, and if with the friendly assistance of the purchaser, it cannot be made to fulfill the warranty, and the fault is in the machine (and that to be determined by the person sent to remedy and inspect the machine and whose determination shall be conclusive and binding upon all parties) it is to be returned by the purchaser, free of charge, to the place where received, which shall fulfill the above warranty, or the notes and money returned and this contract canceled; neither party in such case to have or make any claim against the other. Failure to make such trial or give such notice or use after ten days, without such notice, shall be conclusive evidence of the fulfillment of all warranty, and that the machine is satisfactory to the purchaser. If the company shall, at the request of the purchaser, render assistance of any kind in operating said machinery or any part thereof, or in remedying any defect, if any, either before or after said ten day's trial, said assistance shall in no case be deemed a waiver of, or excuse for any failure of the purchaser to fully keep and perform the conditions of the warranty." This was the only warranty given by the appellant. After the feeder was delivered, Hall tried to use it, and, not being able to get it to work well, he verbally reported the fact to Mr. Keating, of the Keating Company, who sent Mr. McCord, an agent of appellant, to Hall's farm, who put the feeder on the thresher, and started it to running. It ran well while McCord was with the machine, which was only a short time, and Hall gave him a written statement to the effect that the feeder was running all right. Hall continued to use and run the feeder the balance of the threshing season of 1899, using it nine or ten days after McCord put it in operation, and made no complaint either to the Keating Company or the Case Company in regard to it. Hall never gave to either of the companies any written notice of the alleged defects in the feeder. Hall paid the \$75 credited on the note to the Keating Company on September 30, 1899, after its maturity, and made an agreement with the company to extend payment of the balance till August 1, 1900. On October 1, 1899, in a settlement between the Case Company and the Keating Company, the note was, for value, assigned by the former to the latter.

Conclusions of Law.

Under these undisputed facts the court erred in not peremptorily instructing, at the request of appellant, a verdict in its favor. Hall cannot evade his liability on the written contract by proof of an oral agreement made prior to or contemporaneous with its execution. The rule is well settled that, where the parties have reduced to writing what appears upon its face to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake be conclusively presumed

that the writing contains the whole agreement between the parties, and parol evidence of prior or contemporaneous or subsequent conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. Therefore a written warranty excludes proof of a parol one, and, as a general rule, an express warranty excludes the possibility of another and implied one respecting the same subject-matter. Where parties have expressly agreed upon a warranty, the law must, in the absence of fraud or mistake, conclusively presume that they have included in their express agreement whatever of warranty is to prevail between them respecting the matter to which it refers. *Case Plow Works v. Niles*, 30 Wis. 590, 63 N. W. 1013; *Bucy v. Pitts Agricultural Works*, 89 Iowa, 464, 56 N. W. 541; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359. While the acceptance and retention of the goods are not necessarily conclusive against the buyer's right to rely upon the warranty, parties may, by express terms, agree that, if the article does not conform to the warranty, it may be returned, and another substituted in its place. *Hefner v. Haynes* (Iowa) 57 N. W. 421; *Davis v. Iverson* (S. D.) 58 N. W. 796; *Sandwich Mfg. Co. v. Feary* (Neb.) 51 N. W. 1026; *Champion Machine Co. v. Mann* (Kan. Sup.) 22 Pac. 417; *McCormick Harvest Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537. By express terms the parties may make the agreement conclusive, when the contract provides that a retention of the property without complaint or a failure to give the stipulated notice of defects to the seller, unless waived, be deemed conclusive evidence that the warranty is satisfied. *Thomas Gin Co. v. Griffin* (Tex. Civ. App.) 40 S. W. 755; *Aultman v. McKinney* (Tex. Civ. App.) 26 S. W. 269; *Equitable Co. v. Stevens* (Tex. Civ. App.) 60 S. W. 350; *Kingman v. Watson* (Wis.) 73 N. W. 438; *Minn. Threshing Co. v. Lincoln* (N. D.) 61 N. W. 145; *Beasley v. Huyett & Smith Mfg. Co.* (Ga.) 18 S. E. 420. In this case there was no fraud or mistake in the written contract pleaded or proved by Mr. Hall. Under the very terms of the contract the sending of Mr. McCord, at Hall's request, to render assistance in operating the machinery, or to remedy the defect in it, could not "be deemed a waiver of or excuse for any failure of the purchaser to fully keep and perform the conditions of the warranty."

For these reasons we have concluded that under the undisputed facts no liability upon its warranty was shown against the appellant, and that the court should have peremptorily instructed a verdict in its favor. It is patent that, if Hall is liable to the Keating Company on the note, there can be no liability in favor of Hall against appellant for a breach of warranty; for the Keating Company knew of such breach, if there was any, when the note was assigned, and took it subject to any defense that could have been to

a suit brought on it by the original payee. How the jury could find in favor of one company and against the other, we cannot understand. It may be that the verdict serves to show the way the wind blows.

The judgment in favor of the Keating Company against Hall is affirmed. The judgment in favor of Hall against the Case Company is reversed, and judgment is here rendered for said company. The costs of this appeal, as well as all costs incurred in the justice and county court, will be taxed against the appellee, E. B. Hall.

Reversed and rendered.

DAUGHERTY v. LADY.*

(Court of Civil Appeals of Texas. March 25, 1903.)

TESTIMONY CONTRARY TO PLEADING—CONVERSION—DAMAGES—EVIDENCE OF TRUTH AND VERACITY.

1. Defendant's testimony, directly contrary to the fact as pleaded by him, is conclusive against him.

2. The measure of damages for conversion of cattle is their market value at the time of the taking, with interest, and not in addition what they would reasonably be worth for milk and butter to plaintiff.

3. Evidence that a party's reputation for truth and veracity was good 30 years ago, where he then and ever since has lived, is not admissible.

Appeal from Rockwall County Court; E. D. Force, Judge.

Action by H. H. Lady against C. C. Daugherty. Judgment for plaintiff, and defendant appeals. Reversed.

Abernathy & Beverly and B. McMahon, for appellant. H. M. Wade and L. D. Stroud, for appellee.

NEILL, J. This suit was brought by the appellee to recover damages against the appellant for unlawful entry upon his premises and driving off two cows and two bulls, alleged to be appellee's property, and converting such property to his own use.

The appellant's third amended original answer, on which the case was tried, contains: (1) A plea of privilege of being sued in Collin county, wherein it is alleged he resides; (2) special exceptions; (3) a general denial; (4) by special pleas to the effect that he took possession of the animals by virtue of the power given him in a certain mortgage executed to him by appellee on the cattle, as well as by virtue of a sale of the cattle to him by appellee; and (5) the two-years statute of limitations. The exceptions to appellee's petition were overruled, the case tried before a jury, and judgment rendered in favor of appellee for \$200, from which judgment this appeal is prosecuted.

Reasons for Reversal.

The testimony in this case took a very wide range, and, it seems to us, went far beyond

*Rehearing denied April 22, 1903.

the domain fixed by the law which limits the introduction of evidence to such issues as are raised by the pleadings. Evidence raising questions not even collateral to the issues was introduced by one party, which was met and combated by the other, as though the merits of the case depended upon the solution of questions that had nothing in the world to do with it. The appellant not only admitted by his pleadings, but showed by his own evidence, that during appellee's absence, without his knowledge or consent, he entered upon the premises, drove off all the cattle in question, and appropriated the property to his own use, except the red and white bob-tailed bull. Such admissions and uncontradicted testimony left it only to be determined whether he was justified in this conduct by proof of the matters pleaded by him, and, if not, what damages did appellee sustain? Appellant pleaded in justification (1) the power expressly given by a mortgage on the cattle executed by appellee to him, and (2) a purchase by him of the animals from the appellee. As to the first ground of justification, the appellant, by his own testimony, emphatically denied that such a mortgage was ever executed to him by the appellee. His testimony as to this matter was directly contrary to what he had pleaded, and should have been taken as conclusive against him, leaving only the question whether he purchased the cattle from the appellee, and, if not, the damage to be determined. These were the only questions that should, under the evidence and pleadings, have been submitted to the jury; for it was shown from the uncontradicted testimony that two years did not elapse from the time of the taking to the institution of this suit, and it did show that, if the cattle were not appellant's, the trespass was committed in Rockwall county. The jury having determined these issues in favor of appellee, we would not disturb the judgment, were it not that the court erred in its charge in submitting to the determination of the jury, in estimating the damages, the question as to what the cattle would, in addition to their market value, reasonably be worth for milk and butter to the plaintiff. The measure of damages is the market value of the animals at the time of the taking, with legal interest from that date. What they would be worth, in addition, to plaintiff, for milk and butter, is too remote to be considered in estimating the damages. *Lackey v. Campbell* (Tex. Civ. App.) 54 S. W. 48, and authorities cited. In this connection we will say that the exception to that part of appellee's petition alleging the value of the cattle during the time they were detained by defendant, for the production of milk and butter, was \$140, and that he and his family have been deprived of milk and butter during all that time by reason of the taking of the cattle, should have been sustained.

The court did not err in excluding evidence offered by appellant to show that his reputa-

tion for truth and veracity was good 30 years ago in Collin county, where he then and has ever since lived. Such testimony does not come within the terms and limitations of the rule stated in *Brown v. Perez*, 89 Tex. 289, 34 S. W. 725.

On account of the error indicated, the judgment of the county court is reversed, and the cause remanded.

ANDERSON et ux. v. BRIN.*

(Court of Civil Appeals of Texas. March 11, 1903.)

HOMESTEAD—DESIGNATION BY HUSBAND ALONE—VALIDITY.

1. A husband and wife owned approximately 500 acres of land. The husband mortgaged 217 acres thereof, including 64 acres afterwards claimed to be part of their homestead. At the same time he made a designation of another portion of the 500 acres as homestead. The wife did not join in the mortgage or in the designation. *Held*, that as, after designating the 64 acres, and incumbering them with the mortgage, the husband and wife had remaining 200 acres or over, which they were using for homestead purposes, the designation of the other lands in lieu of the 64 acres was valid, though the wife did not join therein, and though the 64 acres was in cultivation by the husband, while some of the other lands designated in lieu thereof were not under cultivation.

Error from District Court, Brown County; J. C. Randolph, Special Judge.

Trespass to try title by W. C. Anderson and wife against Leon Brin. Judgment in favor of plaintiffs for only part of the relief sought, and they bring error. Affirmed.

Jenkins & McCartney, for plaintiffs in error.

FISHER, C. J. This is an action in the nature of trespass to try title, brought in the district court by plaintiff in error Anderson and his wife against the defendant in error to recover the 68 acres of land in controversy. The trial court peremptorily instructed a verdict in favor of the plaintiffs for a portion of the land sued for, and to find a verdict in favor of the defendant for the remainder of the land. In plaintiffs in error's brief it is stated that the principal question in the case is whether a 64-acre tract of land, a part of the William Guyman survey, was a part of the homestead of the plaintiffs at the time it was mortgaged to the defendant. It is contended by the plaintiffs in error that it was a part of their homestead in actual use at the time of the execution of the mortgage by W. C. Anderson, and also that at that time a designation of other lands as his homestead was made by W. C. Anderson, without the knowledge and consent of his wife, Mrs. Anderson. This is the second appeal of this case, and the facts here are substantially as stated in the opin-

*Rehearing denied April 23, 1903, and writ of error denied by Supreme Court.

ion of this court in *Brin v. Anderson* (Tex. Civ. App.) 60 S. W. 778, and, in accordance with the view there expressed, the trial court instructed a verdict in favor of the plaintiffs.

We have not made an accurate calculation as to the number of acres owned by Anderson and his wife which were a part of their home place at the time that the mortgage and designation in question were executed by Anderson, but a rough estimate shows that they then owned and were using approximately 500 acres. On page 30 of the record we find this statement: "Plaintiffs admitted that at and prior to the time the deed of trust on the Guyman 217-acre tract was executed from Anderson to Brin they were using all the lands owned by them in the same general manner for the purposes of a home." According to this agreement, after designating the 64 acres in question, and incumbering it with the mortgage to Brin, Anderson and wife would have remaining 200 acres or over, which they were using for homestead purposes. It is true that the 64 acres in controversy were in cultivation by Anderson, and that some of the other lands that were designated were not all in cultivation, but they were in actual use for homestead purposes. Such being the case, although Mrs. Anderson did not join in the execution of the mortgage or the designation, the husband acting in good faith, the designation of other lands in lieu of the 64 acres in question is binding.

Judgment affirmed.

PARHAM et al. v. SHOCKLER.*

(Court of Civil Appeals of Texas. Feb. 14, 1903.)

WRONGFUL ARREST — INSTRUCTION — NEW TRIAL—APPEAL—LACK OF EVIDENCE—QUESTION NOT RAISED BELOW.

1. The instruction in an action for arresting plaintiff for drunkenness, when he was not drunk, that if plaintiff was drunk the arrest was legal and he could not recover, and if he was sober, but his acts and conduct were reasonably calculated to lead defendants to believe he was drunk, and acting on such belief they arrested him, they were entitled to a verdict, is not open to the charge that before a verdict could be returned for defendants it required the jury to find that plaintiff was sober.

2. Motion for new trial for newly discovered evidence is properly refused, the evidence being cumulative, and the situation having pointed to the witness as a person who knew about the matter, and no excuse being offered for failure to seek information of him before the trial.

3. The petition in an action for wrongful arrest by defendant P. alleged that he was marshal, and had executed bond, with defendants S. & T. as sureties. The answer admitted that P. was marshal, pleaded the general issue, and did not mention the bond. *Held*, that judgment against S. and T. could not be sustained on appeal, there being no evidence that they were such sureties, though the question was not raised in the trial court.

Appeal from District Court, Hill County; A. P. McKinnon, Special Judge.

Action by J. M. Shockler against J. W. Parham and others. Judgment for plaintiff. Defendants appeal. Reversed in part.

Wear, Morrow & Smithdeal, for appellants A. L. Smith and T. E. Tomlinson. Jas. K. Parr and Spell & Phillips, for appellants J. W. Parham and J. A. Jones. Vaughan & Works, for appellee J. M. Shockler.

TEMPLETON, J. J. W. Parham, marshal of the city of Hillsboro, and his deputy, J. A. Jones, arrested J. M. Shockler on a charge of drunkenness. Shockler, claiming that he was not drunk and that the arrest was wrongful, brought this suit against the said officers and A. L. Smith and T. E. Tomlinson, who were alleged to be sureties on the marshal's official bond, to recover damages occasioned by the arrest. A jury awarded him the sum of \$50.

The court defined drunkenness, and instructed the jury that, if Shockler was drunk, the arrest was legal and the plaintiff was not entitled to recover. The jury was further instructed that if Shockler was sober, but if his acts and conduct were reasonably calculated to lead the officers to believe that he was drunk, and that, acting on such belief, they made the arrest, then the defendants were entitled to a verdict. Complaint is made of this charge on the ground that, before a verdict could be returned for the defendants, the jury was required to find that Shockler was sober, whereas they were entitled to a verdict if the officers had reasonable grounds for believing that he was drunk, no matter whether he was drunk or sober. The complaint is not well taken. In legal contemplation, Shockler was either drunk or sober. If he was drunk, the arrest was authorized, and the issue of reasonable cause was not involved. The charge given covers every defensive theory suggested by the pleadings and evidence, and no additional instructions were necessary.

The arrest was without warrant, but, under the ordinances of the city, the officers were authorized to make the arrest, without complaint or warrant, if Shockler was drunk. The evidence is sufficient to sustain the finding of the jury that he was not drunk, and that he was not acting in such manner as to give the officers reasonable grounds for believing that he was drunk, if they had acted with proper discretion. They appear to have acted in the belief that he was drunk, the belief being induced largely, if not entirely, by the way he walked. One of his knees had been recently injured, which caused him to limp and walk unsteadily. The evidence warrants the conclusion that if they had acted with due care they would have ascertained, before making the arrest, that their belief that he was drunk was unfounded. The officers made the arrest by taking him into

*Rehearing denied April 12, 1903.

actual custody. They carried him about 75 yards down a side street towards the calaboose, and then released him. The manner in which he was handled increased the pain he was suffering from his injured knee. The verdict is sustained by the evidence, and is not excessive in amount.

Newly discovered evidence is one of the grounds for new trial set up by the defendants. It appears from the motion, which was verified in this particular, that the defendants learned after trial that they could prove by one Staaden, a bartender in a saloon in Hillsboro, that Shockler tried to buy whisky from him on the night he was arrested, and that he, Shockler, was so drunk that the bartender refused to make the sale. The evidence is material, but is cumulative in its nature. Three other bartenders testified for the defendants on the trial that Shockler was more or less intoxicated on the night he was arrested. The situation pointed to Staaden as a man who might know whether Shockler was drinking on the occasion in question, but the defendants offered no excuse for their failure to seek information from him before the trial. The motion for new trial was properly overruled.

The appellants Smith and Tomlinson, the alleged sureties on the marshal's official bond, ask that the judgment against them be reversed, upon the ground that the record fails to show that they ever became or were such sureties. There is no reference to such bond in the statement of facts. It was alleged in the plaintiff's petition that Parham was the duly elected and qualified marshal of the city of Hillsboro, and that he had executed the bond required of him by law, with Smith and Tomlinson as sureties. Parham answered, admitting that he was marshal as alleged. Smith and Tomlinson adopted the answer of Parham. All of the defendants pleaded the general issue, and there was no mention of the bond in any of the answers filed. There could be no liability on the part of Smith and Tomlinson unless they had executed the alleged bond. The fact appears not to have been proven. The admissions in the pleadings of the defendants are not such as will dispense with the necessity of proving the fact. The admission was that Parham was marshal at the time the arrest was made, not that he had executed an official bond, conditioned as required by law, with Smith and Tomlinson as sureties. It follows that the record before us fails to show liability on the part of Smith and Tomlinson. The question was not raised in the trial court, and we were of opinion, when the case was originally considered, that the question could not be presented for the first time in this court. The judgment was accordingly affirmed as to all the appellants. But the error in rendering judgment against the alleged sureties, without any proof whatever tending to establish liability, is fundamental in its nature. In the total absence of evidence

to support the verdict and judgment, the rule requiring the question to be raised in the trial court cannot be applied. We must assume that the record before us contains a complete transcript of all the proceedings had in the court below, and it would be doing violence to every sense of justice to affirm this judgment against the appellants Smith and Tomlinson upon a purely technical ground, when it appears that absolutely no proof whatever was introduced tending even remotely to show any liability on their part for the damages they have been adjudged to pay.

The motion of the said appellants for rehearing will therefore be granted, and, as to them, the judgment will be reversed and the cause remanded. The motion of appellants Parham and Jones for rehearing is overruled. The original opinion is withdrawn.

MAY v. MARTIN et al.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

PLEDGE BY APPARENT OWNER—REAL OWNER—ESTOPPEL—NOTICE TO PLEDGEE—FAILURE TO PAY DEBT—VERDICT—FORM—SUFFICIENCY.

1. The owner of a note, who by written assignment and actual transfer has clothed a bailee with apparent ownership for the purpose of suing thereon, is estopped to question the validity of such bailee's pledge of the note.

2. Where an owner has clothed a bailee with apparent ownership, whereupon the bailee wrongfully pledges the property, mere notice of the actual ownership by the bailor to the pledgee, without tender of the bailee's debt, will not prevent the sale of the property and its purchase by the pledgee according to the terms of the pledge.

3. A verdict awarding title to the cause of action to an intervener authorizes a judgment against plaintiff, though he is not named therein.

4. A party cannot complain that a verdict does not name another party who is not claiming adversely to himself.

Error from District Court, Dallas County: T. F. Nash, Judge.

Action by W. R. Martin against Mrs. Frazer and husband, in which A. W. May and the Dallas Loan & Trust Company intervene. Judgment for the trust company, and May brings error. Affirmed.

R. H. Capers, for plaintiff in error.

TEMPLETON, J. Suit by W. P. Martin against Mrs. Frazer and her husband on a note for \$375, executed by Mrs. Frazer when she was a feme sole, and secured by mortgage on certain real estate. A. W. May and the Dallas Loan & Trust Company filed pleas in intervention, each of them claiming to be the sole and exclusive owner of the cause of action in suit. A jury was impaneled to try the case, but, when the evidence was in, the court instructed a verdict for the trust company. May has appealed by writ of error.

*Writ of error denied by Supreme Court.

Conclusions of Fact.

There is no controversy as to the facts. On May 27, 1901, May was the owner of the said note, and on that day, by a written transfer reciting a cash consideration of \$375 paid, assigned the same to Martin. On the following day, Martin, by a separate instrument, retransferred the note to May, but retained the note and the original assignment. The object of these transactions was to place the apparent title in Martin, in order that he might sue on the note in his own name, it being intended that the beneficial ownership should remain in May. Martin brought this suit in August, 1901. On March 14, 1902, he applied to the trust company for a loan, and offered to pledge the said note as security therefor. He obtained a loan of \$105; and executed and delivered a written instrument pledging the note as security for the loan. The said instrument provided for the sale of the security in case of default, and that the trust company might become the purchaser at such sale. It was filed for record with the county clerk, and was noted on the docket of the court in which the suit was pending. The assignment by May to Martin was attached as an exhibit to Martin's petition in said suit, and the trust company knew of and relied on the same in dealing with Martin. It had no notice of the reassignment to May, or of the fact that May was the real owner of the note. On June 3, 1902, May learned that Martin had pledged the note to the trust company, and two days later filed his plea in intervention. He notified the trust company that he was the owner of the note, but did not offer to pay the debt for which the note had been pledged. Martin's debt to the trust company having matured, and payment being refused, the trust company caused the note to be sold in accordance with the terms of the pledge. It became the purchaser at the sale for a sum just sufficient to cover its debt. It thereupon intervened in the said suit, and the case was tried with the result stated. May has never paid or offered to pay the debt owing by Martin to the trust company.

Conclusions of Law.

1. May having voluntarily placed the apparent title to the note in Martin, and the trust company having been induced by the said act of May to make the loan to Martin and accept the note as security therefor, May is estopped from questioning the validity of the pledge, and the trust company is entitled to be protected as an innocent purchaser. *Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066.

2. The trust company had a right to subject the security pledged to it by Martin to the payment of the principal debt, in the manner provided by the terms of the pledge, and its right was not affected by notice of May's claim of ownership, given after the

right had been acquired and had become vested. The purchase by the trust company related back to the date of the pledge, and, the pledge being valid, a perfect title was acquired by the purchase. *Kirby v. Moody*, 84 Tex. 201, 19 S. W. 453.

3. May could have prevented the sale under the pledge by paying to the trust company the debt for which the note had been pledged. Having failed to pay or tender payment of such debt, the foreclosure sale was authorized, and was conclusive of May's rights. His title was subordinate to the pledge, and he was bound, for his own protection, to satisfy the debt, which was a charge against his property. Not having offered to do equity, he is in no position to complain. *Goldfrank v. Young*, 64 Tex. 432.

4. It is urged that the verdict is not such as to authorize the judgment, for the reason that there is no reference in the verdict to the plaintiff, Martin. There was a general verdict in favor of the trust company, and a special verdict against all the other parties by name except Martin. The general verdict was sufficient in itself alone to warrant the judgment, and a special finding against Martin was unnecessary. The only real controversy was between the trust company and May. Besides, Martin is not complaining of the verdict or judgment, and May cannot do so for him. The judgment provides that Martin take nothing by reason of his suit, and is therefore a final disposition of the case as to him.

The judgment is affirmed.

On Rehearing.

(April 18, 1903.)

In the original opinion the obligation sued on was described as a note. As a matter of fact, it was a contract to pay the sum stated as attorney's fees, and was not in the form of a promissory note. It was not a negotiable instrument, but was, of course, assignable. It was written evidence of a debt, and the fact that it was not a promissory note does not affect the questions decided, or require any change in the conclusions reached. The motion for rehearing is overruled.

FOURTH NAT. BANK OF DALLAS v. CITY OF DALLAS.*

(Court of Civil Appeals of Texas. March 18, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC BUILDINGS—CONSTRUCTION—CONTRACTS—PUBLIC DEBTS—PROVISION FOR PAYMENT—NECESSITY.

1. Const. art. 11, § 5, declares that no debt shall be created by a city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and to create a sinking fund of at least 2 per cent. thereon. *Held*, that a contract by a city for the erection of a city hall, to be

*Rehearing denied April 22, 1903, and writ of error denied by Supreme Court.

paid for in cash, with the city's option to execute interest-bearing obligations for 25 per cent. of the price, payable in three annual installments, constituted a debt, within such provision, and the city's failure to make provision for the annual assessment of a tax to pay the same at the time the contract was made rendered the contract void.

2. Where, at the time of the making of a contract for the construction of a city hall, the city was possessed of real estate of sufficient value to pay for the building, which it was intended the city should sell, and apply on the building contract, but there was no action on the part of the city council, as a body, directing that such lands, or the proceeds thereof, be applied to such purpose, the contract was not thereby exempted from Const. art. 11, § 5, declaring that no city debt should be created unless provision for the assessment of a tax to pay the same was made at the time.

Error from District Court, Dallas County; Richard Morgan, Judge.

Action by the Fourth National Bank of Dallas against the city of Dallas and others. From a judgment in favor of defendant city, plaintiff brings error. Affirmed.

McCormick & Spence, for plaintiff in error. W. T. Henry and Jas. J. Collins, for defendant in error.

JAMES, C. J. The city entered into a contract with Byrne & Co. for the erection of a city hall at the price of \$75,000, which provided that 25 per cent. of all estimates should be withheld by the city until after the final completion and delivery of the building according to the contract, at which time the city had the privilege of executing its notes for such reserve fund of 25 per cent., amounting to \$18,750, which notes should be three in number, each for \$6,250, due, respectively, in one, two, and three years, with 8 per cent. interest, payable annually. It provided, also, that the city should have the right, through its architects or agent, to take possession of the premises, and at once terminate the contract, whereupon all claims of the contractors, their executors, administrators, and assigns, should cease, and their sureties upon the bond given shall be liable to the city for all damages by reason of the premises in the event the contractors should become bankrupt, refuse or neglect to supply a sufficiency of material or workmen, or cause any unreasonable neglect or suspension of work, or fail or refuse to follow the drawings or specifications, or comply with any part of the agreement. It also provided that the building should be completed and turned over to the city free from all liens—mechanic's, mortgage, or otherwise—upon said building, or for any machinery, material, or labor, or on any other account whatsoever, and hold the city harmless from garnishments that might be run against the city by reason of the contract, and the contractor and his sureties should be responsible to the city for all damages on account of any of said things, liens, or garnishments. The petition alleged, in substance: That the city, then owning real estate, which had been

acquired and paid for for municipal purposes, of sufficient value to pay the contract price of said city hall, and having a large sum of money out of its general revenues applicable to the payment for said building, and intending in good faith to pay for same out of said general revenues, and the proceeds of said real estate which was not needed for any other purposes, and which was then readily salable, contracted with defendants Byrne & Co. for the erection of said building. That, to secure means and resources to carry on said contract, Byrne & Co. arranged to borrow from plaintiff moneys necessary to the performance of the work, and on February 7, 1888, executed to plaintiff an order as follows: "To the Hon. Mayor City of Dallas—Dear Sir: You are hereby authorized to pay to the Fourth Natl. Bank of this city all amounts due us on estimates made by superintendent and architect on work performed or material on ground. Said estimates to be made semimonthly as per contract, less 25 per cent. retained by the city. Byrne & Co., Contractors for City Hall." That on March 28, 1888, plaintiff filed said order with the city of Dallas, and said city, through its secretary, retained possession of same, and issued to plaintiff a copy thereof, under the hand and seal of its secretary and the defendant the city of Dallas. That the city, reorganizing said order, and the rights of plaintiff thereunder, subsequent to May 30, 1888, and prior to September 27, 1889, paid to plaintiff, on estimates, a large sum of money, and on September 27, 1889, a settlement was had between plaintiff and Byrne & Co., and the latter's remaining indebtedness liquidated at the sum of \$8,500, on which day Byrne & Co. and Owen J. Cooke executed to plaintiff their note for that sum, due 60 days thereafter, with 12 per cent. interest, and 10 per cent. attorney's fees in case of legal proceedings thereon. That at the maturity of said note there was due Byrne & Co. by the city under said contract a sum more than sufficient to pay said indebtedness of Byrne & Co. to plaintiff. That the city was duly notified of plaintiff's rights to said fund for that amount, and, though demanded from the city, it has failed and refused to pay same, as well as Byrne & Co. and Cooke—and prayed for judgment against Byrne & Co. and against the city for all sums which had become due under the contract, not to exceed the amount of plaintiff's debt against Byrne & Co., and for any other relief to which plaintiff may be entitled, including attorney's fees.

Plaintiff, in a supplemental petition, alleged: "That the order given to the plaintiff by Byrne & Co. was, within its true meaning, an assignment of all the sums due to Byrne & Co. under and by virtue of the terms of their contract with the defendant the city of Dallas for the construction of the city hall of said city, including the 25 per cent., the payment of which was reserved

until the final completion of the building. And when the said contract with the city of Dallas was entered into by Byrne & Co., providing for the construction of said city hall, said Byrne & Co., and the members thereof, had little or no property, and no capital available for the construction of said building, which was well known to the city of Dallas and to the plaintiff. That, as a part of the arrangement for the erection of said city hall, the said contractors, Byrne & Co., before the said written assignment was made, arranged with the plaintiff to furnish to them the necessary funds requisite for the carrying out of their part of said contract; the plaintiff agreeing to furnish to said Byrne & Co. sufficient funds for that purpose, which funds were to be repaid to the plaintiff when the same became due from the city of Dallas under the terms of said contract (that is to say, 75 per cent. of the estimates semi-monthly, as the work progressed, and the remaining 25 per cent. at the completion of the work under the terms of the contract), which arrangement between said Byrne & Co. and the plaintiff was well known to the city of Dallas before the execution of said contract, and the delivery thereof to the city of Dallas; and that in accordance with the said arrangement and understanding the plaintiff advanced to Byrne & Co., in addition to the 75 per cent. which it received under said assignment from the city of Dallas, the sum of \$8,500, the principal of the note herein sued on, upon the faith of the security of said assignment, and relying on the construction placed thereon by the parties thereto, including the city of Dallas, Byrne & Co., and the plaintiff, that said assignment did convey a lien to the plaintiff upon all of the money estimated or to be estimated to Byrne & Co. under said contract, for the payment of the advances made by the plaintiff to Byrne & Co. in pursuance of said arrangement." That in making the contract the city undertook to incur an obligation and to create a debt. That the contract contemplated that the building would require a term of not less than 10 months from its date. That said period extended beyond the fiscal year in which the contract was made, and contemplated the payment to Byrne & Co. of a portion, if not all, of said indebtedness out of the revenues of the succeeding fiscal year. That at the time the obligation was attempted to be incurred, and such debt attempted to be created, no tax was levied, nor at any other time was any tax levied, by the city, to provide for its payment, nor was there any fund then in existence, under the control of the city, out of which it was contemplated that said indebtedness should be paid, and that by reason of above facts no obligation ever existed to pay said sum of money, and plaintiff has no right to demand payment of any part thereof by reason of an assignment from Byrne & Co. (2) That said order was not an assignment of

the 25 per cent. reserve. That on or about May 1, 1899, the work having been abandoned by Byrne & Co. in an incomplete state, and their contract having been otherwise violated, the city, under the power given it by the contract, took charge of the work of completing it. That at said date work and labor had been performed thereon, according to the estimates, to the amount of \$66,398.41, of which up to that time there had been paid to plaintiff on estimates \$49,799.79, which was all that was coming to plaintiff by virtue of the assignment. (3) That plaintiff's right to collect sums from the city by virtue of the assignment was subject to all the terms and conditions of the contract, and plaintiff could acquire no rights superior to the terms and conditions thereof. That one of its terms was that Byrne & Co. should not sublet the contract, or any work necessary to be done in pursuance thereof. That subsequent to the said assignment Byrne & Co. sublet a portion of the work to P. J. Looney & Co., who did a large amount of work thereon for a consideration to be paid them by Byrne & Co., in which Byrne & Co. made default, and Looney & Co. brought suit against Byrne & Co. and the city of Dallas, as owner of the building, to recover such consideration. That on the trial of said cause Looney & Co. recovered judgment against Byrne & Co. for \$21,848.49, interest and costs, and against the city for \$16,035.82, which latter sum (the full balance due by the city to Byrne & Co.) the city paid to Mrs. Annie Looney, assignee of the judgment. That the agent and attorney in fact representing P. J. Looney & Co. and Mrs. Annie Looney in said cause, and who received said payment from the city, was the cashier and executive officer of plaintiff bank; and upon this fact the city based a plea of estoppel. (4) The contract stipulated that the building should be delivered to the city free from liens and claims of every kind and character, and that the city was compelled to pay off the entire balance due by it to Byrne & Co., and more, in the settlement of claims legally adjudged against it, which should have been protected by Byrne & Co., by reason of which the city was relieved from liability under the assignment.

The judge held the contract valid because the price of the building was not intended to be paid by taxation, but by a special city hall fund created by sales of real estate owned by the city, but gave judgment for the city in pursuance of the following conclusion of law: "I further find, as a matter of law, that the assignment by Byrne & Co. to the Fourth National Bank only gave the bank the right to collect from the city seventy-five per cent. of all estimates made in their favor by the superintendent of construction, and did not give said bank any interest whatever in twenty-five per cent. of said estimates, which were to be retained by the city under the building contract; that, while testimony

was received to the effect that preliminary negotiations between the firm of Byrne & Co. and officers of the bank included an assignment by the firm to the bank of the whole of the estimates, I do not think there is any ambiguity in the language of the assignment, and reject all such testimony in construing the instrument."

Conclusions.

The question we shall consider is that of the legality of the contract, which, if invalid, pretermits all other questions. The court found as facts: That the fiscal year ended April 15, 1888, and the contract provided for the completion of the building in 10 months from its date, January 25, 1888. That the city had not sufficient revenue for that fiscal year not otherwise appropriated at the date of the contract to pay for the building, or any part thereof. That there was no tax levy provided for in reference to this contract. "That at the time the city owned three tracts of land, which the evidence shows the mayor, a committee on municipal affairs, and some of the members of the council, decided should be set aside in a special fund for the purpose of paying for this building, but that there is no evidence that the city council, as a body, ever took any action setting aside this land for that purpose. That the setting aside of this land for this purpose was discussed in council meetings, but no action was ever taken by that body to that effect, no reference was made in the contract to the sources from which payment of the contract price should be made, nor was the land referred to in the contract. At the date of the contract the parcels of land were worth approximately \$56,000. After the execution of the contract, and before the completion of the building, these pieces of land were in fact sold, and the proceeds thereof applied to the payment of the contract price for the construction of the city hall." We may add, for the purposes of this matter, that the land appears to have been worth more than \$56,000. That sales thereof made before the building was finished amounted to more than the contract price, and it appears also that at the time the contract was made, the city had on hand the proceeds of one of the pieces of the land amounting to \$20,000. The city, under the contract, had the right, at the completion and delivery of the building, to execute its interest-bearing obligations for the 25 per cent. reserve, payable in three equal amounts, at one, two, and three years from that date.

Upon these facts, we conclude that this was the creation of a debt, within the meaning of the constitutional provision (article 11, § 5) which declares that no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and to create a sinking fund of at least two per cent. thereon. This provision has been construed to embrace all obligations

not intended to be, and lawfully, payable out of either the current revenues for the year of the contract, or any other fund within the immediate control of the corporation. *McNeal v. City of Waco*, 89 Tex. 87, 33 S. W. 322; *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263. The case of *Howard v. Smith*, 91 Tex. 8, 38 S. W. 15, seems to be in point as to this being a contract falling within the meaning of the constitutional provision cited. No provision for the levy of a tax being made or provided for, the question is whether or not the facts shown in reference to the corporation lands take it out of that class of contracts. It is our opinion that while the lands, and the proceeds derived from the sales thereof, could lawfully have been appropriated for this purpose, it was necessary that there should have been some corporate expression to that effect. Some action of the council as a body was essential to charge the city with such intent and purpose. It was not enough (in fact, it was of no effect whatever) that the mayor or committees or individual members of the council may have discussed the matter, or contemplated or intended to devote the proceeds of these lands to this purpose. The contractor never at any time acquired a right to invoke the assistance of the courts to aid him in realizing his money out of these lands, or to protect him against a different appropriation of the lands by the city if it saw fit to do so. We think that unless the party with whom the city deals in such a matter is in some manner, by the contract itself, or some authoritative act of the council with reference to the contract, placed in a position where he is entitled, as a matter of right, to look to the fund for payment, his contract is not within the rule. There was nothing in this instance to prevent the city from legitimately using the proceeds of the lands for other purposes.

Therefore we think the judgment should be affirmed.

TEXAS & P. RY. CO. v. YARBROUGH.* (Court of Civil Appeals of Texas. March 25, 1903.)

RAILROADS—INJURIES TO PERSONS ON TRACK—
—NEGLIGENCE—FAILING TO SIGNAL—LOOK-
OUT OF ENGINEER—ISSUES FOR JURY—
MEASURE OF DAMAGES—INSTRUCTIONS.

1. In an action against a railroad for killing plaintiff's minor son, the evidence showed that the view along the track for a distance of two miles from where deceased was struck was unobstructed. A witness testified that deceased was walking along the middle of the track when he last saw him, just before he was hit; that the train was going at a high speed; that it did not slow up before striking deceased; and that no bell was rung nor whistle blown. The engineer testified that the speed was about 35 miles an hour; that he was keeping a look-out ahead; and that it would not have been possible for a person to have been walking along the middle of the track without his seeing him. *Held* to warrant submitting to the

*Rehearing denied April 22, 1903, and writ of error denied by Supreme Court.

jury the issue of discovery of the peril of deceased in time to have avoided striking him.

2. An instruction as to the damages recoverable for the negligent death of plaintiff's minor son, which failed to state that the cost of the boy's "keep" should be deducted in estimating the value of his services, was not misleading, as any jury would presumably so understand.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by Mason Yarbrough against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman, W. L. Hall, W. H. Flippen, and L. Q. C. Lamar, Jr., for appellant. M. M. Parks, for appellee.

JAMES, C. J. The action is by the parent for damages resulting from the death of James Yarbrough, a 17 year old son, alleged to have been occasioned by the negligence of defendant's employes in operating the train, which struck and killed the boy. The petition alleged that the event happened at a place on defendant's track which was habitually and customarily traveled by the public with its knowledge and consent; that defendant was negligent in failing to keep a lookout on this occasion—in failing to ring any bell or blow any whistle; in running the train at dangerous speed; and in failing to stop the train, or lessen its speed, after discovering the boy in its track. It alleged that the latter was exercising ordinary care at the time.

We conclude from the evidence, there being ample testimony to sustain the conclusions, that the track at this locality in West Dallas was habitually and generally used by the public as a roadway for pedestrians, and had been so used for years; that this boy was not a trespasser in using the track in that way; that defendant's servants operating the passenger train in question, and which came upon deceased from the rear, were negligent either in not observing him, as the view along the track at the place was straight and unobstructed for a long distance, and it was in common use by the public with defendant's knowledge and acquiescence, or having observed him in a position of danger, as the evidence tends to show, were negligent in not giving signals and in not slowing up, and in doing nothing to avoid running into him. We conclude, further; that deceased was not guilty of contributory negligence.

The above conclusions of fact dispose of the propositions advanced by appellant under assignments 7, 8, and 10.

The fifth and sixth assignments complain of the court's charge in submitting the issue of discovery of the boy's peril in time to have avoided striking him. The testimony warranted submission of the issue. The view along the track for a great distance, two miles before reaching the place of the injury, was open, according to the testimony.

The engineer testified that he was keeping a lookout ahead, and that it would not have been possible for a person to have been walking along the middle of the track in front of the train without his seeing him. The testimony of the witness Jackson was that the deceased was walking along the middle of the track when he last saw him, which was just before he was hit, and that he had walked along the track himself a short distance behind deceased for about half a mile. This witness testified to the high rate of speed at which the engine passed (the engineer said it was going at about thirty-five miles an hour); that he himself did not know of its approach; that the engine did not ring the bell nor blow the whistle nor slow up before it struck deceased. From this testimony it was warrantable for the jury to find that the engineer for a considerable distance observed the boy inside the track ahead of him, and that he was negligent in doing absolutely nothing to avoid running into him, in not even sounding the bell or whistle, which could readily have been done, and which were, to say the least, demanded by the situation as the train neared the deceased. These assignments are not well taken.

The fifth assignment complains of this charge: "If you find for the plaintiff, the measure of damages is what you find and believe from the evidence before you would have been the reasonable value of the services of the deceased boy to the plaintiff from the time of his death until he would have arrived at the age of 21 years." The contention is that plaintiff's measure of damages was the value of the son's services, less the cost of his "keep," and the court failed to so charge. This cost would naturally have to be deducted in order to arrive at the value of the boy's services to the father, and any jury would presumably so understand. Defendant did not request any elaboration of the charge.

The testimony would not have admitted of a peremptory charge in favor of defendant. Judgment affirmed.

GULF, C. & S. F. RY. CO. v. FORT GRAIN CO.

(Court of Civil Appeals of Texas. March 13, 1903.)

CARRIERS—INTERSTATE SHIPMENT—INTENT—REBILLING.

1. If the intent in starting a shipment from a point without the state of Texas was that the final destination should be at a point within the state, and such purpose was not abandoned, the shipment would be an interstate one, though there were temporary breaks by transfers from one carrier to another, and a re-billing at each transfer.

Appeal from District Court, McLennan County; T. P. Stone, Special Judge.

Additional opinion. For original opinion, see 72 S. W. 419.

Prendergast & Sanford and J. W. Terry, for appellant. Davis & Cocke, for appellees.

FISHER, C. J. In stating in the original opinion that the intention and purpose of the shipper should be looked to in order to determine whether the transportation was domestic or interstate, we did not intend to convey the idea that the shipper or owner could not alter his previous intention, and end the shipment before it reached its original destination; but what we meant was that if the purpose and intent in starting the shipment was that it should be transported from one state to the place selected as its final destination in another state, and such purpose was not abandoned, the shipment would be interstate, although there might be a temporary break in the transportation with a view of transferring the shipment from the possession of one carrier to another, even though each carrier, upon receiving the commodity, transported same upon its own bills of lading. We add this statement to what has been said in the original opinion, and it will be considered as a part of the same.

ASKEW v. GULF, C. & S. F. RY. CO.

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

CARRIERS—CONNECTING CARRIERS—INJURIES TO BAGGAGE—LIMITATION OF LIABILITY—AGENTS—VALIDITY OF CONTRACT—ACTIONS.

1. Where the contract sued on limited a connecting railroad's liability to injuries resulting on its own line, it was not liable for injuries to baggage caused by other carriers, although the agent of the initial carrier, who made the contract with the passenger, may have also been the agent of such connecting road.

2. Where a connecting railroad was not sued as a partner, the terms of a contract limiting its liability to injuries caused on its own line were valid, even though the agent acting for it in making such contract was also agent of the other connecting roads.

Appeal from Brown County Court; Henry Drane, Special Judge.

Action by D. E. Askew against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

H. C. Harrell, for appellant. J. W. Terry and A. H. Culwell, for appellee.

KEY, J. This is a damage suit resulting in a verdict and judgment for the defendant, and the plaintiff has appealed.

No error was committed in excluding the testimony referred to in the first assignment of error. Appellant testified that the trunks were carefully and properly packed, and appellee offered no testimony to the contrary, and the charge of the court did not submit that question to the jury. In fact, the plaintiff's case was predicated upon rough handling in transit. That the baggage was injured when delivered to the plaintiff by the defendant was established by undisputed testi-

mony, and it was also shown by like testimony that it was so damaged when delivered to the defendant by the connecting carrier; and, as the contract sued on limited the defendant's liability to injuries resulting upon its line, it was not liable for injuries caused by the other carriers, although the agent of the initial carrier, who made the contract with the plaintiff, may have been the defendant's agent also.

The defendant was not sued as a partner, and therefore the terms of the contract limiting its liability to injuries caused upon its line were valid, even conceding that the agent who acted for the defendant in making the contract was also agent of the other carriers.

No error has been pointed out, and the judgment is affirmed. Affirmed.

On Rehearing.

(March 18, 1903.)

Upon further consideration, we are of opinion that this court fell into error in overruling appellant's second assignment of error. The charge therein complained of was calculated to mislead the jury, and cause them to conclude that the burden was on the plaintiff to show that the baggage was in good condition when delivered by the connecting carrier to appellee. In order to state a cause of action, it may have been necessary to allege, as appellant did in his original petition, that the baggage was in good condition when delivered to appellee, and that the injury complained of was caused while the baggage was in appellee's possession; but, in order to recover, it was not necessary for him to prove all of those averments. Proof by him that the property was damaged when delivered to him by appellee at Brownwood, its destination, was sufficient to make out a prima facie case, and the court should have so instructed the jury. *Railway Co. v. Edloff* (Tex. Sup.) 34 S. W. 414.

In submitting the appellant's theory to the jury, the charge should not have referred to the condition of the baggage when received by appellee. Of course, in submitting appellee's defense, the court should instruct the jury that appellant is not entitled to recover for such injuries as the testimony shows was done to the property before it came into the possession of appellee. On that issue, however, as decided in the case cited, the burden of proof rests upon the carrier, and not upon the shipper.

Motion for rehearing granted, judgment reversed, and cause remanded.

KELLY v. HONEA et al.

(Court of Civil Appeals of Texas. April 11, 1903.)

HIGHWAYS—ESTABLISHMENT—LOCATION—STATUTES—NOTICE.

1. Rev. St. art. 4687, provides that applications for a new road shall be by petition to the

commissioners' court, specifying the beginning and termination of such road; article 4671 gives the commissioners' courts power to order the laying out of public roads; and article 4688 provides that all roads shall be laid out by a jury of freeholders to be appointed by the commissioners' court, etc. *Held* that, as the statute does not require the application for the road to more than specify its beginning and termination, the fact that an application specified the section lines along which the road was to run did not deprive the commissioners' court of the power to open it, on the recommendation of the jury, along a different route.

2. Rev. St. art. 4691, relative to the laying out of highways, provides that the jury of freeholders appointed to lay out the road shall give notice to the landowners of the time when they will lay out the road "or when they will assess the damages." *Held*, that the notice refers only to the question of damages, and a notice is not required where the damages are not assessed at time road is laid out.

Appeal from District Court, Floyd County; Jo A. P. Dickson, Judge.

Suit by W. N. Kelly against Walter Honea and others to enjoin the opening of a public road through plaintiff's premises. From a judgment sustaining a demurrer to the petition and dismissing the suit, plaintiff appeals. Affirmed.

J. B. Bartley, C. E. Coombs, and Randolph & Mathis, for appellant. J. W. Pruitt and Holman & Dalton, for appellees.

STEPHENS, J. Appellant sought to enjoin the opening of a public road through his premises, mainly upon the ground that the jury of view, in laying out the road across his land, which was section 56, block G, Floyd county, disregarded the order of the commissioners' court directing it to be laid out on the west boundary line of said section, and located it on the east boundary thereof, running it through his front yard and orchard. The change thus made, however, was adopted by the commissioners' court when the report of the jury of view was approved, and the road ordered to be opened. The beginning and termination of the proposed road, as specified both in the petition of the requisite freeholders and in the order of the commissioners' court, were duly observed by the jury of view. The statute does not require the application for a new road to do more than specify its beginning and termination. Rev. St. art. 4687. Because the application went further in this instance, and specified the section lines along which the road was to run, did not deprive the commissioners' court of the power to open it, upon the recommendation of the jury of view, along different lines. Rev. St. arts. 4671, 4688. And, when the commissioners' court adopted the line recommended by the jury of view, and ordered the road to be opened accordingly, the order was just as valid as it would have been if this had been the line originally designated.

It is alleged, however, that the jury of view proceeded to lay out the road without the knowledge of appellant, and in his ab-

sence; but there is no complaint that he was not notified of the time when his damages would be assessed, or that he was denied adequate compensation, as provided in Rev. St. arts. 4691-4694. We understand article 4691 to mean that notice of the time when the jury will proceed to lay out the road is only required—as is, perhaps, usually the case—when the damages are then to be assessed, since the clause, "or when they will assess the damages," etc., indicates that a different time may be selected for assessing the damages. The next succeeding articles clearly indicate that the notice required by article 4691 is important to the owner of the land through which the road is to run only on the question of damages. The court did not, therefore, err in sustaining a demurrer to the petition and dismissing the suit.

Judgment affirmed.

CONTINENTAL FIRE ASS'N v. WINGFIELD.

(Court of Civil Appeals of Texas. April 8, 1908.)

INSURABLE INTEREST.

1. A husband has an insurable interest in property owned by his wife and her minor children by a former husband, and occupied at the time as the homestead of husband and wife.

Error from District Court, Freestone County; L. B. Cobb, Judge.

Action by A. N. Wingfield against the Continental Fire Association. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Moses, for plaintiff in error. Geo. A. Bell and Gibson & Bryant, for defendant in error.

FISHER, C. J. This suit was filed in the district court of Freestone county, Tex., on the 13th day of June, 1901, by A. N. Wingfield against the Continental Fire Association, a corporation of Ft. Worth, Tex., to recover on fire insurance policy No. 52,140, issued by said fire association to said Wingfield on the 13th day of October, 1900, insuring for one year from said date, against loss by fire, in the sum of \$1,500, two buildings situated in the town of Wortham, Tex., one of which was a two-story frame building, used as a livery stable and barn, and the other a one-story frame building, used as a feed store. Said buildings were destroyed by fire on the 21st day of January, 1901, and were a total loss. Defendant answered by general denial and by special answers setting up the avoidance of the policy by reason of the breach of several clauses of the same as follows: (1) Because, in his application for the policy, plaintiff disclosed only one policy of concurrent insurance on the property insured—that for \$1,000 in the Home Mutual Com-

¶ 1. See Insurance, vol. 22, Cent. Dig. § 153.

pany of Austin—when in fact he had also a policy for \$1,000 in the State Fire Company of Waco, which, with defendant's policy for \$1,500, made the insurance on said property \$3,500, when it was worth, by plaintiff's valuation, only \$3,000. (2) Because the insured was not the sole and unconditional owner of the property, and because the interest of the insured was not correctly stated in the application, it showing the title to be in the wife of plaintiff, when in fact it was in said wife and her minor children by a former marriage. (3) That plaintiff had no insurable interest in the property, and, to permit him to recover, he must be the owner of, or have some insurable interest in, the property. (4) That the policy contract provided that no change of the contract or waiver of the terms thereof should be claimed by the insured, unless in writing, and attached to or indorsed on the policy. Defendant tendered to plaintiff, and paid into court, the amount of the premium paid and interest. Plaintiff, by supplemental petition, denied generally, and pleaded waiver of the clauses and warranties set up by defendant, because of the knowledge by the agent of the defendant of the condition of the title to the property, and the existence of the policy in the Waco Company, and that defendant was estopped from benefit of the defenses set up, and also that the property insured was plaintiff's homestead at the time the policy was written. Defendant, by supplemental answer, excepted to the pleas of waiver, because said waivers were not shown to be in writing and attached to or indorsed on the policy, and pleaded that C. J. Woolridge, defendant's agent, had knowledge of said facts relied on by plaintiff for waiver and estoppel, and that by reason of his relation to plaintiff (he being plaintiff's father-in-law), and the circumstances under which said agent wrote the policy sued on, he was in fact the agent of plaintiff, and his knowledge would not be binding on defendant, and that plaintiff and said agent colluded together to procure more insurance on said property than same was worth, and same was a fraud on defendant, and rendered the acts of said agent the acts of plaintiff. The case was tried before a jury on March 10, 1902, and a verdict rendered for the plaintiff for the sum of \$1,587.50.

We find that the foregoing facts, as indicated and stated in the pleadings of both plaintiff and defendant, are true, with the exception of what is stated by defendant in its supplemental answer, in charging, in effect, that the agent of the company was the agent of the plaintiff, and that there was any fraud or collusion between them at the time that the policy was issued. As to these questions, the evidence indicates that the averments of the supplemental answer are not true.

Our findings of fact, together with the doctrine announced in *Insurance Company v. Wagner* (Tex. Civ. App.) 57 S. W. 876, dis-

pose of plaintiff in error's first, second, third, and fourth assignments of error.

The fifth assignment of error is as follows: "The court erred in not setting aside the verdict and judgment, because the evidence shows that the property destroyed by fire was the property of other persons than plaintiff, and that he had no insurable interest therein." It appears from the evidence that the property insured and destroyed was the property of the wife of plaintiff and her minor children by a former husband, and that at the time of the insurance and the time of the destruction it was the homestead of the plaintiff and his wife. He was in the actual use and possession of the property, enjoying it as a home, and this right of possession, use, and enjoyment would continue for such a length of time as he and his wife would desire to use the property for that purpose. It might be for the life of either or both. The right of use and possession was a valuable one, which attached to the house and improvements located upon the premises, and gave the husband such an interest as he could protect by insurance.

We find no error in the record, and the judgment is affirmed. Affirmed.

ST. LOUIS & S. F. R. CO. v. AKERS.

(Court of Civil Appeals of Texas. April 8, 1903.)

CARRIERS — WAREHOUSEMEN — LIABILITY — WITNESSES—PUTTING WITNESSES UNDER RULE—VIOLATION OF RULE.

1. Where goods are not demanded by a consignee immediately after their arrival at their destination, the carrier is liable only as a warehouseman.

2. Where witnesses have been placed under the rule, and the same is violated, the court, on ascertainment of its violation, should withdraw the case from the jury and allow a postponement.

Appeal from Lamar County Court; Wm. Hodge, Judge.

Action by J. W. Akers against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Edgar Wright, H. D. McDonald, and L. F. Parker, for appellant.

FLY, J. Appellee sued appellant to recover the value of a trunk and box, and their contents, of the value of \$468.35, alleged to have been lost by appellant between Paris, Tex., and Goodland, Ind. T. Appellee recovered judgment for \$398.10.

The first assignment of error complains of the refusal of the county judge to give a special charge requested by appellant, to the effect that, if the goods were not demanded immediately after their arrival, appellant would only be liable as warehouseman. We think the charge embodied the law applicable

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 609, 1542.

to baggage, and it was error to refuse it. *Railway v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 35; *Railway v. Smith*, 81 Tex. 479, 17 S. W. 133; *Railway v. Terrell* (Tex. Civ. App.) 72 S. W. 430. It is true that the testimony is meager that tends to establish the delivery of the trunk at Goodland, but it was sufficient to raise the issue. Appellee called for his goods the next day after it was delivered. He swore that the agent, whose testimony appellant was unable to obtain, had told him the goods were not delivered; but there is testimony that tends to prove that they not only arrived, but that appellee obtained possession of them in some other way than by receiving them from the agent, and without releasing his checks, on the morning he went after them.

The violation of the rule under which the witnesses were placed, by appellee and his wife, was reprehensible; and, upon ascertainment of the disregard of it, the case should have been withdrawn from the jury, and a postponement allowed. This action might have been taken by the court, had appellant demanded it; but it did not do so, but took chances on a verdict, and presented the question on a motion for a new trial.

The judgment is reversed, and the cause remanded.

VON BOECKMANN v. LOEPP.

(Court of Civil Appeals of Texas. April 8, 1903.)

APPEAL—BILL OF EXCEPTIONS—TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

1. On appeal the court cannot try on affidavits the question whether a bill of exceptions was in fact signed and filed after the term, though the record shows differently.

2. On appeal to the county court, plaintiff has a right to amend his claim for damages by the insertion of an item involved in the same transaction, though such increase has the effect of giving the Court of Civil Appeals jurisdiction.

3. In an action for damages for false representations on the sale of personality, the burden of proof being on plaintiff, it was not error to repeat in the charges the rule of law as to the burden.

4. Where, on appeal in an action for damages for false representations on the sale of a horse, an instruction was complained of on the ground that it confined the jury to a defect in the horse existing at the identical time of the trade, and so left the jury in doubt whether they could find for plaintiff if they found the horse defective immediately before or after the trade, and there was no statement of facts in the record, the instruction could not be held erroneous, as the evidence might have shown that, while there was evidence as to the defect before or after the time of the trade, it might have been so remote that the charge would not have been prejudicial.

5. The instruction having stated what was the law, it did not exclude consideration of facts anterior or subsequent to the time of the trade, and bearing on the issue as to the condition of the horse at that time.

6. In an action for damages for false representations on the sale of a horse, the court

instructed the jury to return a verdict for defendant if the horse was not wind-broken, and if the evidence sustained the plea of privilege. The verdict was, in general terms, for the defendant. The instruction with reference to the plea was that defendant had filed a plea of privilege, alleging that he was a resident of another county, and had not waived his privilege to be sued in such county, and that he made no fraudulent representations. Held that, as the charge as to the plea did not authorize the jury to find for defendant on the plea unless they should find no fraudulent representations, a judgment was properly entered for plaintiff on the merits.

Appeal from Guadalupe County Court; F. C. Weinert, Judge.

Action by E. H. Von Boeckmann against Julius Loepp. From a judgment for defendant, plaintiff appeals. Affirmed.

Dibrell & Mosheim, for appellant. Jas. Greenwood and Adolph Seidemann, for appellee.

JAMES, C. J. In this case we have overruled two motions filed by appellee—one to dismiss the appeal because in the county court, on appeal, plaintiff increased the amount of his claim by an item, involved in the same transaction, which had not been asserted in the justice's court, and which appellee alleges was done for the purpose of giving this court jurisdiction in the case, and the other to strike out a bill of exceptions which related to the action of the trial court in overruling a motion for continuance, which bill of exceptions is alleged to have been in fact signed and filed after the term, although the record shows differently. This court has no jurisdiction to try this latter question on affidavits, but would, in a proper case, allow appellee a reasonable time to have the bill corrected, if it should be, in the county court. *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565. The application for continuance is before us, and it was manifestly insufficient, under the rule laid down in *Ry. v. Woolum*, 84 Tex. 570, 19 S. W. 782. As it is clear the action of the court in overruling the continuance would not be disturbed in any event, the matter need not be further noticed. As to the other motion, we think appellant had the right to amend and increase his claim for damages, even if it did happen to give this court appellate jurisdiction of the case.

The first assignment is that the court erred in refusing the continuance. This, for the reason above given, is overruled.

The second assignment alleges that the court erred in the charge for the reason that it predicated plaintiff's right to recover upon false representations, and not upon a warranty of soundness of the horse given plaintiff in trade. A complete answer to this assignment is the fact that plaintiff nowhere in his pleadings refers to any warranty, but bases his action on false representations.

The third assignment cannot be sustained. The burden of proof being upon plaintiff, it

¶ 2. See *Fraud*, vol. 23, Cent. Dig. § 47.

was not error to repeat this rule of law in the charges. It was not the case of submitting an issue which might be repeated so often as to give it undue prominence. Indeed, it is difficult to see how the court would commit error by impressing upon a jury the rule that plaintiff must prove his allegations by a preponderance of evidence. This complaint of undue repetition is, however, directed to clauses 3 and 4 of the charge, and we find that the rule was stated in only one of them.

There was no error in the charge as complained of by the fourth assignment. The petition alleged the horse to have been unsound, and seems to specify the defect to the animal being wind-broken. There is no statement of facts, and this may have been the precise issue made by the evidence. The charge is also said to be wrong in confining the jury to the defect existing at the identical time of the trade, "whereby it left the jury in doubt whether they could find for the plaintiff if they found the horse wind-broken immediately before or immediately after the trade." We have already adverted to the fact that no statement of facts has been brought up in the record. Possibly we might have said that this charge was calculated to prejudice appellant, had we the evidence before us. There may have been evidence that said defect existed before or after the time of the trade, but so remote as not to have made the charge prejudicial. Whether or not such charge could be prejudicial would depend on circumstances. It was not necessarily erroneous or prejudicial. Besides, the charge stated what was the law; and, in determining whether or not the horse was wind-broken at that time, it did not exclude consideration of facts anterior or subsequent to that time, and bearing on that issue.

The court instructed the jury to return a verdict in favor of defendant in two events: (1) If the horse was not wind-broken; (2) if the evidence sustained the plea of privilege. As the verdict was in general terms—"We, the jury, find for the defendant"—appellant insists that it cannot be told whether they found for defendant on the merits or on the plea, and the court could not on such verdict properly enter judgment against defendant on the merits. This contention, at first blush, is plausible; but, considered in connection with the charge, the question presents no difficulty. The instruction in reference to the plea is as follows: "You are further instructed that the defendant has filed his plea of privilege, alleging that he is, and was at the time of the trade of the horse, a resident citizen of Comal county, Texas, and of Justice Precinct No. 1 of said Comal county, Texas, and that he has never waived his privilege to be sued in the justice precinct and county of his residence; that he made no fraudulent representations which induced plaintiff to make the trade; that he was not guilty of any tort. Now, if you find from the

evidence that the allegations in said plea of privilege are true, then you will go no further, but return a verdict for the defendant." It will be noticed that the charge does not authorize the jury to find for defendant on the plea unless they should find from the evidence, among other matters, that defendant made no fraudulent representations which induced plaintiff to make the trade. Therefore the verdict for defendant, whether it was founded on the main issue or the plea, determined the merits of the case.

The judgment is affirmed.

McCOWN et al. v. HILL et al.*

(Court of Civil Appeals of Texas. March 28, 1903.)

OPENING HIGHWAY—NOTICE—WAIVER—VARIANCE IN ROUTE—FAILURE TO PAY DAMAGES—EFFECT—SUFFICIENCY OF ALLEGATION.

1. The written notice required by statute to be given a landowner of proceedings for the opening of a highway through his inclosure, though jurisdictional, may be waived.

2. Failure to allege in a petition to enjoin the opening of a highway that the route reported by the jury of view and adopted varied from that ordered by the commissioners' court precludes consideration of such objection on appeal.

3. A landowner who consents to the route of a projected highway as reported by the jury of view cannot complain that it varies from that ordered by the commissioners' court.

4. Rev. St. 1895, art. 4694, provides that, before a highway shall be opened, the commissioners' court shall order the payment of damages assessed, and the county treasurer shall have paid them or secured payment by a special deposit. *Held*, that the court's failure to make provision for the payment of assessed damages on adopting the report of a jury of view entitled the landowner to enjoin the opening of the highway.

5. An allegation in a petition to enjoin opening a highway that damages assessed to plaintiff have not been paid is sufficient, in the absence of special exception, to let in proof on that issue.

Appeal from District Court, Hill County; W. Poindexter, Judge.

Suit by T. P. S. McCown and another against L. C. Hill and others. Judgment for defendants, and plaintiffs appeal. Reversed.

A. P. McKinnon and D. Derden, for appellants. Wear, Morrow & Smithdeal, for appellees.

RAINEY, C. J. Appellants sued the county judge and commissioners of Hill county, appellees, to enjoin the opening of a public road through their inclosures; the grounds alleged for an injunction being that the jury of view did not give written notice to the landowners, as required by statute, and that the commissioners failed to pay the amount plaintiffs were damaged. A temporary injunction was granted. F. G. Golden filed a plea of intervention, asking to be made a party plain-

*Rehearing denied April 15, 1903.

¶ 1. See Highways, vol. 25, Cent. Dig. § 70.

tiff, which plea, on motion, was stricken out. On a hearing, said injunction was dissolved, and costs adjudged against plaintiffs. The conclusion is warranted from the evidence that no written notice was given; that Miss Vose, one of the plaintiffs, was a nonresident; that her coplaintiff McCown was her agent, and was present and consenting for himself and Miss Vose when the jury of view were laying out the road reported by them and adopted by the commissioners' court; that he waived notice for himself and Miss Vose, and presented claims for damages for both.

It is insisted by the appellants that written notice by the jury of view was necessary to authorize the assessment of damages, and to give jurisdiction to the commissioners' court to open the road. It is true that the statute requires written notice to be given in order to condemn land for a highway, and this is necessary to confer jurisdiction on the commissioners' court to order the opening of a road, but we see no reason why the service of written notice cannot be waived by the owner of the land. In ordinary suits it is essential to the jurisdiction of the court that a defendant be cited to appear. Yet it is well settled that the service of citation can be waived, in which event the court acquires jurisdiction of the party. There can be no difference, in principle, between this case and other judicial proceedings. We are of the opinion that, McCown having waived the giving of notice for himself and as agent of Miss Vose, the court acquired jurisdiction, and its action was as binding as though written notice had been given. Some of the adjudicated cases hold that the statutory requirement of notice is jurisdictional, and this is correct; but in those cases the parties had not been served with notice, nor had the service of notice been waived. In *Onken v. Riley*, 65 Tex. 468, it is held that where the owner of land was present when the road was laid out by the jury, and was in attendance upon the court when the action of the jury was adopted, he could not object to the road on the ground that he had no notice of the proceedings. See, also, *Allen v. Parker County* (Tex. Civ. App.) 57 S. W. 705.

Appellants' assignment that the route reported by the jury of view and adopted was different from that ordered by the commissioners' court is not entitled to be considered, because such a ground was not alleged in plaintiffs' petition for injunction. As the judgment will be reversed on another ground, and in view of another trial, we deem it proper to remark that the plaintiffs are not in a position to object, as the evidence shows that McCown consented, for himself and as agent, to the route as reported.

It was not reversible error in the court refusing to permit F. G. Golden to intervene, because he was not a necessary party, and none of his rights were in any way jeopardized by the court's action. He was a proper party, however, and his rights could very well

have been litigated in this action, but his exclusion did not prevent the assertion of his rights in a separate action.

The record shows that the commissioners' court failed to comply with the statute providing for the payment of damages assessed by the jury of view. Rev. St. 1895, art. 4694, provides that before the road shall be opened the commissioners' court "shall first order the payment of the damages assessed, if any, by the commissioners of view to be made to the owner of the land out of the treasury, and the county treasurer shall have paid the same or secured its payment by a special deposit of the amount in his office subject to the order of such owner, and shall notify such owner by mail or otherwise of such deposit." Damages were assessed by the commissioners of view, and reported to the commissioners' court, which report was adopted by the said court; but no provision was made by the said court for the payment of said damages, or for securing same by deposit, as required by law. It was essential that this provision of the statute be complied with, to authorize the opening of the road; and, there being a failure to so comply therewith, plaintiffs are entitled to a writ enjoining the opening of the road. *Hopkins Co. v. Cravey*, 85 Tex. 189, 19 S. W. 1067; *Travis Co. v. Trogdon*, 88 Tex. 302, 31 S. W. 358. It is insisted, however, that plaintiffs did not allege such failure as a ground for relief. The petition is not as specific in this particular as it might have been, but it does allege that damages had not been paid; and, in the absence of a special exception to such allegation, it was sufficient to admit proof on that issue, and, the proof clearly sustaining the allegation, the judgment will be reversed and the cause remanded.

Reversed and remanded.

WHITE et al. v. EPPERSON et ux.

(Court of Civil Appeals of Texas. April 4, 1903.)

TRESPASS TO TRY TITLE—EVIDENCE—INSTRUCTIONS—HOMESTEAD—ABANDONMENT—EVIDENCE OF REPUTATION—ADMISSIBILITY.

1. In trespass to try title against claimants under an execution sale of a homestead, a letter written by plaintiff, indicating an arrangement, after removal, to have the land forfeited by the state for the benefit of another, was admissible to show an abandonment, though it was dated after the execution sale.

2. Such letter was also admissible as tending to contradict plaintiff's statement that he had made no such agreement.

3. The fact that plaintiffs had been contradicted on material issues did not authorize the introduction of evidence in support of their reputation for truth and veracity.

4. In trespass to try title against claimants under an execution sale of a homestead, a charge that, if plaintiff left the land sued for with intention to return and occupy the same as a home, then the fact that he may have voted or held office in another state during a temporary absence from the land would not forfeit his homestead right, providing his in-

teution to return and occupy continued from the time he left the land, and existed at the time he so voted and held office, was erroneous, being on the weight of the evidence, in that it assumes that plaintiff's absence was temporary, and singles out important facts, and tells the jury that they do not constitute an abandonment.

5. The instruction was also erroneous because it makes the homestead right of plaintiff depend on his intention at the time he voted or held office, instead of his intention at the time of the sale.

6. In trespass to try title against claimants under an execution sale of a homestead, an instruction that: "Any person leaving his homestead with intention to return and live on it may, during temporary absence therefrom, offer the same for sale, without forfeiting his homestead right thereto; that is to say, one may offer his homestead for sale, and this fact will not, of itself, constitute an abandonment of the homestead. But if, prior to or at the time of such offer to sell, the intention to return and occupy the premises as a home had been abandoned, then his homestead right upon the land could be reinstated only by actually returning to and residing upon it"—was erroneous, in that it singles out a fact in evidence, and tells the jury what effect they may give to it.

Appeal from District Court, Wilbarger County; G. A. Brown, Judge.

Trespass to try title by J. P. Epperson and wife against J. F. White and others. From a judgment for plaintiffs, defendants appeal. Reversed.

F. P. McGhee, R. P. Elliott, Ben H. Kelly, and Tolbert & Berry, for appellants. F. C. Beckett and L. C. Heare, for appellees.

SPEER, J. J. P. Epperson and wife brought this suit in trespass to try title to recover from appellants a tract of land in Wilbarger county. Appellants claimed under said Epperson as common source through an execution sale against him in favor of one Rettig. It was admitted upon the trial that appellants had title to the land unless it was the homestead of appellees at the time of the making of said levy on January 27, 1900, and the question of homestead vel non was, therefore, the main issue upon the trial. It was undisputed that prior to April, 1894, the land was the homestead of appellees. During that month they left the land, and moved from the state of Texas to the state of Illinois, where they have since resided. Neither has ever been on the land since that time, and neither has been in Texas since, except that the husband was back for a short time in the spring of 1900. J. P. Epperson, during his residence in Illinois, voted and acted as clerk at various elections held in that state, and was at one time a candidate for justice of the peace. It was contended on the one hand that there had been an abandonment of the homestead, while, on the other hand, the absence was only temporary, caused by the illness of the wife, and that both husband and wife at all times retained their intention to return to their homestead when the state of the latter's health and their finances would permit. The

jury, accepting the latter contention, rendered a verdict for appellees.

Upon the trial the appellants offered in evidence a letter written by J. P. Epperson in reply to one from James R. Tolbert, which reads as follows: "Rio, Ill., May 30th, 1900. Judge J. R. Tolbert, Vernon, Texas—Dear Sir: Your favor of the 25th at hand. In reply will say that it was my understanding that as you were personally acquainted with Mr. Robbins, you would try and railroad the land through and get it forfeited so Mr. Blaine could file on it as soon as possible. What is the situation at present? My intention was to leave it entirely with you, so push it along as fast as you can. Consult with Mr. W. M. Crutchfield, if you desire, as he understands the case. Respectfully yours, J. P. Epperson." The trial court, upon the objection that this letter was dated after the execution sale of the land sued for, excluded the testimony, to which appellants assign error. We think this ruling was erroneous. The letter was admissible as tending to support the contention that there had been an abandonment of the property as a homestead. Abandonment, like any other question of fact, is to be determined from a consideration of all the circumstances surrounding the transaction. An arrangement, after removal from a homestead, to have the land forfeited by the state for the benefit of another, might not of itself be sufficient to show abandonment, but it would tend to do so. And whether such circumstance is even sufficient is not at all a question of law, but purely one of fact. Moreover, the letter was admissible because it tended to contradict appellee J. P. Epperson, in that he denied that he had made such an agreement with Mr. Blaine. And upon this point, and for the same reason, the testimony of the witness Tolbert, to the exclusion of which appellants' fifth assignment is directed, was likewise admissible.

There was error in permitting the witness Doan to testify that he was acquainted with the reputation of appellees for truth and veracity in the community in which they lived, and that the same was good. The fact that appellees had been contradicted upon material issues by other witnesses did not authorize the introduction of evidence in support of their reputation for truth and veracity. *Jacobs v. State* (Tex. Cr. App.) 59 S. W. 1111; *Harris v. State* (Tex. Cr. App.) 45 S. W. 714; 1 Greenleaf on Evidence, § 469. It is only where the witness' character for truth and veracity has in some way been attacked that reputation for truth and veracity is admissible. *Texas & Pacific Ry. Co. v. Raney*, 86 Tex. 363, 25 S. W. 11.

The sixth assignment, which we sustain, complains of the following charge of the court, to wit: "You are further instructed that if plaintiff J. P. Epperson left the land sued for with intention to return and occupy the same as a home, then the fact that said

Epperson may have voted or held office in the state of Illinois during a temporary absence from said land would not forfeit his homestead right to said land, provided his intention to return and occupy continued from the time he left the land, and existed at the time he so voted or held office." It is pointed out that this charge is upon the weight of evidence, in that it assumes that the absence of J. P. Epperson was temporary, and further singles out important facts introduced in evidence, and tells the jury that they do not constitute an abandonment; and also because it makes the homestead right of said Epperson to depend upon his intention at the time he voted or held office, instead of making it to depend upon his intention at the time of the sale. We think these objections are all tenable. *Mayo v. Tudor's Heirs* (Tex. Sup.) 12 S. W. 117; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Allen v. Frost*, 71 S. W. 767, 6 Tex. Ct. Rep. 495; *Schwartzman v. Cabell* (Tex. Civ. App.) 49 S. W. 113.

Similar objections are urged to the sixth paragraph of the court's charge, which is as follows: "Any person leaving his homestead with intention to return and live on it may, during temporary absence therefrom, offer the same for sale, without forfeiting his homestead right thereto; that is to say, one may offer his homestead for sale, and this fact will not, of itself, constitute an abandonment of the homestead. But if, prior to or at the time of such offer to sell, the intention to return and occupy the premises as a home had been abandoned, then his homestead right upon the land could be reinstated only by actually returning to and residing upon it." It is improper for the court to thus single out a fact or circumstance in evidence, and to tell the jury what effect they may or may not give to the same. The jury might have concluded under another charge that the offer of appellees to sell their homestead, together with the other facts which were undisputed, established an abandonment of the same. This was peculiarly their province.

We have discussed all the questions which we think could affect the case upon another trial. For the reasons stated, the judgment is reversed, and the cause remanded.

CHICAGO, R. I. & P. RY. CO. et al. v.
BUIE.*

(Court of Civil Appeals of Texas. March 21, 1903.)

CARRIER—INJURIES—PASSENGER ON FREIGHT
— NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—HARMLESS ERROR—INSTRUCTION.

1. While the court may have erred in permitting plaintiff, in an action against a carrier for negligent injuries, who had been asked on cross-examination as to the value of his property and what he had acquired after the acci-

dent, to state in rebuttal the value of certain cattle he had lost in a blizzard since the accident, yet, where the jury was, in effect, told not to consider this testimony, any error was harmless.

2. The fact that a passenger on a freight train was standing up in the caboose without holding onto anything when he was injured by being thrown to the floor by the shock caused by the backing up of the train to make a coupling did not, as a matter of law, make him guilty of contributory negligence.

3. A charge in an action against a carrier for negligent injuries did not submit as doubtful the question whether plaintiff's negligence contributed to his injury, merely because it instructed the jury that if they should "find that plaintiff himself was guilty of contributory negligence, and by his own negligence contributed to his injury," he could not recover.

4. In coupling cars onto a freight train, a railroad company owes passengers thereon the duty to use such degree of care, prudence, and foresight as would be used by very cautious, prudent, and competent persons under similar circumstances.

5. The burden of proving contributory negligence in an action for negligent injuries is on the party pleading such negligence.

Appeal from District Court, Montague County; D. E. Barrett, Judge.

Action by J. D. Buie against the Chicago, Rock Island & Pacific Railway Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

N. H. Lassiter, Jas. A. Graham, J. M. Chambers, and Levi Walker, for appellants. L. C. Barrett, J. H. Harper, Galloway & Templeton, and W. S. Jamison, for appellee.

STEPHENS, J. Appellee was injured January 31, 1899, at Clio, Iowa, by reason of a collision between two parts of a freight train on which he was being carried as a passenger to look after certain cattle shipped from Ryan, Ind. T., to Chicago, Ill., over the Chicago, Rock Island & Pacific Railway. When the train reached Clio it was stopped for the purpose of taking up and carrying forward another car of live stock. The caboose in which appellee, with others, was riding, and one other car, were left standing on the main track near the end of the switch track while the additional car of stock was being brought from the railway yards to be coupled onto said car and caboose, which was done in such a rough and negligent manner and with such violence as to throw appellee, who was standing near the stove, against the stove and door of the caboose, down upon the floor, which seriously injured him. As compensation for the loss thus sustained, he recovered a verdict and judgment for \$4,500, from which this appeal is prosecuted.

The issues both of negligence and contributory negligence were properly submitted to the jury, and the verdict in favor of appellee is well sustained by the evidence, both as to liability and as to amount of recovery.

The question of jurisdiction raised by the

*Rehearing denied April 18, 1903.

¶ 4. See *Carriers*, vol. 9, Cent. Dig. § 1192.

first and second assignments of error was fully disposed of on the former appeal in this case. 65 S. W. 27.

While the ruling complained of in the third assignment may not have been strictly correct, the evidence as to the value of 62 cattle, admitted under this ruling in rebuttal of what had been drawn out on cross-examination, could not have done any harm, inasmuch as the charge of the court in effect excluded it from the matters to be considered by the jury in estimating the damages.

The court did not err in refusing to give appellant's second special charge on the issue of contributory negligence, as urged in the fourth assignment, because, if the fourth and fifth paragraphs of the court's charge did not sufficiently cover the issue—though we are inclined to think they did—the special charge was not itself altogether correct, if, indeed, it would not have been a charge upon the weight of the evidence if it had been given in the form requested. It was as follows: "You are instructed that if you believe from the testimony that the plaintiff, J. D. Buie, knew, or by the exercise of ordinary care could have known, that the defendant's train was being backed down the main line to connect on the car which was connected to the caboose, or to the caboose, and that, knowing this, he voluntarily stood up in the caboose without holding to anything, and you further believe that a man of ordinary prudence and care would not have so stood up in the caboose at the time and under the circumstances and conditions the plaintiff did, and you further believe that if he had been sitting down, and not standing up, that he would not have received the injuries complained of, it will be your duty to find for the defendants, though you may believe that the defendant the Chicago, Rock Island & Pacific Railway Company, through its employees, was guilty of negligence in striking the car attached to the caboose, or the caboose, with more than usual force." It may be that a man of ordinary prudence would not have stood up in the caboose without holding to anything under the conditions named in this charge, as appellee did, but that would not have entitled the railway company to a verdict unless such negligence on the part of appellee was the cause, in whole or in part, of the injury, and in this respect at least the charge did not correctly state the law. True, it did require the jury to find that if appellee had been sitting down, and therefore not standing up at all, he would not have been injured, before they could find against him, but they may have found that, and yet not found that his standing up in the manner he did caused the injury. It may be that a person of ordinary prudence would not have stood up in the caboose without holding to something in such manner as to withstand an ordinary shock, and yet the collision in question may have been one of

such unexpected and extraordinary violence as to injure him just as appellee was injured notwithstanding such prudence. In such case the failure of appellee to take hold of something in anticipation of the usual jolt, as a person of ordinary prudence might have done, could not properly be said to be a concurring or contributing cause of his injury.

It will thus be seen that we are not prepared to accept the proposition submitted under the seventh assignment—that, while it may have been proper to submit to the jury whether or not appellee was guilty of negligence, it was error, under the facts of this case, to submit to them whether such negligence contributed to his injury. Besides, with reference to that assignment, we do not understand the charge complained of to be subject to the criticism that it submitted that phase of the issue as doubtful merely because it instructed the jury that if they should "find that plaintiff himself was guilty of contributory negligence, and that by his own negligence he contributed to his injury, then he cannot recover," for it is one thing to instruct a jury to return a verdict in accordance with the undisputed evidence, and quite another to give an instruction that would admit of a finding contrary to the undisputed evidence.

The court did not err, as complained in the sixth assignment, in charging the jury that it was the duty of the railway company to use such degree of care, prudence, and foresight as would be used by very cautious, prudent, and competent persons under similar circumstances, since the law, which has but one standard, exacts this degree of care of all carriers of passengers alike, whatever may be the means of transportation employed. That a freight train was employed in this instance did not therefore change the rule, but was only a circumstance to be considered by the jury in applying the law to the facts.

We approve the charge complained of in the eighth assignment, which placed the burden of proving contributory negligence where the law places it—on the party pleading it. We find nothing in this case to make it an exception to the general rule, and doubt if any exceptions ought ever to have been made, since the effort to do so seems to have been productive of nothing but confusion and uncertainty in the trial of cases.

Judgment affirmed.

McOLENDON et ux. v. BROCKETT et al.*
(Court of Civil Appeals of Texas. March 28, 1903.)

DEED—DELIVERY—CONDITION—EFFECT—
RECLAMATION BY GRANTOR.

1. A parol condition or trust, attached to the delivery of an absolute deed to the grantee,

*Rehearing denied April 18, 1903, and writ of error denied by Supreme Court.

that it shall not take effect till the grantor's death, and then only on the grantee's execution of notes to third persons, is void, and title vests absolutely in the grantee.

2. The reclamation of a deed by a grantor after delivery to the grantee will not divest the latter's title.

Appeal from District Court, Hill County; W. Poindexter, Judge.

Suit by John T. McClendon and wife against Jeff Brackett and others. Judgment for defendants entered on a directed verdict, and plaintiffs appeal. Affirmed.

Jordan, Collins & Walker, for appellants. Wear, Morrow & Smithdeal, for appellees.

TEMPLETON, J. This suit was brought on June 19, 1902, by Mrs. M. C. McClendon, joined by her husband, against the tenant and heirs of E. G. Tipton, deceased, to recover a tract of land situated in Hill county, and to cancel the deed under which the defendants claimed. When the evidence had been adduced, the court instructed the jury to return a verdict for the defendants. The plaintiffs have appealed from the judgment entered on such verdict.

The land in controversy was owned by Mrs. Rebecca J. Tipton. On March 24, 1884, she deeded the land to her son, E. G. Tipton. The deed was in the usual form, contained general covenants of warranty, and recited a cash consideration of \$1,800 paid. On its face the deed was without condition of any kind. E. G. Tipton died intestate on March 19, 1902. Three days thereafter Mrs. Rebecca Tipton made, executed, and delivered to her daughter, Mrs. M. C. McClendon, a general warranty deed to said land, which was filed for record on March 24, 1902. The deed to E. G. Tipton was not filed for record until March 26, 1902. Mrs. Rebecca Tipton, who is still living, testified by deposition: "That she was 87 years old. Resided in Itasca, Hill county, Texas. That E. G. Tipton was her son, and that on March 24, 1884, she lived on her farm, five miles northwest of Itasca, and that E. G. Tipton, Mrs. M. C. Doyle, and C. R. Tipton lived with her. That she was the same Rebecca J. Tipton who made the deed dated March 24, 1884, purporting to convey the land in controversy to E. G. Tipton, and said that, in order to dispose of her land 'among my heirs I gave my son a deed to it, to take effect after my death, provided he executed notes to my different heirs, payable after my death, to the amount of \$1,500; I having given him a \$300 interest in the \$1,800 consideration. The deed was not to take effect until after my death, and not then unless the notes were executed and paid or satisfied. The deed was then placed in E. G. Tipton's hands for safe-keeping, or in trust until my death. It was further agreed that I was to have rents off the land until my death, and E. G. Tipton paid me rents during his lifetime. I had no

interest in the notes to be signed, and they were not to draw interest. The consideration of \$1,800 was the amount I paid for the land. The notes were never signed, and there was nothing paid by E. G. Tipton, or any one else, of the \$1,800 consideration for the land. I placed said deed in the hands of E. G. Tipton to keep until my death. My instruction was that he keep the deed in trust, and not file it for record until after my death. E. G. Tipton died the 19th day of March, 1902, and left surviving him his wife, Agnes Tipton, and three children—Myrta Tipton, about 14 years of age, Allen Tipton, about 13 years old, and Bessie Tipton about 10 years old. I have rendered the land for taxes since 1884, and taxes were paid for me out of my rents off the land. I have received rents from E. G. Tipton since 1885. It was paid in money. I did not authorize any one to file the deed for record executed by me to E. G. Tipton, dated March 24, 1884 at any time, and it was filed without my consent. E. G. Tipton never paid me the \$1,800 mentioned in said deed dated March 24, 1884, or any part of same, but he was to pay my heirs all of said \$1,800, less the \$300 I gave him." Cross-examined, Mrs. Rebecca J. Tipton said her memory was not as active and clear as it was when she was young, but in matters of considerable importance and involving considerable interests, and in which she had taken part, she thought it was very clear. She said, in answer to the following question, viz.: "If you have stated that you placed the deed inquired about in the possession of some one to keep until your death, then state where, and under what circumstances you got possession of said deed, when it was that you delivered the same to the third party, and who the third person was?" Answer: "Somewhere about one or two years after I had given the deed to my son, E. G. Tipton, for safe-keeping—some time after I had taken the deed to my son, E. G. Tipton—and I agreed that J. C. Tipton should hold the deed until my death, and it was to be delivered by J. C. Tipton to E. G. Tipton when the notes were paid or satisfied. I gave the deed to J. C. Tipton to hold in trust until my death." In answer to the fourth interrogatory, in which said witness was asked if it was not a fact that at the time she delivered the deed to the third person it had been executed several years prior to the time she got it, and if it was not a fact that she got it out of the trunk of E. G. Tipton, or out of some place where he had deposited it, she said that some time after, about two or three years, she took the deed out of E. G. Tipton's trunk. She stated that after she signed the deed she gave it to E. G. Tipton to keep, as already explained by her. She further stated that she executed the deed to her daughter, Mrs. M. C. McClendon, after she executed the deed to E. G. Tipton, and after his death. Mrs. McClendon bases

¶ 2. See Deeds, vol. 16, Cent. Dig. § 551.

her right to recover upon the theory that the testimony of Mrs. Tipton shows that there was not such delivery of the deed to E. G. Tipton as would give effect to the deed as a conveyance, and for that reason the said deed was and is a nullity. She does not claim as an innocent purchaser, and this appeal turns upon the correctness of her contention that the deed to E. G. Tipton was never delivered in such manner as to make the same operative as a conveyance.

The deed was, on its face, sufficient to convey, absolutely and unconditionally, the land in controversy, and to vest in the grantee the present title thereto. The grantor, with full knowledge of the terms of the deed, voluntarily placed the same in the actual possession and under the manual control of the grantee. These facts are undisputed, but appellants insist that the delivery was not effectual, because it was not the intention of the grantor that the deed should become operative as a conveyance until her death. The rule contended for by appellants was recognized and applied by our Supreme Court in *Steffian v. Bank*, 69 Tex. 513, 6 S. W. 823. In that case Steffian had deeded certain lands to Hunt. The deed was not to be delivered until the grantee had paid the purchase money. Before all of the purchase money was paid, the grantee induced the grantor to place the deed in his possession upon the representation that he wanted the same for the purpose of copying the field notes of the land. It was held that there was no such delivery as would give effect to the deed as a conveyance. And it has been held that a delivery of a deed for inspection, or the leaving of a deed with the grantee under an agreement that he should transmit the same to a third person, with whom it should remain until the occurrence of a specified event, will not constitute a valid delivery. 1 Devlin on Deeds, § 271. But the rule is applicable only where the deed has been deposited with the grantee, or handed to him for some purpose other than as the deed of the grantor. If the grantor places the deed in the hands of the grantee, except for some special purpose, the law conclusively presumes that he intended the deed to become operative as a conveyance, and the delivery is complete and valid. The evidence in this case does not indicate the existence of such special purpose. According to the testimony of Mrs. Tipton, she delivered the deed to the grantee with the understanding that the same should not take effect until her death, and not then unless he paid the agreed amounts to her other heirs. This condition was not expressed in the deed, and cannot be shown by parol evidence. *Lott v. Kaiser*, 61 Tex. 685; *Lambert v. McClure* (Tex. Civ. App.) 34 S. W. 974; *Ins. Co. v. Clarke* (Tex. Civ. App.) 21 S. W. 277. The deed in question was delivered upon condition, but it was delivered as the deed of the grantor, and not for some special purpose, as was the

case in the instances cited above, where it was held that there was no delivery. True, Mrs. Tipton testified that the deed was deposited with the grantee in trust, or for safe-keeping; but the grantee was not a proper depositary for such purpose. If a deed is to be held in escrow, a stranger must be selected as custodian. The grantee cannot act in that capacity. 1 Devlin on Deeds, § 314. A delivery made to a third person, conditioned on the performance of an act or the happening of an event, whereupon it is to be delivered to the grantee, is called an escrow. 1 Devlin on Deeds, § 312. So the instrument in question must be held to have been delivered as a deed, and not as an escrow. It took effect as a conveyance, according to its terms, or it was a nullity. It is uncontroverted that the deed was intended to take effect on the happening of a particular event and on the performance of a certain condition. It is clear that, if the grantee agreed to hold the deed in trust, it was to await the happening of the event, and to secure the performance of the condition. Such holding would make the deed an escrow if the delivery was to a stranger, but the deed could not be held by the grantee upon such terms. When the deed was delivered to the grantee, his holding was unconditional, and parol evidence is not admissible to show that he accepted the deed to be held by him in trust until his mother died and he had paid to her other heirs the sums of money he had agreed to pay. It is beyond controversy that the deed was actually delivered to the grantee, and it cannot be doubted that it was delivered as the deed of the grantor. There is not a scintilla of evidence tending to show that the grantor reserved any right of dominion over the deed, or that she retained the power to recall it. No other delivery than that which took place when the deed was handed to the grantee was contemplated. There is no delivery, in a legal sense, unless the grantor places the deed in the hands or under the control of the grantee with the intention that the same shall become operative as a conveyance, and the question as to whether such intention existed is one of fact. But when it has been shown that the deed was so placed, it will be conclusively presumed that such intention existed, unless there is evidence tending to show that the instrument was handed to the grantee for some special purpose, and not as the deed of the grantor. There is no such evidence in the present case, and the trial court was, therefore, justified in giving the peremptory instruction.

It is immaterial, at least under the pleadings in this case, whether the grantee agreed not to place the deed on record until after the death of the grantor, and whether the grantor thought that the deed would not become operative until it was recorded. 1 Devlin on Deeds, § 300. And the authority just cited establishes the further proposition

that the recovery of the deed by the grantor, even if it was with the consent of the grantee, did not affect the title of the grantee, or reinvest the title in the grantor. See, also, *Van Hook v. Simmons*, 25 Tex. Supp. 323, 78 Am. Dec. 573; *Sanborn v. Murphy*, 86 Tex. 443, 25 S. W. 610.

Appellants have not attempted to show accident, mistake, or fraud either in the making or the delivery of the deed in question. The evidence offered and relied on by them does not tend to show that there was no delivery, but tends simply to show that the delivery was upon conditions not expressed in the deed. The legal effect of the deed cannot be changed by proof of such conditions, and appellants have failed to establish their right to recover. The title to the land in controversy is vested in the heirs of E. G. Tipton. It would seem that the parties to whom E. G. Tipton agreed to pay the sum of \$1,500 in part consideration for the deed made to him by his mother will be entitled, upon the death of Mrs. Rebecca Tipton, to subject the land in controversy to the payment of the said claims; but that is a question not involved on this appeal and which need not be determined in this proceeding.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. GIST.*

(Court of Civil Appeals of Texas. March 21, 1903.)

CARRIER—INJURIES TO PASSENGER—NEGLIGENCE—INSTRUCTIONS—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. Plaintiff went into defendant's station to purchase a ticket just before the departure of a train, but found the office closed. He then attempted to board the train without a ticket, but was told by the conductor to go and get one. Before he returned, the train had started, and he was injured in attempting to board it while in motion. *Held*, that defendant was guilty of negligence if the train was started without giving plaintiff a reasonable time to purchase a ticket and to return to the train, as *Sayles' Ann. Civ. St. 1897*, art. 4542, expressly requires a railroad to keep its ticket office open 30 minutes before the departure of a train, and it was the duty of the conductor to wait for plaintiff after having sent him away.

2. Where, in an action for negligent injuries, neither plaintiff's pleadings nor his evidence show *prima facie* that he was guilty of contributory negligence, the burden of proving such negligence is on defendant.

3. A charge, in an action against a carrier for negligent injuries, that the burden of proof was on defendant to show that plaintiff was guilty of contributory negligence, is not open to the criticism that it did not make it clear that plaintiff's evidence was to be considered, where other paragraphs of the charge on the same issue make it manifest that the jury understood that they were to consider all the evidence.

4. An order denying a new trial on account of newly discovered evidence will not be dis-

turbed where the evidence could only have tended to reduce the amount of the recovery.

Appeal from District Court, Montague County; D. E. Barrett, Judge.

Action by W. B. Gist against the Missouri, Kansas & Texas Railway Company of Texas to recover damages for negligent injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Eldridge, Gardner & Midkiff, for appellant.
W. S. Jameson and J. M. Chambers, for appellee.

Conclusions.

SPEER, J. The evidence contained in the record warrants us in finding the following facts: On the morning of July 13, 1901, appellee went to appellant's depot, at Nocona, Tex., for the purpose of boarding appellant's east-bound passenger train for Gainesville, Tex., which train passed Nocona at 9 o'clock a. m. The ticket office was open some 30 or 35 minutes before the arrival of the train. Before the train pulled in, the agent, according to his custom, left the office for the purpose of putting on the baggage and express. The train stopped at the usual place that morning, and remained from 3 to 5 minutes. After the train whistled for the station, appellee went into the depot to purchase a ticket, and found the office closed. He remained in there until the train pulled in and stopped, and until he thought it had been there the usual time, when he went out and attempted to board it. The conductor refused to allow him to board the train without a ticket. He told the conductor there was no one in the office to sell him a ticket, and was told to return to the office and get a ticket; that there would be a man there to wait on him. The conductor called to the agent, and the latter then returned to the office and sold appellee a ticket to Gainesville. As soon as appellee received his ticket, he started for the train, which was then moving. On reaching it he found the gate closed, and the conductor just inside, either on the top step or the platform. He seized hold of the gate and asked the conductor to "open the gate." The latter said, "Let go." Appellee repeated once or twice, "Open the gate," when the conductor said, "I can't open the gate till you let go." Appellee then released the gate, and caught hold of the rail on the front end of the car, and the gate came open. The conductor took his extended hand, but failed to properly support him in his efforts to board, and appellee fell and was injured. The train was moving very slowly during all this time, and the appellee was not guilty of negligence in attempting to board it as he did. Appellee's injuries are permanent, and he is damaged to the extent of the verdict of the jury.

The court's charge was in part as follows, to wit:

"(2) If you find from the evidence that the plaintiff went into the defendant's office at Nocona within thirty minutes before the de-

*Rehearing denied April 18, 1903, and writ of error denied by Supreme Court.

¶ 4. See *New Trial*, vol. 37, Cent. Dig. § 226.

parture of said train for the purpose of purchasing a ticket with intent to take passage on defendant's train, and that the agent was not present in said office, and for that reason plaintiff did not purchase a ticket, and if he then went to the train and offered to board it, and if the conductor of said train directed or requested plaintiff to return to the office and procure a ticket, then it became the duty of said conductor to allow plaintiff a reasonable time in which to procure a ticket and return to said train before starting it; and if you find that the conductor started said train before plaintiff had time, by the exercise of reasonable diligence, to procure a ticket and return to and board said train, this would constitute negligence on the part of the defendant.

"(3) 'Reasonable diligence' means such diligence as an ordinarily prudent and diligent person would exercise under similar circumstances.

"(4) If you find that after the conductor advised or directed plaintiff to return to the office and procure a ticket, if he did so, the conductor allowed plaintiff sufficient time, by the exercise of reasonable diligence, to procure a ticket and return to and board the train before it started, then the starting of said train before the plaintiff got on it would not be negligence.

"(5) If you find from the evidence that the failure of the plaintiff to get aboard said train before it started was caused by the negligence of the defendant, and if the plaintiff attempted to board said train while it was in motion, and if in so doing he fell or was thrown down as alleged in the petition, and injured, and if his injury was caused by the negligence of the defendant, and if he did not contribute to the bringing about of his injury by his own fault or negligence, you will find for the plaintiff.

"(6) It was the duty of the plaintiff to use ordinary care to avoid injury to himself. 'Ordinary care' means such care as a person of ordinary caution and prudence would exercise under similar circumstances, and a failure to exercise such care is negligence.

"(7) If you find that the plaintiff was injured while attempting to board a moving train, but if you further find that a person of ordinary prudence and caution, under the circumstances shown by the evidence, would not have attempted to do so, or if such a person, under the circumstances in evidence, would not have continued to try to board said train as long as plaintiff did, then the plaintiff cannot recover, and you will find for defendant, even though you should find that defendant was guilty of all the acts of negligence charged against it.

"(8) If you find for plaintiff, you will assess his damage at such sum as you believe from the evidence will afford him a just and reasonable pecuniary compensation for the injury he has sustained, if any, taking into consideration, in fixing the amount, the phys-

ical pain he has suffered, if any, on account of his injury, and his diminished capacity to labor and earn money, if you find that his capacity so to do has been diminished by reason of such injury.

"(9) You cannot allow plaintiff anything for any injury or afflictions that he has, unless you believe from the evidence that they were caused by the negligence of the defendant.

"(10) If you should find that the defendant was guilty of negligence, this would not entitle the plaintiff to recover unless such negligence was the cause of plaintiff's injury, if he was injured.

"(11) The burden of proof is on the plaintiff to show that he was injured by the negligence of the defendant, and the burden of proof is on the defendant to show that plaintiff was guilty of negligence in attempting to board the train at the time and under the circumstances that he did."

The fourth and sixth assignments of error complain of paragraphs second and fifth of the foregoing charge. Under these assignments counsel for appellant insist that whether it was negligence for appellant's agent not to be present in said office, and whether it was negligence on the part of appellant for its conductor to direct or request plaintiff to return to its ticket office and procure a ticket, and for the conductor to start the train before plaintiff had time to procure a ticket and board its train, was a question of fact for the jury to decide, and that the court should not have instructed that such facts constituted negligence upon the part of appellant. While the question raised is by no means an unimportant one, we have concluded the assignments should be overruled. It is, of course, elementary that controverted questions of fact are to be submitted to the decision of the jury. Negligence is ordinarily such a question. There are, however, certain well-recognized exceptions to this rule: First, where a duty is imposed by statute, and a nonobservance results in injury, the court may tell the jury that such failure constitutes negligence; second, where, from the facts stated, no inference can be drawn but that of negligence, it becomes a question of law, and the court may charge that such facts constitute negligence. *Texas & Pacific Ry. Co. v. Laverty* (Tex. Civ. App.) 22 S. W. 1047; *G. H. & S. A. Ry. Co. v. Matula* (Tex. Sup.) 15 S. W. 573; *H. & T. C. Ry. Co. v. Wilson*, 60 Tex. 142; *Sanchez v. S. A. & A. P. Ry. Co.* (Tex. Sup.) 30 S. W. 431. It was the duty of appellant—made so by statute—to keep its ticket office open half an hour prior to the departure of its train. *Sayles' Ann. Civ. St.* 1897, art. 4542. It was the duty of the conductor, after causing the appellee to return to the office for the purpose of procuring a ticket, to allow him a reasonable time in which to procure such ticket and return to the train before starting it. *Texas & Pacific Ry. Co. v. Mayfield* (Tex. Civ. App.) 56 S. W. 942. Under the facts of this case

the acts of the conductor amounted to an agreement upon the part of the company to do as much. No other inference but that of negligence can be drawn from his conduct in not allowing appellee a reasonable time to return to the train. Indeed, its conduct in refusing to receive him without a ticket can only be excused, if at all, upon the ground that he was afforded reasonable opportunity to procure a ticket and board the train. The law allows him full 30 minutes before the departure of his train. This the company did not give him, and there is perhaps force in the contention that in sending appellee away when he first applied for passage the appellant violated a statutory requirement, which would be negligence per se. Sayles' Ann. Civ. St. 1897, art. 4494. But without deciding this question, we have already stated that it was the duty of appellant to wait a reasonable time to allow appellee to return and board its train before starting it, and the court committed no error when he instructed the jury that a failure to discharge this duty was negligence. Reasonable minds could not reach different conclusions upon that question. It follows, then, that even though the failure of appellant to keep its ticket office open for the required time was not, as contended, the proximate cause of appellee's injuries, nevertheless the charge, presenting the two questions conjunctively, could not be erroneous. If a part of the acts enumerated constituted negligence, undoubtedly the whole would do so. But it is by no means clear to the writer that the failure of appellant to keep its ticket office open for the 30 minutes preceding the departure of its train was not a concurring proximate cause of appellee's injuries. But for this negligence the appellee would have boarded the train in safety, and the accident would not have occurred. But for the conduct of appellant's conductor in causing appellee to return to its office for a ticket, and in starting the train before he had had a reasonable time in which to return and board it, the injuries would not have occurred. All these acts of negligence concurred in bringing about the injuries. It may be that, standing alone, neither was the sole, efficient, proximate cause, but that all combined were. *Mills v. M. K. & T. Ry. Co.* (Tex. Sup.) 59 S. W. 874, 55 L. R. A. 497. In the case cited the court say: "Whether or not negligence of the defendant constituted a proximate cause of plaintiff's injury must be determined from a consideration of everything that happened. It would be a mistaken way of viewing the evidence to take separately each act or omission which may be found to have been negligent, and inquire if it alone constituted the proximate cause. The combined effect of all may be considered."

The tenth assignment of error complains of the charge of the court imposing upon appellant the burden of proof upon the issue of contributory negligence. This question seems

of late to be a constantly recurring one. Certainly, neither appellee's pleadings nor his evidence showed prima facie that he was guilty of contributory negligence, and it was therefore proper for the court to charge that the burden of proof upon such issue was upon appellant. *G. C. & S. F. Ry. Co. v. Shieder* (Tex. Sup.) 30 S. W. 902, 28 L. R. A. 538. Nor do we think the charge is subject to the criticism that it was calculated to confuse the jury, and deprive appellant of the benefit of the defense of negligence arising out of appellee's evidence. It is upon this theory that some of the charges upon contributory negligence have been condemned. The charge of the court told the jury that "the burden of proof is on the plaintiff to show that he was injured by the negligence of the defendant"; yet no one would contend that the charge, on the whole, did not make it clear that all the evidence was to be considered. So, the charge informed them that "the burden of proof is on the defendant to show that plaintiff was guilty of negligence in attempting to board the train at the time and under the circumstances that he did"; yet under the sixth and seventh paragraphs of the charge upon the same issue it is manifest the jury understood they were to consider all the evidence.

The newly discovered evidence upon the strength of which a new trial was sought was probably not true in the light of the other testimony, and at most could only have tended to reduce the amount of the recovery. *Ham v. Taylor*, 22 Tex. 225; *G. C. & S. F. Ry. Co. v. Brown*, 16 Tex. Civ. App. 113, 40 S. W. 608.

None of the assignments presents reversible error, and all are overruled.

The judgment is affirmed.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. CITY OF SAN ANTONIO et al.*

(Court of Civil Appeals of Texas. April 1, 1903.)

TAXATION—CORPORATE FRANCHISE.

1. The franchises of a corporation, exercised and enjoyed by it in a city, are property, within the provision of the city's charter requiring a tax on all property in it.

2. The description on the assessment roll of a city, "the * * * Company franchise," is not sufficient.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Suit by the Southwestern Telegraph & Telephone Company against the city of San Antonio and others. Judgment for defendants, and plaintiff appeals. Reversed.

J. F. Onion and A. H. Graham, for appellant. Wm. Aubrey and Frank H. Wash, for appellees.

*Rehearing denied April 22, 1903, and writ of error denied by Supreme Court.

NEILL, J. This suit was brought by the appellant against the city of San Antonio, its mayor and tax collector, to enjoin the collection of a tax assessed for the year 1897 upon appellant's franchise. The facts shown in our conclusions are alleged and relied upon as the grounds for the injunction. The appellees answered by general and special exceptions. The case was tried without a jury, and judgment rendered dissolving the injunction theretofore issued, and dismissing appellant's petition.

The material facts are as follows: "Appellant is a corporation under the laws of New York. It had a permit to do business in the state, and has been doing business since 1889, and in the city of San Antonio by ordinance from said city. (2) That appellant furnished to the public a method of communication by its telephone system; that each of the telephones of its several subscribers was connected with all the others for the purpose of telephoning to other towns and cities in the state and out of the state. (3) That appellant's telephone system extended throughout the states of Texas and Arkansas; that each subscriber connected with appellant's system in the city of San Antonio had communication with each subscriber in all other portions of the states named, as well as with each subscriber in said city. (4) That appellant listed and rendered its real and personal property in San Antonio for taxation for the year 1897, the value of the same being stated at \$21,550; that such rendition was approved by the board of equalization of the city of November 18, 1897, for 1897; that appellant paid in full the amount assessed upon said real and personal property so rendered by it at the rates mentioned; that the rate was \$1.50 on \$100. (5) That the tax assessor of the city of San Antonio entered upon his supplemental list or roll of unrendered property for the year 1897, as an item of property belonging to appellant, a franchise valued at \$100,000, and assessed the same as follows: 'The S. W. Tel. & Tel. Company franchise, \$100,000. Total value, \$100,000;' that on or about the 17th day of January, 1898, the board of revision and appeals approved said assessment. (7) That appellant failed and refused to pay the tax so assessed upon its franchise, amounting to \$1,500, because it claimed that such assessment was invalid and without authority of law. (8) That the tax collector of San Antonio had threatened to collect said tax by levy of legal process upon the property of appellant, and that, unless restrained, said collector would proceed to so collect such tax."

Conclusions of Law.

The charter of the city of San Antonio, the provisions of which courts of this state are required to take judicial cognizance, contains no express authorization for the levy and collection of a franchise tax. If such

authority is conferred upon the city, it is by that provision of its charter which requires an annual levy and collection of a tax on all real estate and property in the city of San Antonio not exempt from taxation by the Constitution of the state or city charter. "There is almost a consensus of opinion that corporate franchises are property. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; *San Jose Gas Co. v. January*, 57 Cal. 614; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Stein v. Mobile*, 17 Ala. 234; *Enfield Toll-bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 41 Am. Dec. 141; *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561; *Belleville Nail Co. v. People*, 98 Ill. 399; *Fietsam v. Hay*, 122 Ill. 298, 18 N. E. 501, 3 Am. St. Rep. 492; *Baltimore v. Baltimore & O. R. Co.*, 6 Gill, 288, 48 Am. Dec. 531; *Portland Bank v. Athorp*, 12 Mass. 252; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *State Bd. of Assessors v. Central R. Co.*, 48 N. J. Law, 146, 4 Atl. 578; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367; *People ex rel. Panama R. Co. v. New York Tax Com'rs*, 104 N. Y. 240, 10 N. E. 437; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 44 N. Y. Supp. 825; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921." *Louisville Tobacco Warehouse Co. v. Commonwealth (Ky.)* 49 S. W. 1069, 57 L. R. A. 33. Corporate franchises are taxable under a statute requiring all property in the state not exempt to be taxed. *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581; *State ex rel. v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Commercial, etc., Co. v. Judson (Wash.)* 56 Pac. 829, 57 L. R. A. 78; *Edison Elec. Illum. Co. v. Spokane Co. (Wash.)* 60 Pac. 132; *State v. W. U. Tel. Co. (Mo. Sup.)* 65 S. W. 775; *South Covington, etc., v. Bellevue (Ky.)* 49 S. W. 23, 57 L. R. A. 50. Franchises relating to corporations are of two kinds: (1) The franchise to be a corporation, conferred upon the corporators; (2) the franchises of the corporation, conferred upon the corporation. *Noyes, Intercorp. Relations*, § 130. As is said in *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 619, 5 Sup. Ct. 303, 27 L. Ed. 711: "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body, as such, are the franchises of the corporation." The one is a franchise to be.

The other is a franchise to do. "The franchises to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done." *Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 985. In the same case it is said: "It matters not in what * * * intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, producing income, and passes current in the markets of the world. To ignore this intangible property, or to hold it not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property? * * * It is a cardinal rule, which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation."

Upon the principles stated, we are of the opinion that franchises exercised and enjoyed by a corporation in a city which is required to levy and collect a tax on all property in it are, to the extent of their value in such city, subject to taxation, although a tax has been levied and collected by the city upon the tangible property of such corporation. But has a tax been levied by the city of San Antonio upon the franchises of the appellant as property within the city? "The S. W. Tel. & Tel. Company franchise, \$100,000," is the entry made by the tax assessor upon the roll of unrendered property for the year 1897 as an item of property belonging to appellant. What franchise? The franchise to be, or the franchise to do? The franchise exercised and enjoyed in the city of San Antonio, Tex., or the franchise exercised in every town and city in the American Union when it carries on its business, or whenever it exercises any right or privilege of the purpose of its existence? These questions cannot be answered from the entry on the assessor's rolls, which is claimed to be the assessment of the tax. The tax rolls must, by the description, show what property is assessed, and the property

must be within the jurisdiction of, and subject to the taxing power of, state or municipality assuming to exercise the right of its taxation. Here it cannot be told from the assessment rolls what the property is, or where it is. The description attempted to be given on the rolls is no description at all. In the case of *State of Texas v. A. & N. W. R. Co.* (Tex. Sup.) 62 S. W. 1050, the assessment is as follows: "The intangible personal property of the said Austin & Northwestern Railroad Co. within the state of Texas, consisting of its right, privileges, immunities, good will, contracts and franchise to do and carry on the business of a railroad company as a common carrier of freight and passengers for hire—value of same, \$835,048.00." In passing upon the validity of the assessment, the Supreme Court says: "It was clearly the intention of the Legislature to require that the list, whether made by the taxpayer or by the assessor, should specifically enumerate the properties to be assessed, and should affix thereto the separate value of each. * * * Conceding, for argument sake, that a franchise is described, its value is not separately stated. Rights, privileges, immunities, good will, contracts, and franchises are valued in a lump sum. If taxable at all, each specific article of property of the character in question should be valued by itself. But beyond all this, we know of no law for assessing for taxation, by the vague description given in the assessment before us, rights, privileges, immunities, good will, contracts, and franchises, as the property of any individual or corporation." In that case the description is much more specific than in the one at bar, and the statute under which the assessment was attempted to be made in that case, like the charter under which the assessment is sought to be upheld in this case, required all real and personal property to be taxed. The case of *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.* (Tex. Sup.) 66 S. W. 836, is not analogous to the one under consideration. In that case "the sum of \$2,865 was imposed as a tax by the city on which is denominated the 'franchise to operate and maintain lines of street railway' over certain streets," by virtue of express authority granted the city by its charter "to levy and collect the ordinary municipal taxes upon the roadbed, rights, franchises, and all other property of street roads of every kind." The franchise in that case is specifically described upon which the tax is levied. In this case there is no description whatever of the franchise.

We conclude that the assessment of the tax sought to be enjoined is absolutely void, and that the trial court erred in not perpetuating the injunction restraining its collection. Therefore its judgment is reversed, and judgment is here rendered in favor of appellant, perpetually enjoining the city of San Antonio, its officers and agents, from

the collection of the sum of money, or any part thereof, claimed by the city by virtue of the pretended assessment. Reversed and rendered.

LYNCH et al. v. PITTMAN et al.*

(Court of Civil Appeals of Texas. March 7, 1903.)

TRESPASS TO TRY TITLE—PLEADINGS—APPEAL—FINDINGS—PRESUMPTIONS—MISRECITALS.

1. A suit, though, as originally brought, one to remove cloud on title, is, as between plaintiffs and certain defendants, who, in addition to the plea of not guilty, present a cross-plea, in substance a petition in trespass to try title, alleging ownership of the land and ouster, one in trespass to try title, in which, plaintiff having proved long-continued possession, payment of taxes, and assertion of title under a recorded deed, such defendants must prove a better right.

2. Certificate issued in 1839 in the right of J. A., reciting proof by his administrators that he came to Texas before the declaration of independence, May 28, 1835, was married and the head of a family, and a patent issued thereon in 1848 to his heirs, is sufficient to support, if not compel, a finding that the certificate and patent were not issued in the right of J. A., the ancestor of defendants, in whose name no claim was asserted to the certificate or patent of land till 1900, and who did not die till 1857, and as to whose coming to Texas the testimony of one was that he came "in an early day," and of another that he came prior to 1840.

3. The power of persons to convey an interest in one's headright certificate may be inferred, after a lapse of 60 years, from the recitals in their bond for title authorizing the inference that they purported to act as his administrators.

4. Recital in the record that one having title to the J. A. league survey in B. county conveyed her interest in the J. A. one-third league survey in B. county, will be held a misrecital; there being no evidence that, in addition to the league survey, there was in B. county a J. A. one-third league, and the subsequent conveyances having related to and purported to convey the land as part of the J. A. league survey.

5. In support of the judgment, though there is no direct proof of it, it will be presumed on appeal that the J. A. league was located and surveyed by virtue of a certain certificate making recital as to proof by the administrators of J. A.; the record disclosing that appellees introduced such certificate in evidence without objection, and that they introduced no other certificate, and their brief reciting that they introduced in evidence the original certificate on which the patent was issued.

Appeal from District Court, Bosque County; William Poindexter, Judge.

Action by T. E. Pittman and others against J. P. Lynch and others. From the judgment, defendants Lynch appeal. Affirmed.

Robertson & Robertson, for appellants. H. J. Cureton and E. R. Pedigo, for appellees.

CONNER, O. J. As originally instituted, appellees sought to remove cloud from the title to the land described in their petition, and of which they were in possession; declaring against the unknown heirs of Jarrett

Allen, deceased, and other parties named in their petition. Appellees' petition is excepted to as not in compliance with the requirements of Rev. St. art. 1504c; but we think it is at least sufficient as an allegation of title under the five and ten years' statutes of limitation specifically pleaded by them, and it was alleged that the claim of the unknown heirs of Jarrett Allen was unknown. All parties were cited, but no appearance was made save by appellants, J. P. Lynch and his wife, B. A. Lynch, who answered, pleading over against appellees in trespass to try title for affirmative relief. Appellants claim by virtue of the right of Mrs. Lynch, whom the proof shows was the sole surviving heir of a Jarrett Allen who died in Virginia in 1857. The trial was before the court, which rendered a general judgment for appellees, and J. P. Lynch and B. A. Lynch alone appeal.

Appellees claim through mesne conveyances from, and under a bond for title made to, James McCown and F. B. Pankey on August 28, 1840, by M. C. McRoy and wife, Frances McRoy, obligating the McRays to have located, and, when patent was obtained, to perfect title in McCown and Pankey to one-half of, a certain claim of land for one league, granted by the board of land commissioners of Montgomery county in April, 1839, to the estate of Jarrett Allen, deceased. This bond was duly acknowledged and recorded, and recited the grantor as "administrator of the estate of Jarrett Allen, deceased." Patent issued from the state of Texas to the heirs of Jarrett Allen, deceased, for one league of land, including that in controversy, on April 18, 1848. The evidence further shows that since about August 29, 1887, the appellees and those under whom they claim have had and held, under registered deeds, actual possession of the land in controversy, paying all taxes thereon. The questions presented, however, that relate to the acknowledgment of one of these deeds, and to the effect of a failure to have one or more promptly registered, will not be noticed, inasmuch as we think, if it be conceded that appellees, by reason thereof, and of Mrs. Lynch's coverture, failed in the proof of title in them by limitation, as pleaded, the judgment nevertheless must be sustained upon another ground.

Appellees were by no means mere trespassers, and the recitals in the certificate and in the patent of the prior death of the Jarrett Allen, in whose right and to whose heirs such certificate and patent issued, tended to show, if they did not require the finding, that the Jarrett Allen, under whom appellants claim, was not the Jarrett Allen in whose right the land was granted. As finally resolved under appellants' cross-action, the suit, as between appellants and appellees, was one in trespass to try title, in which appellees at least proved long-continued possession, payment of taxes, and assertion of title

*Writ of error denied by Supreme Court.

under a deed or deeds registered in the county where the land in controversy was situated. This clearly called for proof of better right in appellants, and, in recognition of such necessity, they offered the testimony of C. C. Collins, who testified that he knew a Jarrett Allen in Harrison county, Tex., in 1854; that he was married; and that he died in Virginia in 1857. Also that of J. P. Lynch, who testified to the same effect from family reputation; both witnesses tracing the heirship of Mrs. Lynch to this Jarrett Allen. Neither of the witnesses, however, was able to say when or under what circumstances the Jarrett Allen of whom they testified came to Texas, or that he was ever in Montgomery county. It nowhere appears that the Harrison county Allen, or any one in his name, ever asserted claim to the certificate or patent or land in controversy until appellants answered in this case. We hence conclude that the evidence, as a whole, at least raised the issue of identity, and is sufficient to support, if not compel, a finding against appellants on this issue. *Graham v. Billings* (Tex. Civ. App.) 51 S. W. 645; *Dick v. Malone* (Tex. Civ. App.) 58 S. W. 168; *Malone v. Dick* (Tex. Sup.) 61 S. W. 112.

The judgment being supported on the issue indicated, assignments of error relating to others become immaterial.

Judgment affirmed.

On Motion for Rehearing.

(April 4, 1908.)

Counsel for appellants very earnestly insist that we were in error in stating that "appellees claim through mesne conveyances from and under a bond for title made to James McCown and F. B. Pankey on August 26, 1840, by M. C. McRoy and wife, Frances McRoy." We have again carefully considered the evidence, and the conclusion quoted has, in our minds, been verified. The record discloses no affirmative power in M. C. McRoy and Frances McRoy to convey any interest in the Jarrett Allen headright certificate. The recitals of the bond, however, authorize the inference that they purported to act in an administrative capacity, and the power may well be presumed after this long lapse of time. From the McRays we find that F. B. Pankey, one of the beneficiaries in their bond for title, by deed acknowledged May 29, 1851, conveyed to Alexander McCown all interest in the Jarrett Allen league in Bosque county, acquired by him, as the deed recites, by virtue of the McRoy bond for title. It is true that this deed recites that the interest conveyed is an interest in "a certain $\frac{1}{4}$ of a league, part of the headright of Jarrett Allen, located and surveyed by virtue of his headright," but the recitals of the deed as a whole clearly show that its purpose was to convey the one-fourth acquired by virtue of the bond of the McRays conveying or agreeing to convey to J. B. Pankey and James Mc-

Cown one-half of the league. On October 16, 1871, William McRoy conveyed to D. C. McCown all interest he had in an undivided interest of one-half league in Bosque county, known as the "Jarrett Allen Headright League," thus vesting in James McCown, Alexander McCown, and D. C. McCown all right in said one-half league acquired under the McRoy bond for title, and whatever interest William McRoy had therein. N. R. Morgan testified, in substance, that his mother, E. M. F. Morgan, was a daughter of James McCown, and niece of Alexander McCown; that Alexander McCown died without issue in the 60's, leaving as his sole surviving heir his brother, the said James McCown; that D. C. McCown and E. M. F. Morgan were both children of said James McCown; that there was a verbal partition of the estate of James McCown in 1872 among his children, and that E. M. F. Morgan received the Jarrett Allen league as her distributive share of her estate, and that the deed in the name of D. C. McCown was so taken for convenience, but that it was in fact in trust for his sister, E. M. F. Morgan; and that the McCown heirs have always recognized and acquiesced in Mrs. Morgan's claim to said Jarrett Allen league as her part in said partition. The record further shows that E. M. F. Morgan, on January 9, 1885, redeemed from state tax sale 3,121 acres of the Jarrett Allen survey in Bosque county, and on July 7, 1884, she, joined by her husband, by special warranty deed, conveyed to their son, N. R. Morgan, all interest she had "in the Jarrett Allen one-third league survey in Bosque county, Texas, describing it by metes and bounds." There is no evidence indicating that, in addition to the league survey, a part of which is in controversy in this suit, there was in Bosque county a Jarrett Allen one-third league survey, and we conclude that the recital quoted was a mere misrecital, and that the conveyance to N. R. Morgan related to the particular league survey, a part of which is in controversy, it being undoubtedly true that all subsequent conveyances related to and purported to convey the land in controversy as a part of the Jarrett Allen headright league survey. August 7th N. R. Morgan conveyed to J. W. Gray the particular 50 acres of land in controversy, and from this on down to appellees were regular chains of transfer, so that we think it quite clear that appellees claim through and under the McRoy bond for title as originally stated.

It is also insisted vigorously and elaborately that there is no evidence in the record that the land in controversy was located and patented by virtue of the certificate to the recitals of which we gave effect in our original opinion, but in this also we think appellants are in error. It was stated in appellees' brief (page 25) that appellees introduced in evidence "the original certificate upon which the patent was issued," and a critical re-examination of the record, we think, sus-

tains this statement. The record discloses that appellees introduced in evidence but one certificate for land. That was headright certificate No. 103, issued by the board of land commissioners of Montgomery county on May 28, 1839, reciting that M. C. McRoy and Frances McRoy, administrator and administratrix of the estate of Jarrett Allen, deceased, having made proof before said board that the said Jarrett Allen, deceased, was the head of the family, and an emigrant to Texas before the declaration of independence, May 21, 1835, was a married man, and entitled to a league of land. The certificate was not objected to as irrelevant, and the conclusion is irresistible that it was this certificate by virtue of which the McRays presumed to convey or agree to convey, and by virtue of which the land in controversy was thereafter located and patented, and under which the McCowns and others claiming under the McRoy bond for title asserted and exercised acts of ownership over the land in controversy. Under the circumstances shown, and after judgment and in aid thereof, it certainly seems to us that we should adhere to the conclusion originally expressed relating to said certificate and patent, notwithstanding the fact that direct proof was not made that the Jarrett Allen league in Bosque county was located and surveyed by virtue of said certificate 103.

Concluding, as we do, that the recitals show that the Jarrett Allen in whose right it was issued was in fact dead at the time of its issuance, and that it was issued to the legal representatives of his estate in May, 1839, and it being undisputed that the Jarrett Allen under whom appellants claim did not die until the year 1857, we think it affirmatively appears that appellants had no right or interest in the land in controversy. It is true, as insisted, that one of appellants' witnesses testified that the Jarrett Allen under whom appellants claim came to Texas in an early day, and that the other one testified that he came to Texas prior to the year 1840. This, however, is not equivalent to proof that he was the head of a family, and an emigrant to Texas, at or prior to the declaration of independence.

It is likewise vigorously insisted that we should have considered and disposed of the questions presented that relate to the sufficiency of appellees' pleadings, and of the acknowledgment of one of the deeds under which they claim, and that relate to the effect of a failure to have said deeds promptly registered. A painstaking examination of the record convinces us that the able counsel for appellant are also mistaken in these contentions.

In addition to the plea of not guilty and of the coverture of Mrs. B. A. Lynch, appellants also presented a cross-plea, in substance a petition in trespass to try title, alleging ownership of the land in controversy, and ouster therefrom on November 28, 1900. The judgment is in favor of appellees against the

unknown heirs of Jarrett Allen, deceased, M. C. McRoy, Frances McRoy, James McCown, F. B. Pankey, Francis Allen, J. P. Lynch, and B. A. Lynch, establishing appellees' title, and removing cloud therefrom, and also adjudging in separate and distinct sentence that appellants take nothing by virtue of their said cross-plea, and that as to this appellees go hence without day, and recover their costs, etc.; to which ruling J. P. and B. A. Lynch except, and give notice of appeal. The evidence related materially to the issue of identity. So that we think it appears not only that the evidence is insufficient to authorize us to set aside the trial court's judgment to the effect that appellants failed to connect themselves as owners of the certificate by virtue of which the land in controversy was located, but also that, as finally resolved, the case was one in trespass to try title upon the cross-action of appellants in which they were clearly in the attitude of plaintiffs, and resting under the necessity of relying alone upon the strength of their own title. Appellants being without title, as we must hold, the question relating alone to appellees' title and to the relief granted them by the court is entirely immaterial, as held by us.

Other explanations of the evidence might also, perhaps, be properly stated in deference to the earnest motion, but we think, after a careful re-examination and consideration, that the motion should be overruled, and it is so ordered.

CASEY-SWASEY CO. et al. v. MANCHESTER FIRE ASSUR. CO.

(Court of Civil Appeals of Texas. April 4, 1903.)

TRIAL — SPECIAL FINDINGS — EVIDENCE — INSUFFICIENCY — SETTING ASIDE FINDINGS — ENTERING JUDGMENT — NEW TRIAL.

1. The question whether certain answers of the jury to special issues entitled a party to a judgment cannot be considered on appeal, where the trial court set aside such findings because not supported by the evidence, and there was no assignment requiring a review of such rulings.

2. Where the trial judge considers that certain special findings are not sustained by the evidence, it is his duty to set them aside on motion.

3. Rev. St. 1895, art. 1332, makes a special finding by the jury conclusive between the parties as to the facts found. *Held*, that where a special verdict consists of many findings, and special findings are set aside as not sustained by the evidence, the judgment cannot be rendered on the remainder of the verdict, but a new trial should be granted.

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

Action by the Casey-Swasey Company and others against the Manchester Fire Assurance Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Orrick & Terrell and Geo. E. Smith, for appellants. G. H. Goodson, for appellee.

STEPHENS, J. The property covered by the insurance policy declared on in this case was destroyed by fire January 27, 1902. Z. P. West, who was then owner both of the policy and the property insured, transferred the policy immediately after the fire to J. T. Meroney, who afterwards assigned it to appellant. Appellee, the company issuing the policy, pleaded as grounds of forfeiture, *inter alia*, breaches of the iron-safe clause, and of the clause against "fraud and false swearing concerning the insurance or the subject-matter thereof whether before or after the loss. These defenses were sustained by the special verdict. But the waiver pleaded in avoidance of these, as well as other alleged forfeitures, seems also to have been sustained by the special verdict, as will be seen from the answers of the jury to special issues following: "(27) You will find whether or not the insurance company, or J. S. Aldshoff, its adjuster, after it or he had knowledge of the facts alleged in its answer herein as avoiding the policy, did any acts or act whereby it or he recognized the binding force and validity of said policy, or if it or he ever did any acts or act for the purpose of making West or his assignees believe that it or he recognized the binding force of said policy, and whether or not the said West or his assignees, by said act or acts, were in fact deceived and misled into believing that the insurance company recognized the binding force of said policy? Ans. 27. Yes. (28) You will find whether or not, after the defendant company had knowledge of the matter set up in its answer, it asserted any right under said policy that would recognize its continuing validity, and that actually deceived and misled West or his assignees into believing that the company was intending to claim any right thereunder and recognize its validity, and through which the said West or his assignees were actually induced to expend any money. Ans. 28. Yes." Appellee made a motion to set aside these findings upon the ground that there was no evidence whatever to support them, and also upon the ground that the evidence was not sufficient to support them, and further moved the court to proceed to enter judgment upon the other findings in its favor. On the other hand, appellant made a motion to enter judgment in its favor upon the whole verdict. Both motions were submitted and acted upon together, the court overruling appellant's and granting appellee's.

Error is first assigned to the judgment upon the ground that the answers of the jury to the special issues above quoted entitled appellant to a judgment. But appellant seems to have overlooked the fact that these findings were, on motion of appellee, set aside for want of evidence to sustain them, and has made no assignment requiring us to review this ruling, if, indeed, such a ruling could be reviewed on appeal. It was not only the province, but also the duty, of the district judge to grant the motion of appellee to set aside

73 S.W.—55

these findings, if he considered the evidence wholly insufficient to warrant them, as alleged in the motion. But the court went further, as was also asked in the motion, and, after thus setting aside a material part of the verdict, covering, as it did, the important issue of waiver, which was raised both by the pleadings and the evidence, rendered judgment upon the remainder of the verdict and the undisputed facts, instead of granting a new trial. In this the court erred, and the error is fundamental. A special verdict, though comprising many findings, is but one verdict, and no material part of it can be set aside for want of sufficient evidence to sustain it without setting it all aside. But if each material finding be treated as a separate verdict the result would be the same, since the statute makes it conclusive between the parties as to the facts found. Rev. St. 1895, art. 1332. The court cannot disregard any such finding and enter judgment, even upon conclusive evidence to the contrary, as has been expressly decided. *Waller v. Liles* (Tex. Sup.) 70 S. W. 17. In any view of the case, therefore, the court erred, as is apparent on the face of the record, in rendering judgment for appellee; and for this error, though not assigned, the judgment must be reversed.

We cannot agree with appellant in the contention, urged in its second assignment, that the verdict established a substantial compliance with the iron-safe clause, for we cannot distinguish this case from *Insurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661.

The remaining assignments become immaterial, so far as this appeal is concerned, and as our jurisdiction is not final, and as it is not clear either that the rulings complained of were erroneous, or that they will be important on another trial, we will not discuss them. It seems worthy of mention, however, that the issue of waiver was submitted in a very general way, and not, as we think it should have been, with reference to the specific acts alleged by appellant as constituting the waiver. The following cases seem applicable to this issue: *Ins. Co. v. Moriarty* (Tex. Civ. App.) 37 S. W. 628; *Writs refused*, 38 S. W. xvii; *Roberts, Willis & Taylor Co. v. Ins. Co.* (Tex. Civ. App.) 35 S. W. 956; *Insurance Co. v. Evans* (Tex. Civ. App.) 61 S. W. 537.

Reversed and remanded.

BARRETT v. BALL.*

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

ATTORNEY AND CLIENT—ASSIGNMENT TO ATTORNEY—VALIDITY.

1. Where an attorney had previously represented plaintiff in obtaining administration on the estate of his deceased son, and, after termination of his employment, plaintiff assigned to such attorney his entire interest in the son's estate, the validity of such assignment will be reviewed in a subsequent suit to set it aside in

*Rehearing denied April 14, 1903.

the same manner as though the relation of attorney and client had continued.

2. Defendant represented plaintiff as attorney in obtaining administration on the estate of his son, and also represented the administrator in certain suits for the recovery of assets. Plaintiff was a man approaching 70 years of age, impaired in sight, in feeble condition, ignorant, and of shiftless habits. As the father of the son, he was entitled to the son's entire estate in Tennessee, together with one-sixth of the son's estate in Missouri, all of which he assigned to defendant for \$75. Defendant made two trips to Tennessee, where he collected \$573.80 on account of such estate, and also received from the administrator in Missouri, as the father's share, \$136 in addition. *Held*, that the assignment should be set aside, and that defendant should be required to account for the amount received, less a reasonable credit for his professional services and expenses in collecting the fund.

Appeal from Circuit Court, Montgomery County; E. M. Hughes, Judge.

Action by John M. Barrett against Claude R. Ball, to set aside an assignment of a distributive share in an estate. From a judgment in favor of defendant, plaintiff appeals. Reversed.

In September, 1898, plaintiff's minor son, Arthur Barrett, died in the state of New York; and his remains, together with his money and jewelry, in value about \$1,500, were shipped back to Montgomery county, Mo. In addition to the above property, the deceased was entitled to \$1,093 for services under a contract of employment with E. S. Gardner & Son, of Sumner county, Tenn. T. J. Powell, as public administrator of Montgomery county, took charge of the property sent to Missouri in September, 1898; and later E. S. Gardner was appointed his administrator, and took charge of the estate of the deceased in Tennessee. Under the laws of Tennessee, plaintiff inherited all of the property of the deceased minor son in that state. Under the laws of Missouri, the estate in course of administration in the hands of the public administrator was divisible into six parts, of which plaintiff, as father of the deceased, was entitled to one portion. The defendant acted as attorney for plaintiff and one of the other heirs in applying for an administrator in the state of Missouri, and in having the letters of administration by the public administrator taken out, and thereafter defendant was retained by the public administrator as attorney in the course of the administration. On September 9, 1899, plaintiff executed and delivered to defendant an instrument in the form following:

"I, John M. Barrett, of Truxton, Lincoln county, Missouri, the father of Arthur Barrett, deceased, and being a lawful heir of such estate, for value received, do hereby sell, assign, transfer and set over unto Claude R. Ball, of Montgomery City, Mo., all my right, title and interest in and to the estate of Arthur Barrett, deceased, now in the hands of Thomas J. Powell, public administrator of Montgomery county, Missouri

(who is public administrator in charge of said estate). And said Thomas J. Powell, public administrator in charge of said estate of Arthur Barrett, deceased, or his successor as such administrator, is hereby directed to pay over unto said Claude R. Ball all moneys due me as an heir to such estate, at any and all times, when a distribution of said estate is had or made, and all claims of whatever kind that I may have against said estate, I hereby for value received, assign to Claude R. Ball. Dated this 9th day of September, 1899."

At the time of the execution of this assignment the defendant paid the plaintiff therefor the sum of \$75, and later, in turn, defendant purchased the interests of other heirs of the estate of Arthur Barrett, paying for one \$75, and for others \$140 each. March 28, 1900, plaintiff executed and delivered to defendant the following additional instruments:

"Montgomery City, Mo., Mar. 28, 1900. E. S. Gardner & Son, Saundersville, Tenn., or to Ed. Gardner, Jr., Administrator of the Estate of Arthur Barrett, Deceased: Please pay to Claude R. Ball, of Montgomery City, Missouri, all moneys in your hands belonging to the estate of Arthur Barrett, deceased, due me as the father of Arthur Barrett, deceased, according to the law of descents and distributions of the state of Tennessee, whether in your hands as individuals, or whether in the hands of Edward Gardner, Jr., as administrator of said estate, and this order when countersigned by Claude R. Ball, shall be your receipt for the same. The identification of Claude R. Ball is hereby waived. Yours truly, John M. Barrett.

"State of Missouri, County of Montgomery—ss.: I hereby certify that on this 28th day of March, 1900, the above article was signed by John M. Barrett and that his signature thereto is genuine. I further certify that I am personally acquainted with John M. Barrett. In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Montgomery City, Missouri, this 28th day of March, 1900. Thomas T. Johnson, Clerk Circuit Court Montgomery County, Missouri."

"State of Missouri, County of Montgomery. John M. Barrett, being duly sworn, upon his oath says that he is the father of Arthur Barrett, deceased; that Arthur Barrett was born August 10, 1878; that he died at Sheepshead Bay, New York, on September 10, 1898; that he was killed while in the services of E. S. Gardner & Son; that his remains were shipped to me at Montgomery City, Missouri, and his remains buried in the cemetery at Montgomery City, Missouri; says further that at the time of the death of Arthur Barrett he was under the age of 21 years; that he was single and unmarried, and left no widow or children to survive him; that his parents and living brothers and sisters are as follows: John M. Barrett, father; Martha Jane

Barrett, mother; Bell Woolwine, sister; D. Boone Barrett, brother; Elmer Barrett, brother; Bailey Barrett, brother; and Maude Barrett, sister; Helen Pennington, an infant girl named — Grupp, daughters of Bettie Grupp, deceased, who was a sister of Arthur Barrett, deceased. The said Helen Pennington and infant girl baby, name — Grupp, are nieces of Arthur Barrett, deceased; that all of the above named are of lawful age, except Maude Barrett, Helen Pennington, and the little Grupp girl, who are minors; says further that the said Arthur Barrett was never married. John M. Barrett.

"Subscribed and sworn to before me this 28th day of March, 1900. Thos. T. Johnson, Clerk of the Circuit Court."

"State of Missouri, County of Montgomery. George W. Boddie, Clerk and Master of the Chancery Court, Sumner County, Tenn.—Dear Sir: I am the father of Arthur Barrett, deceased, who died in September, 1898, at Sheephead Bay, New York, while in the service of E. S. Gardner & Son of Saundersville, Tenn. You will please pay to Claude R. Ball, of Montgomery City, Missouri, all the money in your hands belonging to me as the father and heir of Arthur Barrett, deceased, according to the laws of descents and distributions of the state of Tennessee, and this when countersigned by the said Claude R. Ball, shall be your receipt. Dated at Montgomery City, Missouri, this 28th day of March, 1900. John M. Barrett.

"I hereby certify that the above instrument of writing was signed by John M. Barrett, that the same was signed in my presence, and that his signature thereto is genuine. I further certify that said John M. Barrett is the father of Arthur Barrett, deceased, who died as stated in the above manner. In witness whereof, I have hereunto signed my name and affixed my official seal. Done at my office in Montgomery City, Missouri, this 28th day of March, 1900. Thomas T. Johnson, Clerk Circuit Court, Montgomery County, Missouri. [Seal.]"

"State of Missouri, County of Montgomery—ss.: I, John M. Barrett, father of Arthur Barrett, deceased, formerly a resident of Truxton, Lincoln county, Missouri, but now a resident of Warrenton, Warren county, Missouri, for value received do hereby sell, assign, transfer, and set over unto Claude R. Ball of Montgomery City, Missouri, all my interest as the father and heir of Arthur Barrett, deceased, and do by these presents sell, assign, transfer and set over unto said Claude R. Ball all of my interest in and to the estate of my deceased son, Arthur Barrett, there being an administration on said estate in the probate court of Montgomery, Montgomery county, Missouri, at Montgomery City, in said county, of which Thomas J. Powell is the administrator of and in charge of said estate, also there is an administration on said Arthur Barrett's estate in the county court or chancery court of Sumner county,

Tennessee, Ed. Gardner, Jr., being the administrator of and in charge of said estate, in the state of Tennessee. Now by these presents I sell, assign, transfer and set over unto said Claude R. Ball all my interest in the estate of said Arthur Barrett, both in Missouri and Tennessee, and the administrator of said estate in Missouri, and the administrator of said estate in Tennessee, are hereby authorized and directed to pay to said Claude R. Ball all my interest as father and heir to the said estate of Arthur Barrett, deceased. The administrator of Montgomery county, Missouri, is directed to pay my interest in said estate to Claude R. Ball, my interest to be determined according to the laws of descents and distributions of Missouri, and the administrator of said estate pending in the court of Sumner county, Tennessee, is hereby authorized and directed to pay to Claude R. Ball all monies due me from the estate of Arthur Barrett, according to the laws of descents and distributions of the state of Tennessee. In witness whereof, I have hereunto set my hand at Montgomery City, Missouri, this 28th day of March, 1900. John M. Barrett.

"State of Missouri, County of Montgomery—ss.: Be it remembered that on the 28th day of March, 1900, before me, a clerk of the circuit court of Montgomery County, Missouri, personally came John M. Barrett, who executed the foregoing instrument of writing in my presence and acknowledged the same to be his free act and deed for the uses and purposes therein mentioned. I further certify that I am personally acquainted with John M. Barrett and that his signature above is genuine. In witness whereof, I have hereunto set my hand and affixed my official seal. Done at my office in Montgomery City, Missouri, on the day and year first above mentioned. Thos. T. Johnson, Clerk of the Circuit Court."

Upon the receipt of these papers thus executed, the defendant proceeded to Gallatin, Tenn., and a decree was entered in the chancery court directing the payment to defendant, as attorney of plaintiff, the sum of \$573.80, after the collection of which defendant returned to Montgomery county. Defendant later collected the further sum of \$86.20, again visiting Gallatin for such purpose.

This action was brought to the May term, 1902, of the circuit court of Montgomery county. The petition originally contained two counts, but a demurrer was sustained to the first count. The second count is as follows: "Plaintiff, for further and separate cause of action against the defendant, states that plaintiff's son Arthur Barrett died intestate about October, 1898, owning a large amount of personal property in the county of Sumner, in the state of Tennessee, and the said property was duly administered upon in said county and state, and that the proceeds thereof, after deducting all cost

of administration, amounted to the net sum of \$626.40, and that, under the laws of descent of the state of Tennessee, plaintiff was and is the sole heir of said Arthur Barrett, deceased, as to all property owned by said Arthur Barrett, deceased, at the time of his death, in said county of Sumner and state of Tennessee. Plaintiff further states that about April, 1900, defendant agreed to go to Sumner county, Tennessee, as attorney for plaintiff, and collect the money due plaintiff from said estate of Arthur Barrett, deceased, in said county and state, and that defendant requested plaintiff to give him written authority to collect said money. Plaintiff states that defendant thereupon prepared two written instruments, which he represented to plaintiff were for the purpose of authorizing defendant to collect said money for plaintiff; that defendant read over one of said written instruments to plaintiff, which said instrument contained authority to defendant to collect said money for plaintiff, and nothing more, and that defendant represented to plaintiff that said other written instrument was a copy of the one so read over; that thereupon plaintiff, relying upon said statement of defendant, signed and acknowledged both of said written instruments, leaving them in the possession of defendant, and that in truth and in fact the one of said written instruments that was not read over to him purported to be an assignment, for value received, of all of plaintiff's right, title, and interest in the estate of Arthur Barrett, deceased, wherever located, to defendant; and that plaintiff did not discover that said written instrument purported to be an assignment until November, 1901. Plaintiff further states that said alleged assignment was based on no consideration whatever. Plaintiff further states that defendant thereafter proceeded to collect all the interest of plaintiff in the estate of Arthur Barrett, deceased, in the county of Sumner and state of Tennessee, amounting to the sum of \$626.40, and that defendant has failed and refused, and still refuses, to pay same over to plaintiff, but claims the ownership thereof under said alleged assignment. Plaintiff further states that said written instrument purporting to be an assignment is now in the possession of defendant, and that defendant has refused to permit plaintiff to take a copy of same, and that plaintiff is therefore unable to set the same out in full in this petition. Plaintiff further states that defendant is an attorney at law, and that immediately after the death of Arthur Barrett, deceased, plaintiff consulted defendant with reference to instituting an administration on said Arthur Barrett's estate in Montgomery county, Missouri, and that, at the instance of plaintiff, defendant prepared and filed in the probate court the necessary papers to institute said administration, and that thereafter defendant acted in the capacity of attorney for the public administrator of Montgomery county,

Missouri, in the matter of said estate, and was acting in that capacity at the time plaintiff signed said alleged assignment, and that defendant was familiar with the condition and value of said estate, both in Montgomery county, Missouri, and Sumner county, Tennessee. Plaintiff further states that, at the time said alleged assignment was signed by plaintiff, plaintiff was, on account of his age, physical infirmities, and lack of knowledge of business affairs, incapable of properly attending to complicated matters of business, and that, having confidence in defendant, he relied upon the advice and statement of defendant in signing the two written instruments aforesaid. Plaintiff further states that the rules of common law afford him no adequate relief in the premises. Wherefore plaintiff prays the court that said written instrument purporting to be an assignment be ordered delivered up and canceled, and for naught held, and also for a judgment against the defendant for said sum of \$626.40 collected by defendant in the state of Tennessee, aforesaid, with six per cent. interest from the date of the filing of this petition, and for such other orders, judgments, and decrees as may to the court appear just and proper."

Defendant made answer to the second count, first, by way of general denial; and, next, by the specific allegation that he bought, without reservation, the entire interest of plaintiff in and to the estate of Arthur Barrett, deceased, wherever situate. A trial was had before the court, which rendered judgment for defendant, and plaintiff has appealed to this court.

The record is made up chiefly of the testimony of the opposing parties, including their oral testimony at the trial and their depositions prior to the hearing. The plaintiff testified and deposed that he was born in April, 1834; that at the time of the death of his son the estate of the latter consisted of the jewelry and money sent with his body to Montgomery City, and the amount of wages accrued in the hands of Gardner & Son in Tennessee. In whose employ the deceased was when he met his death; that he had employed defendant to collect the money coming to him in Tennessee, having talked to him about it, and also with Powell, the administrator; and that Powell had said that he did not believe he could get it. Plaintiff further narrated: That in March, 1902, he met defendant at the depot at Warrenton, where witness was then residing, shook hands with him, and, in response to an invitation to take a walk uptown, accompanied him to an office, where defendant began preparing upon a typewriter something in the form of a sale by witness, who then protested he was selling nothing, and defendant then destroyed what he had written, and asked plaintiff to accompany him to Montgomery City, upon which he replied he would have to go to the hotel and get some money, and defendant answered that he would get his ticket; and thereupon he ac-

accompanied defendant to his office, at Montgomery City, where the papers were drawn, part of which were read over to plaintiff, and then they proceeded to the office of the circuit clerk, where the plaintiff acknowledged his signatures. That the defendant read but a single paper, but plaintiff, thinking it was all right, signed two papers, and defendant said he would collect the money for him; that he would send him a draft when he got back after its collection. But plaintiff answered that he did not want a draft, but would go up to Pike county pretty soon; and later, hearing nothing from him, he returned and asked defendant about the affair, and he said that he had collected only a part, and to wait until he could collect the balance; that he thought he could collect the balance pretty soon; and that he would send him a draft. But again plaintiff told him that he should not send a draft; that he would return for the money. That in the meantime he had moved from Warrenton to Truxton, and that when he again saw defendant, in the fall of 1901, at his office, and told him he had come to get the money, defendant replied that he did not owe him anything; that he had bought all—to which defendant answered that he had bought what was in the hands of Powell, in Montgomery City, only; and defendant ordered him out of the office, and this suit followed. Plaintiff further stated: That when defendant met him at Warrenton, he told him he could get the money for him. That at that time he did not know or remember that the administration was pending on his son's estate in Tennessee. That at the time he sold to defendant he needed money, as he wanted to go to St. Louis to have his eyes treated. That he never tried to sell his interest in the estate to Powell, but had applied to Powell for a portion of the money in his hands, and Powell had refused to advance him any, but referred him to defendant to purchase his interest, and he thereupon went to defendant for that purpose. That at the time he was negotiating with defendant to sell his interest in the estate of his son, he did not understand he was selling all his interest, nor did he ever tell any one that he had. That he did not then think the Tennessee money would be paid into the hands of Powell, or he would not have taken \$75 for his share in the estate, although he then needed money badly. That he saw defendant twice respecting the sale of his interest to him in September, before he executed the first assignment, for which he received \$75, but that it was not at his suggestion that the consideration was omitted. That at the time he employed the defendant to go to Tennessee to collect the money, he had made no agreement for the amount he was to pay him. The defendant had said he would go for whatever was right, and that was all there was about it. That the defendant asked no money for his expenses to Tennessee. That he knew at that time there was

considerable money in Tennessee, but not the exact amount. That he then supposed the money was still in Gardner's hands. That at the time he acknowledged the papers before the circuit clerk, he thought they were papers authorizing the defendant to collect the money for witness. That in signing the papers at that time he supposed that defendant knew his business. That in May following he told defendant he required some money, and defendant replied that he had only collected part of the money, and that he could not let him have any of it until he got it all, and finally handed defendant \$150. That this was about two months—perhaps three months—after the 28th of March, 1900. That at the time he sold his share in the estate in Montgomery county, he thought it would be about \$150. At the time he signed the papers in March, no money or other consideration was paid to him, but that he thought defendant was honest, and would do right to him as soon as he got the money.

The defendant deposed: That he had known John M. Barrett all his life. That soon after the burial of Arthur Barrett in Montgomery county, in September, 1898, plaintiff and his son Boone consulted him respecting the settlement of the estate of the deceased. That he advised Boone and his father regarding the most economical way of disposing of the estate, and had suggested an administrator, and finally prepared an affidavit for plaintiff and his son, which was signed either before him or before an officer of the probate court, and filed in the probate court, and Powell took charge of the estate. At this time plaintiff stated that plaintiff's wife had received a draft from New York for \$1,000, which she would not give up, and that she had given her son Bailey \$500, and had deposited \$500 in the Union Savings Bank. The administrator, upon taking charge of the estate, notified this bank not to pay the money to Mrs. Barrett, claiming it as part of the estate of the deceased; and later the defendant obtained a check from Mrs. Barrett, and collected it from the bank. That he had brought suit for the administrator against Mrs. Barrett and Bailey for the money she had given to Bailey, and for \$430 worth of jewelry received, and recovered judgment for \$930 against them; defendant representing Thomas J. Powell, administrator, in such action. That in September, 1899, plaintiff approached him on several occasions to purchase his interest in his son's estate, stating that, if defendant would not buy, some one else would, and he finally bought his interest at \$75; and at this time plaintiff was in normal condition, and knew the difficulties connected with the estate. That he had tried to sell it to Powell, who refused because he was administrator, and had referred him to witness. That he told defendant it might be to his interest to hold his share and not sell it. That he told plain-

tiff that he knew the condition of the estate in Tennessee pretty well, as he had gathered it from Powell, and the estate was mixed up down there, and they could not tell heads or tails where it was going, nor how much would be gotten out of it; and, when defendant finally bought, defendant said, "I won't give you a dollar more than \$75 for your interest in the estate of Arthur Barrett, deceased, both in Missouri and Tennessee—the whole estate." That at the time he had said to defendant that, if the assignment was not full enough, he could expect a more perfect assignment. That Powell was administrator, and had corresponded with the attorney for Gardner & Son, with which correspondence both he and plaintiff were then familiar, and that Powell had received a letter from Gardner stating that plaintiff was entitled to the fund in Tennessee, and that Barrett had so informed him. That the letters the administrator had received left the impression upon both the administrator and witness that it would be but a short time until Powell would receive the money owed by the Gardners, until February, 1900, when Powell received a letter from them stating that the matter had been closed by payment of the money to the clerk and master in chancery, until which time the impression prevailed that the money would be paid into the hands of Powell. Up to the spring of 1900 there was no question, and up to the receipt of Gardner's last letter there had been no question, but that the money would be paid over to Powell, as administrator, and that all those interested in the estate would participate in its distribution. That he did not find out for certain until he went to Gallatin, Tenn., that the money would not be paid into the hands of Powell as administrator. That Powell had become dissatisfied with the way in which affairs were progressing in Tennessee, and that witness went to Warrenton to see plaintiff, and informed him he was going to Tennessee, and told him that Powell and himself had talked the matter over, and, if he could not get the money for Powell, he would get it for himself, and that he had come to plaintiff to procure a perfect assignment or bill of sale, so that there could be no question, and that he wanted an order on G. W. Boddie, an order on E. S. Gardner & Son, and an order on E. S. Gardner, Jr., as administrator, so that there would be no question of his right to collect the money; adding that, if he succeeded in collecting all the money in the hands of the Gardners, he would make a present of \$50 or \$60 to plaintiff, who replied: "All right. Whatever you want to give me will be accepted. It is yours, and you bought it." That they then proceeded to Peers' office to draw up the necessary papers, but on arrival they found a Smith Premier typewriter machine, which defendant could not operate; and, finding further that they would not have time, he

so informed Barrett, and destroyed what he had written, without reading it to Barrett, and asked him to accompany him to Montgomery City, which he consented to do if his expenses were paid. That when they arrived at Montgomery City they went to defendant's office, and the assignment and other papers were drawn and signed in duplicate. That the information in the affidavit was obtained from defendant. The papers were all dated March 28, 1900, and read to plaintiff; and the assignment was especially read over and explained to him by defendant, and he fully understood it. Plaintiff understood every paper signed, and they then went down and acknowledged them, and the circuit clerk asked plaintiff if the signatures were his, and if he was acquainted with the contents, or something to that effect, and Barrett replied that he understood. That the reason for obtaining duplicates was that he did not know what Gardner & Son, or E. S. Gardner, Jr., also, would want, and that there was money held by Gardner & Son, or E. S. Gardner, Jr.—something over \$200—and the assignment was fixed so he could use it with Boddie, the clerk, to get what money was in his hands, if any, and use the other with E. S. Gardner, Jr. That shortly before he went to Gallatin, Powell and himself had visited the law library at St. Louis, examined the statutes of Tennessee, and discovered that in Tennessee, unlike Missouri, the father inherited, and he obtained a perfected assignment, so that his own interests would be absolutely protected, and all other papers he took, so that he would have no trouble in collecting the estate if they refused to pay it to Powell as administrator. That he took all these papers when he went to Gallatin on his first trip, as well as written authority from Powell. That he went to Gallatin representing Powell, as administrator of Arthur Barrett's estate, and on his own behalf as well. That he occupied the position of owner and attorney. That the relation of attorney and client did not exist between plaintiff and himself, and had never existed, except in so far as to draw up the original application for an administrator was concerned. That Powell advanced \$40 for this trip, and upon his arrival in Tennessee he presented the authority of Powell to the attorney at Gallatin, with whom they had corresponded, and employed to assist in the matter; and this attorney (Bell by name) took defendant over and presented him to Dismukes, attorney of the Gardners, who, in turn, introduced him to the clerk and master in chancery, Boddie. That he showed his authority, and said he was there to get the money for Powell, as administrator, if it could be so obtained, and, if not, he would take it as his own; showing the letter of authority and assignment. That he showed the different orders and assignments to the attorney of the Gardners. That the court was not in session, and finally,

after consultation between the parties named, it was suggested that a decree be prepared reciting that the costs of the court and administrator's expenses should first be paid, and the balance turned over to defendant. That he was advised that the statutes of Tennessee did not recognize foreign administrators, and the estate could not be transferred to the administrator in Missouri. The costs and expenses were computed, and a decree drawn and put on record. That he received from the master in chancery \$535.20, and paid his attorney \$25; collecting the money as the assignee of plaintiff. That he next saw plaintiff after his return on May 2d. That he returned April 3d. That when he saw plaintiff, about the 1st of May, he had no conversation with him respecting his trip to Tennessee, but was requested to loan plaintiff \$5. That he told plaintiff he did not have that much, but gave him \$3, and plaintiff then asked what success he had had in Tennessee; and he said they had kept \$300 which they ought not to have kept, and that he would have to make a fight. That he made no demand then for any money collected in Tennessee. That he saw him once or twice after that on the street, and spoke to him casually. That he never made any request or demand until about October or September, when he came into the office in an intoxicated condition, and asked how much of the money received in Tennessee defendant was going to give him, and he replied that he did not owe him a cent, and plaintiff answered that he knew that, but that he ought to give him something, and defendant further answered that he was not able to give him any money, whereupon plaintiff became angry; and that he ordered him out of the office, and no other demand was ever made on him for the Tennessee money. On cross-examination, defendant said that in a deposition he had testified that, at the time he took the assignment from plaintiff, he knew the father inherited the property of the deceased son in the state of Tennessee, and that plaintiff also knew this at the time, and so stated; that plaintiff made no objection at any time to the money coming into Powell's hands, and, after he bought his interest, made no objection to its passing into his hands; that in his deposition he said that at the time he bought Barrett's interest he knew he was the only one who would participate in the Tennessee estate, and was entitled to inherit all in the hands of the administrator in Tennessee; that it occurred to him to obtain the assignment in March, after he had examined the statutes of Tennessee, and found that the statute was more emphatic than he thought as to the right of plaintiff to the whole estate; that the statute was more emphatic than the information obtained through the letter from Gardner to Powell of September, 1898; that at the time he bought plaintiff's interest, in September,

1899, he had been informed of the receipt of this letter, and knew its contents, and that plaintiff then had the same information; that he did not then know that plaintiff considered that the money which had accrued under the contract of his minor son would come to him by law, and did not know that it formed part of the boy's estate; that plaintiff had said he had no objection, and made no objection to this money going into the estate of his son in this state; that the suggestion to plaintiff when he took his assignment in September, 1899, that he might later want a more complete or full assignment, arose from the knowledge of the estate in Tennessee; that the estate was supposed to come to Missouri; that that seemed to be the advice of the lawyer and Powell and of Gardner, but that, in case of any trouble, he wanted a perfect assignment; that he did not draw a perfect instrument in the first place because plaintiff wanted to return on the afternoon train, and it took some time to draw up the assignment; that he thought the assignment of September, 1899, was complete and full, but that other people who had to be consulted might not consider such assignment a full assignment.

The record of the decree of the chancery court of Sumner county, Tenn., dated March 31, 1901, recited that the administrator had in his hands of the estate of Arthur Barrett the sum of \$1,093, from which deducting expense of administration, \$305.50, left a balance due the estate of \$787.50, of which the administrator had paid into the chancery court \$573.80, and that, it further appearing to the satisfaction of the court that Claude R. Ball, an attorney, represented the Missouri administrator, Thomas J. Powell, and also John M. Barrett, father of Arthur Barrett, deceased, and that said Ball, as attorney for such parties, had filed with the clerk and master in chancery of the court his written authority and power to receive and receipt for the fund then on hand, and that John M. Barrett, being the legal heir of his son, was entitled to such fund, it was ordered and decreed by the court that the clerk and master in chancery pay over to Claude R. Ball, as attorney for John M. Barrett, the fund due the estate, taking his receipt as attorney of John M. Barrett for same, said Ball, as attorney, also to execute to the clerk and master his receipt for the amount; but said receipt thus executed should not be taken in full settlement due said Ball as attorney for John M. Barrett, for the reason there appeared from the record of the county court to have been a mistake as to the amount due from E. S. Gardner, Jr., the administrator, to the estate of Arthur Barrett, deceased (the court being of the opinion that said administrator had failed to pay in all that was due by him), and that the decree was not intended to adjudicate the matter, but the amount of this discrepancy was held in abeyance for further adjudication, and, whatever such balance might

be ascertained to be due by the administrator, he was authorized and directed to pay into court, take a receipt of the clerk and master thereof, and the clerk and master, upon receipt of such fund, should transmit same to Claude R. Ball, at Montgomery City, and take his receipt for the same. Defendant further testified that he was present when the decree was drawn up and entered in the court, but the decree was written up by Dismukes; that when he went to Tennessee, in March, 1901, he receipted for \$555.20, paying Bell \$25; that he did not know whether Bell receipted to him therefor as attorney in the case of Ball v. Barrett, but the receipt would speak for itself; that Bell did not receipt to him as assignee of John M. Barrett; that he did not ask him to; that he cared nothing about it; that he accepted the \$555.20 after the decree ordered it paid over to him as attorney for John M. Barrett; that he returned to Tennessee in March, 1901, and collected \$98.20 from the administrator of Arthur Barrett, making a total in all of \$785.40, for which he had given \$75; that at the time he bought of Barrett (September, 1899) he had no reason to believe he would collect more than he had collected, or that there would be more coming to Barrett from Tennessee; that estimating the amount in Tennessee at \$1,093, and allowing \$200 expenses, the heirs would be entitled to \$300 and odd apiece, upon the theory that the Tennessee property should come in and be divided equally between the heirs in Missouri; that at the time he bought from Barrett he knew that the law, according to Mr. Gardner, was that Barrett alone would inherit in Tennessee, but everything then tended to the turning over of the money to Powell; that at the time of the first assignment he knew the amount in the hands of the administrator, Powell, and that he and Powell had computed the amount in settling the judgment against Mrs. Barrett and Bailey Barrett before the assignment in September, 1899; that although he knew that the law obtained that plaintiff would inherit all the money in Tennessee, and that an administrator had been therein appointed, he was under the impression that it was going to Powell's hands, to be divided between the heirs equally, because no objection was being made by anybody; that after collecting \$555.20 he remained in Gallatin two days; that he had protested to Dismukes that he did not represent Barrett as attorney, but that he represented Powell, but Dismukes said the decree was drawn in that form, and it did not amount to anything, and that his authority was on file, and he had his assignment, and that it did not make any difference.

A. W. Lafferty, for appellant. Basil Rosenberger, for respondent.

REYBURN, J. (after stating the facts). From the record, the history of the transac-

tion herein sought to be annulled may be thus outlined: In September, 1898, having been consulted by plaintiff regarding the estate of his son Arthur Barrett, then lately deceased, the defendant prepared an affidavit for signature of plaintiff and his son, which was filed in the probate court, and the public administrator directed to take charge of the estate; defendant being employed by Powell, and conducting one or several suits on his behalf, as such administrator, for the recovery of assets of the estate. In September, 1899, for the sum of \$75, plaintiff executed an assignment to defendant, by virtue of which defendant, as assignee, had collected \$136 from Powell as the distributive share of plaintiff in the estate in Missouri. In March, 1900, having first ascertained by telephone communication that plaintiff was in Warrenton, defendant met plaintiff there, and at his own expense took him to his office, at Montgomery City, where the second or full assignment, with the accompanying orders, were drawn by defendant, signed by plaintiff, and acknowledged before, and certified to by, the clerk of the circuit court. The latter states that he knew nothing of the contents of the instruments, and they were not read over to plaintiff in his presence, but he asked plaintiff the usual question—whether he had signed them—and he answered in the affirmative. Armed with the authority contained in these instruments, as well as under power of attorney from Powell as administrator, defendant proceeded to Tennessee, and after a delay of two days a decree was prepared by the local attorneys—one acting in the interest of the Tennessee administrator, and one under employment by defendant and Powell—by the terms of which \$573.80 was ordered to be paid to defendant as attorney of John M. Barrett as the legal heir of his son. This decree was entered of record in the chancery court of Sumner county, and the sum therein named was by the clerk and master in chancery paid to, and receipted for by, defendant. At the time of the first assignment, by correspondence, defendant knew that under the laws of Tennessee the father inherited the estate of the son under the conditions herein presented. Plaintiff disclaimed any knowledge then or later of administration in Tennessee, but believed he was entitled by law to the sum of money representing the unpaid earnings of his minor son. There is no dispute respecting the affair thus far, except that plaintiff was charged by defendant with knowledge of the pendency of administration in Tennessee, and acquiescence in the payment, if practicable, of all assets to the Missouri administrator, for distribution under the laws of Missouri, which would have resulted in great loss to plaintiff.

In determining whether a court of equity should annul a transaction such as is here presented, many elements enter into consideration, some of which alone would warrant equitable interposition, but which, united and

concurring, will present together such a situation as to make it the duty of the court to afford relief. Mere inadequacy of price is not per se a ground recognized in equity as sufficient for avoiding a sale, for if parties are not, from attending circumstances, under personal disability, they are free to dispose of their property upon such terms as they may elect, and whether such transactions are prudent or profitable are questions not to be decided by courts of justice, but by the parties directly concerned. But if the inadequacy of consideration be gross, and this feature combines with the further incidents of old age, confidential relations, or great mental inequality between the respective parties, a court of equity should not hesitate to interfere. The proof shows that the plaintiff is a man approaching 70 years of age, impaired in sight, in feeble physical condition, shiftless, ignorant, and irregular in his habits, while defendant is a member of a learned profession, and had acquired the familiarity he possessed with the condition of the assets of Arthur Barrett's estate as the direct result of the professional conference had with him by plaintiff, and the consequent administration in Missouri. The rule is well settled that there is no class of transactions respecting which courts of equity are more jealous or scan more critically than dealings between clients and attorneys, and, where an attorney bargains with a client to his own advantage, it devolves upon the attorney to show that he fully and faithfully discharged his duties, without misrepresentation or concealment of any material fact, and the client was fully informed of the extent and character of his rights and interests in the subject-matter of the transaction and the effect of the contract, and so situated as to deal at arm's length with his counsel. That this doctrine is so well established as to require no authority in support would doubtless be conceded by defendant, but its application herein is questioned, as the existence of the relations of attorney and client between the parties was alleged to have ceased prior to the date of the transaction. But it has been well said that, where a relation which presupposes an ascendant or controlling influence by one party on the mind of the other has existed, the influence acquired by such relation may extend more or less after the period of its termination, and when such is the case the transaction will be scrutinized with the same jealousy as if the relation had continued. *Mason v. Ring*, 2 Abb. Prac. (N. S.) 322; *Id.*, 3 App. Dec. 210. In the application of these well-recognized principles to the case herein presented, a court of equity should not turn a deaf ear to such an appeal for relief. "It would be doing violence to the name and principles upon which courts of equity have been builded into our system of jurisprudence to refuse the plaintiff the relief he asks for in such case." *Gottschalk v. Kircher*, 109 Mo. 186, 17 S. W. 905.

The cause will be remanded, with directions to the lower court to order an accounting by defendant, and after allowing defendant credit for the reasonable and proper expenses and costs of the journeys to Tennessee, and for his professional services rendered in collecting the funds in Tennessee, that a judgment be rendered against defendant for the balance of the total amount collected in Tennessee, with interest from the date of filing the petition herein.

BLAND, P. J., and GOODE, J., concur.

ZUENDT v. DOERNER.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

NOTES—TRANSFER—TITLE BY ESTOPPEL—CONSIDERATION—SUFFICIENCY—SURRENDER OF OLD NOTE—SURETYSHIP—CONSIDERATION—SURRENDER OF COLLATERAL.

1. Where the maker of a note induced defendant, into whose hands the note had come, without any legal devolution of title, on the death of the payee, to surrender it, and plaintiff induced her to surrender collateral pledged to secure its payment, in reliance on a new note executed by the maker and secured by plaintiff, plaintiff was estopped to deny defendant's title to the surrendered note.

2. The surrender and cancellation of an old note is sufficient consideration for the execution of a new one given in lieu thereof.

3. The surrender of stock pledged to secure the payment of a note is sufficient consideration to support the signature of a surety.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Emilie Zuendt against Eliza Doerner. From a judgment for defendant, plaintiff appeals. Affirmed.

The suit is to recover \$350, plaintiff's part of rent on certain premises in the city of St. Louis, which the defendant collected and withheld from plaintiff. The answer set up a counterclaim, to wit, a note for \$2,000, dated July 8, 1895, payable to defendant, and executed by plaintiff and her husband, Adelbert Zuendt. The reply admitted the execution of the note, alleged that it was given without consideration, and set out circumstantially the facts upon which plaintiff relied to show that the note was without consideration. These facts will be noticed later on. The reply was a general denial.

The issues were submitted to the court, sitting as a jury. On the trial, defendant conceded plaintiff's claim, and, in support of her counterclaim, offered and read in evidence the following promissory note and writing, showing the pledge of 20 shares of shoe stock as collateral security for the payment of the note:

"\$2,000. Jefferson City, Mo., July 8, 1895. Three years after date we promise to pay to the order of Mrs. Eliza Doerner of St. Louis, Mo., two thousand dollars, for value received, negotiable and payable, without de-

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. § 852.

falcation or discount, with interest at the rate of six per cent. per annum from date. Adelbert Zuendt. Emilie Zuendt.

"Having executed our note as above and being desirous of securing the same, we hereby pledge as collateral security twenty shares of the capital stock of the Standard Shoe Company, a corporation doing business in Jefferson City, Mo., certificate No. 66, par value \$2,000." (Then follows authority to sell the collateral in case default be made in the payment of the note.)

Defendant then rested.

In rebuttal, and to sustain her plea of want of consideration, plaintiff testified that she was the daughter of the defendant, and wife of Adelbert Zuendt; that she signed the note about one year after it was given by her husband, and knew that 20 shares of shoe stock had been pledged by her husband to secure its payment; that her husband gave the note in place of another note—and produced a note for \$2,100, dated March 4, 1892, signed by her husband, and made payable to Louise Seitz. She testified that Louise Seitz was her grandmother, and the mother of defendant; that her husband borrowed \$2,100 of her grandmother, and gave the note therefor; that Mrs. Seitz died at plaintiff's home, in Jefferson City, in the year 1893; that defendant came up from St. Louis to her house before her grandmother Mrs. Seitz died; that after the death of her grandmother the note was in possession of the defendant (the evidence does not show how she got possession of it); and that she told her husband the defendant had the note, and he would probably have to pay it to her.

The evidence is that Mrs. Seitz died intestate, leaving two heirs, the defendant and Charles Seitz; that letters of administration on her estate were granted to Charles Seitz; that the \$2,100 note never came into his hands as such administrator; that final settlement of the estate was made by Charles Seitz on the 29th day of June, 1895. On the back of the \$2,100 note were indorsed these words in the handwriting of Adelbert Zuendt, to wit: "Paid by another note for \$2,000 and \$100 draft on St. Louis. Sign here" (in blue pencil). This indorsement was signed by the defendant. The evidence shows that in June, 1896, the plaintiff was in the city of St. Louis, staying with her sister Mrs. Alvina Weber, and while there received from her husband the following letter: "My dear Emilie: * * * I am going to buy out Mr. Knaupp to-night. He is discouraged, does not care to bother with the store any more. He sells it to me at 25 per cent. below cost price on shoes and furnishing goods, 30 per cent. off on hats and caps, 30 per cent. on fixtures. He takes \$5,000 in S. S. Company stock, balance cash furnished by C. Scovern. He takes part of it. I wish you would tell Ma to let me have that stock she has as security. * * * Tell her I will secure her in another way just to let me have it

for a short time. My note is just as good without it especially for this debt. I must have the stock, so send it up at once, cancel my name on back of it before you mail it. * * * [Signed] A. Zuendt." Plaintiff testified that after receiving the letter from her husband she saw her mother, told her of its contents, and got the 20 shares of stock and sent them to her husband. Mrs. Weber testified, in substance, as follows: "After getting the letter Mrs. Zuendt asked Mrs. Doerner for the shares of stock. My mother refused to give them to her unless she had something else to secure her on the note. She consented to turn the stock over to her if she would sign the note. Mother went to the safe deposit and got the note and shares of stock, and I went with my sister to my mother's house. Mrs. Zuendt signed the note, and the stock was turned over to her. She sent the stock to her husband, and my mother got the note." In respect to the transaction, defendant testified as follows: That she received the note of July 8, 1895, and the collateral. The note was then signed by Adelbert Zuendt. About a year later, her daughter, the plaintiff, Emilie Zuendt, asked her for the stock, and she demanded her signature to the note. That at her house, No. 2950 Dickson street, in the city of St. Louis, in her presence and in that of her daughter Alvina Weber, Mrs. Zuendt signed the note, and she (Mrs. Doerner) thereupon delivered to her the shares of stock.

The court gave the following instructions for defendant:

"Under the pleadings and evidence in the case at bar, an inquiry into the title or ownership of the note given by Adelbert Zuendt to Louise Seitz is not admissible."

"If the court finds from the evidence that the defendant had possession of the note given by Adelbert Zuendt to Louise Seitz, and surrendered same to him upon the execution and delivery to her of the note in suit, then the surrender of the earlier note was a valuable consideration for the execution of the note in suit."

"Although the court may find that the note recited in defendant's counterclaim was executed and delivered by plaintiff's husband in July, 1895, and that plaintiff did not sign it until a year or more afterwards, yet if the court finds from the evidence that at plaintiff's request, and in consideration of her signature to the note, defendant surrendered the shares of stock pledged as collateral security for the payment of the note, then the execution of the note by the plaintiff is founded upon a valuable consideration."

The court refused instructions asked by the plaintiff to the effect that, if the facts were as herein set forth, defendant could not recover on her counterclaim. The finding and judgment were for the defendant on the counterclaim for the balance due on the

note, after deducting the \$350 due plaintiff for rent. Plaintiff appealed.

R. P. & C. B. Williams, for appellant.
Kehr & Tittmann, for respondent.

BLAND, P. J. (after stating the facts). 1. The evidence in the record is insufficient to show that defendant acquired title to the note of March 4, 1892, from her mother, Mrs. Seitz, the payee; and if the administrator of the estate of Mrs. Seitz was a party to this suit, contesting the right of defendant to the note of July 8, 1895, given in place of the note of March 4, 1892, quite a different question would be presented for decision from the one that is before us. Charles Seitz, the son of Louise Seitz, administered on the estate of his mother, and had closed the administration by a final settlement before this suit was commenced. It cannot be contended that he did not know of the existence of the note of March 4, 1892, during the time he was administering on the estate of his mother, and did not know that his sister, the defendant, had possession of it, claiming it as her property. The close kinship of all the parties, and their intimate relations with each other, forbid any such inference. The evidence shows that Adelbert Zuendt, the maker of the note, was told by his wife that defendant had the note, and that he would, in all probability, have to pay it to her. With full knowledge of all the facts, and after final settlement of the estate of Mrs. Seitz had been made, he took up the note of March 4, 1892, by giving the one sued on, and by the payment of \$100—the difference in the principals of the two notes—to defendant. From these facts it is fairly inferable that it was understood among all the parties in interest that the note of March 4, 1892, should be the property of the defendant, as a part or whole of her distributive share of the estate of her mother. If so, then she was at the least the equitable owner of the note. *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479, which, in effect, overrules *Adey v. Adey*, 58 Mo. App. 408, relied on by plaintiff. But whether this be true or not, the plaintiff and her husband by their conduct and dealings with defendant have recognized her as the owner of the note, and induced her to part with it and the 20 shares of shoe stock pledged as collateral security for its payment, and to take in their place the note sued on by the counterclaim. Plaintiff, by such conduct on her part, and the maker of the note, Adelbert Zuendt, are estopped to deny defendant's title to the note. *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424; *State ex rel. v. Branch*, 151 Mo. 622, 52 S. W. 390; *Pitman v. Mining Co.*, 78 Mo. App. 438.

2. In respect to the plea of the want of consideration, the evidence is all one way—that the note of March 4, 1892, was surrendered up and canceled in consideration of the new note and Zuendt's check or draft

for \$100 to make up the difference between the two. The surrender and cancellation of the old note was a good and sufficient consideration for the giving of the new one in lieu thereof. *Meyers v. Van Wagoner*, 56 Mo. 115; *Slemans & Halske Electric Co. v. Ten Broek* (Mo. App.) 70 S. W. 1092. In *Wilton v. Eaton*, 127 Mass. 174, the defendant, Annie Eaton, administered on her husband's estate in 1871. On July 9, 1873, she filed her final account as administratrix, which was allowed by the probate court, and by which it appeared that the estate was solvent, and that after the payment of debts she had paid the next of kin their distributive shares thereof. No new assets afterwards came into her hands. Some time in 1875 the plaintiff produced a promissory note for \$1,000, dated January, 1867, payable on demand, and signed by the intestate (Mrs. Eaton's husband), and given by him to plaintiff for money loaned, and requested the defendant to pay the same. There were various indorsements of interest on the back of the note, and the following in the handwriting of plaintiff: "Received payment in full upon the within." This indorsement was made by the plaintiff at the time he gave Eaton's note to the defendant, and took the note in suit in exchange therefor. The only consideration for the note was the surrender to the defendant of the note of the intestate for the note in suit. It was held the surrender of the former note, whether that note was at the time of the surrender capable or incapable of being enforced at law, was sufficient to constitute a consideration for the new note. In *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, it was held that the cancellation and surrender of the note of a corporation was a sufficient consideration to support a renewal note executed by its president in his individual name. In *Osborne & Co. v. Doherty*, 38 Minn. 430, 38 N. W. 111, it was held that the note of the defendant, executed and delivered by her to her husband's creditor upon an agreement, which was carried out, that said creditor should surrender her husband's past-due paper, was a sufficient consideration for her obligation. The surrender of the twenty shares of shoe stock, of the par value of \$2,000, hypothecated as security for the payment of the note, furnished a good consideration for the signature of plaintiff to the note as surety to her husband.

The judgment is affirmed. All concur.

CITY OF LOUISIANA v. ANDERSON.
(Court of Appeals at St. Louis, Mo. March 31, 1903.)

CRIMINAL LAW—KEEPING SALOON OPEN ON SUNDAY—COMPLAINT—SUFFICIENCY.

1. A complaint for keeping a saloon open on Sunday, which stated the offense in the lan-

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 158, 254.

guage of the ordinance, was not insufficient because it did not state the purpose for which the saloon was kept open.

Appeal from Louisiana Court of Common Pleas; David H. Eby, Judge.

Proceeding by the city of Louisiana against George Anderson for the violation of an ordinance. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Reynolds, for appellant. Pearson & Pearson, for respondent.

Statement of Facts and Opinion.

GOODE, J. Respondent, George W. Anderson, was complained against, under an ordinance of the city of Louisiana, for keeping his saloon open on Sunday, convicted, and fined; but the court arrested the judgment because of the supposed insufficiency of the complaint, which was as follows: "City of Louisiana, Plaintiff, v. George W. Anderson, Defendant. In the Recorder's Court. The city of Louisiana complains of George Anderson for the violation of section 21 of chapter 9 of the Revised Ordinances of said city, approved the first day of September, 1896, said chapter being entitled 'Dramshop, Beer and Wine Saloons,' in this, to wit: That said George Anderson did on Sunday, and between the hours of twelve o'clock (midnight) Saturday, July 26, 1902, and twelve o'clock (midnight) Sunday, July 27, 1902, keep open his wine and beer saloon on Main street in said city; that during said times the said George Anderson and B. A. Pappenfort were the owners and keepers of the aforesaid saloon, under the firm name of Anderson & Pappenfort, within the corporate limits of said city, whereby the said George Anderson became indebted to the said city in the sum of ninety dollars, for which, and the costs of suit, said city asks judgment. James W. Reynolds, City Attorney for the Said City of Louisiana." This is the ordinance violated: "It shall be unlawful for the keeper of any dramshop, wine or beer saloon or any person for him to keep open his or her dramshop, wine or beer saloon in this city between the hours of twelve o'clock (midnight) Saturday, and twelve o'clock (midnight) Sunday, for the purpose of washing or otherwise cleaning out said dramshop, wine or beer saloon or for any other purpose whatever." The penalty for violation of said ordinance is prescribed in the following section: "Whenever any person or persons shall be convicted of the breach of any ordinance in this city, no penalty being fixed for the violation of the same, it shall be lawful for the court or jury convicting such person or persons to fine him or them in a sum not less than one or more than ninety dollars and costs."

The testimony showed that Anderson's saloon had two entrances on Main and one on Georgia street, and that on a certain Sunday morning one of the Main street entrances

was open, and he was in the saloon and behind the bar, selling whisky to men.

The complaint is said to be insufficient because it does not state the purpose for which the saloon was kept open. It charged the offense in the language of the ordinance, and that is sufficient. In fact, it is generally sufficient to charge a statutory crime in the language of the statute when the proceeding is by indictment; and less particularity of pleading is required in prosecutions under a city ordinance, which are in the nature of civil actions, as to the rules of pleading that govern. *De Soto v. Brown*, 44 Mo. App. 148; *City of St. Louis v. Knox*, 74 Mo. 79; *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Stevens v. Kansas City*, 146 Mo. 460, 48 S. W. 658. It is the policy of the law in this state to prevent saloons from being kept open on Sunday, regardless of whether liquor is sold in them or not. We have two statutes on the subject, which in terms prohibit dramshops from being kept open, and also prohibit the sale or giving away of liquors, on Sunday. Rev. St. 1899, §§ 2243, 3011. Municipalities are authorized to aid the state in carrying out this policy, and, under their power to regulate dramshops, may enact ordinances to prevent them from being open, because, when open, sales of liquor are apt to occur in them, and, besides, they frequently become loitering places for noisy and dissolute persons, to the encouragement of bad morals. The ordinance in question leaves no doubt that the purpose of the city of Louisiana was to do more than prohibit sales of liquor, namely, to force saloons to be closed on Sunday; and it had a right to prescribe such a rule, in the interest of the due observance of that day. Of course, the decisions on this question vary somewhat, according to the language of the ordinance or statute construed and the end sought by it; but complaints and indictments for the offense of keeping open dramshops on Sunday, exactly like the one before us, have been held good generally, even when attacked before verdict. *Hall v. State*, 3 Ga. 18; *Kroer v. People*, 78 Ill. 294; *Fant v. People*, 45 Ill. 259; *People v. Waldvogel*, 49 Mich. 337, 13 N. W. 620; *People v. Cox*, 70 Mich. 247, 33 N. W. 235.

Respondent's counsel argues that this construction of the law would make it a crime for a saloon keeper to open the door of his saloon on Sunday for any purpose—for instance, to enter on some necessary errand—but this is sophistry. Courts are supposed to construe the law with some common sense, and enforce public measures according to their intent and purpose. Tribunals which hold complaints like this one good hold also that merely opening the door to pass in and out is no offense. *Patten v. Centralia*, 47 Ill. 370; *People v. Minter*, 59 Mich. 557, 26 N. W. 701. Opening the door of a saloon by the proprietor, merely to go in on some errand, would not be keeping the

10, 1894, your verdict should be for the plaintiff; and unless you so find, as in these instructions defined, your verdict should be for the defendant. If your verdict is for the plaintiff, it will be in the sum of \$2,000, with interest at the rate of 6 per cent. from February 11, 1901, the date of the commencement of this suit."

R. P. & C. B. Williams, for appellant.
Grant, Carroll & Kennedy, for respondent.

BLAND, P. J. (after stating the facts). The case was here by appeal once before on substantially the same evidence as we find in the record on the present appeal. 69 S. W. 662. In respect to the death of Winter, this court on the former appeal said: "The weight of authority supports plaintiff's proposition that the inference of death deducible from the absence of Mr. Winter during seven years, in the circumstances described, does not necessarily imply that his death occurred at the end of that period. The circumstances of each case are to be weighed. If they warrant an inference of death of the individual in question at an earlier date than the close of the seven years of absence, a finding that the death so occurred may stand. *Tisdale v. Insurance Co.*, 26 Iowa, 170, 96 Am. Dec. 136, approved in *Hancock v. Insurance Co.*, 62 Mo. 26, and in *Lancaster v. Insurance Co.*, Id. 121. The three cases just cited are authority to sustain the ruling of the learned trial judge in submitting to the jury that issue of fact whether or not Mr. Winter died before March 10, 1894. The substance of the testimony has been given. We need not repeat it. Plaintiff was not required to establish beyond a reasonable doubt the fact of the death of the insured prior to the date named. She was required merely to furnish proof which tended to show that fact, and to make it appear to the jury more probable or credible than otherwise; that is to say, by the preponderance of the evidence. That she did. *Lancaster v. Insurance Co.*, 62 Mo. 121; *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086; *Rhodes v. Rhodes*, 36 Ch. Div. 586; *Insurance Co. v. Stevens*, 18 C. C. A. 107, 71 Fed. 258; *Garden v. Garden*, 2 *Houst.* 574; *Hamilton v. Rathbone*, 9 App. D. C. 48; *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443; *Cox v. Ellsworth*, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827." In *Carpenter v. Supreme Council Legion of Honor*, 79 Mo. App. 597, this court, in speaking with reference to the legal presumption of death from disappearance, said: "The legal presumption of death permitted at common law upon the lapse of seven years is also allowable before the expiration of that period, if there is evidence tending to prove that death occurred at an earlier date, or showing a greater probability of death than life at the prior date, * * * but that the burden of proving death within seven years is cast upon the party affirming the fact." In *Biegler v. Supreme Council of Am. Legion of Honor*, 57 Mo. App. 419, it was held: "The

sufficiency of presumptive proof of death at common law depends upon the facts of each case." The instruction that was condemned on the former appeal was amended at the last trial so as to conform to the opinion of this court.

The evidence at both trials being specifically the same, the former opinion, holding, in effect, that it should be left to the jury to determine from all the facts and circumstances in evidence whether or not Winter died prior to March 10, 1894, is res adjudicata. *Chapman v. Railway Co.*, 146 Mo. 481, 48 S. W. 646; *Baker v. Railroad*, 147 Mo. 140, 48 S. W. 838; *Carey v. West*, 165 Mo. 452, 65 S. W. 713; *Butler County v. Boatmen's Bank*, 165 Mo. 456, 65 S. W. 716. The demurrer to the evidence was therefore properly overruled.

On its assumption that, if Gustav Winter died prior to March 10, 1894, he committed suicide, defendant asked a number of instructions on the presumption of innocence and of the love of life as opposed to the assumed theory of suicide, which the court refused. The theory of suicide was not submitted to the jury, nor was any other theory as to the manner or cause of the death of Winter. The jury was instructed, in effect, that there were facts and circumstances in evidence from which they might infer that Winter died prior to March 10, 1894. They were not required, nor was it essential to the validity of their verdict, that they should find by what means Winter died, or how he came to his death. All they were required to do, to find that he died prior to March 10, 1894, was to find from the facts and circumstances in evidence that there was a greater probability that he was dead prior to that date than that he was living.

The other instructions asked by defendant are opposed to the rulings of this court on the former appeal, and were properly refused.

There being no reversible error in the record, the judgment is affirmed. All concur.

COURTNEY et al. v. ST. LOUIS POLICE RELIEF ASS'N.*

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

BENEFIT ASSOCIATIONS—DELINQUENT ASSESSMENTS—WAIVER OF FORFEITURE.

1. Provision in the constitution of a benefit society that individual membership shall cease if a member shall refuse for three calendar months to pay an assessment, unless reinstated, was waived by the association where it appeared that it had not been in the habit of enforcing the same.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Paulina Courtney and others against the St. Louis Police Relief Association. Judgment for plaintiffs, and defendant appeals. Affirmed.

*Rehearing denied April 14, 1903.

¶ 1. See *Insurance*, vol. 22, Cent. Dig. § 1914.

Defendant is a beneficial life insurance association, incorporated under the laws of Missouri. Its membership is confined to members of the police force of the city of St. Louis. The contract of insurance with each member is for \$2,000, and its contracts are formed by the constitution of the association. No policy or certificate of insurance is issued, but the insurance is carried on the books of the association with the names of the beneficiaries of the insured. Edward Courtney joined the defendant association in April, 1900, and designated the plaintiffs as his beneficiaries. He died July 25, 1901. The suit is to recover \$2,000 insurance on his life. The answer set up the following special defenses: "Defendant states that, by section 2 of article 1 of the constitution of the defendant association, individual membership in the association terminated whenever a member refused for three calendar months to pay any assessments. And defendant states that, by the provisions of section 2 of article 6 of said constitution, each member of the association was required to pay, each pay day of the police force, a regular assessment of one dollar, and that, under section 3 of article 6, each member was required to pay an additional assessment of two dollars at the death of any member of the association, upon notice by the executive committee of such death and such assessments. And defendant states that said Edward J. Courtney, deceased, mentioned in plaintiffs' petition, had not paid any assessments, either regular or special, mentioned in sections 2 and 3 of article 6 of the constitution, for the months of January, February, March, April, May, June, and July, 1901, although regular assessments were due each month on the pay day of the police force for that month, and although special assessments had been called and notice thereof given to the said Edward J. Courtney as follows: Assessment No. 5, called January 9, 1901, due and payable January 31, 1901; assessment No. 6, called February 4, payable February 28, 1901; assessment No. 7, called March 4, payable March 30, 1901; assessment No. 8, called April 8, payable April 30, 1901; assessments Nos. 9 and 10, called May 8, due May 31, 1901; assessments Nos. 11 and 12, called June 10, 1901, payable June 30, 1901—each for the amount of two dollars. And defendant states that said Edward J. Courtney thereby forfeited all of his rights as a member of the association, and was not a member thereof, in good standing, at the time of his death, and his beneficiaries are not entitled to the death benefit of \$2,000 sued for. The reply is as follows: "Comes now the plaintiff in the above-entitled cause, and, for reply, says that she denies each and every allegation therein. And further replying, said plaintiff says that by their course of dealing they waived their right to demand payment on a day fixed and certain. Wherefore plaintiffs pray judgment as in their petition."

The initiation fee to be paid to the association is \$10. The monthly assessment is \$1 per month, to be paid without notice. On the death of a member an assessment of \$2 is made, payable on the last day of the month in which the assessment is made. Of these assessments each member is entitled to notice. Notices are sent to each station in the several police districts in the city, and are there, on roll call, read to the policemen assigned to duty in the district. Special assessments were called as follows: No. 6, February 20, 1901; No. 7, March 23, 1901; No. 8, April 29, 1901; Nos. 9 and 10, May 13, 1901; Nos. 11 and 12, June 10, 1901. Notice of these assessments was given in the usual and customary way. None of them was paid by Edward Courtney, nor did he pay any of the monthly dues after January, 1901. In April, 1901, he paid \$3, which was credited as follows: \$1 for monthly dues, due for January, 1901, and \$2 to pay special assessment No. 5. In each police district the association designated a particular officer as its collecting agent, who collected the dues and special assessments from the members, and paid them over to the association. Michael Donohue was the collecting agent of the Fifth District from August, 1900, to July 31, 1901. Courtney during this time was on duty in this district. Donohue testified that in May and June he notified Courtney that his general and special assessments after January, 1901, were due and in arrears, but that they were never paid. In April, 1901, Courtney was paid \$126 sick benefits, which he repaid to the association in June, 1901; having been allowed pay by the city during his sickness. He was required, under section 1, art. 8, of the constitution, to return the benefit when so paid.

Defendant read in evidence the following provisions of the constitution of the association:

"Sec. 4. Death. Whenever any member of the police force, who is a member of this association, shall die, the sum of \$2,000 shall be paid within thirty days after his demise to such person or persons as he may have designated on the books of the association. If he shall have failed to designate, it will be paid to his heirs at law in accordance with the law of descent and distribution. If he shall have failed to designate, and he has no heirs at law, it shall revert to the association."

"Art. 11. Any member suspended for non-payment of dues or assessments can be reinstated to membership by the payment of all dues and assessments within six months from the date of his suspension, but after that time he shall have to pass a medical examination and pay the initiation fee the same as an applicant for original membership."

It was shown by a number of officers of the association that the association was in the habit of receiving dues from its members at any time they were offered for pay-

ment, regardless of the number of months the member making payment was in arrears, and that money for past dues was received from the members whenever offered.

The issues were submitted to the court without the intervention of a jury. The court, of its own motion, declared the law as follows:

"First. The court declares that by virtue of section 2, art. 1, of the constitution, which provides as follows: 'Individual membership shall terminate whenever (1) the individual shall cease to be a member of the police force of the city of St. Louis; (2) the individual shall refuse for three calendar months to pay an assessment, except as provided in article 11 hereof;' and by virtue of article 11 of the constitution, which provides, 'Any member suspended for nonpayment of dues or assessments can be reinstated to membership by the payment of all dues and assessments within six months from the date of his suspension, but after that time he shall have to pass a medical examination and pay the initiation fee the same as an applicant for original membership'—the membership of a person belonging to the defendant association could not be terminated or suspended by reason of nonpayment of dues, except after due notice to the delinquent member, and affirmative action on the part of the association, declaring the member suspended, or his membership forfeited; and if the court, sitting as a jury, believes from the evidence that no such action was had by the association, and that no notice of such suspension or ousting from membership was given, but, on the contrary, that the defendant association treated the said Edward J. Courtney as a member of the association, by receiving dues more than three months past due, paying him sick benefits, and calling upon him for assessments long after such defaults had occurred under said constitution and by-laws, then the plaintiff is entitled to recover.

"Second. If the court, sitting as a jury, believes from the evidence that it was the custom of the defendant association, not only in its dealings with the said Edward J. Courtney, but also with all other members of the association, to receive payment of dues and assessments at any time when tendered by a delinquent member, no matter how long such dues or assessments may, under the constitution and by-laws, have been due and payable, then the defendant association has waived the right to claim that the membership of said Edward J. Courtney at the time of his death, in July, 1901, was suspended or forfeited. No matter what may have been the terms of said constitution and by-laws relative to the suspension or removal of members, if the court finds from the evidence that no action has ever been taken by said defendant association looking to the suspension or removal of said Edward J. Courtney, and no notice of

such suspension or removal was ever given to him, then the plaintiff is entitled to recover."

The defendant offered instructions, the substance of which were that section 2 of article 6 was self-executing, and that, if the court found from the evidence that Courtney was more than three months in arrears for monthly dues and special assessments, the issues should be found for the defendant. These instructions the court refused to give, and found the issues for the plaintiffs, and rendered judgment in their favor for \$2,027. A timely but ineffectual motion for new trial was filed. Defendant appealed.

Johnson, Houts, Marlatt & Hawes, for appellant. Marchal & Babbitt, for respondents.

BLAND, P. J. (after stating the facts). Section 2 of article 6 of the constitution provides that individual membership shall cease in the association if a member shall refuse for three calendar months to pay an assessment, unless reinstated as provided by article 11 of the constitution. It is conceded by the plaintiffs that Courtney did refuse for more than three months to pay either his regular monthly dues or special assessments. He therefore ceased to be a member of the association unless the association, either by failing to take any steps to enforce the suspension provision of the constitution, or by its habit of dealing with its members in respect to payment of assessments, waived the provision. The evidence is all one way, and comes from the officers of the association, that the habit of the association was to receive dues and assessments from members at any time they were offered, whether three or more months in arrears, and it is in evidence that \$3 was received from Courtney in April, 1901, more than three months after they became due, and was applied to the payment of monthly dues for January, 1901, and to the payment of special assessment No. 5; and we think that the evidence is conclusive that it was not the habit of the association to enforce this provision of the constitution against its members. In such circumstances, the Supreme Court, in *McMahon v. Sup. Tent K. of Maccabees*, 151 Mo., loc. cit. 522, said: "A member of an assessment insurance company has the right to look to the general conduct of the business of the company in reference to the collection of its assessments according to its prescribed rules, and particularly as that conduct affects himself. And if the company, by its conduct, has induced him to fall into the habit of delaying the payment beyond the time which the company's law calls the day of suspension, it cannot, without warning to him of a change in its business conduct, inflict the penalty of suspension on him."¹

¹ Language of syllabus. See same case, 53 S. W. 384.

That provisions of this character in life insurance contracts may be waived, and the waiver shown by the habit or custom of the insurance company, is well-settled law in this state. *James v. Mut. Reserve Fund Life Ass'n*, 148 Mo. 1, 49 S. W. 978; *Hanley v. Life Ass'n of America (St. L.)* 4 Mo. App. 253; *Id.*, 69 Mo. 880; *Harvey v. Grand Lodge (K. C.)* 50 Mo. App. 472; *Thompson v. St. Louis Mut. Life Co.*, 52 Mo. 469.

This view of the case makes it unnecessary to decide whether or not section 2 of article 6 is self-executing. The judgment is manifestly for the right party, and is affirmed. All concur.

EDWARDS v. HOME INS. CO.*

(Court of Appeals at St. Louis, Mo. Dec. 16, 1902.)

INSURANCE—BROKERS—SCOPE OF AUTHORITY —NOTICE OF CANCELLATION.

1. Rev. St. 1899, § 7997, provides that whoever, for compensation, negotiates contracts of insurance or placing risks for any person other than himself, and not being the appointed agent or officer of the company in which such insurance is effected, shall be deemed an insurance broker. *Held*, that where a firm of insurance agents had represented a corporation in placing all their insurance, part of which was placed in companies represented by such agents, and the balance negotiated through other agents, receiving their compensation for policies so placed by deducting their fees from the premiums paid them by the corporation before turning such premiums over to the agents of the insurance companies writing the policies, such firm, as to such policies, were insurance brokers, and not mere special agents for the corporation for the issuance of insurance.

2. Where insurance brokers for several years had had entire charge of the insurance affairs of the corporation, and had issued and obtained all the insurance written on the corporation's property, they had authority to receive notice of cancellation of a policy written by a company which they did not represent, but which they had obtained through another agency.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Albert N. Edwards against the Home Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Fyke Bros. and Snider & Richardson, for appellant. J. H. Overall, H. W. Bond, and Wm. G. Schofield, for respondent.

GOODE, J. Albert N. Edwards, the respondent, is the trustee in a deed of trust executed by the American Baseball & Athletic Exhibition Company, November 16, 1900, on the buildings and improvements of said company situated in the National League Baseball Park in the city of St. Louis, Mo., and as trustee he instituted this action to recover the proceeds of a policy of insurance issued by the Home Insurance Company on said

property, which was destroyed by fire May 4, 1901, while the policy was in force, unless it had been canceled, as the appellant says it had.

The answer pleaded, among other things, the following special defense: "Further answering, defendant alleges it is provided in said policy as follows: 'This entire policy shall be canceled at any time at the request of the insured or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company, by giving notice, it shall retain only the pro rata premium.' Defendant alleges that no premium was ever paid by insured or by any one for it for said policy; that on April 17, 1901, defendant duly notified said insured that it would decline to carry said risk and that said policy was canceled, and it demanded of insured the surrender of said policy; that on April 24, 1901, the said insured did, in compliance with defendant's request, surrender and deliver to it said policy, so that all liability of defendant thereunder, if any ever existed, which it denies, thereupon ceased and determined, and plaintiff is not entitled to recover."

A replication was filed, containing this new matter: "Now at this day comes plaintiff, and, for replication to defendant's answer, says that on or about the 24th day of April, 1901, the said policy of insurance was in possession of the National Bank of Commerce, in St. Louis, Missouri; that the agents of defendant in the city of St. Louis, where said bank has its place of business, without any notice to the insured that said policy of insurance had been or would be canceled, and without the knowledge of plaintiff, received from said bank said policy of insurance, under promise that the said policy should remain in force until the same, or some other policy equally good, and for the same amount, should be returned to said bank; that neither the same, nor any other policy in place thereof, was afterwards delivered to said bank. Further answering, plaintiff denies each and every allegation, matter, fact, and thing in the answer alleged, not herein expressly admitted, and, having fully replied, asks for judgment as in petition prayed."

M. S. Robison, who is the vice president and treasurer of said American Baseball & Athletic Exhibition Company, held the note of the company for \$48,500, secured by a deed of trust in which the respondent, Edwards, was trustee, and the insurance policies on the property embraced in the deed of trust were made payable to the trustee as his interest might appear, for the further security of the beneficiary. Robison had bor-

*Rehearing denied April 14, 1903.

† 2. See Insurance, vol. 28, Cent. Dig. § 503.

rowed \$15,000 from the Bank of Commerce on his note, and, to secure that loan, had deposited with the bank as collateral said note of the baseball company, with the deed of trust and policies that accompanied it as security, and those documents were held by the bank when the fire occurred.

The facts in regard to the issuance of the policy in suit are these: Robison, as vice president and treasurer of the baseball company, was exclusively charged with keeping its property insured. Between the 5th and 12th of April, 1901, he applied to the firm of Roeslein & Robyn, who were insurance agents and brokers in the city of St. Louis, for insurance to take the place of certain policies which would expire at noon on the seventeenth of that month. They agreed to get new insurance, but encountered considerable difficulty in inducing companies to write the risk, and appealed to the agency of Geo. D. Capen & Co., who were agents for certain insurance companies, including the Home, to help them cover the property. That firm expressed doubt as to whether any of the companies they represented would carry the risk, but finally agreed to write policies in some of their companies on the condition and understanding that the clause of the policy requiring five days' notice of cancellation should be waived, or, in other words, that on notice of the rejection of the risk by a company its policy should be canceled forthwith. This occurred on the 12th of April, and several policies, including the one in suit, were written that day, to take effect at noon on the seventeenth. On the 24th of April, Robison accompanied the baseball club on an Eastern tour, and got back the evening of the 1st day of May. On the 25th of April, Capen & Co. received a letter from the general office of the Home Insurance Company, in New York, notifying them of its refusal to carry the risk on the baseball company's property, and directing them, as the Home's agents in St. Louis, to see that it was relieved of liability on the risk. Capen & Co. went immediately to the office of Roeslein & Robyn, which was on a lower floor of the same building where Capen & Co.'s office was, and notified Roeslein & Robyn of the cancellation of the policy. Noel Robyn took said letter written from the Home's New York office to the Baseball Park, and showed it to Muckenfuss, bookkeeper of the baseball company; Robison, as stated, being out of the city. Robyn also showed Muckenfuss a list of several other companies that had ordered their policies canceled, saying he wished to take them up. Muckenfuss told him the policies were in the National Bank of Commerce, and arranged for Robyn to meet him there at half past 9 o'clock. They met accordingly, and transacted the business they had with Cowen, the assistant cashier of said bank. There is a dispute as to what was said when the policies were taken from the bank. Cowen and Mucken-

fuss say that Robyn stated he wished to withdraw some policies covering insurance on the baseball company's property; handing Cowen a list of them, and promising the latter to keep the insured property covered until new insurance was written. Cowen swore the bank relinquished some of the policies to Robyn on that condition and with that understanding. Robyn denied this, and said he simply asked for and took certain policies; stating that they had been canceled by the company. Robison testified he knew nothing of those policies being taken up and canceled until the 2d day of May, when his attention was called to it by Muckenfuss. He saw Roeslein & Robyn on the following day in regard to the matter, and a conversation occurred, which is recited below. When Robyn got the policy in suit from the bank, he returned it to the Home Insurance Company, no premium having as yet been paid on it, and that company had it when the present action was begun.

The contention of the respondent is that the policy had not been legally canceled at the time of the fire, for lack of five days' prior notice to Robison or any one else authorized to receive notice on behalf of the baseball company, while the theories of the appellant are: First, notice to Roeslein & Robyn was sufficient; second, notice to Muckenfuss, the bookkeeper, was sufficient; third, Robison himself knew of the cancellation five days before the fire, of which there is slight, if any, evidence; fourth, Robison knew of the cancellation on the 2d or 3d of May before the fire, thereby waiving the five days' notice; fifth, the policy was issued on the condition and understanding that the five days' notice of cancellation was waived.

It is necessary to state fully the testimony of Robison in regard to the relation sustained by Roeslein & Robyn to the baseball and athletic exhibition company. Robison testified, as stated above, that the duty was left to him to see that insurance was taken out on the property and to look after it; that the insurance on the property at the time the fire occurred was procured through Roeslein & Robyn, who occupied the position to the baseball company of both insurance agents and insurance brokers; that, when he discovered most of the company's insurance would expire on the 17th of April, he sought Roeslein & Robyn, and asked them to replace it, and they said they would; that all previous insurance had been placed through them for the years 1899 and 1900; that in 1899 the policies were issued about April 17th, and the premiums paid on the 16th of May, the check being given to Roeslein & Robyn; in 1900 the policies were issued at the same time, and paid for by check on the 9th of August; that the baseball company never paid premiums to the insurance companies, but always to Roeslein & Robyn. Robison testified further: "I nev-

er asked anybody else in the city to place a dollar's worth of insurance on the property, or outside the city, up to that time [namely, May 2d or 3d, when the conversation between him and Robyn took place about the difficulty in procuring insurance]. We had placed everything in their hands, and they had always kept it fully covered." He also testified as follows: "Q. Now I understand you that you depended on Roeslein & Robyn to look after your insurance matters for you? A. Yes, sir. Q. They were your sole dependence? A. Yes, sir. Q. You never applied to any other agent or agents in the city with reference to the matter? A. Not up to the time I called there on the 3d of May. Q. And you gave it no personal attention yourself? A. No, sir, not outside—(interrupting). Q. Outside of calling attention to the fact that you wanted a certain amount of insurance? A. Yes, sir. Q. And you wanted the insurance kept in force? A. Yes, sir. Q. And you depended on them to do that? A. Yes, sir. Q. Of course, you didn't dictate what companies? A. No, sir; except they were to be good companies. Q. In fact, you didn't know just what companies you were insured in? A. Well, I knew about as much about that as I would about any insurance company. Q. Did you have a policy in the Home Insurance Company the year previous to May 17, 1901? A. I couldn't tell you that. Q. I mean April 17, 1901? A. I don't know. Q. You don't know whether you did or not? A. No, sir. Q. Don't you know that you didn't have? A. No, sir; I couldn't tell you. Q. Don't you know that this is not a renewal of any policy at all that you had had previously? A. I think the question you asked me was, did we have any insurance with that company? Is that your question? Q. Yes, sir. A. I couldn't state whether we had any before that with that company or not. Q. You don't know? A. No, sir; I don't. Q. You paid no attention to that? A. No, sir; I trusted to them what companies they placed our insurance in. Q. You depended on them to select the companies for you to keep the property insured? A. Yes, sir. Q. What was the amount of insurance? A. Twenty-three thousand five hundred. Q. Was that the amount they were directed to procure? A. No, sir; they were directed to keep twenty thousand. Q. How did you happen to go to Roeslein & Robyn's office on the 3d of May? A. I wanted to find out what policies they had taken away, and how much insurance there was on the property. Q. Taken away from where? A. Taken away from the Bank of Commerce. Q. You had learned that the policies had been delivered up, had you? A. Yes, sir. Q. When did you learn that? A. On the day before—the 2d of May. Q. You knew then on the 2d of May that these policies had been delivered back to the company? A. I knew they had been delivered to Roeslein & Robyn. Q. Back to your

agents? A. Yes, sir. Q. You didn't know whether they had been delivered back to the agents of the insurance company or not? A. I didn't know anything about that. Q. Didn't they tell you at that time that it was impossible for them to carry the insurance here in St. Louis? A. On the 2d of May? Q. Yes, sir. A. Yes, sir. Q. And you requested them to mail you the form, and so forth, to the Burnett House, in Cincinnati? A. Yes, sir. Q. And you would see if you could place it there? A. If I could place it down East. Q. Either in Cincinnati or elsewhere? A. Yes, sir. Q. Before you went East the property burned? A. Yes, sir. Q. The way you did this business, as I understand it, you depended on Roeslein & Robyn to pay the premiums to the different companies; then, when they rendered you the bill, you paid them whatever it amounted to? A. Yes, sir. Q. That is, if you didn't pay it right away, you paid it some time? A. Yes, sir. Q. Did they ever render you any bill for this policy? A. I don't think they ever did. Q. There had no premium ever been paid on this policy, has there? A. It has been tendered for it. Q. When? A. On the 6th of May. Q. But that was after the fire? A. Yes, sir. Q. No premium had been tendered up to the time of the fire? A. No, sir; there hadn't been on any of the policies."

It was shown the baseball company kept a record of its insurance policies in a book, stating the amount of each, when it took effect, and when it expired; also notings as to exchanges and cancellations. The morning of April 17, 1901, Noel Robyn took up the Phoenix policy, which was replaced probably by the one in suit, and an entry made by Muckenfuss in the company's books that the Phoenix policy was canceled. Robison testified: "Q. Who first made the arrangement with the firm of Roeslein & Robyn to look after your insurance for the baseball park company? A. Mr. E. C. Becker. Q. When was that? A. In April, three years ago. Q. That same arrangement was kept up right along? A. Yes, sir. Q. Were the policies renewed in 1900? A. Yes, sir; they were renewed each year." There was testimony to show Muckenfuss had nothing to do with procuring insurance, but that he was simply bookkeeper, and whatever entries he made in regard to insurance were made under the direction and supervision of Robison; and perhaps there was slight evidence tending to show he acted independently of Robison in looking after insurance. The particular policies to take effect on April 17, 1901, bore a higher rate of premium than had previously been charged, of which fact Robison was notified by Roeslein & Robyn before they were written, and he agreed to the increased rate.

We will state Robison's testimony in regard to the interview with Roeslein & Robyn on the 2d or 3d of May. After testifying that this policy had been deposited in the

National Bank of Commerce, with 16 others, on the 17th day of April, he proceeded as follows: "Q. When did you next hear of this particular policy of insurance? A. When did I next hear of this policy? Q. Yes, sir. A. It was on the 2d of May. Q. What year? A. 1901. Q. What did you do when you heard of it? A. I went down to Mr. Roeslein & Robyn to see what policies had been taken away from the bank, and how much insurance we had left there, and I found this was one of the policies that had been taken away. I would like to correct that. Q. Certainly correct it. A. I only got— The first intimation I had that any policies had been taken away was on the 2d of May, by a note that my bookkeeper left on my desk about this as one of the policies that was taken. Q. In consequence of that information you went down to the office of these insurance brokers, did you? A. That was partly so. On that same day Mr. Cowen, cashier of the bank, informed me they had taken a number of other policies besides what they had taken the first day. Q. Before pursuing that any further, was there a different rate of premium charged in this policy over those which showed they had been replaced the year before? A. Yes, sir. Q. Did you at that time ever receive any notice of the desire of the company to cancel these policies? A. Only on the 3d of May, 1901. Q. As the result of that fire, what became of the property insured? A. Why, the grand stand and pavilion— Q. I mean, covered by this policy. Was it totally destroyed, or not? A. All except one of the items. Q. Yes, sir; that we don't sue for here? A. No, sir. Q. What was the value of the property destroyed? A. Something over twenty-seven thousand. Q. Over how much? A. Over twenty-seven thousand dollars. Q. Do you remember anything else that occurred in the conversation you had with Roeslein & Robyn, or any one of that firm, on the 3d of May, 1901? A. Yes, sir. Q. Well, state it to the jury. A. Mr. Robyn suggested to me— He said he had hard work to replace all the insurance; to keep up the amount we wanted. He suggested to me that I take hold of it myself, and see what I could do. I told him that I would do so, and that is the first notice that I had, or the first time that I had been outside of his office to get any insurance. I never asked anybody else in the city to place a dollar's worth of insurance on the property, or outside the city, up to that time. We had placed everything in their hands, and they had always kept it fully covered. I took the matter up the next day—tried to get some insurance—and the fire occurred on that day. I told Mr. Robyn, if he would forward blank forms he had, to me at Cincinnati, as I expected to go on Monday night, and was on my way East, or would be, I would take the matter up with an agent

in New York, who had placed insurance for me on railroad property, and, if he would send on these blank forms to me at Cincinnati, I would take them down with me. Q. The understanding was between you and Robyn that you should help him if you could get other insurance to replace this existing insurance? A. Yes, sir."

The trial court refused an instruction requested by the appellant for a verdict in its favor, but gave this one: "The court instructs the jury that if you find from the evidence that Roeslein & Robyn were employed or engaged by the American Baseball & Athletic Exhibition Company to procure insurance for it, and to take charge of its insurance business, and to keep its property insured in good companies to a certain amount, and that said firm placed and controlled all the insurance of said exhibition company, and, when policies were ordered canceled by insurance companies, said firm replaced the same, when possible, with other policies, as they saw fit, and if you find that said firm advanced premiums for said exhibition company on policies placed by them for it, and if you find that such had been the relations between said firm and said exhibition company for several months, and if you find that Roeslein & Robyn did not countersign or issue the policy sued on, then you are instructed that said firm were agents of the insured, and not of the defendant; and if you find that said firm, as agents of the assured, applied to defendant's agents, Capen & Co., for the policy sued on, and that said policy was issued by said Capen & Co., as defendant's agents, and delivered to Roeslein & Robyn for the insured, and if you find that afterwards, and more than five days before the fire, Capen & Co. notified Roeslein & Robyn that defendant would not carry said risk, and demanded return of the policy, and that said Roeslein & Robyn did surrender said policy to Capen & Co. more than five days before the fire, the plaintiff is not entitled to recover, and your verdict must be for defendant." The jury returned a verdict for the plaintiff under the instructions given.

Opinion of the Court.

If the notice given by Capen & Company to Roeslein & Robyn was a valid and effective notice, the policy was not in force when the loss occurred, and no attention need be paid to the other propositions argued by counsel.

By comparing the instruction quoted with the testimony of Robison, it will be perceived that every fact the court told the jury they must find as to the acts and authority of Roeslein & Robyn as insurance brokers employed by the baseball company, the duties they performed, and the powers they exercised in behalf of said company, was positively sworn to by Robison himself; and, if

said instruction was rightly given, it would have been right to give the peremptory instruction requested by the appellant. Were Roeslein & Robyn such general agents and representatives of the baseball company, in connection with its insurance affairs, that notice to them of the cancellation of the policy in suit affected and bound the company, so that their surrender of the policy and its cancellation on that notice ended the liability of the appellant? The cases on this subject are in accord, and lay down two propositions:

First. A broker employed by an owner to procure a policy of insurance on property, or a line of insurance, has completely performed the subject-matter of the agency when he gets the insurance. His employment is then at an end, and subsequent notice to him by a company which wrote a risk on the property, of the cancellation of its policy, is no notice to the assured, nor a compliance with a provision of the policy that notice must be given to the assured, and an attempt to cancel on such notice is a nullity. *Rothschild v. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303; *Gardner v. Ins. Co. (K. C.)* 58 Mo. App. 611; *Grace v. Id.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Hermann v. Id.*, 100 N. Y. 411, 8 N. E. 341, 53 Am. Rep. 197; *Insurance Co. v. Hartwell*, 100 Ind. 566; *Insurance Co. v. Raden*, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 36.

Second. When a broker is intrusted by an owner with the duty of keeping the owner's property insured, taking out policies thereon, renewing the same when they expire, paying premiums to be repaid to the broker by the owner, and obtaining other insurance in lieu of expired or canceled policies, and this course of dealing has been carried on for some time, the broker is the general agent of the owner in respect to the latter's insurance, and notice of cancellation given to the broker binds his principal. *McCartney v. Insurance Co. (K. C.)* 33 Mo. App. 652; *Hugins v. Id. (K. C.)* 41 Mo. App. 530; *Gardner v. Id.*, supra; *Hodge v. Id.*, 33 Hun. 583; *Stone v. Id.*, 105 N. Y. 543, 12 N. E. 45; *Davis Lumber Co. v. Id.*, 95 Wis. 227, 70 N. W. 84, 37 L. R. A. 131; *Schauer v. Id. (Wis.)* 60 N. W. 994; *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502; *Dibble v. Ins. Co.*, 70 Mich. 1, 87 N. W. 704, 14 Am. St. Rep. 470; *Bulck v. Id.*, 103 Mich. 75, 61 N. W. 337; *Royal Ins. Co. v. Wight*, 5 C. C. A. 200, 55 Fed. 455; *White v. Ins. Co. (C. C.)* 93 Fed. 161; *Mutual Assurance Society v. Id.*, 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819; *Ostrander on Insurance*, p. 53; 16 Am. & Eng. Ency. Law (2d Ed.) 974; *Mechem on Agency*, § 931.

Our statute says: "Whoever for compensation acts or aids in any manner in negotiating contracts of insurance or re-insurance or placing risks or effecting insurance or re-

insurance for any person other than himself and not being the appointed agent or officer of the company in which such insurance or re-insurance is effected shall be deemed an insurance broker." Rev. St. 1899, § 7997. Roeslein & Robyn come within that definition of a broker, we think, although it is true they got their compensation by deducting their fees from the premiums paid them by the baseball company before turning them over to the agents of the insurance companies. Plainly, Roeslein & Robyn were not the agents of the Home Insurance Company; for, as brokers of the baseball company, they applied to Capen & Co., agents of the Home Insurance Company, to write the risk, and in the transaction Capen & Co. represented the insurance company, and Roeslein & Robyn represented the baseball company. The latter did not assume to represent the insurance company, and could not have represented it, since no agent can serve two masters. *Hugins Cracker Co. v. Insurance Co. (K. C.)* 41 Mo. App. 530; *De Steiger v. Hollington (K. C.)* 17 Mo. App. 388; *Insurance Co. v. Hope (St. L.)* 8 Mo. App. 408. A broker acting for a property owner as Roeslein & Robyn acted in this case is always held to be the agent of the assured. *Mechem on Agency*, § 931; *Ins. Co. v. Brooks (Md.)* 34 Atl. 373; *Hamblet v. Ins. Co. (D. C.)* 36 Fed. 118; *Ins. Co. v. Reynolds*, 36 Mich. 502; *Standard Oil Co. v. Ins. Co.*, 64 N. Y. 85.

As Roeslein & Robyn were insurance brokers, and agents of the baseball company, the question of whether notice to them of the cancellation of the policy bound the baseball company turns on whether their agency was a general one, or merely special; that is, whether they were employed to procure a given line of insurance, or to represent the baseball company generally in its insurance business, for that is the test in all such cases, as the authorities cited show. A general agent is one who is empowered by a principal to transact all his business of a particular kind, while a special agent is one authorized to act only in a specified transaction. *Mechem on Agency*, § 6; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Cross v. Railway Co. (K. C.)* 71 Mo. App. 590. A person dealing with an agent appointed to transact generally a certain class of business for his principal has the right to presume a much wider authority is vested in such agent than he would, were the agent empowered to act only in a particular instance, and may in the former case rely on the agent's acts unless they go beyond those usually done by general agents. *Mechem on Agency*, §§ 284, 285. Notice to any agent, either general or special, binds the principal, if it is in reference to a matter included in the agent's authority, and while he was still representing the principal. There is no difference in the effect of notice, whichever is the class the agent belongs to; but, as the scope of a gen-

eral agent's authority is more extensive, so notice to him is correspondingly effective, and will often be good, as relating to a subject falling within his authority, when it would be bad to a special agent, as relating to a matter outside his. On principle, a company's notice declining to carry an insurance risk, given to a broker empowered generally to look after all the policy holder's insurance business, and who has exerted that power continuously for a considerable period, ought to be sufficient, and all the cases we have examined hold it is sufficient. It is difficult to see how an agent could have more extensive powers in connection with the business of his principal than Roeslein & Robyn had as brokers for the baseball company, as for several years said company's insurance affairs had been committed entirely to their charge; and, if an insurance company ever has the right to rely on a broker's authority being wide enough to render a notice of cancellation to him a good compliance with the requirement of notice to the insured, that right existed in this instance. The cases cited as supporting the second proposition of law above stated conclusively establish that notice to a general broker is effective, and the facts of several of them were practically identical with those in the one at bar, as testified to by Robison.

The able counsel for the respondent invoke the rule that, where different inferences may legitimately be drawn from oral evidence, it is for the jury to say what inference shall be drawn; but that rule, we think, is inapplicable to the present case. The doctrine that juries are the sole judges of the weight of evidence, and entitled to deduce any inference it will legitimately bear, does not mean that, if a plaintiff proves by uncontradicted testimony facts which defeat his own claim, a jury may disregard the only testimony offered, and give him judgment notwithstanding; else there is no need to introduce evidence at all, and a demurrer to a plaintiff's case could never be sustained, as it must be unless there is a prima facie case. *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Hyde v. Railway*, 110 Mo. 272, 19 S. W. 483. Robison is not the plaintiff in this case, but he was the vice president and treasurer of the baseball company, and his testimony in regard to the scope of the agency of Roeslein & Robyn is corroborated by all the other testimony in the case. There is nothing in the record, so far as we have detected, from which an inference could be properly drawn by the jury contrary to the facts hypothesized in the instruction above quoted, in which they were told, if they found the specified facts, to return a verdict for the defendant. In returning one for the plaintiff, they ignored the positive direction of the court and all the evidence in the case, and their verdict cannot be allowed to stand. The trial court should have given the peremptory instruction requested by the appel-

lant in the first instance, and, having failed to do so, should have set aside the verdict of the jury. In some of the cases *supra*, the ruling on similar facts was that there was nothing to submit to the jury.

The judgment is reversed.

BLAND, P. J., and BARCLAY, J., concur.

EDWARDS v. SUN INS. CO.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

INSURANCE — AGENTS — AUTHORITY — CANCELLATION OF POLICY — NOTICE TO PLEDGEE — CONSENT TO CANCELLATION — NOTICE TO TRUSTEE — ACTIONS — INSTRUCTIONS — QUESTION FOR JURY.

1. Where a firm of insurance agents issued a policy on a corporation's property, which by its terms was to take effect April 18th, and the policy was deposited with a bank as collateral security for a loan, and thereafter, on April 24th, one of the agents went to the bank and obtained the policy for cancellation on his agreement that the insurance should be in force until other insurance was written in place of it, such agreement did not constitute an invalid verbal agreement to insure, but was an agreement that the policy should not be canceled until other insurance had been substituted.

2. An agreement by an insurance agent who had issued a policy, on receiving the same from a pledgee for cancellation, that the insurance should not be canceled until another policy of equal value had been substituted, was within the scope of the agent's authority.

3. Where insurance agents had written a policy on the property of a corporation in a company which they represented, which thereafter directed a cancellation of the policy, such agents represented the insurers only, and notice of cancellation to them was not notice to the insured.

4. Where insurance agents who had been directed by the insurer to cancel a policy applied to insured's bookkeeper therefor, who went with one of such agents to a bank where the policy had been deposited, from which they obtained the same, and the agent had full knowledge of all insured's matters pertaining to its insurance, the agents were not misled or justified in believing that the bank had authority to surrender the policy or receive notice of its cancellation without notice to the insured.

5. Where a policy of insurance was pledged as additional collateral security in a deed of trust, notice of cancellation of the policy to the trustee was unnecessary.

6. Where, in an action on a policy which had been pledged to a trustee, there was no issue that an alleged cancellation was void for lack of notice to him, the refusal of an instruction that such notice was not required was not error.

7. Where notice of cancellation of an insurance policy was given to assured's bookkeeper, and it was shown that such bookkeeper kept a record of the insurance policies carried on the corporation's property, whether he had authority to receive notice of such cancellation, which was binding on the company, was for the jury.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Albert N. Edwards against the Sun Insurance Company. From a judgment

¶ 3. See Insurance, vol. 23, Cent. Dig. § 503.

in favor of plaintiff, defendant appeals. Affirmed.

Fyke Bros. and Snider & Richardson, for appellant. John H. Overall, H. W. Bond, and W. G. Schofield, for respondent.

Statement of Facts and Opinion.

GOODE, J. In some respects this action resembles the case by the same plaintiff against the Home Insurance Company (heretofore decided by this court) 73 S. W. 881, but in vital points is materially different. The Sun Insurance Company on April 12, 1901, issued a policy of insurance for \$2,500 on the buildings of the American Baseball & Athletic Exhibition Company of St. Louis, to be in force from April 17, 1901, to April 17, 1902. Roeslein & Robyn, who are insurance agents and brokers in the city of St. Louis, and the local agents of the Sun Insurance Company in said city, issued the policy in question. The buildings covered by it were damaged by fire May 4, 1901, and this action was instituted to recover the proceeds of the policy. Two special defenses were pleaded—the first that when the policy was delivered it was agreed between Roeslein & Robyn, the agents of the insurance company, and M. S. Robison, the vice president of the baseball company, that before the policy should take effect said Roeslein & Robyn would communicate with the insurance company to ascertain whether it would carry the risk, and if it declined to do so the baseball company should surrender the policy; that when the insurance company was informed about the matter it notified its said agents that it could not carry the risk, and on April 17th, in the forenoon, before the policy took effect, said agents informed the insured of the decision of the company, and the policy was afterwards, pursuant to said agreement, surrendered to the company, and therefore never took effect. The other defense rests on a condition of the policy providing for cancellation at any time by the company on five days' notice to the insured, and the surrender of the unearned portion of the premium. The answer states that no premium was ever paid, but that the defendant on April 17th notified the insured that it could not carry the risk, and demanded the surrender of the policy, and the insured, in compliance with said request, surrendered it on April 24th. The replication alleges that on April 24th the policy was in the possession of the Bank of Commerce of St. Louis, and the agents of the insurance company got it from said bank without any notice to the insured—said agents promising the bank at the time that it should remain in force until some other policy just as good should take its place—but that neither the same policy, nor any other in lieu of it, was afterwards delivered to the bank. When the insurance was taken out, this policy and other policies were deposited in the National Bank of Commerce

as security for a note for \$48,000 made by the baseball company, payable to Robison, its vice president, which had been placed by Robison with said bank to secure a note for \$15,000 he had executed to the bank. The note of the baseball company was secured by a deed of trust on real estate in which plaintiff, Edwards, was trustee; and, as the insured buildings stood on the real estate, the policy was made payable to said trustee as his interest might appear. The testimony of Robison as to Roeslein & Robyn's authority to act as agents for the baseball company in connection with its insurance affairs tended to prove that they were not authorized to do more than procure the amount of insurance each year asked for by Robison. It may be said that the record contains scant, if any, evidence of the alleged special agreement that this policy was to be canceled without five days' notice if the company objected to carrying the risk.

By its terms the policy was to take effect on April 17th at noon, and we find no testimony that Roeslein & Robyn notified the officers of the baseball company during the forenoon of that day of the company's refusal to carry the risk. As stated, one of the defenses is that the policy was taken from the Bank of Commerce by Roeslein & Robyn on April 24th, pursuant to a previous agreement that said agents might take it if the company refused the risk. This defense seems not to have been made good by proof. Just what transpired at the bank is uncertain, because the evidence is conflicting. Cowen, the bank's cashier, and Muckenfuss, the baseball company's bookkeeper, testified that Noel Robyn stated he would like to withdraw some of the policies, but that he would hold them covered in his office until he could rewrite them, and with this understanding he was allowed to take, among others, the Sun Insurance Company's policy. Robyn denied making that statement, and the insurance company contends that, if made, it was, at most, a verbal contract for insurance, and invalid for lack of authority to Roeslein & Robyn to bind the insurance company by it. We cannot accept that view. The contract for insurance was contained in the written policy, and, if Robyn made the disputed statement, it was not a verbal agreement to insure, but an agreement that the existing written insurance should remain in force until other insurance was written in place of it. In other words, it was an agreement that the policy should not be canceled then, nor until as good a one could be substituted. The defendant ought not to be permitted to assert that an agreement by its agent in charge of the matter to cancel the insurance in the future, and then only in a certain contingency, amounted to an absolute cancellation on the spot, and ended the company's liability. How were Cowen and Muckenfuss to know Robyn was acting outside his authority, when, to all appearances,

he was acting within it? The testimony of Robison tended to prove that Roeslein & Robyn had no authority to cancel policies of the baseball company, or receive notice of cancellation; and it is manifest that in this instance notice to said firm was not notice to the baseball company, because Roeslein & Robyn were local insurance agents who had written this insurance, and were still looking after it for the insurance company, and they could not be agents for the baseball company, too, in adverse transactions.

The first instruction given at the instance of the plaintiff adopted the foregoing theories of the case, and told the jury, in effect, that getting the policy from the Bank of Commerce under a promise that it should remain in force until another was substituted in lieu of it, if they found that was done, left it in force on May 4th, when the fire occurred, as no other policy had been substituted in the meantime; also that five days' notice of cancellation was required.

Appellant complains of the refusal of an instruction asked by it which propounded the theory that, as the policy was in the custody of the Bank of Commerce, notice of cancellation to said bank was sufficient, inasmuch as the deposit of the policy with the bank led the insurance company to believe the bank had authority to surrender it. This contention will not bear examination. Roeslein & Robyn were the insurance company's agents, knew all about the insurance matters of the baseball company, and, instead of applying to the Bank of Commerce to get the policy, applied to Muckenfuss, the bookkeeper of the baseball company. Robyn went to the bank because the policy happened to be deposited there, not because he was misled into believing the bank was authorized to surrender it. A person holding an insurance policy as collateral security certainly has no right, unless the circumstances are exceptional, to consent to the cancellation of the insurance without notice to the owner, and thereby leave the property uninsured, and the owner ignorant of that fact. Notice of cancellation must be given to the insured, or to some agent whose general or special powers are sufficient to render notice to him equally effective. *Rothschild v. Insurance Co.*, 74 Mo. 41, 41 Am. Rep. 303; *Edwards v. Home Insurance Co.*, supra.

We agree with the appellant that notice of cancellation to Edwards was unnecessary, as he was a mere trustee. Such notices ought to be given to interested persons whose property is at stake, so that they may protect themselves by taking out new insurance. But we do not agree that the court erred in refusing to give an instruction that no notice to Edwards was required, because there was no contention that the alleged cancellation was void for lack of notice to him. Instructions ought to be directed to the issues the jury are trying, and, so far as we can gather, the instruction asked by the defendant on

this point would have been irrelevant. At the instance of the appellant the court instructed the jury that if they believed Muckenfuss was authorized to look after the baseball company's insurance business in the absence of the officers of said company, and that Muckenfuss was notified of the cancellation of the policy five days before the fire, and surrendered it to Roeslein & Robyn, the plaintiff was not entitled to recover; also that if the vice president of the baseball company was notified by the insurance company's agents that the policy had been canceled, and acquiesced therein without objection, plaintiff could not recover. There was no contention that anybody received five days' notice of the cancellation, except the Bank of Commerce and Muckenfuss. Notice to the bank was nugatory, and it was for the jury to say whether the duties and authority of Muckenfuss were such as made notice to him binding on the baseball company.

Defendant insists that Robison himself was notified on May 3d the policy had been canceled, and acquiesced in the act by not objecting to it. But in what kind of cancellation did he acquiesce? In an immediate and absolute one, or one contingent on the substitution of new insurance, as Cowen and Muckenfuss swore was the agreement? Acquiescence in the latter proceeding was altogether different from consenting to an outright termination of the contract of insurance, and the court submitted the issue of whether Robison was informed on May 3d that the policy had been already canceled, and made no objection.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

BELSHE et al. v. BATDORF.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

LANDLORD AND TENANT—ACTION FOR RENT—LIEN ON CROPS—LIABILITY OF PURCHASER—LIMITATION TO LIFE OF LIEN—RES JUDICATA—GARNISHEE JUDGMENT.

1. In an action for rent by a landlord against a purchaser of his tenant's crop, evidence showing that the purchaser knew that the seller was plaintiff's tenant, and evasive answers given by him to questions on cross-examination asking whether he knew that the crop came from plaintiff's land, were sufficient to submit the issue of knowledge of the tenancy to the jury.

2. A judgment recovered in an action for rent by a landlord against his tenant and against a purchaser of the tenant's crop as garnishee will not bar a subsequent action against the purchaser for a balance unsatisfied by the execution issued under the former judgment.

3. Under Rev. St. 1890, § 4123, providing that a purchaser of a crop raised on demised premises upon which rent is unpaid, having knowledge of the demise, is liable in an action for the value thereof to the party entitled thereto, a landlord may maintain an action against one who has purchased during the life-

time of the lien, although the lien may have expired at the time the action is brought.

Appeal from Circuit Court, Grundy County; Paris C. Stepp, Judge.

Action by Robert N. Belshe and others against F. B. Batdorf. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. A. Kerr, for appellant. Harber & Knight, for respondents.

BROADDUS, J. This is a suit which originated in a justice's court wherein plaintiffs seek to recover of the defendant as a purchaser with notice of the lien thereon of certain corn grown upon demised premises. The evidence disclosed that one Charles Lamp leased from plaintiffs certain premises for the year 1899, for which he was to pay \$200 rent, due and payable on the 1st day of January, 1900. Some time in the month of November, 1899, one of the plaintiffs learned that the lessee was selling and delivering a part of the corn crop raised on said premises to the defendant, whereupon he called to defendant over the telephone and asked him if he was buying corn of said tenant, and at the same time informed him that the tenant had not paid plaintiffs their rent, and telling defendant not to pay said tenant until he (the plaintiff) had seen him. Defendant answered, "Certainly," or words to that effect, and, further, that he had a medical bill against said Lamp. Proof was made of the number of bushels defendant bought and received of the tenant and its value.

When defendant was testifying he was asked if he did not know that the corn he got from Lamp had been grown upon plaintiffs' premises, to which inquiry he answered: "I did not see him gather it. I just knew I was getting corn from Lamp. I did not know where he gathered it." On cross-examination he was asked as follows, "And you do know that the corn was grown on that place?" to which he answered, "I did not see him gather it."

The record shows that the plaintiffs instituted proceedings before a justice of the peace against the tenant, Lamp, in which one S. P. Batdorf was summoned as garnishee, wherein, upon final hearing, plaintiffs recovered judgment against such garnishee in the sum of \$200 and their costs. The evidence discloses that the plaintiffs realized from said judgment sufficient only to reduce their claim to the sum of \$172.78, the constable returning the execution unsatisfied, finding no goods and chattels of the defendant to satisfy the same. Afterwards, on the 11th day of April, plaintiffs commenced this suit.

The defendant moved to dismiss this case on the ground that plaintiffs had already obtained judgment against Lamp and S. P. Batdorf for the full amount of the claim for rent. The court overruled his motion, the cause tried, and finding and judgment were for the plaintiffs, from which defendant appealed.

The defendant contends that the court was in error in overruling his said motion to dismiss the cause and in giving and refusing instructions; and, further, that under the evidence the plaintiff was not entitled to recover, and that the evidence does not support the verdict, in this: that it was not shown that defendant purchased the corn with knowledge of the fact that it had been grown on plaintiffs' demised premises.

The defendant, according to his own evidence, knew that Lamp was the tenant of the plaintiffs' premises; and when asked, as we have seen, if he knew where the tenant got the corn, he answered that he did not see him gather it. This evidence shows that he tried to evade answering the question, but his answer, such as it was, with the admitted knowledge that Lamp was the tenant of plaintiffs, was sufficient to submit that question to the jury.

We do not think the defendant's contention that this suit should have been dismissed upon his motion upon the showing made by him that plaintiffs had previously obtained judgment for the same demand against S. P. Batdorf in said garnishee proceeding, should have been sustained. The authority cited of *Hill v. Chowning* (Mo. App.) 67 S. W. 750, has no application. It was there held that the plaintiff, having obtained a judgment enforcing his mechanic's lien, could not afterwards maintain another suit against the same defendant, who was a party to the former suit upon the same demand. Here, however, the parties are not the same. The landlord might well have a cause of action for his rent against more persons than one. If different individuals had obtained different parts of the crops grown on plaintiffs' premises on which they had a lien, it would be a harsh as well as unjust rule that would not permit them to sue and recover from as many of the same as would be necessary to satisfy the claim for rent. In other words, the landlord in such cases would have a distinct cause of action against the different individuals. This view of the case requires no argument to sustain its correctness.

The defendant's refused instructions were asked upon the theory that if plaintiffs' lien had expired at the institution of the suit they were not entitled to recover, notwithstanding at the time defendant purchased from the tenant plaintiffs' lien was in force. In section 4123, Rev. St. 1899, amongst other matters it is provided: "If any person shall buy a crop grown on the demised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof to any party entitled thereto, or he may be subject to garnishment at law in any suit against the tenant for the recovery of the rent." Our attention has not been called to any authority in this state on the question raised by said refused instructions.

The landlord's lien against the crop grown exists for a period of eight months after rent becomes due and payable, and no longer; but it does not necessarily follow that he must, in order to render a purchaser of the crop with knowledge of such lien liable, commence his action against such purchaser within the time in which the lien exists. In order to enforce his lien against the crop itself, he must proceed to enforce it during the life of the lien. The statute was enacted for the purpose of giving landlords a reasonable time in which to secure their rents, and the limitation as to time in which the lien should exist was to prevent unnecessary restraint of trade. But no good reason can be assigned why a purchaser during the life of the lien, with knowledge that the crop purchased was grown upon the premises of the landlord, should not be liable to the landlord at any time after such purchase and before the statute of limitation would bar his right of action. In such cases the landlord's cause of action would accrue during the life of the lien, and there is no statute requiring him to bring suit within any specified time, save the statute of limitations.

For the reasons given the cause is affirmed. All concur.

PEPPERDINE v. BANK OF SEYMOUR.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

JUDGMENT—RES JUDICATA—BANKRUPTCY PROCEEDINGS—RESISTANCE BY CREDITOR—ATTACHMENT—DATE OF LIEN—BANKRUPTCY—AVOIDANCE OF ATTACHMENT.

1. An adjudication in bankruptcy for having, while insolvent, permitted a creditor to obtain judgment against the bankrupt, is not conclusive against the creditor's right in the property acquired by virtue of such judgment.

2. The resistance by a creditor of involuntary bankruptcy proceedings instituted against his debtor under Bankr. Act 1898, c. 4, § 18, Act July 1, 1898, 30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429], authorizing creditors so to do, does not make such creditor a party to the proceedings, so as to conclude his rights in property acquired from the bankrupt.

3. The lien of an attachment dates from the date of the levy, and, when matured by judgment, execution, and sale thereunder, relates back to the date of the levy, and passes title as of that date, free from subsequent incumbrances.

4. Under chapter 7, § 67f, of the bankrupt act, Act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3450], providing for the avoidance of all liens, judgments, and attachments acquired within four months prior to the inception of bankruptcy proceedings, the entry of judgment in an attachment suit within four months of the filing of a petition in bankruptcy does not avoid the lien of the attachment acquired more than four months prior to the filing of the petition.

Error to Circuit Court, Greene County; J. T. Neville, Judge.

Action by George Pepperdine against Mildred Hymes and the Bank of Seymour. From a judgment for defendant bank, plaintiff brings error. Affirmed.

This is an action by the trustee of a bankrupt's estate to recover a preferential payment alleged to have been made by the bankrupt to the defendant, and was brought originally in the circuit court of Webster county, but removed on a change of venue to the circuit court of Greene county. On the 15th of August, 1898, defendant commenced an attachment suit against A. B. Good, subsequently adjudged bankrupt, then a lumber and furniture merchant in Seymour, and levied on his stock of goods. Other creditors of Good later brought attachment suits for their respective debts. On October 10, 1898, the stock of goods attached was sold pursuant to an order of the circuit court made in the attachment suit brought by the defendant, and the proceeds of the sale were held by the sheriff to await the result of the attachment proceedings. On March 24, 1899, after a previous mistrial before a jury, Good withdrew his plea in abatement to defendant's attachment, and judgment was rendered sustaining the attachment and on plaintiff's cause of action against the defendant therein for \$1,900. Judgment by default was also rendered in favor of the subsequent attaching creditors. The sheriff paid to defendant under its judgment \$1,300, the recovery of which amount is the purpose of this suit. On the 12th of June, 1899, a petition in involuntary bankruptcy was filed against Good in the Western District of Missouri, the act of bankruptcy complained of being the permitting and procuring of the above judgment against him in favor of the defendant, and the preferring by him of such bank as a creditor. The defendant herein employed its own attorney to resist the bankruptcy proceeding on behalf of Good, and a trial was had, Good adjudged a bankrupt, and the plaintiff herein appointed trustee of his estate.

Omitting the formal averments of his petition, the plaintiff alleged as the preferential payment complained of that, while Good was indebted and insolvent, and within four months before the filing of the petition in bankruptcy, the defendant obtained a judgment against him through legal proceedings, and obtained an execution thereunder, and levied upon his property, and thereby obtained property and money belonging to him to the amount of \$1,300; that all such proceedings were null and void, and the money and property so obtained a part of the bankrupt's estate. As a further ground the plaintiff alleged that, while Good was so indebted and insolvent, and within four months of the filing of the petition in bankruptcy, he procured and suffered a judgment to be entered against himself and in favor of defendant bank, and made a transfer of his property and money to the amount of \$1,300 to defendant; that the purpose of such judgment and transfer and their effect was and would be to enable defendant to obtain a greater percentage of its debt than any other of his

creditors of the same class; that defendant had reasonable cause to believe Good was insolvent and indebted, and that it was intended thereby to give it a preference.

At the trial before the court the following stipulation was introduced and read: "It is stipulated that the following statement of facts may be read in evidence on the trial of the above-entitled cause, either party to be entitled to urge objections and save exceptions to the admission of said evidence on account of irrelevancy."

Said agreed statement of facts is as follows: "That prior to August, 1898, A. B. Good was a merchant of Seymour, Missouri. That in August, 1898, the defendant Bank of Seymour brought in the circuit court of Webster county a suit by attachment against him. That a writ was issued, and the sheriff of said county seized and levied upon a certain stock of furniture, lumber, etc., under the writ of attachment. That immediately thereafter there were several other attachment suits brought in said circuit court, and levies made thereunder, all, however, being subsequent to the levy of the Bank of Seymour. That a short time after said writ of attachment was levied the Bank of Seymour presented a petition to said circuit court for an order of sale of said property, and the court made an order for the sheriff to sell the same, as provided by statute, and hold the proceeds for the further orders of the court; and that thereafter, under and by virtue of said order of sale, having duly advertised the same, the sheriff sold said attached property, and the proceeds therefrom, amounting to \$1,421, was held by him to await the result of said action. That defendant Good filed pleas in abatement to all said actions of attachment. That in the case of the Bank of Seymour there was also filed an interplea by one A. B. Ritchie, one of the creditors represented by the trustee in bankruptcy in this action. (The last statement was objected to by plaintiff as irrelevant and immaterial to the issues herein, and, his objection being overruled, he duly excepted at the time.) That said Ritchie claimed a part of said property by virtue of a chattel mortgage, and at the March term, 1899, of the circuit court of Webster county said interplea was duly tried by a jury in said court, and a judgment rendered in favor of said Bank of Seymour and against said interpleader. (The last statement objected to by plaintiff as irrelevant and immaterial, and foreign to any issues in this case, and, his objections being overruled, he then excepted at the time.) That none of the subsequent attaching creditors requested to be made parties or were made parties, but the attorneys representing said subsequent attaching creditors also represented said A. B. Good in his defense to said suit of the plaintiff bank. That the trial resulted in a hung jury. That thereupon, at the same term of court, and after said jury had been discharged by the

court, there was filed in said cause by the attorney of said bank the following stipulation, which had been prepared by said attorney, and which was signed by said Good, to wit: "The Bank of Seymour, plaintiff, v. A. B. Good, defendant. In the Circuit Court of Webster County, March Term, 1899. I request that my plea in abatement in the above case be withdrawn, and consent that the attachment of plaintiff be sustained. Marshfield, Mo., March 24, 1899. A. B. Good." That said writing was signed by said Good without his having consulted with the attorneys who had defended said action, but that same was filed in open court when said attorneys were present. That no defense was interposed by the said Good in any of the other attachment suits then pending against him, and a judgment was rendered at said term against him in said suits by default. That upon the filing of said stipulation in said case said plea in abatement was withdrawn, and judgment was rendered by the court sustaining said attachment, and on the merits in favor of said bank and against said Good for \$1,900, the amount sued for; and the net proceeds of the sale of said property, after paying the costs, amounting to \$1,300, was delivered to said bank by the sheriff by virtue of said judgment and the execution issued thereon. That in said case the writ of attachment was levied on the 15th day of August, 1898, the order of sale for the attached property was made at the September term of the Webster county court on the 10th day of October, 1898, and that the judgment sustaining said attachment and in favor of said bank was rendered on the 24th day of March, 1899. That within four months from the rendition of said judgment, and on the 12th day of June, 1899, a petition in involuntary bankruptcy was filed against said Good in the United States District Court for the Southern Division of the Western District of Missouri to have said Good adjudged a bankrupt. That said Good appeared to said action, and made a defense to said suit, and the expense of making said defense, including an attorney's fee and all other necessary costs and expenses in defending against said bankruptcy action, was paid by the defendant bank of Seymour. That said Good was in said proceedings adjudged a bankrupt, and that George Pepperdine, plaintiff herein, was selected and appointed as trustee of said estate, and duly qualified, and is the duly appointed and acting trustee in charge of said estate. That no assets have come into his hands, and that debts and claims have been proven and duly allowed against said bankrupt by the referee in bankruptcy aggregating \$3,000 or more. That at the time said judgment in favor of said bank of Seymour against said Good was rendered by the circuit court of Webster county the said bank knew that said A. B. Good was insolvent, and largely indebted, and that the payment of the proceeds of the

sale of said property to it would leave and did leave said Good without property which could be applied to the payment of his debts or means of satisfying the same. That all the stock in the bank of Seymour except two shares was owned by the father-in-law, brother-in-law, and wife of said Good."

Plaintiff also introduced the petition in bankruptcy against Good, filed June 12, 1899; the answer of Good thereto, in effect a general denial; the order in such bankruptcy proceedings made by the federal court adjudging Good a bankrupt, and the opinion of the federal judge in such proceedings.

At the close of the testimony plaintiff asked declarations of law, all of which were refused by the court, the court giving of its own motion the following: "The defendant, having defended the bankruptcy proceeding, is bound by everything decided therein that was legitimately before the court for determination. But the rights here involved were not in issue there. Under the law of Missouri in reference to attachments the lien of a levy, if more than four months old, is not vacated by an adjudication in bankruptcy, even though the judgment in the cause is within four months of the filing of the petition."

Judgment was thereupon rendered in favor of defendant, and after proper steps an appeal to this court followed.

Hefferman & Hefferman, for plaintiff in error. Barbour & McDavid, for defendant in error.

REYBURN, J. (after stating the facts). 1. This case is brought to this court upon the contracted transcript permitted by section 813 of the Revised Statutes of 1899, and the abstract in print filed by appellant is assailed by respondent as insufficient, but the infirmities, if present and material in the original abstract, have been removed, and any defects supplied, by the supplemental abstract now on file establishing without challenge or contradiction by respondent the perfecting of the appeal in lawful manner. Taken together, these abstracts contain the substantial requirements pointed out by this court, and we are now authorized to review the case on its merits.

2. Appellant urges that the adjudication in bankruptcy is conclusive upon respondent, asserting that the question in issue in the present case was the identical question decided by the bankruptcy court. The bankruptcy court had no lawful authority to pass upon any but the sole issue before it—whether within four months next before the petition Good committed an act of bankruptcy by suffering defendant to obtain judgment against him on March 24, 1899—and no adjudication upon any other issue was sought or rendered in the proceeding. A judgment is conclusive upon all parties in privity to the litigation, and privity is de-

fined by eminent authority to be a mutual or successive relationship to the same rights of property; but the same authority declares that, to create this relationship, two requisites must concur: First, the party to be thus connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties; and, second, privies bound by the judgment are those who acquired an interest in the subject-matter after the rendition of the judgment, and, if their title or interest antedated such judgment, they are not bound unless made actual parties. Black, Judgments, vol. 2, § 549 (2d Ed.); Freeman, Judgments, vol. 1, § 162 (4th Ed.). It may be conceded that plaintiff, upon his election as trustee of the bankrupt's estate by the creditors of the latter, became successor to the rights and interests of the general creditors in such estate; but the defendant was no party, direct or intermediate, to the bankruptcy proceedings, and whatever rights it possessed in that portion of the bankrupt's property herein involved had attached prior to the adjudication. Subject to the determination of the further question hereinafter taken up, the defendant's succession to such rights of property claimed by it having occurred prior to the institution of the bankruptcy proceeding, it could not be privy to any judgment ensuing therein. Nor is the effect of the adjudication amplified so as to reach and conclude defendant by the resistance, through counsel in its employ, to the bankruptcy proceeding. In such conduct it was merely in the lawful exercise of the right expressly recognized and accorded to all creditors by the terms of the bankrupt act to oppose an adjudication. Bankr. Law 1898, c. 4, § 18. Act July 1, 1898, 30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429]. The defendant is concluded and bound by the adjudication in bankruptcy to the same extent as the rest of the world, and no farther; and as against it as other parties concerned, and in the same manner as against other creditors, the judgment of the issue of Good's bankruptcy under the bankruptcy law is final, and cannot be questioned.

3. The bankrupt act provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent within four months of the inception of the proceedings in bankruptcy shall be annulled and avoided. Chapter 7, § 67f (30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]). By necessary implication, all levies, judgments, attachments, and other liens secured earlier than four months prior to the commencement of the bankruptcy are excluded from the operation of the act. It has been held that even a release of the debtor by his discharge in bankruptcy will not bar a creditor from enforcing by judgment a lien secured by attachment more than four months before the bankruptcy proceeding was inaugurated. Powers, etc., Co. v. Nel-

son, 7 Am. Bankr. Rep. 506, 88 N. W. 703, 58 L. R. A. 770; *Stickney et al. v. Goodwin*, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408. Also that the equitable lien acquired by a creditor of an insolvent by filing a creditors' bill to set aside a fraudulent conveyance has its date from the filing of such bill, and not from date of decree, and is not avoided by the bankruptcy proceeding, where the bill is filed more than four months prior to the petition in bankruptcy, although the decree is rendered within four months. *Doyle v. Heath* (R. I.) 47 Atl. 213; *Taylor v. Taylor* (N. J. Ch.) 45 Atl. 440; *In re Kavanaugh* (D. C.) 99 Fed. 928. Under the interpretation of the statutory provisions by the courts of this state a specific lien is secured from the moment of levy by attachment upon the property seized, matured by the judgment, and the execution thereunder relates back to the time of the levy; so that a sale thereunder passes a title divested and discharged of all succeeding incumbrances. The lien is created by the attachment levy, and bears date thereof, but is fixed by the judgment. *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Huxley v. Harrold*, 62 Mo. 516; *Lackey v. Seibert*, 23 Mo. 85. The judgment does not create a new lien nor discharge the lien existing by virtue of the attachment levy, but merely directs its enforcement. A proper construction of the bankrupt act makes it evident that the preferential lien of a judgment, where a lien is obtained as the effect of a judgment, was intended to be destroyed by the adjudication in bankruptcy, but the purpose of the law was not to render void the judgment itself as such. The bankrupt act does not annul an attachment lien obtained more than four months before the bankruptcy proceeding was inaugurated, but recognizes an attachment as a lien, and provides especially that liens given or accepted in good faith, and not in contemplation of, or in fraud upon, the act, and for a present consideration, recorded, if record thereof be required to impart notice, shall not be affected. The present bankrupt law also contemplates that judgment may be recovered against the bankrupt after the adjudication, and established against his estate. Chapter 7, § 63 (5) (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). A literal and different construction of this section of the statute would invalidate a lien obtained more than four months prior to the bankruptcy proceedings, and protected by the express terms of the act.

The question here presented has been before various federal courts. In the United States District Court of Massachusetts it is held that an attachment on mesne process under the statutes of that state which create a lien, enforceable, however, only by obtaining judgment and issuing execution thereon within a fixed time, is not discharged under the bankrupt act by the filing of a petition in

bankruptcy against the defendant more than four months after such attachment was levied, although judgment was not obtained until within the four months; nor are the judgment and execution issued thereon rendered void, since they do not affect with a lien the property attached, but only enforce a lien existing and attached more than four months prior to the filing of the petition, and by necessary implication preserved by the act. *In re Blair*, 108 Fed. 529. This rule is also adopted by the United States District Court of Oregon, reversing a former ruling of the same court (*In re Beaver Coal Company*, 110 Fed. 630), which latter case was affirmed by the United States Circuit Court of Appeals, Ninth Circuit (*In re Beaver Coal Co.*, 51 C. C. A. 519, 113 Fed. 889). The state appellate court of Maine also has adopted the interpretation of the bankrupt law herein upheld. *Stickney v. Goodwin*, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408.

The decisions in conflict with the views herein expressed might be distinguished by the language of the states under which the questions are presented, but in any aspect we are of the opinion that the reasoning of the cases above is more satisfactory, and more in consonance with the spirit and purposes of the bankrupt act, than the opinions expressed in the opposing cases. *In re Lesser* (D. C.) 100 Fed. 433, *In re Lesser* (D. C.) 108 Fed. 201, and *In re Johnson* (D. C.) 108 Fed. 373.

The judgment below will be affirmed.

BLAND, P. J., concurs. GOODE, J., having been of counsel in some litigation involving the same matters, does not sit.

THIRD NAT. BANK OF ST. LOUIS v. REICHERT.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

BILLS AND NOTES—CONSIDERATION—COLLATERAL ORAL AGREEMENT—DEFENSES.

1. Where a national bank, which had acquired a flouring mill, entered into a business arrangement with defendant for the organization of a corporation to own and operate the mill, which contemplated the giving of certain notes by defendant in payment for stock, and also that defendant should run the mill, and have the privilege of acquiring the entire business, and that the bank should lend the milling company the capital required to operate the mill, the notes so given were based on a sufficient consideration in the agreement of the parties to undertake the enterprise as agreed.

2. Where a note sued on was payable absolutely without condition, the maker was not entitled to urge as a defense a parol agreement that the note was only to be paid contingently in the event enough money was earned by a certain milling corporation to pay the same from its profits.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

¶ 2. See Evidence, vol. 20, Cent. Dig. §§ 1800, 1943.

Action by the Third National Bank of St. Louis against W. J. Reichert. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dawson & Garvey, for appellant. F. E. Richey and Turner & Ho'den, for respondent.

Statement of Facts.

GOODE, J. Action on a negotiable promissory note for \$2,750, executed by the appellant to the Chemical National Bank of St. Louis on the 13th day of August, 1896, due six months after date, and given in renewal of a previous note for the same amount on February 10, 1896. The petition avers that the instrument in suit was indorsed and delivered by the Chemical National Bank to the respondent, the Third National Bank of St. Louis, for value, and before maturity; while the answer avers that the appellant received no consideration for the note, and that in fact there was no consideration for it; further, that the respondent was not a purchaser in good faith, before maturity, but came into possession of the note long after it was due, and otherwise than by purchase.

Complaint is made of the refusal of certain declarations of law by the circuit court, but the declarations need not be recited, because we think no defense to the respondent's case was shown, and that the judgment was for the right party. The Third National Bank of St. Louis purchased the assets of the Chemical National Bank of said city, the purchase being the outcome of negotiations and transactions which began anterior to January 13, 1897, and were finished by the removal of said assets to the respondent's banking house on the 28th day of February. The latter date fell about two weeks after the maturity of the note in controversy, and that fact is relied on as showing that the respondent did not acquire it in the ordinary course of business before maturity, but subsequently, and hence that any equity appellant may have against the note is available as a defense to the respondent's action. The officers of the Third National Bank on January 13th made a verbal agreement to purchase the assets of the Chemical Bank for the Third National Bank, if, on examination, they were found to be satisfactory. The examination was made January 18th, and the purchase then definitely arranged, so far as the principal officers of the two banks could arrange it; but the terms of the deal were not put into writing until January 30th, when an instrument was drawn up and signed by the officers of the banks providing for the purchase of the assets, furnishings, good will, fixtures, and property of all kinds of the Chemical Bank by the Third National for \$475,000, the agreement being based on a statement of the condition of the Chemical Bank's affairs rendered on January 18th. Said instrument provided that the officers of the two institutions should procure approval of

its terms by their boards of directors, and that it should be carried out in accordance with the provisions of the federal national bank act, the transfer of the assets to be made on or before March 1st. At the time the sale was negotiated, appellant's note was among the assets of the Chemical Bank, and was passed at its face value by the officers of the Third National without any information or notice coming to them that it was other than what it purported to be, namely, an ordinary promissory note not yet due, held by the Chemical Bank as one of its bills receivable. It unquestionably constituted part of the consideration moving the Third National Bank to make the purchase, as the testimony shows it was regarded as gilt-edged paper. The testimony of the officers of the Third National tends to show that the assets and property of the Chemical were transferred to the former institution, and actually delivered on or about the 30th day of January, but that they were not physically removed from one banking house to the other until February 28th.

The facts out of which the supposed equitable defense of the appellant arises are connected with the organization of a milling company in the state of Illinois to operate a mill at La Grange, Mo. The appellant, W. J. Reichert, and his brother, George Reichert, were the controlling owners of the capital stock of the Reichert Milling Company, which was engaged in manufacturing flour in Freeburg, Ill. Said concern kept a bank account with the Chemical National Bank of St. Louis, enjoyed a line of credit with said bank, and the officers of the two corporations seem to have been on friendly terms. Some time in 1895 the Chemical Bank acquired the property of the La Grange Milling Company at La Grange, Mo., on account of having loaned this company money secured on its milling plant, and being forced subsequently to take the plant. The title to said plant was put in the name of William E. Garvin to hold for the Chemical Bank. J. C. Richardson and Francis Kuhn were president and vice president of the Chemical Bank, and after this property had been taken over by the bank, said officers, in order to make it productive, opened a negotiation with the Reicherts, and proposed that the Chemical Bank or its officers and the Reicherts should operate the La Grange plant together, as the latter were practical millers. The result of that negotiation was that the Climax Milling Company was organized under the laws of the state of Illinois, with a capital stock of \$15,000, which was paid by Garvin conveying to it the mill and machinery of the defunct La Grange Milling Company. Of the 150 shares of capital stock of the Climax Milling Company, Richardson and Kuhn took 35 shares each, W. J. Reichert and George Reichert 30 shares each, C. A. Whittaker 15 shares, and Walter J. Serth 5 shares. Whittaker and Serth had been employes of the

Reicherts in the Freeburg mill, but after the organization of the Climax Milling Company the former took charge of that enterprise, as it was understood they should when the plan to operate the La Grange property was arranged. The Climax Milling Company continued business for seven or eight months, and then stopped, as it lost money all the time. When said Company was organized, W. J. and George Reichert each executed a promissory note for \$2,750 to the Chemical National Bank to pay for the shares of stock taken by them, which included the 20 shares put in the names of Whittaker and Serth, who gave their notes to the Reicherts for their shares; that is to say, the Reicherts subscribed for 80 shares of the total 150 shares, and sold 20 shares to Whittaker and Serth. They also took the following contract binding Richardson and Kuhn to sell them the other shares:

"Freeburg, Illinois, Jan. 31, 1896.

"This agreement is that Wm. J. Reichert and George Reichert are to have eighty shares of Climax Milling Company for \$5,500.00, and agree to resell to the Reicherts within fifteen months, our seventy shares for the sum of \$7,000, and if bought we agree to waive all profits except six per cent. interest.

J. C. Richardson.

"Francis Kuhn."

When the original notes given by the Reicherts to the Chemical Bank matured, renewal notes were executed, and the instrument sued on is one of the renewals.

The position of the defendant is that his original note was given pursuant to an understanding and agreement between him and the officers of the Chemical Bank that he was not to be bound for its payment, but that it was to be paid out of the earnings of the Climax Milling Company; that in fact it was an accommodation note, and the entire arrangement was entered into by him and his brother, George, at the solicitation of the officers of the Chemical Bank for the convenience of the latter institution, and so that it might utilize its La Grange property, keep its assets in presentable condition, and have the two notes given by the Reicherts to exhibit to the national bank examiner as solvent assets. That is substantially the testimony of the Reicherts and of Becker, a bookkeeper of the Freeburg mill, who says he heard the arrangement made; but it is disputed by the respondent, and there is testimony the other way. Becker's version of the affair, which is in all respects like that given by the appellant himself, is as follows: "He [Richardson] came out there one morning on the nine o'clock train, and came down to the mill. Mr. Reichert and myself were in the office, and he came in, and shook hands, and said, 'How do you do?' and said, 'Mr. Reichert, we are stuck.' They talked a while, and he said, 'What is the matter?' He said, 'We are stuck on a mill, and we want you folks to

help us out.' So he said, 'What do you want to do?' He told him they wanted to buy in the property; wanted to form a stock company, and run the mill again. He asked him what mill it was, and he said it was the La Grange Milling Company at La Grange, Illinois, and Mr. Reichert asked him how the mill was, and the location and everything; and, the way he explained it, it was a good mill and a good country. Mr. Reichert told him, well, before he could do anything he would want to see the property, and see the location of it; and I think right after that Mr. Reichert went up there, and Mr. Richardson came out again, and asked him whether he was ready to form a stock company, and he said— By the Court: Q. Are you speaking now of another interview? You said Mr. Reichert went up there? Do you mean went to La Grange? A. Yes, sir. Q. Have you told us all that passed at the first interview between Mr. Richardson and Mr. Reichert? A. The first time he was out there? Q. Yes, sir? A. No, sir. Q. Tell us what else passed. A. Mr. Reichert told him they had their hands full, and did not want to go into any more business. They had a large mill, and that was all he wanted; and at the same time he asked him what they required of him, and he told him that they would organize a stock company, and give them so many shares, and they would have to hold that for the Chemical National Bank, and wanted their notes—wanted his note and his brother's note. He said he did not like to go into that, and Mr. Richardson the same time always told him: 'You will not be liable for a cent. You give us your notes, and the money that you will have to pay these notes with will have to be made at the mill at La Grange before you have to pay them.' Mr. Reichert said, 'Well, that is a pretty fair offer.' He said, 'If you insert that on the notes, we wouldn't mind taking hold of it and trying it.' He told him, as a national bank, that would be impossible. When the examiner comes around he would see that on the note, and would pass on it. They couldn't hold such a note. Mr. Reichert said that would be the only way that they could go into it. * * * Mr. Reichert told him that would be the only way that they would go into it. He said that it would be impossible; that he could take his word for that; that they would be protected; and he told him, too, that they would not have to pay a cent until the money was made out of the mill up there. He said that they would start up in business, and, if they make any money, these notes would be paid out of the money made at the La Grange mill; that he himself would not be liable for one cent; that he had nothing at stake whatever. Those are the words he told him. He said: 'We are stuck up here, and want you folks to help us out. We know you are experienced millers, and know that you folks can help us out on that mill.' Q. Have you

stated all that he said as to why he wanted it in this shape? A. Well, I think I did, because he told him it could not be put in the note because it was a national bank, and when the examiner comes around he would throw that note out, and not pass on it. Q. Was there any other conversation that you heard after that time? A. No, I don't think there was. Q. Repeat again, Mr. Becker, what you said he said as to how these notes were to be paid. A. He said that, 'You will not be liable for one cent; that this note will be paid out of the proceeds of the Climax Milling Company.' Mr. Richardson told Mr. Reichert— Mr. Reichert had a clause written out, saying, 'This note is to be paid out of the proceeds of the mill at La Grange only,' and Mr. Reichert laid that before Mr. Richardson, and asked him to insert that in the note, and Mr. Richardson said: 'No, we cannot do that. It is against the laws of Missouri, and, if we insert that on the note, and the bank examiner comes around, he would not accept that note. But you can take my word for it, you won't be liable for one cent.' Q. Is that all that he said about the paying of the note? A. Yes, sir; I think it was."

Some letters were introduced, which throw light on the true nature of the agreement; among others the following:

"Freeburg, Ill., Nov. 7, 1895.

"Mr. J. C. Richardson, St. Louis, Mo.— Dear Sir: Referring to our conversation of yesterday, beg to say we cannot sign the agreement the way you have it written, but will go in with you provided you insert the following clause: 'The Chemical Nat'l Bank also agrees to loan the Reicherts \$10,600.00 on their notes at four months time—payable only upon condition that the money is made out of the mill at La Grange, Mo., only—the Reicherts not to be personally liable.' The above clause also to appear in the notes which we are to give for \$10,600.00. If the foregoing is not satisfactory to you then go ahead and buy the mill and we will lease it from you for one year with the option of renewing the lease at end of first year; or to buy the mill at any time at whatever price we can agree upon. If you accept any one of these agreements my brother and Mr. Whittaker, our head miller, will go to La Grange Friday night.

"Yours truly, W. J. Reichert."

"Freeburg, Ill., Dec. 4, 1895.

"Mr. J. C. Richardson, St. Louis, Mo.— Dear Sir: After considering and reconsidering we have come to the conclusion that we are not able to go in with you at La Grange; unless as per our written proposition of October 7, 1895. Mr. Buehler is a good office man and a first-class flour salesman, and if he takes stock in the mill you will have a good man. With best wishes, I am,

"Yours truly, W. J. Reichert."

The Chemical Bank refused to put such a clause in the notes as the Reicherts de-

manded, and whatever proof there is in regard to an agreement that the notes should not be paid according to their tenor is verbal.

The circuit court rendered judgment in favor of the Third National Bank.

Opinion.

According to the testimony relied on by the appellant, he executed the note in question for the distinct purpose of imposing on any national bank examiner who might investigate the condition of the Chemical Bank. Such examinations are made for the good of stockholders and the public generally. They are the means prescribed by law to keep national banks in sound condition, prevent losses by improvident or dishonest managers to stockholders and customers, maintain public confidence in those institutions, and a stable condition of the country's finances. It is a serious question whether appellant is not estopped to interpose the defense of lack of consideration for a note given in the circumstances and for the purpose he says he gave this one. Granting that it was acquired by the respondent after maturity, as it was executed by the appellant to deceive the officer whose duty it was to scrutinize the bank's assets, appellant occupies a weak position on which to withstand the demand of the respondent, who was innocent of actual knowledge of the facts, and would fall a victim to a scheme contrived by other persons to evade the law. Makers of commercial paper who acted from similar bad motives have been held estopped to defend on the ground of want of consideration. *Mead v. Nat. Bank* (Sup.) 34 N. Y. Supp. 1054; *Winton v. Freeman*, 102 Pa. 366; *Longmire v. Fain*, 89 Tenn. 393, 18 S. W. 70; *Howard v. Palmer*, 64 Me. 88; *Leggett v. Goodrich*, 20 La. Ann. 165, 98 Am. Dec. 388. The rule is probably universal that a person who engages in a fraudulent transaction will be left without relief from a hurtful consequence which may befall him.

But there was a consideration for the note. Appellant and the Chemical National Bank entered into a complicated business arrangement, which contemplated the giving of appellant's note to said bank; contemplated likewise that the Reicherts and their employees should take charge of and run the La Grange milling plant, and that the Reicherts should have the privilege of acquiring the entire business; also that the Chemical Bank should lend the Climax Milling Company the capital required to operate its mill. The consideration for the note was the agreement of the parties to undertake that enterprise, which was carried out in all its details. In view of such facts the plea of want of consideration is utterly baseless. *Given v. Corse*, 20 Mo. App. 132; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Ridenbaugh v. Young*, 145 Mo. 274, 46 S. W. 959; *Kansas City School Dist. v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576;

Lindell v. Rokes, 60 Mo. 249, 21 Am. Rep. 895; *Tureman v. Stephens*, 83 Mo. 218.

The defense attempted was not want of consideration, but a side agreement that the note was not to be paid absolutely according to its tenor, but only contingently in the event enough money was earned by the Climax Milling Company to pay it, and that, if sufficient money was not earned, it should not be paid at all. This was nothing more or less than an attempt to ingraft on a written contract a verbal stipulation opposed to the terms of the instrument itself; a verbal stipulation, too, which appellant had first demanded be written in the note, and afterwards waived that demand when the bank refused to accede to it. That such a defense cannot be made to a promissory note has been decided many times. *Trustees of Christian University v. Hoffman*, 93 Mo. App. 488, 69 S. W. 474; *Jones v. Jeffries*, 17 Mo. 577; *Smith's Adm'r's v. Thomas*, 29 Mo. 307; *Unzeld v. Stephenson*, 83 Mo. 161; *Massmann v. Holscher*, 49 Mo. 87; *Rodney v. Wilson*, 67 Mo. 123, 29 Am. Rep. 499; *Ewing v. Clark*, 76 Mo. 545; *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57, 1 L. R. A. 594, 15 Am. St. Rep. 288; *Hyde v. Tenwinkel*, 28 Mich. 98; *McKegney v. Widekind*, 6 Bush, 107; *Gillett v. Ballou*, 29 Vt. 296; *Walters v. Smith*, 23 Ill. 342; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

PREWITT v. BROWN.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

GARNISHMENT—AFTER GIVING OF CHECK FOR PRICE.

1. A purchaser who has given his check to a seller for the price has so far paid for the article that he is not subject to garnishment as the seller's debtor; he being under no obligations to stop payment unless he learns that the sale is in fraud of creditors.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Garnishment proceedings by Theodore A. Prewitt against Alexander H. Brown, garnishee of Louis A. Coquard. Judgment for garnishee, and plaintiff appeals. Affirmed.

Alex Young and Max F. Ruler, for appellant. S. N. & S. C. Taylor, for respondent.

Statement of Facts and Opinion.

GOODE, J. Plaintiff, Prewitt, obtained judgment in the circuit court of the city of St. Louis, October 16, 1900, against defendant, Coquard, for \$3,140, and on November 25, 1901, had Brown garnished by an execution issued on said judgment. Brown was summoned to the February term, 1902, of

the circuit court, at which term plaintiff filed interrogatories in the usual form. The garnishee answered, denying any indebtedness to Coquard, and plaintiff filed a denial of the garnishee's answer, in which he charged that the garnishee was indebted to Coquard in the sum of \$3,500, averring that the indebtedness accrued on account of the purchase by Brown of Coquard's membership in the St. Louis Stock Exchange, an association of persons engaged in buying and selling stocks and other securities.

The facts stated in plaintiff's denial are that on or about November 15, 1901, Coquard entered into an agreement with Brown to sell the latter his membership in the stock exchange for \$3,500, and pursuant to said agreement the name of Brown was posted in the exchange as an applicant for membership, and on or about January 15, 1902, he was elected a member in lieu of Coquard; that when Brown was summoned as garnishee on November 25, 1901, he had not paid Coquard for his membership, but still owed him the full price of \$3,500 agreed to be paid. The denial further alleges that when the agreement for the sale of the membership was made Brown deposited the purchase price, either by check or in cash, in escrow, to be turned over to Coquard when Brown was elected a member of the stock exchange; that at the time the latter was garnished said check or cash had not been turned over to Coquard, but was still under the control of the garnishee, and if subsequently delivered to Coquard the garnishee was nevertheless liable to plaintiff. Brown filed a general denial of the allegations contained in plaintiff's denial of the answer.

It should be premised that no declarations of law were requested or given in this case, and hence, in so far as the facts are in dispute or the evidence warrants different inferences and findings, we are bound by the conclusion of the circuit court. But there is slight, if any, discord in the versions given by the witnesses of the transaction which plaintiff contends entitled him to judgment against Brown.

Coquard had for years been a member of the St. Louis Stock Exchange, but wanted to sell his membership, and Brown told a broker by the name of Drummond, who is a member of the firm of Drummond, Betts & Co., to buy it as cheaply as he could. On November 19th, Drummond, as Brown's agent, made a contract with Coquard for the latter's membership at the price of \$3,500, Coquard directing that payment be made for him to Edwards & Sons Brokerage Company. In compliance with that direction, Brown, on November 22d, delivered his check for \$3,500 to Drummond, payable to Edwards & Sons Brokerage Company, and on the same day Drummond delivered the check to said brokerage company in payment for the membership. Everybody connected with this transaction except Brown was a member of the

§ 1. See Garnishment, vol. 24, Cent. Dig. §§ 22, 24.

St. Louis Stock Exchange, and knew its rules, and Drummond was on the governing board of the exchange. Said association had a rule requiring the application of an applicant for membership to be posted in the chamber of the exchange, it seems, for 10 days, and another rule or by-law that all debts or obligations owing by a member about to sell his membership to other members of the exchange should become due and payable when notice of the agreement to transfer the membership was posted on the bulletin board of the exchange, and that such debts and obligations should be liquidated and paid by the committee of arbitration of the exchange out of the proceeds of the membership on the consummation of its transfer.

So far as appears, Brown knew nothing about the latter rule, and had nothing to do with seeing it was observed in this affair. But Drummond turned the check over to Edwards & Sons Brokerage Company, it was held 10 days from the date of Brown's application for membership, which was dated November 20th, and then delivered by the Edwards Company to Coquard. This was done under the rule of the exchange, to make good any obligations or debts Coquard might be under or owe to the other members.

Drummond testified on this point as follows: "Q. You say it [the check] was to be paid at the expiration of ten days after his [Brown's] name was posted? A. That is according to the rules of the stock exchange. There was no agreement of that kind, but it is understood in the sale of a membership that the money shall be paid by the treasurer at the expiration of ten days after his name is posted."

As we gather it, the usual custom is for the price of a membership sold by a retiring to an incoming member to be paid to the treasurer of the exchange to liquidate the retiring member's obligations. Instead of that being done in this instance, Brown's check seems to have been left with the Edwards Company for the same purpose, we suppose because the members of the Drummond and Edwards concerns were all active members of the exchange.

Drummond again testified as follows: "Q. You say that according to the rules your purchase was to be turned over ten days after his name was posted? A. I did not. I said that was according to the rule of the stock exchange. There was no such agreement between Coquard and myself. Q. I know you did not have an open agreement. You were both members at that time of this stock exchange? A. Yes, sir. Q. And that was the rule? A. Yes, sir."

Brown testified that he was asked for his check on November 22d, and gave it in payment for Coquard's seat in the exchange; also that he did not see the check again until it came back to him, paid, when his bank-book was balanced. The check was delivered to Coquard by Edwards & Sons Broker-

age Company on November 30th, and was cashed by him on that day.

From the above recital of facts it will be noticed that, while Brown's check to pay for Coquard's seat was made out and delivered by him on November 22d, it was not in fact cashed until November 30th, or five days after the service of the garnishment on Brown. Plaintiff insists that it was incumbent on Brown to stop payment of the check when he was summoned as garnishee, and as he failed to do so, and allowed it afterwards to be paid to Coquard, he is answerable to plaintiff as garnishee.

Underlying this contention is the notion that the check did not constitute payment; that Brown was still indebted to Coquard on the original contract of sale. It is true enough that as between the parties a check on a bank does not constitute full payment, but the original liability may be sued on if the check is dishonored when presented for payment. *Johnson-Brinkman v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Hall v. Railroad*, 50 Mo. App. 179. But it is equally true that a purchaser in good faith, who has given his check to a seller for the price of an article bought, has so far paid for the article that he is not subject to garnishment as the seller's debtor. *Getchel v. Chase*, 124 Mass. 386; *National Bank v. Levy Bros.* (R. I.) 24 Atl. 777, 19 L. R. A. 475; *Pearce v. Davis*, 1 Moody & R. 365; *Waples on Attch. & Garn.* (2d Ed.) § 364; 2 *Morse on Banking* (4th Ed.) § 545. The reason of this rule is that the drawer of a check is under no duty or obligation to stop payment when garnished, for the benefit of the garnishing plaintiff; has no moral right to do so. He gave the check in lieu of cash to the seller, with the understanding that the seller would get cash when he presented it for payment. To countermand the check would, therefore, be in derogation of an implied agreement that it should be honored when presented.

A different rule prevails when the drawer of the check learns before payment that the vendor sold his property in fraud of his creditors; and in such instances the drawer, after notice of that fact, is bound to stop payment if the check is still in his control. *Arnholz v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528; *Shoe Co. v. Lisman*, 149 Mo. 85, 50 S. W. 276. This rule is discriminated by the cases from the other rule, that the purchaser of property who has given his check in payment may not be held for the purchase price as garnishee, although the check was not yet paid when the writ was served. *Arnholz v. Hartwig*, supra. The distinction seems to rest on the circumstance that if the drawer of the check permits it to be paid after he has notice of the fraud, and while he can stop payment, he participates in the fraud.

We have alluded to the latter rule, not because any charge of fraud was made in this

case, but because decisions recognizing said rule are cited and relied on by the plaintiff in support of his demand for judgment against the garnishee. We think they lend no help to his case.

So far as appears, Brown's check was delivered to Edwards & Sons Brokerage Company without any reservation by him against its immediate payment. It was retained by said company pursuant to no direction or agreement made by him or his agent, but in observance of a rule of the stock exchange which it is not shown Brown even knew. It was retained, too, for a special purpose, namely, to satisfy debts which Coquard might owe to members of the exchange. Brown was not a party to the retention of the check by the brokerage company, and its retention reached no further than to protect the members of the exchange. So far as Brown was concerned Coquard was entitled to the check the day it was delivered to the brokerage company, and so far as the rules of the stock exchange were concerned he was entitled to it when 10 days had elapsed from the posting of notice that he had sold his seat without any claims being filed against him.

It therefore appears that neither when he was summoned nor when he answered was Brown indebted to Coquard in any sum, and the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

GREGORY v. JONES et al.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

ACTION ON NOTE—ADMISSIBILITY OF ENTRY MADE IN BOOK—CORROBORATING EVIDENCE.

1. Entries of payments on a note made by the maker on his books are not the proper subject of book accounts, so as to make them admissible in evidence as to such payment in a suit on the note.

2. Such entries do not come within Rev. St. 1899, § 4652, providing that in actions where the matter at issue is proper matter of book account a party may testify in his own favor as to when the entries were made and in whose handwriting, and section 4653, providing that in such actions no disputed account shall be allowed on the oath of the party when he has a book of original entries, unless the book be produced.

3. In an action on a note defendant testified as to a slip from his account book containing an entry of a payment, which was admitted in evidence, and was then permitted to read in evidence several accounts against other parties copied from the same book, which accounts he had hung on a hook, together with the slip, and put away in an envelope, which he had not seen till just before the trial, 20 years afterwards. *Held*, that the court erred in permitting the reading of these accounts, as neither the witness nor the entry could be corroborated in this way.

Appeal from Circuit Court, Audrain County; Elliott M. Hughes, Judge.

Action on a note by John B. Gregory against John S. Jones and others. Judgment for defendants, and plaintiff appeals. Reversed.

P. H. Cullen, for appellant. W. W. Fry, for respondents.

BLAND, P. J. Omitting caption, the petition is as follows: "Plaintiff states that defendants, by their promissory note herewith filed, dated 21st day of December, 1878, promised to pay to John B. Gregory, plaintiff, or order, \$1,200, four months after date, for value received, with interest thereon at the rate of 10 per cent. per annum from date until paid, and if interest is not paid annually to become as principal, and bear same rate of interest; that defendants have made the following payments on said note: July 20, 1880, paid \$500; November 13, 1880, paid \$88.72; December 31, 1881, paid \$250; March 28, 1882, paid \$200; December 21, 1883, paid \$100; December 5, 1885, paid \$50; December 17, 1887, paid \$50; September 18, 1889, paid \$50; December 5, 1890, paid \$50; February 1, 1892, paid \$50; January 8, 1894, paid \$50; December 24, 1895, paid \$40—all of which payments have been entered as credits on said note. Plaintiff states that he is now the owner and holder of said note, that the same is past due, and that the remainder thereof of said note and interest is yet due and owing to the plaintiff by defendants; for which sum, together with costs, he prays judgment."

The defendants filed the following answer: "Now come the defendants, and for their answer to plaintiff's petition admit that they executed the note sued on, and admit that the twelve payments credited on said note were made by the defendants at the date of said several credits, and the same are correct. But the defendants further state that the defendant John S. Jones did make a payment of three hundred dollars on said note on the 9th day of June, 1879, which payment the plaintiff neglected and failed to credit on said note, and defendants are entitled to a credit of said sum of three hundred dollars on said note on June 9, 1879, as a payment thereon at said date. Defendants state that the payment of fifty dollars, credited on said note on December 5, 1885, paid off and satisfied said note and made an overpayment of \$27, and that said payments credited in 1887, 1889, 1890, 1892, 1894, and 1895 were overpayments on said note made by mistake, and that defendants have overpaid plaintiff on said note to the amount of three hundred and seventeen dollars. Defendants state they did not see said note from the time it was executed until 1901, and that said payments were made on said note from time to time without seeing said note, and relying all the time on plaintiff to credit said payments, and with no knowledge of the amount they

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1451.

had paid or that they had overpaid the same. Defendants therefore plead payment of said note, and state that they have overpaid the same to plaintiff in the sum of three hundred and seventeen dollars. Defendants therefore say that the plaintiff is indebted to them in the sum of three hundred and seventeen dollars, for which amount, with interest and costs, they ask judgment."

The reply was a general denial of the new matter in the answer.

There was a verdict for the defendants, assessing their damages at \$318. Motions for new trial and in arrest proving of no avail, plaintiff appealed.

The whole of the evidence at the trial was directed to the alleged payment of \$300 on the note made on June 9, 1879. In respect to this payment one of the defendants, John S. Jones, testified as follows: "Mr. Fry: Mr. Jones, when was your attention called, or when after this note was signed, about, did you next see it? A. I saw it at your office. Q. When? About when? A. About in January. It has been about a month ago, I guess. Q. Speak a little louder. A. It has been about a month ago, gentlemen, I think. Q. Had you seen a copy of the notes and credits before that? A. No, sir; I never had seen that note or a credit on it up to that time. Q. Well, did your son, Eugene, show you a copy of the notes and the credits on the note or call your attention to it? A. Yes, sir. That was in August, I think. Q. What August? A. This present August. I told him to get them. I told him to get copy of the credits. Q. Now, when your attention was called to the credits on the note, state whether all the payments you had made had been credited on the note? A. I said I was entitled to \$400 or \$500 more money I had paid on that note. Q. I am not asking you what you said. State whether at that time, as a matter of fact, the note had been credited with all you had paid on it? A. No, sir; it had not been credited when I saw it. Q. At what time was the payment made that had not been credited on that note that you noticed at that time? A. It was in June. Q. What year? A. '79. Q. What was the amount of that payment? A. It was \$300. I have recollection of that. After at your house I have studied this matter over, and there are several points I could give. Q. What did you do in the way of looking up some memorandum of it? A. I went all through my papers and looked for it. Q. What did you find? A. I didn't find anything when I first looked—nothing to show that ever I had packed a pound of pork in this town. Q. What did you finally find? Mr. Cullen: I object to what he finally found. Mr. Fry: He says he remembers the payment. Court: Let him state the fact and under what circumstance he made this entry of that payment. Mr. Fry: You say you remember a payment had been made in June, 1879, of \$300. State how that pay-

ment was made and who made to? A. That payment was made to Mr. John B. Gregory. Court: By whom? A. By myself. Mr. Fry: At what place? A. At my porkhouse. Q. At your porkhouse? A. Yes, sir. Q. How much was that payment? A. \$300. Q. How did you pay him? A. In the currency of the country—in paper money. Q. You have a recollection of that fact? A. Why, yes; I do. Q. Now, did you afterwards— Did you make any memorandum of that payment? A. Yes, sir; I did. Q. Have you that memorandum? Mr. Cullen: I object. The memorandum offered is not such memorandum as may be admitted in evidence. It is not a book entry—not shown to be kept in the usual course of business. Court: Do you seek to introduce that paper as evidence? Mr. Fry: No, sir; not now. Q. Now, Mr. Jones, at that time—at the time you made that \$300 payment—did you keep any book or memorandum of your daily work or business? A. Yes, sir. Q. Now, how did you keep it? A. I kept it in my pocket. Whenever I would buy anything from anybody I would put it down, and whenever I would pay anything I would put it down in this book. Q. What kind of a book? A. Similar to that. When I paid anybody anything I marked it down, and if I bought any hogs or anything I would put it down there too, and I kept a book of that kind until '95, as long as I was dealing. Q. '85 you mean? A. No, sir; '95. Q. You kept a book of that kind in '79? A. Yes, sir. Q. At the time you made that payment? A. Yes, sir. Q. Do you know what became of that book? A. No, sir; I do not. Q. Do you know what you did in the way of keeping any parts of that book? A. I don't know as to that now. Q. Well, is the paper you have in your hand a part of that book? A. Of that book? Q. Yes, sir; of '79? A. Oh, I would not say whether it is a part of that book or the book I had before. Q. Well, what was your custom? Did you make memorandums of that kind and file them away in '79? Mr. Cullen: I object to what his custom was. Q. Well, did you do that? A. Yes, sir. Q. Well, now, just state to the jury how you did it? A. I can't tell you how this got on that book. Mr. Cullen: I object. It is incompetent testimony. It is no more or less than a declaration in his own favor. Mr. Clay: We have not offered to introduce the paper. Court: What was your question? Mr. Fry: I asked him what was his custom in the way of keeping a memorandum of his business in '79. Court: Do you want to know whether he did keep it? Mr. Fry: No, sir; I want to know how he kept it. Court: You may answer whether you kept a memorandum of your business in '79. A. I did in '79 and ever after that. Q. You did keep it? A. I had three books I kept my pork business in; these books I used in carrying them with me in buying stock. There is one of these preserved. I kept them as my

books the same as any other. Court: Is that paper you hold in your hand a portion of your account book you kept in '79? A. Yes, sir; it is. Mr. Fry: Now, we offer this in evidence. Mr. Cullen: I object to it as presented. It does not appear to be a memorandum made in the usual course of business, but simply a part cut from a book. Court: He says it is a portion of his account book which he kept in '79. Where is the balance of the book? A. Judge, I don't know. Q. You don't know? A. No, sir. Q. Do you know when this was separated from the book—this piece of paper? A. I can't just state. It was separated prior to my drawing off a whole lot of little accounts, because it was hung on that hook with those accounts, and they would run on from 25 cents to two or three dollars—little bit of accounts. I took them all off the hook, and I am satisfied this was taken off at the same time as these little accounts. Q. When? A. That was in '79. Q. '79? A. Haven't you got some of those? You can see where they were torn off. I was posting up all those, probably on the daybook. That was my book that I carried in my pocket. Mr. Fry: Well, we offer this memorandum in evidence. Mr. Cullen: I desire to ask the witness some questions on that. Court: I think that is proper. Mr. Cullen: Q. Now, Mr. Jones, that slip of paper, which Mr. Fry just handed to me, and which you have in your hands, you have no personal recollection of making that entry, have you? A. I had as soon as I saw it. Q. But before you saw it? A. I was satisfied I was entitled to a credit. Q. That is not my question. Before you found this slip of paper you had no recollection of having made any book entry of the payment of \$300? A. I did that. I had made a claim that I paid more. Q. You gave your deposition in this case, didn't you? A. Sir? Q. You gave your deposition in this case, didn't you? A. Yes, sir. Mr. Fry: We object. He is not cross-examining the witness now. Court: The objection is well taken. (Plaintiff excepted at the time and saved his exceptions.) Q. You say you had a personal recollection of making this entry before you found it? A. I had a personal recollection of making entries in my daybooks when I paid him money. Q. The question is, had you personal recollection of making this particular entry before you found it? A. That is one of the entries I refer to as not having been credited on the note. Q. Pay attention to my question. Before you found this slip of paper did you have any recollection of having made an entry of that kind—did you or not? A. Well, I can't say. It was just a recollection that I was entitled to more credits than I had, and I had a book of that kind that I could refer to. Q. This book that you think this was cut from was not a book that you kept in your business generally? A. It was a book that I kept in my business generally as long as it lasted, in

buying stock and ship porkhouse. Q. That was a memorandum that you kept? A. Yes, sir; but you say it was my book of business. Q. Isn't it a fact that it was in a book about the size of this? Q. A. It is a book you had for private transactions in? Q. Private; it was transactional at the time, whether it was. All the business that you kept in that book? A. All the business way of buying and paying in these books. They would keep a book of business. Q. That was the only book of business? A. Which? Q. Are all you ever had? Q. House books had no credit. The books you kept in your business in handling the entry of this kind? A. Q. The book you think was a book you carried in your private sales in? A. I don't know about it. It was a book in my pocket. I kept books in my pocket. Many entries in my pocket taken from those books. Q. What other page? A. I don't know. Q. The entry was in that book? A. You don't know. Q. I don't know what entry followed it? A. I don't know. It was a book and none followed it. Q. What page? A. Yes, sir; the book with my business—what was the occasion for that from the book? I don't know. A. Well, sir; the book about full—about filled with that of some importance. You have not the reason why you cut that out? Q. Others. Q. Those you found in your position was taken? A. Yes, it was taken? Well, I may have been acquainted with him awhile? A. Certainly. Q. Name was Gregory, didn't you? A. I didn't know how it was. Was Gregory or Gudgory? A. Not I. B. Gedgorn? (Declarer is for the jury to state the name.) A. It is not an 'I'. Mr. Fry: This is your objection, sir. Mr. Cullen: Where is Gregory? A. I don't know. Q. This is Gedgory. J. B. Gregory. Q. Spell it. A. Well, I might have. Mr. Cullen. Q. How is it? Mr. Fry: The paper shown. The objection is well taken. The objection is well taken and accepted at the time and

Court: Did you intend by that name John B. Gregory who is the plaintiff in this suit? A. That is what I intended to spell there. I am much obliged to you, judge. Good many of us are not educated. Mr. Cullen: You knew Gregory didn't spell his name Gredory? A. I don't know; I never saw him sign his name in my life. I don't know anything about that. I say that is the way I spell it. Court: It seems prima facie it would be admissible, coming from the proper source—from the books kept in the regular course of his business. Mr. Cullen: I object for the reasons given before. (Court overruled the objection, and plaintiff excepted at the time and saved his exceptions.) Mr. Fry then read in evidence memorandum identified by witness, which is in words and figures following, to wit: 'June 9th, 1879. Cash paid J. B. Gregory, \$300. J. S. Jones.' Q. Now, Mr. Jones, in June, 1879, were you indebted to Mr. J. B. Gregory in any other way than this note sued on here? A. None whatever; didn't owe him a cent. Q. Mr. Jones, here is a memorandum in this book here, '85. Whose handwriting is that? A. It is mine. Q. When did you make that entry? A. Well, what is it? I can't see. Will you just read it to me. '85; I entered that December 10, '85." This witness further testified that he copied from the memorandum book, from which the slip read in evidence was cut, a number of small accounts on divers persons, and that he hung these with the slip on a hook, and some time afterwards placed them in an envelope containing an insurance policy, and put the envelope in the bottom of a box in which he kept his papers, and that after a search among his papers he found them two days before the suit was commenced in the envelope where he had placed them. Over the objection of plaintiff, these accounts (16 in number) were read in evidence. He (defendant Jones) also testified that he made an entry in memorandum books of each payment he had made on the note, and was permitted, over the objection of plaintiff, to read from several of these memorandum books entries of other payments made on the note, about which there was no controversy.

In 1879 Jones was engaged on his own account in the pork-packing business in Audrain county, Mo., and he testified that he kept the accounts of his business in pocket memorandum books; that he sold spareribs, backbones, and sausages to the town people, and kept their accounts in the same kind of memorandum books, and from one of these he cut the slip read in evidence. He was not able to produce the book itself or to account for it further than to say that some of his account books had been lost in a fire. Plaintiff testified that Jones made no payment at all on the note in the year 1879, and that he entered on the back of the note every payment made and the time it was made. Plaintiff's son testified that in

1880 he was in partnership with Jones in the pork-packing business, and that in discussing money matters between them Jones stated to him that he owed the plaintiff a note of \$1,200 and had made no payment thereon. There is other evidence of a circumstantial nature tending to show that no payment was made on the note in the year 1879.

1. Plaintiff's contention is that the court erred in admitting the slip of paper containing the entry or memorandum made by Jones of the payment of \$300, June 9, 1879, and in admitting the copies of accounts of third parties taken from Jones' books, and also in admitting the entries in his books of other payments on the note that were not in dispute. Leaving out of consideration the fact that the book, from which the slip was taken, was not produced or satisfactorily accounted for, nor any good reason given for its mutilation, the question arises whether or not the slip read in evidence and other similar entries, made at other times and in other books, are the proper subjects of book account, and as such admissible in evidence. The last clause of section 4652, Rev. St. 1899, which section first appeared in the General Statutes of 1865, provides "that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther." The succeeding section (4653) provides: "The court before which any action for the recovery of any sum or balance due on account, and where the matter at issue and on trial is a proper and usual subject of charge on books of account, may require either party to produce, at the trial, either his ledger or original book of entries, or both; and no disputed account shall be allowed upon the oath of the party, when it shall appear that he has a book of original entries, unless such book shall be produced upon reasonable request."

In *Anchor Milling Co. v. Walsh*, 108 Mo., loc. cit. 282, 18 S. W. 905, 32 Am. St. Rep. 600, the Supreme Court, through Black, J., in commenting on these sections, said: "We think these sections were designed to and do give complete recognition to the rule which then prevailed and now prevails in most of the states, and is sometimes called the American rule, namely, that contemporaneous book entries are evidence for as well as against the party by whom they are kept." In *Robinson v. Smith*, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510, it was held: "Bankbooks containing original entries, and shown to have been accurately kept and written up each day, are admissible in evidence in favor of the persons by whom they were kept." Substantially the same ruling was made in *Seligman v. Rogers*, 113 Mo. 642, 21 S. W. 94; *Borgess Investment Co. v.*

Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Missouri, E. L. & P. Co. v. Carmody (St. L.) 72 Mo. App. 534. See, also, Smith v. Smith (N. Y.) 52 L. R. A. 545, and note.

The rule admitting books of account in evidence when supplemented by the oath of the party had its origin in necessity, and is supported on the theory that they are the best evidence attainable of the transactions written in them. If, therefore, the transactions recorded are not the proper subject of book account, they do not come within the reasoning of the rule. If the usual course of business is to preserve the evidence of the transaction in some other way, as by some other writing or voucher, it is not the proper subject of book account. In *Jewett, Adm'r, v. Winship et al.*, 42 Vt. 204, it was held that under the Vermont statute—from which our statute (section 4652, *supra*) was taken—a payment that operates presently to diminish or extinguish an existing debt is not a subject of book charge. In *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138, it was held that the ruling, which admitted books of account properly kept as evidence, “does not apply to books or entries relating to cash items or dealings between the parties.” After stating the necessity for the rule admitting book accounts as evidence, the court said: “But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes, or writing, or vouchers, in the hands of the party paying or advancing the money. Moreover, entries of cash transactions may be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold or delivered or of services rendered.” Substantially the same ruling was made in *Sanford v. Miller*, 19 Ill. App. 536.

The only items entered by Jones in his memorandum account book of any transactions with the plaintiff were the cash items, which he testified were payments on the note. Payments of this character are ordinarily evidenced by an indorsement of them on the back of the note, and we think that, both upon principle and authority, such entries are not the proper subject of book account, and that they do not come within the purview of the statute or the reasoning of the rule.

2. The only purpose the reading in evidence of the 16 copies of meat accounts against third parties could serve was to corroborate Jones' evidence in respect to his having hung them on a hook with the slip read in evidence, and then placing them in an envelope, where he found them 20 years afterwards. Neither a witness nor a book of account can be corroborated in this manner. At most, the entries made by Jones of cash paid to plaintiff are memoranda from which he might have refreshed his memory

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as to the fact of payn

The judgment is re-
remanded.

REYBURN, J., and

Abstract

JONES v

(Court of Appeals at

31.

**GIFT INTER VIVOS—BUT
TION OF PARTIES—IN
SUFFICIENCY OF EVI
—COMMENT ON ITEMS
SIBILITY OF EVIDENCE**

1. The burden of pr
establish a gift.

2. The general rule
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 especially applicable w
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3. Evidence in an action of the mother against the father for money, claimed by the father to be due to him in the mother's estate, is held insufficient to establish the mother's part to donate, especially in view of the fact that the money was not made until after the father's death.

4. In an action by the cover from decedent's the latter to have been requested by the son, delivered to him as a could not recover, is instructions that if, wored or agreed to deliver she intended that he should and that she would not against him therefore, the gift, and could not be establish a gift the delivery with intent to dominion.

5. Instructions that, that at the time of giving stated that she had given the money to the government must be in his father's handwriting. It was stated to the son, in the presence of the mother, that she would give it to the son, if he delivered it, then judgment was given for the son; and that, if he died on the day the money was given, the money would have been given to the son. The mother stated that she would never give the money to the son, if the court was warranted in properly refused, as money was given in isolated parts of the testimony.

6. In an action by the decedent's son to recover the property by the latter as a gift, the son to his sister, after declining that he would pay the estate for services, was pressed for the claim to it as donee.

7. Evidence that dece
intention of leaving her
her death was properly

Appeal from Circuit

L. B. Woodside, Judge.

Action by Wesley 1
trator of the estate o:
ceased, against John
plaintiff, and defendant

¶ 1. See Gifts, vol. 24, Ce

Crites & Garrison, for appellant. T. M. & C. H. Jones, for respondent.

REYBURN, J. This record discloses that several years prior to the 29th day of September, 1901, Margaret Falls, plaintiff's intestate, had resided at Rolla, Mo., with her only son, John Falls, appellant herein, occupying as their home a house the property of the son, and on the 29th day of September, 1901, Margaret Falls died, leaving as her heirs at law, appellant and four daughters. At the time of her decease Margaret Falls had \$306 cash in her possession, which was delivered by the sisters of appellant to him, and deposited by him in bank in his own name, and from which he afterwards paid the expenses of the funeral and last illness of his mother, aggregating \$204.55. Prior to December, 1897, appellant and C. P. Reinhoehl proposed to buy a stock of goods then offered for sale in Rolla, and appellant, finding he required \$600 to provide sufficient money to pay his share, in company with Reinhoehl, went to deceased, and asked her for the money. With some reluctance, and after some hesitation on her part, she agreed to let him have it, but, not having the amount at hand, appellant, through J. J. Crites, procured a loan of \$600 on a farm belonging to his mother, upon which she executed a deed of trust securing her note for that amount, of date December 6, 1897. After thus obtaining the money, deceased turned it over to appellant without taking from him any acknowledgment of its receipt, or any obligation of any character for its return or repayment to her. Appellant invested the money in his business, and paid interest on the loan during the lifetime of his mother, but after her death, upon default in payment of the mortgage indebtedness under the provisions of the deed of trust, the realty was sold, and bought in by appellant.

The petition is in two counts, the first reciting that defendant, not having any property of his own to pledge as security for money, importuned deceased to borrow for him \$600, and on the 6th day of December, 1897, deceased borrowed for defendant, at his instance and request, such sum, executing her promissory note therefor, and securing payment thereof by a deed of trust on the property described; that defendant received said sum from deceased, and agreed to pay same to her, or to pay off and discharge said note and deed of trust given by her for said sum of money, but defendant had failed and refused to pay off said note and have such deed of trust satisfied of record, and had failed and refused to pay deceased in her lifetime, and had permitted the deed of trust to said real estate to be foreclosed, and had failed and refused to pay plaintiff, as her administrator, said sum. In the second count plaintiff averred that prior to the death of his mother defendant had received from her sundry sums of money, collectively \$350, to

be deposited to her account in the bank, which defendant had converted to his own use, and had refused to account to plaintiff for such sums or pay same to him.

The answer of defendant admitted the administration, and that deceased had borrowed for him the sum alleged, to be used by him in his business, and had pledged her real estate for its payment; and, further, that on the 6th of December, 1897, he was engaged in business in the city of Rolla, and needed said sum of \$600 in his business; that the deceased, his mother, was desirous of assisting him in his business, and suggested to him that, being the owner of the real estate described in plaintiff's petition, she would borrow the money for him, pledging such real estate for the payment thereof, and that she would give to defendant, for use in his business, said sum of \$600 so procured from such loan, and informed him he need not repay the same; that she made him a present of same on account of the kind treatment and support she had received from him during the past; that thereupon she borrowed said sum, and executed and delivered her promissory note for the sum of \$600, and a deed of trust upon such real estate to secure its payment; that his mother delivered to him, as a gift, such sum of \$600, and that it was so intended and understood by her and defendant at the time. In answer to the second count defendant denied he had converted any money belonging to the estate of his mother to his own use, but that a short time before the death of his mother, during her last illness, his sisters, who were in attendance upon her, delivered to him for safekeeping \$306 of the deceased, and at their request and suggestion he had placed it in bank, and after the death of his mother he had paid therefrom the funeral expenses, physicians and nurses, \$204.55, and to a sister the sum of \$21.24, leaving a balance in his hands of \$80.21, belonging to the estate of his mother, which he then tendered into court, and offered to allow judgment to go against him in said sum; that the amount of \$44.85 in cash on hand at the residence of his mother at the time of her death was divided equally by her heirs at law, and was never in his possession.

The reply was a general denial, and an averment that defendant was to pay off and discharge the mortgage indebtedness, and have the deed of trust satisfied of record, which he had failed to do, permitting the note to mature, and the land mortgaged to be sold in satisfaction.

At the close of the case defendant asked the following instructions:

"No. 1. The court declares the law to be that, if it believes and finds from the evidence that Margaret Falls, now deceased, on the 6th day of December, 1897, delivered to the defendant, John Falls, as a gift, the sum of \$600, described in plaintiff's petition and defendant's answer, the plaintiff cannot

recover in this action, and the finding and judgment of the court will be for the defendant.

"No. 2. The court declares the law to be that a gift is a transfer of personal property, made voluntarily and without consideration; and this case, if the evidence shows that the said Margaret Falls, after or at the time she gave the defendant the \$600 charged in plaintiff's petition and admitted in defendant's answer, stated that she had given the defendant said \$600, the judgment of the court will be for the defendant.

"No. 3. If the court believes from the evidence that Margaret Falls stated to the defendant in the presence of witness Reinoehl that she would give him, the defendant, John Falls, the \$600 in question, and afterwards delivered and gave to the said defendant the sum of \$600, then in law it was a voluntary transfer of the said personal property without consideration, and the finding and judgment of this court will be for the defendant.

"No. 4. If the court believes from the testimony of the witness Crites that the said Margaret Falls, on the day said \$600 was delivered to the defendant, John Falls, informed said witness that she had given the defendant the \$600 in question, and, if he lost it, she would never give him any more money, then in that case the court is warranted in finding that it was a voluntary transfer of said money from the said Margaret Falls to the said defendant, a gift within the meaning of the law, and the judgment and finding of the court will be for the defendant.

"No. 5. The court declares that the evidence offered preponderates in the defendant's favor, and the finding of the court will be for the defendant.

"No. 6. The court declares that there is no evidence offered in this case on the part of the plaintiff contradicting or disapproving the statements shown in evidence by the defendant."

—All of which the court refused, and gave the following:

"The court declares the law to be that if, at the time deceased, Margaret Falls, agreed to deliver, or at the time she did deliver, money in question to John Falls, she intended that he should keep the same as his own, and that she would thereafter have no claim or demand against him for the recovery of the same, then it was an absolute gift, and the plaintiff cannot recover the same on this action."

The court then, of its own motion, gave to the plaintiff the following declaration of law: "The court declares the law to be that, in order to establish a gift, the evidence must show a delivery of possession of the money with the intent to relinquish any claim or dominion thereafter over it, and the court finds from the testimony in this case that the deceased did not intend to relinquish any claim or dominion over the money," and the court found for plaintiff on the first

count for the sum of \$603 and upon the second count for \$81.24.

Appellant assigns as error the finding for plaintiff on the evidence adduced, and that the judgment was against the preponderance of the evidence, and should have been for defendant, insisting that the uncontroverted testimony clearly and unmistakably establishes that Margaret Falls, at the time of giving plaintiff the sum of money, intended to relinquish all claim thereto, and with the purpose that he should have it as a gift, and that he had accepted it as a gift; thus concluding the transaction. The law is well settled that a gift, when consummated in the proper manner, is effective and conclusive between the parties thereto. *Meyer v. Koehring*, 129 Mo. 15, 31 S. W. 449. In the language of a well-considered case in the Supreme Court of this state: "To constitute a valid gift *inter vivos*, there must be an intention to give, and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient unless made with an intention to give. The transaction must show a fully executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given." *In re Estate of Souard*, 141 Mo. 642, 43 S. W. 617. But such transaction must be established by clear and convincing testimony, and the burden of proof is upon the party claiming the benefit and asserting title to the property. *Wheeler v. Glasgow*, 97 Ala. 700, 11 South. 758; *Selleck v. Selleck*, 107 Ill. 389; *Teegarden v. Lewis* (Ind. Sup.) 35 N. E. 24; *Sampson v. Sampson*, 67 Iowa, 253, 25 N. W. 233; *Collins v. Lofftus*, 10 Leigh, 5, 34 Am. Dec. 719. Tested by the application of the foregoing well-established rules, the testimony introduced by appellant, consisting wholly of oral proof, is far from satisfying the requirements of the law to establish a gift *inter vivos*, being essentially as follows:

Amelia B. Seers, a resident of Rolla, stated she was a particular friend of Margaret Falls during her lifetime, and had known her for over 25 years. Was frequently at her house, spending many evenings with her, and the deceased had frequently talked over her business affairs with her. That the latter had always expressed herself as wanting the defendant to have everything that she left. That she was with her one day when she put \$835 in the National Bank at Rolla, assigning as a reason that she drew that out of the store because she did not like Mr. Reinoehl, and wanted to get the money out. That she remembered the deceased let the defendant have some money to put into the store, but she could not say how much. That the deceased did not say any more than that defendant wanted it in his business, and

she wanted to let him have it, and said she gave a deed of trust on her farm; but she did not say that she wanted to give him the money. She said she gave it to him to help him in his business; that he needed it. And in response to a question by the court whether the deceased said at any time it was a gift or a loan, this witness replied: "She did not say which it was to me. She said she would let him have it to use in his business. She said that he needed it."

Amos Seers testified that he was frequently at the house of deceased during the last 20 or 25 years, and she talked over what disposition she was going to make of her property, but he could hardly tell about what she had said, and could not remember very well, and forgot things; but she gave him to understand that there was a part of her children that would not get anything at all, and that defendant and one girl, he thought there was, that she calculated would get what she had; that he remembered something about the deceased letting the defendant have the money at the time defendant started in the store; that deceased said she had let him have \$600, but he did not remember whether she said \$600 or whether she said that she let him have the money to go into business with. In reply to the direct question whether or not that was a loan or whether that was a gift to him, he replied that he did not think that she stated that, but she said she let him have the money to go into business with. It was her money that was in the store.

C. P. Reinhoehl testified to his acquaintance with defendant for 13 years, and that he engaged in business with him in December, 1897; that there was a stock of goods that defendant and himself wanted to buy, and they lacked \$600 of having enough money to pay for it, and made different efforts to get the money unsuccessfully, and defendant and witness went to his mother's, and tried to get the money, and talked for an hour or an hour and a half, and at first she did not want to let defendant have the money; said she would not, as she was afraid he would make a failure in business, and she did not want defendant and witness to go into business together, and finally said for defendant to go ahead, and she would let him have the money; that that was about the substance of it. In reply to the express question whether she said she would loan the money or give it to him, he said that she said she would give it to him; for him to go ahead, and buy the stock of goods, and she would give him the money, and thereupon they closed up the trade; that he did not know how she got the money, but he knew defendant got \$600. In reply to the question whether he understood that she was making the defendant a gift of the money at the time, he said he did not know anything about that; she said for him to go ahead, and she would give him the money.

J. J. Crites testified that about the 4th, 5th, or 6th of December, 1897, Reinhoehl came to him, and inquired if he could raise \$600 for him. Witness learned the nature of the security, and said that he thought he could, and prepared a deed of trust for \$600, and took defendant to the bank, gave him the check, and witness, who lived near deceased, met her that night when he went home, and she asked him what he thought about it, and he replied he did not know anything about it, and she said: "I am opposed to John going into business with Mr. Reinhoehl, as I am afraid he will beat him out of money. I have given him that \$600, and, if he loses that, I will not give him any more."

Defendant, in his own behalf, stated that before the death of his mother there was placed in his charge \$306 by his sisters, and he detailed the items of the funeral expenses paid by him therefrom, aggregating the amount claimed in his answer, and admitted that the realty securing the sum of \$600 had been foreclosed, and that he had bought it, and that he had paid interest on this loan from his own funds up to a year before the trial, which was had September 19, 1902.

A granddaughter testified that the deceased lived with defendant during her lifetime and at the time of her death, and that her aunts lived there until they were married; that the defendant was unmarried at the time of the death of his mother.

On behalf of plaintiff, a sister of defendant testified that she had had conversations with her mother about the loan on the real estate, and that her mother said that it was mortgaged for a year, and witness talked with her a short time before she died, and she told her sister and herself that it was mortgaged for a year, and she did not know whether it was paid or not; and she said the defendant had paid the interest; she did not know whether he had paid the principal or not; that this was last April; that in a recent conversation with defendant she had said, "You don't deny getting the money, do you?" and he replied, "Certainly," and she said, "Why don't you go and pay off the farm?" and he said, "I consider that I am entitled to the money, and I have got it in my hands, and am going to keep it."

The defendant, recalled, identified a letter addressed to one of his sisters, which was introduced in evidence over the objection of defendant; and he further stated that the conversation just detailed by his sister consisted of a question by her what he was going to do with the money, and that he had replied that his mother gave him that money, and he was not going to pay it back. That the letter was written after his mother died, which letter is as follows:

"Rolla, Mo. Jan. 13, 1901.

"Sister Sarah: No doubt you and my other sisters have had a wrong impression as to the final outcome or ending of your present cause. You must now replace in the bank, the mon.

ey you have secured of mother's and then of course you know or ought to know that the chances are against you ever getting anything as costs, etc., will take it all. To protect myself of course I will probate an account against the estate for several years labor on the farm, for taxes I have paid for mother, for maintenance, care etc., amounting to at least \$1,800. You forget, I guess, that I worked for years on the farms many times renting land from others and never getting any more for it than you did.

"You ought to know that no court or jury will refuse or can refuse me some and liberal pay for this and for taxes. I have receipts for at least 15 years—interest of course will have to be allowed you can imagine about how it will figure.

"You ought to know that I am acting under the best of advice and very nearly know what I am doing—it may not yet be too late to save a part if you act promptly.

"I have written this letter to each one."

He further stated that the letter was written soon after he was notified he would have to replace a part of the money, and that he wrote them, thinking, perhaps, they had not been notified of that fact; that his sister had put this in the hands of the administrator, and, after the suit was brought, he told them they would have to put back the money to be administered upon, being \$171 received by each.

The general rule requiring gifts inter vivos to be established by the conclusive evidence is especially applicable where such gift is not asserted until after the death of the alleged donor, and gifts thus preferred after death of the alleged donor are regarded with suspicion by the court. In the Matter of Manhardt, 17 App. Div. 1, 44 N. Y. Supp. 836. In our judgment, the testimony herein falls far below that degree of proof required to establish that in the transaction it was the deliberate purpose of the deceased to give appellant the sum of money borrowed by her upon her real estate for his benefit, or that he on his part understood it to be a gift. He confessedly paid the interest accruing until about the death of his mother, and it is not disputed that the claim that it was not a loan, but an outright gift, was not advanced until after her decease. The parol evidence relied on is obscure, not cogent, and in such dealings between a son and his aged mother should be carefully scanned.

2. Appellant further complains of the action of the court in refusing the declarations of law submitted on his behalf, but the court committed no error in such ruling. So far as the first instruction was proper, in substance it was embraced in the instruction given by the court, and the second, third, and fourth instructions are mere commentaries upon isolated parts of the testimony, and were properly refused. The fifth and sixth declarations are, in effect, peremptory declarations in favor of defendant, and, in the view

we have taken, above stated, they were also properly refused.

3. The trial court is charged with error in admitting the letter of defendant to his sister, and excluding questions seeking to elicit statements of deceased to the effect that she wanted everything she had to go to the defendant. The letter was clearly competent as tending to prove that at that time, after the death of his mother, but prior to this action, he did not assert the sum involved had been given to him by his mother as a gift; that he then, in lieu of preferring such claim thereto in the letters to his sisters, threatened to present a claim against the estate of his mother for services, taxes paid, maintenance, and care to the amount of \$1,800 at least.

The testimony sought to be drawn out regarding the wishes and intentions of the deceased as to the disposition of her property was not competent upon the issue here presented, which was whether the transaction in controversy was an outright gift, while such evidence could have only tended to establish a purpose on the part of the deceased of giving to her son her estate at her death, which could only be carried out by proper testamentary disposition.

The judgment will accordingly be affirmed.

BLAND, P. J., and GOODE, J., concur

NOLL v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

STREET RAILWAYS—COLLISION WITH TEAM DRIVING ON TRACK—CONTRIBUTORY NEGLIGENCE—INSTRUCTION—DAMAGES.

1. The driver of a team which was struck by a street car from behind is not necessarily guilty of contributory negligence in driving along the car track, without looking back, where no warning was given, as should have been, if he was, or could by the use of ordinary care have been, seen, or if it was too dark to see him.

2. Failure of an instruction in an action for injury to several articles to limit the award for each article to the amount claimed therefor in the petition is harmless, the proof being that the damages were less than alleged, and the verdict being for a third the sum prayed for.

Appeal from St. Louis Circuit Court; S. P. Spencer, Judge.

Action by Emil Noll against the St. Louis Transit Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Boyle, Priest & Lehman and Jones & Jones & Hocker, for appellant. Geo. W. Lubke, Jr., for respondent.

Statement of Facts and Opinion.

GOODE, J. While plaintiff was driving eastwardly on Arsenal street, in the city of St. Louis, in a one-horse covered wagon, used for delivery purposes, a car in charge of defendant's servants ran into the wagon from the rear, smashed it, injured plaintiff's

horse, harness, his clothes, and himself. This action was brought to recover damages for the injuries.

The acts of negligence charged are that the motorman did not warn plaintiff of the approach of the car by sounding the gong, failed to keep a vigilant lookout for vehicles and persons on the track, and ran the car too rapidly. The vigilant watch ordinance is pleaded, and a violation alleged in respect to watching for persons on the track. Besides a general denial, the answer alleges contributory negligence on the part of plaintiff in driving in front of the car, when, by looking, he might have seen, and, by listening, might have heard, the approach of the car, and avoided the accident.

Plaintiff's testimony is that at 5:30 or 6 o'clock in the morning of November 23, 1901, he drove on Arsenal street in his delivery wagon from Morgan Ford Road, and, after looking along Arsenal street both east and west, to see if a car was coming, and, seeing none, he turned east on said street; that he drove on the car track because it was muddy on both sides of the street, and driving was easier on the track. After driving about three blocks, and when he was near Russell Place, he suddenly heard the rumble of a car behind him, whipped up his horse, turned to the left, and got the horse and left front wheel of the wagon off the track when the car struck it, overturning the wagon, throwing him to the ground, and pushing him about 20 feet. We need not state the extent of his injuries, as no point is made about the amount of the verdict.

There is a marked dispute between the witnesses as to whether the morning was clear or foggy, and as to whether at that particular time it was so dark as to prevent one from seeing far ahead, or light enough to see quite a distance. Plaintiff testified that it was a fairly clear morning, so that one could see both ways from Morgan Ford Road about half a mile. He said there was no fog. That he did not know whether he looked back or not after he got on the track. He kept on until he was within 15 feet of Russell Place. Did not know whether he looked back or not, but something told him a car was near. Henry A. Lowenstein testified that he was a passenger on the car. Got on at Bent avenue. That, while waiting for the car to come along, he saw a white horse and a covered wagon driving on the track. That the car came about five minutes after the vehicle passed. That it was a very dark morning. Could not say whether he heard the bell ringing or not, but remembered hearing it after the accident. Did not notice any slackening of the speed of the car before the wagon was struck. Did not know how fast it was going, for it was dark; but saw the car a long block away before he got on it, as it had a headlight. Testified that he could not see the wagon very far—not until he got opposite the next lamp post. Michael Koebel testi-

fied he was a passenger on the car, and the first he knew of the occurrence was when the car struck the wagon. He heard no bell, and observed no slackening of the car until the wagon was struck. Could not say how far the car ran after striking the wagon. Michael Queenan testified he was a passenger on the car, but swore he could not see out of the car because it was so dark. That when the car struck the wagon the motorman reversed the car as quickly as he could, and there was a flash like a fuse had burned out. That he did not hear the bell, but he was not paying any attention to the motorman or whether the bell was rung. Henry Browning the motorman, testified that it was a very dark, foggy morning. He was running at half speed—about six or eight miles an hour. The headlight was burning, but would only throw its light 15 feet or so ahead, as it is more difficult for the rays of a headlight to penetrate the fog than ordinary darkness. He first saw the wagon when it was about 15 feet distant. Reversed the car, struck the wagon, and ran a car length afterwards. That he was looking ahead at the time, and the first he saw of the wagon he was 15 feet from it. He sounded the gong as he approached Russell Place, and slackened speed, so as to take on a paralyzed man who usually got on at that place. This man was not on hand that morning, so he went ahead, and hit the wagon east of Russell Place between there and Gustine avenue. He swore there was nothing he could do, after he saw the wagon, except to reverse the car; that the street lights there are not worth anything, as they are too far apart. The conductor, Scarborough, testified he was inside the car, collecting fares. It was a dark, foggy morning. Fog dims the headlight, and one cannot see so far ahead in fog as in ordinary darkness. The motorman had been ringing his bell every 20 or 30 feet, and the first thing that attracted his attention was the reversal of the car. He next heard the crash of the collision. Henry B. Ellers swore he was a passenger. The morning was dark, gloomy, and foggy. The bell was ringing. He felt a jerk all at once, saw a flash, and the collision occurred. Willis Woodworth testified he was a passenger. That the morning was dark and foggy. The headlight was burning. Paid no attention to whether the bell was ringing or not. First had his attention attracted by the crash of the collision. August Winter testified that he paid no attention to whether the bell was ringing or not. Saw a flash, and immediately after felt the jar of the collision. Louise Queenan testified it was a dark and foggy morning, and that one could not see very far. Her attention was drawn by the flash. She was thrown back in her seat. The crash of the collision came; and that the car was running at ordinary speed.

The above is a summary of the evidence in the case outside the proof of damages.

five minutes without looking back to see if a car was coming. In point of fact, plaintiff did not so testify, but said he did not remember whether he looked back or not. Be that as it may, to give warning by sounding the gong was undoubtedly the duty of defendant's motorman if he saw plaintiff's wagon ahead of him on the track, or if the morning was so dark or foggy he was unable to see whether a person was on the track or not. According to the testimony for the defense, this duty was performed, but there was countervailing evidence the other way for the jury to consider. If the plaintiff's testimony that it was light enough to see several blocks away is true, the motorman must have observed the wagon long before he struck it, unless, instead of keeping a vigilant watch, his attention was directed elsewhere. A case for the jury was made out as to negligence or due care on the part of the motorman.

The facts before us are identical with those in *Courad Grocer Co. v. Railroad*, 89 Mo. App. 391, except as to names and dates. In that case, too, the accident occurred early in the morning, and the defense was that the driver, while traveling on the track, did not look back for approaching cars for five minutes. But, as there was evidence that no warning was given of the approach of the car which struck his wagon, it was held his failure to look back did not necessarily constitute contributory negligence and render a nonsuit imperative. An instruction was given in said case that it was the duty of both the conductor and motorman in charge of the car to keep a vigilant watch for persons on the track, which charge has since been condemned as imposing a duty on the conductor that he could not perform and perform his other duties, too, and as enlarging the requirement of the vigilant watch ordinance. *Gebhardt v. Transit Co.* (Mo. App.) 71 S. W. 448. But in the present case the duty of keeping a vigilant watch was imputed by the instructions to the motorman alone, and so the error condemned in the *Gebhardt* Case was avoided.

Neither is this case distinguishable in its material facts from *Klockenbrink v. Railroad*, 81 Mo. App. 351, or *Hutchinson v. Railroad*, 88 Mo. App. 376. The jury were required to find, as a prerequisite of a verdict for the plaintiff, that he himself was in the exercise of ordinary care while driving along the car track, and whether he was or not was for them to settle. The *Klockenbrink* Case, *supra*, has been recently affirmed by the Supreme Court, to which it was certified on a division of opinion among the judges of this court. 72 S. W. 900. That decision leaves no doubt that the issue of the defendant's negligence and the plaintiff's

The instructions of the court required of the defendant's motorman no more than ordinary care to avoid hurting the plaintiff after he discovered, or by keeping vigilant watch might have discovered, plaintiff's position of peril.

The instruction on the measure of damages is criticised because it did not limit the award for the injury to plaintiff's wagon, harness, clothes, and person to the amount claimed for each item in the petition. The evidence introduced as to the several injuries laid the amount of damages at less than the petition charged, and it is reasonable to suppose the jury were governed by the evidence. The verdict was for \$700, while the petition prayed for \$2,650. In view of these facts, the omission to limit the award for the different injuries was at most a case of nondirection, which does not appear to have resulted in prejudice to the defendant. *Price v. Barnard*, 70 Mo. App. 175.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

McLAIN v. ST. LOUIS & S. RY. CO.*

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

STREET RAILROADS—COLLISIONS—INJURIES TO MOTORMAN—EVIDENCE—TRIAL—DEMURRER TO EVIDENCE—WAIVER—QUESTION FOR JURY—INSTRUCTIONS—CITY ORDINANCES—ACCEPTANCE—DAMAGES—FUTURE PAIN—MEDICAL EXPENSES—APPEAL—REVIEW OF EVIDENCE.

1. A demurrer to the evidence at the close of plaintiff's testimony is waived by the subsequent introduction of evidence on defendant's behalf.

2. Where at the close of all the evidence defendant renewed a motion made at the close of plaintiff's case in the nature of a demurrer to the evidence, and asked that the jury be instructed to find a verdict for defendant, which was refused, defendant is entitled, on an appeal, to a review of the evidence as a whole.

3. In an action for injuries to a motorman sustained in a collision with a car of another company at a crossing, where the evidence tended to show that the collision was attributable to the negligence of defendant's motorman in the management of his car as it approached the crossing, and contained contradictory, inconsistent, and improbable statements of opposing witnesses, the case was properly submitted to the jury.

4. In an action for injuries to a motorman by a collision with a car of another company at a crossing, the court charged that it was the duty of defendant company to use ordinary care to prevent collision and to observe the provisions of the city ordinances which gave plaintiff's car the right of way, and that if defendant in the operation of the car which collided with plaintiff's car failed to give plaintiff the right of way and negligently collided plaintiff's car, by reason of which he injured, plaintiff was entitled to recover that such instructions were not error misleading.

*Rehearing denied April 14, 1903.

5. The instructions were not erroneous as charging that defendant's mere violation of the ordinance was negligence per se.

6. In an action for injuries to a street railway motorman by collision with a car of another company at a crossing, the fact that plaintiff proved that defendant had accepted a city ordinance which gave plaintiff's car right of way at the crossing did not require an instruction on such subject, since the ordinance was binding on defendant without acceptance.

7. In an action for personal injuries, plaintiff's recovery is not limited to past bodily pain and suffering, but he is also entitled to compensation for such future suffering as will result from his injuries.

8. Where a street railway motorman injured by a collision with a car of another company at a crossing was taken to a hospital by his employer, which he thereafter left, and was taken to another hospital, at which he incurred and paid for medical treatment, he was entitled to recover for such expenses in an action against the owner of the colliding car for the injuries sustained.

Appeal from St. Louis Circuit Court; S. P. Spencer, Judge.

Action by Grant McLain against the St. Louis & Suburban Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an appeal by defendant from a judgment of the circuit court of the city of St. Louis in favor of plaintiff for the sum of \$3,700 for personal injuries of a grave and permanent character inflicted on him by a street car of defendant striking a car of the St. Louis Transit Company. The catastrophe occurred about 4 o'clock in the afternoon of January 25, 1902, at the intersection of the double parallel tracks of defendant on Union avenue, extending northwardly and southwardly across Delmar avenue, and the double parallel tracks of the Transit Company on Delmar avenue, running eastwardly and westwardly across Union avenue, in the city of St. Louis. The plaintiff, in the performance of his duties in the employ of the Transit Company, was operating one of its cars as a motorman. The petition charged that the Transit Company had the right of way across the tracks of defendant at Union and Delmar avenues, and it was the duty of defendant's servants in charge of its cars to wait before such crossing until the car of the Transit Company had cleared it; that while plaintiff was in charge of a car of the Transit Company, and such car was being lawfully propelled eastward on Delmar avenue, over the crossing and right of way, defendant's servants in charge of and operating one of its cars over its tracks on Union avenue carelessly and negligently failed to wait before such crossing until it was cleared by the Transit car, and carelessly and negligently so ran defendant's car upon such crossing and tracks of the Transit Company that they caused defendant's car to collide with the car of the Transit Company; that at the time there was in force in the city of St. Louis an ordinance giving the Transit

Company the right of way over such crossing, and the right to cross its east-bound car first over such crossing, and defendant was prohibited from entering upon such crossing while it was in use by the Transit Company, and defendant's servants in charge of its car violated such ordinance by not waiting before such crossing until the Transit Company's car had cleared the crossing, and such violation directly contributed to cause the collision, and defendant, in consideration of its franchise from the city to operate its railway upon such streets at such place, had agreed to obey the provisions of the ordinance. Defendant's answer contained a general denial, and a general plea of contributory negligence, and further charged, as specific acts of contributory negligence, that plaintiff so carelessly operated the Transit car as it approached and went on the crossing that he caused it to collide with defendant's car; that he caused and permitted it to come in contact with and collide with defendant's car by carelessly and negligently failing and omitting to look and listen for and watch defendant's car, and to use ordinary care to prevent the collision, when by so doing he might have avoided it; that he negligently failed to bring the Transit car to a stop before he ran it on the crossing; that the rules of the Transit Company, binding on plaintiff, provided that motormen should not take any risk in crossing tracks at any point, whether the company's cars had the right of way or not, and should be prepared to stop to avoid a collision; but plaintiff negligently, and in violation of such rule, ran his car on such crossing when there was a risk of a collision, and so ran his car without stopping.

The record reveals the following state of facts:

Some snow had fallen just prior to the casualty, but how heavily or whether it was then continuing was controverted. However that may be, at the time stated a car of the Transit Company approached from the west, moving eastwardly on the south track, a slight down grade, and when about 200 feet west of Union avenue its speed was reduced, but its movement toward the crossing was continued. At the same time a car of the Suburban Company drew near Delmar avenue from the south, moving northwardly on the east track, and when about 125 feet south of Delmar avenue its speed was diminished, but its progress towards the crossing continued, until it was about 40 feet from the track of the Transit Company, when the car of the latter started to cross the intersecting tracks of defendant, and had gotten partly over when the Suburban car struck the Transit car in front of its rear trucks, west of the center of the latter car.

Plaintiff, on his own behalf, testified that when he first observed the Suburban car, then about 200 feet from the crossing, with

¶ 7. See Damages, vol. 15, Cent. Dig. § 226.

avenue, not exceeding two miles per hour; that when he first observed the defendant's car its motorman was nearly a block from the crossing, and brought the car he was operating at about half rate of speed, till within 40 feet of the car of witness, when he further lessened the speed, and then witness started his own car across at a speed of about two miles an hour; that he had observed nothing wrong about the Suburban car, and its motorman was operating it in the usual way when about to stop, until the Suburban car had reached within 35 or 40 feet, and the Transit car was on the east track of the Suburban line, when its car shot forward with terrific speed, its motorman disappearing from its front end. Plaintiff, continuing, stated that he then threw half the power on his car at one movement, being all it would stand, in the effort to clear the crossing, as when he saw the Suburban car propelled forward at an increased rate of speed he believed a collision imminent, and he tried to clear the crossing; that his own car was then moving without the power being on, and if he had reversed his car it would have rendered it motionless, "paralyzed," for an instant, during which the Suburban car would have struck it in the front part; that he got a fraction over half-way across when his car was struck, and further personal knowledge of the occurrence on his part terminated by his injury; that his instructions and the custom there were that the Suburban cars came to a stop, and allowed east and west bound Transit cars to have the right of way. This witness further stated that he could have stopped his car within 8 feet when at the west line of Union avenue, which was about 100 feet wide, and in the center of which the two parallel tracks of defendant are situated; that from the time he first perceived the motorman on the colliding car he did not notice him putting the brake on or reversing the Suburban car, but he might have reversed his car without witness observing it, and from the way the Suburban car was drawing near its motorman had no occasion to stop his car, and up to the time the Suburban car arrived within 25 or 30 feet of witness it was moving at a reasonable rate of speed, not exceeding four miles an hour; that its motorman could have easily stopped it; that the Transit Company had printed rules, which he had not read, but knew one of which was at all crossings east and west bound cars have right of way, but employees were cautioned not to take any risk in crossing tracks at any point, and to reduce speed of cars before crossing, and be prepared to stop in order to avoid a collision or accident.

Defendant's motorman testified that two or three inches of snow had fallen, and at a

which did not work, and the car began to slide from the snow on the tracks, and he then reversed the car, but "she wouldn't take contact," there was so much snow on the track, and the wheels were spinning backward; that he was trying to bring the car to a stop for fear of a collision, and he did not bring the car to a stop before he hit the other car, because it was sliding and he could not; that when his car arrived within 25 or 30 feet from the Transit car his power was reversed, and his wheels were spinning backward, but his car not going faster than before, and when he hit the Transit car the latter was going about a couple of miles per hour; the collision stopped his car before it got on the Transit tracks, but the Transit car passed over the Suburban tracks before it stopped. This witness further stated that he remained at his post on his car until after the collision, but did not remember which way, front or rear, he then got off, but he got off as soon as his car stopped, and went around to the Transit car; that the injuries sustained by his car consisted of the vestibule broken, the dashboard bent, and the controller broken, and after the occurrence it was operated by its own power to the sheds; that he examined the Transit car, and noticed nothing broken but two windows. He admitted that the Transit car had the right of way over the crossing, and that he had been in the habit of stopping and letting them go by, and it was his intention to stop and let this car pass; that under the conditions existing on that day he could not stop his car in 125 feet, although there is an incline there to the Transit track, and he had a sand box; that it was his duty to stop his car, and he meant to do it; that when he threw his brakes first, at about one hundred and twenty feet from the crossing, he was going about seven miles an hour and the car began to slow up. Proceeding, he said that plaintiff was moving about a mile and a half an hour over the crossing, and in his oral testimony contradicts the statements contained in a deposition, to the effect that the front of the platform of plaintiff's car was over the west crossing when the car of witness began to slide, and says that he thought he had a clear crossing, saw no car, and approached the crossing with the intention to stop. On re-direct examination, he said he was about three or four car lengths from the crossing when he saw plaintiff's car. Testimony of disinterested witnesses confirmed the description of plaintiff as to collision was brought about, one witness was walking east, especially corroborating testimony on the principal and important points. The testimony of disinterested witnesses further showed that the car was struck near the center and end; that two other cars were

move it, one witness stating it was almost broken in two, and all that the windows and side were broken and smashed in, and that the platform and front of the Suburban car were also smashed in.

The conductor of defendant's car, in testifying, stated he first saw the Transit car when the latter was distant 150 feet west of Union avenue; that his own car was then running more slowly than it had been; that defendant's motorman was working the brakes and sand lever without appearing to reduce the speed, owing to the bad condition of the rail caused by the snow fall; that the car of the Transit Company came on from the west, and reached the crossing before they did, and at the time the cars collided his car was going at about the same rate of speed—that is, as the Transit car; that between the time when his car hit the Transit car and he first saw the Transit car the speed of his car had not increased, but, if anything, had diminished. Continuing, he said his motorman was on the front platform when the cars came together, and he got off the rear platform, and went around to see if his motorman was injured, but found him unhurt, and repeated that his motorman was on the front platform at time of the collision, and was not hurt at all, not even scratched, and did not go back into the car; that the front end of his car was pretty badly wrecked; that it collided with the other car, and only broke two glasses; that his car bounded back two or three feet after it struck the Transit car.

At the close of plaintiff's evidence and at the close of all the testimony defendant asked an imperative instruction to the jury to find a verdict in its favor, which the court refused. The court also refused a series of instructions prayed by defendant, which will be considered hereinafter so far as deemed necessary, and instructed the jury as follows:

"(1) It was the duty of the defendant company in the operation of its cars to use ordinary care to prevent collision, and to observe that provision of the city ordinance which gives to the east and west bound cars the right of way at intersecting points over north and south bound cars. It was at the same time the duty of the plaintiff in the operation of the east bound car to exercise for his own protection ordinary care to avoid a collision, and notwithstanding his right of way, because of his being on an east bound car, it was his duty to avoid collision if he saw danger ahead, or in the exercise of ordinary care would have seen danger, in time to have stopped his car or otherwise have averted the accident; and if you believe from the evidence plaintiff failed to exercise such care or perform such duty, and that such failure in any way contributed to his injury, then he is not entitled to recover.

"(2) By 'ordinary care' is meant such care as a person of ordinary prudence would, un-

der the same or similar circumstances, exercise. The absence of such care is negligence. If, therefore, from the evidence, you believe that the defendant company operated upon a public open street of St. Louis the car which collided with the car of the Transit Company, and that in its operation at the time of the accident the defendant company, by its servants or employees in charge of said car, failed to give to the east-bound car the right of way, and negligently ran its car so as to collide with the east-bound car, and that by reason of such collision the plaintiff was injured, and that he was himself at the time of the accident exercising ordinary care for his own protection as herein defined, then your verdict should be for the plaintiff. The burden of proving any negligence of defendant or failure to observe the city ordinance regarding the right of way is upon the plaintiff throughout the entire case to establish it by a preponderance or greater weight of the testimony. The burden of so proving any contributory negligence on the part of the plaintiff is upon the defendant.

"(3) If your verdict is for the plaintiff, you will assess his damages at such a sum as from the evidence you believe will fairly compensate him for any injury of person which he has suffered by reason of the said accident, considering whether you believe any such injury is temporary or permanent; for any pain of mind or body which from the evidence you believe he has suffered or may suffer by reason of the said accident; for any earnings which from the evidence you believe he has lost or may lose by reason of the accident; for any expenses for medicines or medical attention or care which you may believe from the evidence have been necessitated or may be required by him by reason of the said accident, considering the fair and reasonable value thereof. If your verdict is for the defendant, you will simply so state in your verdict."

Dawson & Garvin and L. Wilcox, for appellant. J. D. & A. Howe and D. D. Holmes, for respondent.

REYBURN, J. (after stating the facts). 1. Defendant strenuously insists that the plaintiff should have been nonsuited. Any objection that the plaintiff's testimony did not make out a prima facie case, and that in consequence the instruction by way of demurrer to the evidence at close of plaintiff's testimony should have been given, was waived by the subsequent introduction of the evidence on behalf of defendant, but the refusal of a similar instruction asked at the close of all the testimony requires a review of the evidence as a whole. *Bluedorn v. R. R.*, 121 Mo. 268, 25 S. W. 943; *Hill v. R. R.*, 101 Mo. 42, 13 S. W. 946. Such an instruction is warranted only where there is no testimony before the court from which a different conclusion can be reached, and in de-

termining whether the cause should go to the jury the plaintiff is entitled to the benefit of the most favorable view of the facts and of every reasonable inference therefrom. *Buck v. Ry. Co.*, 108 Mo. 179, 18 S. W. 1090. "Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences in respect of the defendant's failure of duty which arises from these facts should be undisputable." 2 *Thompson, Trials*, § 1663. In this aspect, and applying the foregoing well-established rules, no error was committed in refusing to withdraw this case from the jury. The testimony on plaintiff's behalf strongly tended to establish that the collision was attributable to the negligence of the motorman of defendant in the conduct of his car at the crossing, and the record is replete with contradictory, inconsistent, and improbable statements, so that to the jury, as triers of the facts and judges of the credibility of the opposing witnesses, were properly referred the issues for determination.

2. The instructions given are assailed as misleading and erroneous, and it is charged that the first tells the jury that it was defendant's absolute duty to observe the ordinance, which is again referred to in instruction second in such a manner, especially when taken together, as to imply that a mere violation of that ordinance is negligence per se. We cannot perceive the force of this contention, or that these instructions, either separately or together, are in any wise infected with the vice condemned in *Gebhardt v. Transit Company*, 71 S. W. 448, by this court, cited by appellant. Nor is the second amenable to the charge preferred, that it ignores the qualifying and closing paragraph of the ordinance; for there was no issue in the pleadings of a wanton or willful collision, and certainly no evidence of any such conduct on the part of plaintiff.

3. It is urged that plaintiff having alleged that defendant had accepted the ordinances referred to in the petition, and thereby made proof thereof material, the instructions should not have been silent as to this issue. In his proof the plaintiff, exceeding the bounds within which he might safely have confined his testimony, introduced proper evidence of the acceptance by defendant of the ordinances tendered, and no evidence otherwise or instruction relating to such acceptance was introduced or sought by defendant. Nor can we recede from the position of this court so recently assumed in the *Gebhardt* Case, *supra*, or yield to the contention that the ruling in *Jackson v. R. R.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650, did not undermine the *Fath* Case, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74, or, if it appeared to have such effect, all that the Supreme

78 S.W.—58.

Court said in the *Jackson* Case about the principle of the *Fath* Case was outside the decision; for the judgment in the *Jackson* Case in favor of plaintiff was reversed, without remanding the cause for failure of proof of defendant's negligence. It would seem manifest that in the critical review of the doctrine first announced in the *Fath* Case, and subsequent cases in which it was followed, contained in the decision in the *Jackson* Case, the Supreme Court concluded that a departure had been made from numerous prior decisions of the court, to which reference is had, and that the *Fath* Case should be and was expressly disapproved and vigorously condemned.

4. In an action for personal injuries the right of recovery is not limited to past bodily pain and suffering, but the party is also entitled to compensation for such future sufferings as the evidence tends to prove will result from the injuries. The plaintiff was permitted to introduce the testimony of medical experts to establish the probable consequences of his injuries and their permanent character, and the court in its instructions allowed as an element of damages such pain of mind or body as he might suffer as well as compensation for such he had suffered, and this constituted no error. In determining the amount of damages from a personal injury, the jury are justified in considering not only the bodily pain and mental suffering already undergone, but such as are likely to result in the future. *Sedgwick, Damages*, vol. 1, § 86; *Sutherland, Damages*, vol. 1, § 253; *Gorham v. Ry.*, 113 Mo. 408, 20 S. W. 1060.

5. Defendant finally contends that the instructions improperly permitted the jury to take into consideration expenses for medicines or medical attention, but the testimony of the plaintiff was that he was in a hospital of his own choice, after he left the first hospital to which he was transported by the Transit Company immediately after the casualty, and that he had incurred and paid for medical treatment. *Gorham v. Ry. Co.*, *supra*.

The issues in this cause, under the pleadings and evidence, were clearly presented, and in no wise complex, the instructions were commendably comprehensive, lucid, and concise, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

BLACKMER et al. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

CARRIERS—RAILROADS—COAL—CONVERSION—QUESTION FOR JURY—DAMAGES—DETERMINATION—PUNITIVE DAMAGES—DEDUCTION OF FREIGHT.

1. Defendant railroad company notified a coal company that thereafter none of its cars

on the side track at the mines should be loaded with coal for any other customer than defendant. Prior to such notification defendant had permitted its cars to be loaded to be carried to any consignee, and the coal company was under contract with plaintiffs to furnish them constantly a certain portion of the output of the mines. The coal company did not assent to the notification, but loaded the cars set out, and notified defendant's agent to bill the coal to plaintiffs. Instead of doing so, the agent marked the bill of lading for defendant's use, by whom it was appropriated. *Held*, that whether the coal was put on the cars for plaintiffs in such a manner as to constitute a delivery to them, so as to render defendant liable for converting plaintiffs' property, was for the jury.

2. Where a railroad company converted coal consigned to plaintiffs, under a contract by which plaintiffs were entitled to a certain part of the output of the mine, the measure of plaintiffs' damage was the value of the coal at destination, and not its value at the mine.

3. Where a railroad converted coal consigned to plaintiffs, which they had contracted to deliver to their customers, and there was no evidence that defendant was compelled to use such coal or stop running its trains, but it was proved that the coal was willfully taken without regard to plaintiffs' rights, plaintiffs were entitled to recover punitive damages.

4. Where, in an action for the conversion of coal consigned to plaintiffs by defendant railroad, the agent of the consignor testified that the consignor paid the freight on all coal shipped to plaintiffs once a month, and there was no evidence that plaintiffs were liable for freight on coal so shipped, defendant was not entitled to a deduction of the freight charges from the value of the coal at the point of destination in determining plaintiffs' damages.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by C. E. Blackmer and others against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Wise & McNulty and R. A. Holland, Jr., for appellant. Dawson & Garvin, for respondents.

Statement of Facts and Opinion.

GOODE, J. The petition in this case is in six counts, each of which charges the defendant with converting to its own use certain car loads of coal which belonged to the plaintiffs, and had been put aboard cars on defendant's tracks at Hillsboro, Ill., by the Hillsboro Coal Company, consigned and to be carried by the defendant to the plaintiffs. The first count of the petition charges the conversion of five car loads of coal on December 18, 1901, and states that the plaintiffs, who were partners doing business in St. Louis under the name of the Hart Coal Company, were under contracts with various persons in said city to deliver daily large quantities of coal to run the factories of said customers, and that the defendant, well knowing the facts and that plaintiffs would not be able to procure other coal to supply its customers, willfully, wantonly, maliciously, and against plaintiffs' protests and entreaties, wrongly converted said car loads of

coal to its own use. The remaining five counts of the petition state as many causes of action based on the wrongful conversion of car loads of coal on the 19th, 20th, 25th, and 26th days of December, 1901, and the 8th day of February, 1902. The answer was a general denial.

The jury found a verdict for the plaintiffs, and awarded them both actual and punitive damages on each of the counts. From the judgment entered on said verdict, this appeal was prosecuted.

The evidence strongly supported all the causes of action stated in the petition, and, indeed, to those stated in the fourth, fifth, and sixth counts practically no defense was made, the defendant admitting that it appropriated the coal consigned to the plaintiffs on those days, but contending that the measure of damages for the conversion was the value of the coal at Hillsboro, where it was taken, and not at East St. Louis, its destination.

As to the first, second, and third counts, the defense was made that the railroad company never accepted the car loads of coal mentioned in said counts to be carried to the plaintiffs as the plaintiffs' property, but that, on the contrary, said coal was delivered to the defendant by the Hillsboro Coal Company for its own use.

On December 18, 1901, the defendant notified the Hillsboro Coal Company that none of defendant's own cars set out on the side track at Hillsboro should be loaded with coal for any other customer than the defendant itself. This notification, as well as the appropriation of plaintiffs' coal, was induced by the urgent need of the railroad company for coal to operate its trains at that time, as there was a car famine so that coal could not readily be obtained from the different mines on defendant's lines and elsewhere. Prior to said notification the defendant had permitted its own cars to be loaded with coal to be carried to any consignee, and when the notification was given the Hillsboro Coal Company did not assent to the requirement that all coal loaded on the cars should be for the use of the railroad company; in fact, did not make any response to the notice. The Hillsboro Coal Company could not have agreed to the proposition of the railroad company, because it was under a contract with the plaintiffs to furnish them constantly a certain proportion of the output of its mines, while plaintiffs were under contracts, as stated, with various consumers in the city of St. Louis, to furnish them so much coal daily to run their factories, and relied on getting their supply from Hillsboro. Coal cars were set out on its side tracks at Hillsboro by the defendant on the 18th, 19th, and 20th of December, and were loaded as usual by the Hillsboro Company for plaintiffs, and the agent of the defendant company instructed by telephone, as had been the custom, to bill the coal to

the plaintiffs at East St. Louis. Instead of doing so he marked on the bill of lading that the coal was for the company's use. The Hillsboro people were powerless to prevent this action, although their employé who attended to the matter testified positively that he never consented for the coal to be taken by the railroad company.

In view of those facts, the most that can be said in favor of the defendant is that it was a question for the jury whether the coal was put on the cars for the plaintiffs in such a way as to amount to a delivery to them, so that when the railroad company afterwards took the coal it converted plaintiffs' property to its own use. Perhaps there was evidence on which the jury might have found the coal was delivered to the railroad company instead of the plaintiffs on the said three days, but they found the other way, and there was abundant evidence to support that finding; for the testimony shows defendant had agreed to furnish cars for transporting all coal to be shipped under the contract between the Hillsboro Coal Company and the plaintiffs, and that those cars of December 18th, 19th, and 20th were loaded by the coal company to be carried to the plaintiffs according to the ordinary course of business. At the instance of the defendant the court gave an instruction to the jury which told them that, before they could return a verdict for the plaintiffs as to the coal embraced in the first three counts of the petition, plaintiffs had to prove by a preponderance of the evidence that said coal was the property of plaintiffs. We think the defendant had nothing to complain of on the score that the verdict on the first three counts was unwarranted.

We do not accede to the contention that the measure of damages was the value of the coal at Hillsboro, instead of at East St. Louis. Some cases so hold, but the law in this state, and we think in most jurisdictions, is that the true measure of damages in cases like this is the value of the goods at their destination. *Farwell v. Price*, 30 Mo. 587; *Rice v. Railroad*, 3 Mo. App. 27. It is palpable that plaintiffs' loss was what they could have sold the coal for at St. Louis, less the cost of transportation, if they had to pay that expense. Their damages, therefore, could not be measured by the value of the coal at Hillsboro without doing them an injustice.

We think, too, this was a case for punitive damages. The defendant's urgency may have been great, but so was the plaintiffs'. If the defendant had to have coal to run its trains, plaintiffs likewise had to have coal to supply their customers in fulfillment of plaintiffs' contracts, and so that the customers could run their factories; and an emergency such as the defendant may have found itself in affords no excuse for appropriating the property of another. The evidence does not show that the defendant

was bound to use the coal in its trains; and if there be no justification for converting the coal and others into a like use, the defendant might excuse the damages. We see no reason for an action for the conversion, accompanied by circumstances of fraud and oppression, punitive damages may be awarded as much as compensatory to property, and if exemplary damages may be awarded. *Carson v. Smith*, 855; *Reamer v. Express*, 501, 67 S. W. 718; *Dickinson v. B. & O. R. Co.*, 25 C. C. A. 244, 79 F. 2d 101.

Defendant makes the instruction in regard to the measure of damages erroneous, in that it is a deduction from the value of the coal at East St. Louis of the freight charges to that point; the measure of damages is the value of the coal at that point, less the freight charges. The measure of damages is its value as property, less the cost of transportation. The owner has to pay said freight charges. The defendant's testimony of Hillsboro Coal Company that the latter company paid the freight charges is contradicted by the testimony of the plaintiffs that they shipped to some arrangement for the coal. If plaintiffs bought the coal at the expense of their recovery ought not to be allowed for freight charges.

The judgment is affirmed.

BLAND, P. J., and B.

SCHOLTEN v. ST. LOUIS & S. F. R. CO.

(Court of Appeals at St. Louis, Mo., 31, 1918)

RAILROADS — PRIVATE PROPERTY — CONTRACT WITH PUBLIC — VALIDITY — PUBLIC POLICY — DAMAGES.

1. Where a railroad's duty to maintain a switch for a private party did not affect the railroad's duties to the public, the railroad is not entitled to allege, in an action for damages, that the destruction of the switch, that was against public policy.

2. Where a railroad's duty to maintain a switch for a private party did not affect the railroad's duties to the public, the railroad is not entitled to allege, in an action for damages, that the destruction of the switch, that was against public policy.

Appeal from Circuit Court of St. Louis, Mo., J. T. Neville, Judge.

Action by Henry Scholten & San Francisco

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Parker and J. T. Woodruff, for appellant. O. E. Gorman, for respondent.

REYBURN, J. This is an action brought by the plaintiff against the defendant railroad company to recover the sum of \$1,200 damages alleged to have been sustained by him by the removal of a switch, side, or spur track, which had been constructed upon defendant's right of way through a farm of plaintiff.

The testimony disclosed that in September, 1897, the plaintiff and defendant entered into a parol agreement, by the terms of which plaintiff was to grade the line of a spur track along defendant's railroad on defendant's right of way through plaintiff's farm, and to furnish the cross-ties for such track, and the railroad was to equip with rails, construct, and maintain the side track and connect same with its main line, and furnish cars to transport the products of plaintiff's farm, and that pursuant to such oral understanding the track was completed, the plaintiff performing the grading and furnishing the cross-ties at a total outlay to himself of \$60, the railroad building the side track and connecting it with its main line.

The petition was predicated on such agreement, and charged the compliance by plaintiff therewith, and the construction and maintenance of the track by defendant until the year 1901, when defendant, without plaintiff's knowledge or consent, tore up said track and converted the cross-ties to its own use. The issues were completed by a general denial, by way of answer, on part of defendant, and the cause proceeded to trial before a jury.

It further appeared in evidence that the principal crop raised by plaintiff was apples, of which, during the year 1897, he shipped about five car loads over this side track, but severe drought had caused light crops during succeeding years, until the year 1901, when a very good crop was produced, the major part of which was sold by plaintiff in bulk upon the trees, prior to the removal of the switch or spur track, in the fall of 1901; that the total shipments of plaintiff upon defendant's road consisted of the five or six cars shipped during the year 1897, to Springfield, at a cost not exceeding \$15 per car, and no shipments were made during the ensuing years by plaintiff, but during 1899 shipments were made by parties other than plaintiff, the spur track being used by permission of the defendant's representative; no other shipments whatever were shown during the period that the spur or side track existed, but plaintiff had received about 14 car loads of freight, at a rate of \$5 per car, brought to his premises upon this track.

The only testimony offered on behalf of defendant was that of a single witness, its division roadmaster, who deposed that the

grading for the spur track would not exceed \$10 in value, and the ties furnished by plaintiff were culled ties, about 200 in number, and worth not more than 15 cents apiece, and that the keeping of a switch at any point remote from a station involved danger to passing trains, as the switch could not be as carefully supervised as if located near a station, and was in danger of being thrown by trespassers and derailing trains. It further appeared, however, that such peril could be avoided, for at seasons of the year when such switches were not in use they could be severed from the main line by taking up the connecting frog, which was done for two years with the Scholten spur.

At the close of the testimony defendant asked the court to give an imperative instruction to the jury that the plaintiff was not entitled to recover, and the verdict should be for the defendant, which the court refused, and gave the following: "If you find from the evidence that plaintiff made an agreement with the defendant to place a switch track on its right of way near his farm, and that in pursuance of such an agreement plaintiff did, with defendant's consent, and by the terms of said agreement, furnish ties and aid grading for said switch, then, in the absence of evidence to the contrary, you are to presume that said switch was to be permanent; and, if defendant removed the same without plaintiff's consent, plaintiff is entitled to recover the amount expended by him in obtaining said switch, not to exceed sixty dollars."

The jury returned a verdict for \$60, and after unsuccessful motion for new trial defendant has appealed.

The position of defendant appears to be that in the absence of an express contract affirmatively determining the period of time the switch or side track should be maintained and operated by the railroad company the law will imply that it should be continued so long only as the amount of shipments offered by the plaintiff and the earnings therefrom would justify the railroad in incurring the expense of maintaining and operating the track, including a fair income upon its original cost to the company, and that an interpretation of a parol understanding imposing the obligation upon a railroad to perpetually maintain a switch, regardless of the consideration whether used by the plaintiff for shipments or not, would be harsh and unreasonable. The defendant contended, further, that contracts by a railroad, by which it undertook to bind itself to establish side tracks, spur tracks, switches, depots, and like appurtenances at any particular point and permanently maintain them, were void, as against public policy. The principle is undoubtedly well established that the first duty of a railroad company in the location and operation of its tracks and switches is toward the public, and such corporations cannot lawfully enter into any

doctrine is that such contracts should not be upheld, if shown to be materially injurious to the interests of the public, as mere private benefit must yield to the public welfare and public wants. Where no public interest is affected or concerned, a railroad company may lawfully bind itself to establish and maintain a switch at any designated point for the accommodation and convenience of patrons in the vicinity, shippers or consignees of freight, and the policy of the law above cited does not condemn such agreements, and is not applicable to the state of facts herein presented. No considerations of the public welfare are herein involved. The purpose and execution of the contract did not affect or impair the performance of the duties of the railroad company to the public. If it be conceded that by implication the railroad was accorded the right to remove the switch, when its operation had ceased to be profitable and plaintiff had ceased to furnish shipments of freight sufficient to warrant its further maintenance, yet it is but just that the railroad make restitution to plaintiff of that portion of the cost of its construction contributed by him, and this is attained by the verdict of the jury for plaintiff in the amount of the value of the cross-ties furnished by him (which the testimony shows the defendant removed and converted), together with the cost of the grading paid by him.

The judgment is for the right party, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

SCHNABEL v. THOMAS et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

APPEAL—AFFIRMANCE—SUBSEQUENT WRIT OF ERROR.

1. After a judgment has been affirmed on appeal, it cannot be reviewed by writ of error, even though the affirmance was for failure to prosecute the appeal as required by law.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by P. R. Schnabel against John W. Thomas and others. Judgment for defendants, and plaintiff brings error. Writ quashed.

G. W. Barnett, for plaintiff in error. W. D. Steele, for defendants in error.

PER CURIAM. A writ of error was sued out in this cause on the 3d day of March, 1902. The records of this court show that an appeal taken in this cause to this court on the 29th day of March, 1901, by the plaintiffs in error herein, was, on the 10th day of February, 1902, disposed of by an affirmance of the judgment of the lower court for failure

to quash the same. The writ was improvidently issued. *Brewing Co. v. Levvie*, 41 Mo. App. 584; *Brummel v. Phillips*, 79 Mo. App. 116; *Harburg v. Arnold*, 87 Mo. App. 328.

The motion to quash is sustained. All concur.

RAMLOSE v. DOLLMAN et al.

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

BUILDING CONTRACT—BREACH—BURDEN OF PROOF—DAMAGES FOR DELAY—REASONABLENESS—AMENDMENT OF PLEADINGS—ADMISSION OF EVIDENCE.

1. Where the contract for the erection of a building stipulated that the payments should depend on the progress of the work, and on presentation by the contractor of certificates from the architect as to the performance of the work, it was not necessary for the owner of the building to plead performance of the conditions of the contract in an action against the contractor for breach of the contract.

2. Where, in an action for the breach of a building contract, defendants alleged that plaintiff had unreasonably deferred making certain payments, but there was no evidence that defendants were prejudiced on account of these delays, the trial court's finding that the delays were not unreasonable will not be disturbed on appeal.

3. A stipulation in a building contract that the contractor should pay \$10 per day as liquidated damages for delay in completing the building within the specified time is not unreasonable, and will be upheld where it is shown that the rental value of the building was \$300 per month.

4. Where the owner of a building retained out of the amount he had agreed to pay for its erection the demurrage stipulated for delay in completing the building on time he simply withheld what belonged to him, and was not thereby precluded from bringing an action against the contractor for a breach of the contract.

5. Where the owner of a building offered to pay the contractor and his surety a small amount due on the contract for the erection of the building before suing them for a breach of the contract, and they refused to accept it, they are not in a position to insist on this default as a bar to a recovery in the action.

6. Where the original pleadings in an action raised every issue on which any evidence was heard and on which the court made a finding, an alleged error in permitting a party to amend his pleadings so as to conform to the proofs, after the court had arrived at its findings, will not be considered on appeal.

7. Where evidence admitted over a party's objection was not prejudicial to him and did no harm, it furnishes no ground for complaint.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by Christian E. Ramlose against Charles Dollman and the National Surety Company for breach of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

The suit is on the following bond:

"Contractor's Bond.

"Know all men by these presents: That Charles Dollman as principal and National

*Rehearing denied April 27, 1903.

Surety Company, a Missouri corporation, as security, are jointly and severally held and firmly bound unto Thomas Warren, obligee, in the sum of nine thousand (\$9,000) dollars lawful money of the United States of America, well and truly to be paid to the said Thomas Warren, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors, administrators, and successors or assigns, firmly by these presents. Sealed with our seals and signed with our hands, this first day of May, in the year of our Lord eighteen hundred and ninety-five.

"The condition of the above obligation is such, that whereas the said Charles Dollman has on the day of the date of these presents, executed and entered into a certain contract for the erection of certain buildings in said contract described, which contract is hereto annexed: Now if the above-named obligee and the said Charles Dollman shall respectively well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and the said Charles Dollman shall keep the said obligee, Thomas Warren, harmless and indemnified from and against all and every claim, demand, judgments, liens and mechanics' liens, costs and fees of every description incurred in suits or otherwise, that may be had against him or against the buildings to be erected under said contract, and shall repay the said Thomas Warren all sums of money which he may pay to other persons on account of work and labor done or materials furnished on or for said buildings, and if the said Charles Dollman shall pay to the said Thomas Warren all damages he may sustain, and all forfeitures to which he may be entitled by reason of the nonperformance or malperformance on the part of said Charles Dollman of any of the covenants, conditions, stipulations and agreements of said contract, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

"Witness our hands and seals.

"Charles Dollman.

"[Seal.] National Surety Company,

"By A. E. Stilwell, President.

"Attest: W. S. Rugh, Secretary."

The petition alleged an assignment in writing of the bond by Warren to plaintiff on July 25, 1899, without alleging that Warren had performed or kept all the conditions of the building contract referred to in the bond on his part, and alleged the following breaches of the bond by Dollman: "For specific breaches of the condition of said bond plaintiff assigns the following: That the said Charles Dollman did not well and truly perform and fulfill all and every the covenants, conditions, stipulations, and agreements in said contract mentioned to be performed and fulfilled; that under the terms of the said

contract the said Charles Dollman agreed and undertook that the said buildings in said contract mentioned should be completed ready for use and occupancy on or before September 1, 1895; that said Dollman should pay to said Warren the sum of ten dollars (\$10) as liquidated damages for each and every day after said date until said building should be completed and ready for use and occupancy. Plaintiff further states that said building was not completed and ready for use and occupancy until the 1st day of November, 1895, and that thereby there was due and owing to the said Thomas Warren the sum of \$610 on account of the same, all of which said sum is still due and unpaid. For another and further breach of said bond plaintiff states that the said Charles Dollman did not keep the said Thomas Warren harmless and indemnified against all and every claim, demand, judgment, liens, and mechanics' liens, costs, and fees of every description, incurred in suits or otherwise, that might be had against said Warren or against said buildings erected under said contract; that on or about the 12th day of April, 1899, in an action in which the said Dollman was defendant, Hazelhurst Lumber Company recovered a judgment against Henry D. Viser and L. T. Sanders, subcontractors under said Dollman, and others, in the St. Louis circuit court on a demand for material furnished for said buildings, and said demand was adjudged by said court to be a lien on the buildings aforesaid, and the land on which the same was situated; that said Thomas Warren was compelled to pay, and did pay, on or about June 27, 1899, the sum of ten hundred and ninety-four dollars and one cent in settlement of said judgment and costs; that said Dollman has never repaid to said Warren any part of said sum; that by reason thereof said Thomas Warren has been damaged in the sum of \$1,094.01. Plaintiff further states that by reason of the failure of defendants to keep the condition of said bond the said Warren has been damaged in a total sum of \$1,704.01."

Defendants Dollman and the National Surety Company filed separate answers. They are, however, identical in respect to the defenses relied on at the trial. These defenses are as follows: "This defendant, further answering said petition, says that article 9 of the contract between said Charles Dollman and said Thomas Warren, referred to in the petition herein, was and is as follows: 'It is hereby mutually agreed between the parties hereto that the sum to be paid by the said owner to the contractor for said work and materials shall be \$9,000, subject to conditions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments, as follows: When first floor timbers are laid, seven hundred dollars (\$700); when second floor timbers are laid, eight hundred dollars (\$800); when roof is

on, four thousand five hundred dollars (\$4,500); when top floors are laid, fifteen hundred dollars (\$1,500); when finished, fifteen hundred dollars (\$1,500). All payments to be made by the party of the second part under this contract shall be made to the National Surety Company in trust for the use and benefit of the party of the first part, for the purpose of performing the covenants and agreements of the party of the first part as herein provided. The final payment shall be made within ——— days after this contract is fulfilled. All payments shall be made upon written certificates of the architects to the effect that such payments have become due. If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.' Said defendant avers that said Thomas Warren did not perform his part of the said article 9 with respect to the time of payments of the various amounts set forth therein; on the contrary, he delayed making payment of each and every of said installments set forth in said article 9 long beyond the period set for the payment of the same, as provided for in said article in said contract; that he particularly delayed the payment of \$2,990.27 to various dates and times for various portions of same to, on, and between the date of November 7, 1895, and June 25, 1896, and that in addition thereto said Warren wholly failed to pay under his said contract the sum of \$589.73, and never was paid the same. Wherefore this defendant says that by reason of the premises it was and is wholly released from its obligation as surety on said bond sued upon in this action." Both answers also contained a general denial. The reply was a general denial to both answers. The issues were tried to the court, sitting as a jury.

The sixth article of the building contract was read in evidence by plaintiff, and is as follows: "Art. 6. The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, the building to be completed ready for use and occupancy on or before September first. A forfeiture of ten (\$10) dollars per day after the above date, provided that," etc. The ninth article of the building contract is correctly set forth in the answers of defendants. The other parts of that contract are not material to the controversy.

Plaintiff's counsel then offered in evidence

mechanic's lien of the Hazelhurst Lumber Company v. Viser et al., in the St. Louis circuit court, No. 159, p. 491, together with record of judgment in said cause, page 503, of the records of the St. Louis circuit court. Plaintiff's counsel also offered in evidence the execution. Said documents, in effect, showed that a mechanic's lien was filed by the Hazelhurst Lumber Company on the property mentioned in the petition and in the above contract and bond, and that in said suit judgment was entered on April 13, 1899, against Viser et al., with the lien on the property in question, amounting to \$945.13; interest, \$11.70; costs, \$91.30; advertising, \$31.90; levy, \$1; commission, \$12.98; total, \$1,094.01. Christian E. Ramlose, being duly sworn, testified that he was the plaintiff in this cause. He was shown the above-mentioned bond and assignment, and stated that Thomas Warren signed them. Witness Ramlose then testified that he was occupying the building in question; that said building was ready for occupancy about November 10, 1895, but was not quite completed then. Witness moved in November 1, 1895, but it was not quite completed until the 10th or 14th. About the 10th of November, 1895, witness loaned the money to Warren to satisfy said execution and judgment. On cross-examination by Mr. Davidson, witness stated that he bought the said premises from Thomas Warren while the building was in course of construction. Witness advanced to Warren the amount necessary to pay the said judgment and execution, and now holds Warren's note for same. August M. Beinke, being duly sworn, testified that he was an architect and superintendent; that he was architect of the building mentioned in the contract between Warren and Dollman. He was shown the contract above mentioned, dated the 1st day of May, 1895, between Charles Dollman and Thomas Warren, and identified the signatures of Dollman and Warren. At this point the plaintiff rested.

The defendants, to maintain the issues on their part, introduced the following evidence: Charles Dollman, being duly sworn, on direct examination testified that at the time the building was turned over to Mr. Warren there was \$589.73 unpaid, besides some extras that were due witness. Thomas Warren refused to pay the \$589.73, and assigned as ground for his refusal that he was entitled to hold it on account of delay in constructing the building. When the lumber company lien suit was filed witness went to Mr. Warren, and told him he would like to have \$580. He said: "If you will pay that \$580 to the surety company, I will satisfy it and have that lien released." Mr. Warren declined to do it. "Q. I will ask you whether or not you could have settled that claim at that time with that money? (Objected to. Objection sustained and exception noted.)" Witness was shown a paper, and identified it as a statement that Thomas Warren gave

him. Said paper is marked "Exhibit No. 1," and is as follows, to wit:

St. Louis, June 24, 1897.

Mr. Chas. Dollman: In account with Thomas Warren.

July 5, to check.....	\$ 700 00
July 26, " ".....	800 00
Sept. 3, " ".....	308 55
Sept. 17, " ".....	100 00
Oct. 23, " ".....	174 85
Oct. 29, " ".....	3,916 60
58 days' demurrage, as per contract	580 00
Nov. 7, to check.....	1,500 00
1896.	
Mch. 13, " ".....	261 97
Mch. 13, " ".....	68 30
June, " order for C. E. Ramlose..	125 00
June, " ".....	160 00
June 25, " order for Tower Grove P. M.	295 00

\$8,990 27

The building was completed the latter part of October. Witness stated that the paper marked "Exhibit 1" is in the handwriting of Mr. Warren. The contract price was \$9,000. After allowing 58 days for delay, which Thomas Warren claimed, there would still be a balance due of \$9.73, which had never been paid. Witness stated that the first two certificates given by the architect for payments to be made on this building were duly presented to Mr. Warren, and neither of them were paid upon presentation. The first one was presented to him, and Warren claimed that he had lost his copy of the contract and bond. Witness was of the opinion that there was nearly two weeks' delay in paying the first certificate. The second certificate was issued, and was not paid until about a week after it was presented. Witness only got two certificates from the architect. All moneys were paid through the National Surety Company. Witness was shown a paper dated June 22d, signed "Architect," and identified it as the architect's certificate handed to him by Mr. Beinke. Said instrument is marked "Exhibit 2," and is as follows, to wit: "St. Louis, June 28, 1895. Mr. Thos. Warren: Dear Sir:—The first payment of seven hundred dollars (\$700) is due Mr. Chas. Dollman, as per contract, when first floor beams are laid. August M. Beinke, Architect." Witness handed this paper to the surety company the same day he received it. Witness was shown architect's certificate dated July 17, 1895, signed "Beinke, Architect," and identified the signature. Said instrument is offered in evidence, and marked "Exhibit 3": "St. Louis, July 17, 1895. Mr. Thomas Warren: Dear Sir:—Please pay to Charles Dollman the sum of eight hundred (\$800) dollars, being second payment on your factory building corner of Eleventh and Monroe streets, as per contract. Respectfully, Aug. M. Beinke, Architect."

R. A. Smith, a witness for defendants, testified that he was connected with the National Surety Company, and stated that the

architect's certificate dated June 28, 1895, was paid on July 5th; the one dated July 17th was paid on July 26th; that several demands were made for payment of these certificates on defendants before they were paid. He testified that he received the following letter from Warren:

"St. Louis, June 15, 1896.

"Mr. Ruffin A. Smith, G. A. National Surety Co., City. Dear Sir: Yours 13th noted. After Mr. Ramlose's claims are settled by allowance to him of \$310—which I understand from you is his agreement—\$279.73 balance, I am ready and willing to pay on the contractor's order, properly endorsed by your company, in full of all claims against me on contract of Chas. Dollman, Esq., which was for say \$9,000.00, provided he completed building by or before Sept. 1, 1895; or at rate of \$10 per day less for each and every day's default in said time of completion.

"I paid on contractor's orders as follows, viz.:

1895.		
July 5.....	\$ 700 00	
" 20.....	800 00	
Sept. 7.....	308 55	
" 17.....	100 00	
Oct. 23.....	174 85	
" 29.....	3,916 60	
Nov. 7.....	1,500 00	
1896.		
Mch. 13.....	330 27	
58 days in default.....	580 00	\$8,410 27
Amt. your agreement with C. E. Ramlose	310 00	
		\$8,720 27
Leaving balance to apply on contract	279 73	
		\$9,000 00

"Yours, truly, Thomas Warren."

On May 18, 1899, Warren wrote Messrs. McKeighan, Barclay & Watts, attorneys for the National Surety Company, the following letter:

"Dear Sirs:—Yours 17th noted. The National Surety Co. must see to the lien, so far as I am concerned. I sold the notes with bond long since.

"Nine and $\frac{73}{100}$ dollars (\$9.73) is the amount to credit of contract with C. Dollman, and will honor his order through National Surety Co. for that amount.

"Very truly, Thomas Warren."

On cross-examination Smith testified that he did not remember what excuse Warren offered for the delay in making the two payments.

In rebuttal Warren testified that when the demand was made on the first certificate of the architect he had lost his copy of the contract, and waited until he could procure a copy to see if the payment was due under the contract. He testified that Dollman never told him that if he (witness) would pay \$580 he (Dollman) would satisfy the Hazelhurst Lumber Company's lien; that no certificate of the architect had been presented to him by Dollman or the National

Surety Company for any balance due on the contract; that notice of the lumber company's lien was first served on him about January 21, 1896; that prior to that time notice of other liens by subcontractors had been served on him; that on this account he made the several payments to the National Surety Company in advance of their becoming due upon written orders of Warren, of which the following is a copy:

"St. Louis, Mo., ———.

"Mr. Thomas Warren, St. Louis, Mo. You are hereby authorized, and the National Surety Company does hereby consent, for you to pay the amount of the within order, \$——, to ———, without waiving any of the rights, recourses or benefits under the bond executed by said company, guaranteeing the fulfillment of your contract with Charles Dollman.

"[Signed] National Surety Company,

"By Ruffin A. Smith, General Agent."

He testified that the monthly rental value of the premises was \$800; that after this suit was commenced Dollman asked him to give him (Dollman) \$150 or \$200, and he would disappear and not show up at the trial; that he had no interest in the suit, and in this way he would help plaintiff to get a judgment against the National Surety Company; that \$7,500 was paid on certificates of the architect, and \$910 on the written waivers of the surety company, without the architect's certificates.

At the request of the parties the court made a finding of the facts, the material parts of which are as follows:

"(3) That the building referred to in said contract was, by the terms thereof, to have been completed and ready for occupation on or before the 1st day of September, 1895, and that it was not so ready for use and occupation until sixty-one days thereafter, and that said delay was not occasioned by any change or addition in or to the work required by said plans and specifications; and that by the terms of said contract there was a forfeiture of ten dollars per day after the above date, to wit, after September 1, 1895, but that the said Warren has claimed and does claim a forfeiture for but fifty-eight days, at ten dollars a day, or \$580.

"(4) That, on account of the contract price of nine thousand dollars to be paid under said contract, the sum of \$8,410.27 has been paid, leaving a net sum of \$589.73 still in the hands of said Warren, for whom the said building was constructed, the same being \$9.73 more than the forfeiture of ten dollars per day for fifty-eight days, amounting to \$580, and claimed and retained by the said Warren under the terms of the contract.

"(5) That said contract provides that 'all payments shall be made upon written certificates of the architect,' and are to be made to the defendant surety company. The architect's certificates were issued for the first four payments as and when required by the

terms of the contract, as follows: The first one on the 28th day of June, 1895, for \$700, which was paid on the 5th day of July, 1895; the second one on the 17th of July, 1895, for \$800, was paid on the 26th day of July, 1895; the third one the 24th day of October, 1895, for \$450, which was paid on presentation; the fourth one on the 7th day of November, for \$1,500, which was paid on presentation. That afterwards other payments were made before their maturity, and were made upon the written request and waiver of the defendant surety company, and that there was never any final certificate issued upon the completion of the building, as required by the contract, nor was there any demand made, with a presentation or offer of a written waiver, by the defendant surety company, for such payment; and that all of said payments so made were made either upon written certificates or upon written requests and waivers thereof, as above stated, and that all architect's certificates were paid within a reasonable time after presentation, and that at no time was refusal of payment of any of said certificates made by the said Thomas Warren.

"(6) That on the 21st day of January, 1896, the Hazelhurst Lumber Company gave notice to the owner, Thomas Warren, of its claim of \$823.23 against said building, and its intention to file a lien therefor within ten days from said date if the sum was not paid, and that afterwards the said Hazelhurst Lumber Company filed a mechanic's lien for the same, and afterwards, and within the time fixed by law, brought suit thereon in the circuit court of the city of St. Louis against all necessary parties, and such proceedings were had therein that a judgment with a mechanic's lien against said property was rendered and sustained on the 12th day of April, 1899, in the sum of \$945.13, with interest at the rate of six per cent. per annum and costs of suit; and that afterwards, on the 28th day of June, 1899, the said judgment was satisfied and paid by said Thomas Warren on execution and after levy by the sheriff under said execution upon the property in question, and that the sum so paid was \$1,094.01, as follows:

Debt	\$945 13
Interest	11 70
Court costs	91 30
Advertising	31 90
Levy	1 00
Sheriff's commissions	12 98

"(7) That the value of the property in question, including the buildings and real estate, was about fifteen thousand dollars.

"(8) That the forfeit of ten dollars per day after September 1st, as provided by said contract, taken in connection with the evidence as to the rental value of the premises in question and the nature and character of the same, and the purposes for which it was intended, is not unreasonable as liquidated damages, and that the same should be and is so considered and found by the court.

"(9) That on the 27th day of June, 1899, the said Thomas Warren duly assigned to the plaintiff, Christian E. Ramlose, all of his right, title, and interest in and to the cause of action sued on.

"(10) It therefore follows that the plaintiff, Christian E. Ramlose, has been damaged by reason of the said mechanic's lien judgment in the sum of \$1,072.11, and the further sum of \$580, being the sum of ten dollars per day for fifty-eight days, the number of days' delay claimed for by said Warren for delay in the construction of said building, making a total amount of damages sustained by the plaintiff of \$1,652.11; and it further appearing, as above found, that the said Warren has in his hands the sum of \$589.73, the balance unpaid on account of said contract price of \$9,000, the plaintiff should recover only the difference between said sums of \$1,652.11 and \$589.73, or the sum of \$1,062.38; and judgment should therefore be entered against the defendant Dollman and the said surety company in the sum of \$9,000, the amount of the penalty of the bond sued on, with damages in the sum of \$1,062.38, with interest thereon from the 15th day of July, 1899, the date of the institution of this suit, and that execution issue therefor; and it is so ordered."

To all of the above findings defendants duly objected and excepted.

Leave was then given plaintiff to amend reply in regard to the unpaid balance of \$588.73 to conform to the proofs. This amended reply is as follows: "Plaintiff, for reply to the answers of the defendants, denies each and every allegation of new matter therein contained. Further replying, plaintiff admits that the said Warren has retained and now holds the sum of \$589.73, being the balance of the contract price for the construction of said building; but plaintiff says that no final certificate has ever been issued by the architect, as required by the contract, for the payment of said sum, nor has any demand ever been made therefor by defendant National Surety Company; of which said sum plaintiff says that \$580 was and is due and payable to the said Warren under the terms of the contract on account of the delay in the completion of said building, as stated in plaintiff's petition. Having fully replied, plaintiff renews his prayer for judgment."

Thereupon the court rendered judgment for plaintiff for the penal sum of the bond to be discharged on the payment of the damages assessed, \$1,062.38, with legal interest thereon from July 15, 1899.

Defendants filed a motion for new trial, and the following affidavit in support thereof: "Robert A. Holland, Jr., being duly sworn, on his oath says: He is one of the counsel for the defendant, the National Surety Company, in said cause above entitled, and participated in the trial thereof on behalf of the said defendant; that, had opportunity been afforded, said defendant, by its

attorneys, could have submitted to the court testimony tending to show that certificates by the architect required by the contract mentioned in said cause, for the payment of money under said contract, had been waived by a general course of dealing between the parties to said contract, during the performance thereof, and, had the allegations stated in the amended reply been made of record prior to the hearing of the evidence in said case, that this defendant would have offered evidence to the court tending to show that the making of certificates for payments under said contract had been waived by a course of dealings between the parties to said contract. This affiant further states that the proof which said defendant would have submitted in that behalf consists of the oral evidence of Charles Dollman and Rufin A. Smith, and affiant believes that said facts might have been further corroborated by other witnesses, whose names affiant is unable at present to give, and by the dealings between the parties to said contract. This affiant further states that this defendant was surprised by the ruling of the court permitting an amendment of said reply of plaintiff, and that this defendant has been, in the opinion of this affiant, prejudiced and surprised by said ruling permitting said amendment; and affiant further states that no opportunity was afforded to this defendant to introduce evidence as aforesaid, thereby to meet the allegations in the plaintiff's amended reply. And this affiant further states that the said defendant, had opportunity been afforded by the court, could and would have introduced testimony tending to prove that prior to the bringing of this action demand had often been made upon plaintiff's assignor for payment of the sum mentioned in plaintiff's amended reply, and that such demands could have been proved by the witnesses already named, and by others, as this affiant has been informed by some of said witnesses; and this affiant avers that the said defendant was surprised by the ruling and order of the court permitting the amendment of said reply, and believes that this defendant was prejudiced by said order. And further affiant saith not. Robt. A. Holland, Jr. Subscribed and sworn to before me this thirteenth day of July, A. D. 1900. Henry Troll, Clerk Circuit Court, City of St. Louis, State Missouri. [Seal.]"

The motion was overruled. Defendant then filed a motion in arrest of judgment, which the court also overruled. Thereupon defendants duly appealed.

R. A. Holland and B. O. Davidson, for appellants. Lee W. Grant, for respondent.

BLAND, P. J. (after stating the facts). 1. Defendants insist that the motion in arrest should have been sustained, on the ground that the petition failed to state any cause of action. Their contention is that it was esser

tial to the petition that it contain an allegation to the effect that the plaintiff or his assignor had performed all the conditions of the contract imposed on Warren. The rule that requires an allegation of that kind in an action on a contract applies where the contract requires something to be done by the plaintiff as a condition precedent to his demanding performance of the contract on the part of the defendant. *Basye v. Ambrose*, 32 Mo. 484; *Pier v. Heinrichhoffen*, 52 Mo. 333; *City of St. Louis v. Cruikshank*, 16 Mo. App. 496. But the rule has no application to suits on contracts, when there are no precedent conditions to be performed by plaintiff to entitle him to demand performance by the defendant, nor when the right to demand performance on plaintiff's part must be preceded by a performance of a part or the whole of the contract by the defendant. By reading the building contract into the bond, as should be done, to ascertain the full scope and purpose of the bond, it will be seen that the only obligation resting on plaintiff was to pay the installments of the contract price for the construction of the building, as provided in article 9 of the contract. This obligation was not a certain and absolute one to pay. The maturity of the payments are made to depend upon performance of the contract by Dollman and the procurement by him of the architect's certificate of such performance. *Roy v. Boteler*, 40 Mo. App., loc. cit. 222. The burden, therefore, to show that plaintiff or Warren had violated the contract in this respect was on the defendants to show that Dollman had procured the certificate; that he had performed the work under the contract which entitled him to payment. By their answer the defendants set out the stipulation in the contract in respect to payments, and averred breaches thereof on the part of Warren. They thereby assumed, and rightfully assumed, the burden of proving those breaches, and that plaintiff had not performed his part of the contract.

2. It is insisted that the court erred in finding there was no unreasonable delay in paying the first and second certificates of the architect. There is not a word of evidence that defendants or either of them were in the least prejudiced by the few days' delay in making these payments, nothing to show that they suffered any loss or were put to any expense or trouble on account of the delay, and we think the court's finding on this issue was eminently just.

3. The finding of the court that the demurrage of \$10 per day for delay in completing the building within the contract time was liquidated damages is assigned as error. The only evidence of the rental value of the property came from Warren, who placed it at \$300 per month. On this evidence the stipulated damages were reasonable and just, and there was no evidence to the contrary which would authorize a court to undo the agree-

ment of the parties that \$10 a day should be regarded as liquidated damages.

4. Defendants by separate instructions moved the court to declare the law to be that if Warren detained \$589.73 of the contract price, or the sum of \$580 for demurrage on account of delay, or the sum of \$9.73 over and above the demurrage claimed, he could not recover, all of which instructions the court refused to give. This ruling is assigned as error. The evidence is all one way that there was over 58 days' delay in the completion of the building. On this state of facts Warren had a right under the contract to keep back the demurrage. In doing so he kept what was his own, what belonged to him under the contract, and we do not understand why the plaintiff should be defeated in this action for the reason that Warren kept his own moneys in his own pocket. In respect to the \$9.73 over and above the demurrage that was confessedly due on the contract, Warren offered to pay it on May 18, 1899, before this suit was begun, but defendants for some reason declined to accept it. They are in no position to charge Warren with a default in respect to the payment of this trifling sum.

5. In respect to the amended reply, it suffices to say that the amendment was entirely useless and unnecessary. The petition, answer, and reply raised every issue upon which any evidence was heard and on which the court made a finding.

6. Some shadowy objections were made to two questions asked the witness Smith on cross-examination that were overruled by the court. His answers to these questions did not elicit the evidence probably expected. They were not prejudicial to the defendants, did no harm, and furnish no ground for complaint.

We discover no prejudicial error in the record. The judgment is manifestly for the right party, and is affirmed.

REYBURN and GOODE, JJ., concur.

DAVIS et al. v. MODERN WOODMEN OF AMERICA.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

LIFE INSURANCE—DUEL—DEATH CAUSED BY VIOLATION OF LAW.

1. In a mutual benefit certificate providing that it should be void if assured should be killed in a "duel," the word "duel" signified a combat resulting from prearrangement, and hence that assured was killed in combat did not avoid the certificate, in the absence of any evidence of prearrangement.

2. Deceased, seeing a neighbor, with whom he had long been on bad terms, passing in the highway, armed himself, and, going out, had a wordy altercation with the neighbor, and, after he had passed on, deceased stationed himself near the road, and waited 15 or 20 minutes for the neighbor to return. When he did so, both parties fired, and deceased was killed. *Held*, that in awaiting the neighbor's return deces-

ed was guilty of an unlawful act, avoiding a mutual benefit certificate conditioned that it should be void if deceased was killed in consequence of a violation of law.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

Action by Ila Davis and others, by guardian, against the Modern Woodmen of America. From a judgment for plaintiffs, defendant appeals. Reversed.

King & Elliott and M. T. January, for appellant. Scott & Bowker, for respondents.

ELLISON, J. This action is based on a benefit certificate of life insurance issued by defendant to John W. Davis in the sum of \$3,000; \$1,000 for the benefit of his wife, and \$2,000 for his surviving children. He died, leaving a widow and two children. The widow assigned her interest to the children, and they are the plaintiffs, seeking to recover the full amount of the certificate. They obtained judgment in the trial court.

The certificate contained two provisions which bear upon the case: They were that, if Davis' death "occurred in consequence of a duel, or of any violation or attempted violation of the laws of any state or territory of the United States," the certificate should become void. Davis was shot and killed by one L. E. Bryan at the side of the public road in front of his house. The defense to the action is based upon the contention that he was killed either in a duel with Bryan, or while engaged in a violation of the law of the state.

1. We think the word "duel," as it appears in the present contract, was used in its ordinary signification, and with the meaning which is ordinarily attached to the term; that is, a combat with deadly weapons between two persons by some prearrangement and understanding, and, perhaps, with some formality. And so the word is doubtless understood when found in our laws placing certain disabilities on those who may engage in a duel. *State v. Herriott*, 1 McMul. 126; 1 Bouvier's Law Dict. The evidence in the record falls altogether to show that the encounter between Bryan and the deceased was of such character as to be classed as a duel, and we therefore reject that theory of defense.

2. We have, then, only to consider the other cause of defense, viz., that the deceased came to his death by consequence of a violation of the law. The evidence took a wide scope, and this was quite natural when the character of the difficulty, the length of time it had been brewing, and its unfortunate ending is considered. Davis was killed by Bryan early in the morning of the 3d of July, 1901. The evidence shows that Bryan, Davis, and one Chaney were farmers living in the same neighborhood in Vernon county; that Bryan lived on a public road running east and west, which connected with a road running north and south, on which Davis and

Chaney lived, Bryan's house being about three-fourths of a mile from Davis'; and Chaney's premises and pasture gateway being short distance beyond Davis'. Shortly after daylight on the morning of the 3d of July, Bryan discovered that one of his mules was missing. He saw, by tracks in the middle of the road, that it had gone east towards the north and south road. He (as he stated, supposing it had been stolen) then saddled a pony, got his shotgun, and started out in hunt of the mule. He traced it by the tracks north on the north and south road past the Davis premises, and on until it turned into the gate into Chaney's pasture. He, with Chaney's assistance, drove it out into the road headed for home; he following on the pony. These are uncontroverted facts, and we come now to what the records show as to acts of the two men towards each other, and which resulted in Davis being killed. Davis and his wife were at the breakfast table that morning as Bryan was coming north on the road approaching their house, and Mrs. Davis saw him through the window as he came riding north, and saw that he had a gun. She called her husband's attention, and he, too, saw him. He then went to the front door, the upper half of which was glass, looked out, turned back, and got his shotgun, and went out into the yard. Bryan testified that he (Davis) hailed him in a "loud and infuriated" tone, but that he could not hear what he said, but that Davis followed him on up the road towards Chaney's for a considerable distance. Mrs. Davis stated that when her husband got the gun and went out the front door she did not see either of the men, but that she could hear that they were saying something to each other. After Bryan had gone by, and was in Chaney's pasture, getting the mule, Mrs. Davis went out to the yard gate, and found that her husband was at the big gate leading into the lot, and he came down to where she was, but it is not known what they said together. She then returned to the house and Davis to the lot gate. The fences along this road were hedge, and Davis' lot gate set back in a recess of some four or five feet, so that one standing at the gate would be at least partially hidden from the view of one coming along the road. Here Davis waited 15 or 20 minutes. That he waited for Bryan's return is not questioned. When he did return along the road, and got about opposite to where Davis was standing, each began firing at the other, with the result that the shot fired by Davis tore off the muscle of Bryan's arm, and the shot fired by Bryan struck Davis in the side, from which he died within an hour. There was much evidence on the question of which of the two fired the first shot. And so a great deal of testimony was given as to threats made by Bryan beginning back five or more years, when Davis fired at him with a pistol and assaulted him with a knife and a pick ax. Evidence was

given tending to show that Bryan entertained feelings of wicked and deep-seated malice for Davis, and that he rejoiced over having killed him. Bryan denied the threats and the expression of pleasure at having killed him, but for the purpose of disposing of the case we will assume that he made the threats, and that his feelings were as indicated by some of the witnesses. We will further assume that when he came upon Davis on his return from Chaney's he fired the first shot, and thus put an end to a large part of the argument laid before us. Yet, with all this conceded, does not the evidence which remains undisputed—in fact, the evidence offered by plaintiffs—establish that Davis was engaged in an unlawful act? His conduct from the time he saw Bryan riding along the public road in hunt for the mule until he was shot was one continuous act. It consisted in seeing Bryan riding in the public road which led by his house armed with a gun, arising from the breakfast table, looking out of the front door, getting his shotgun and going out into the yard, engaging in a word controversy with Bryan, and thence going to the gate leading from the road into his feed lot, and there, gun in hand, remaining in wait for Bryan's return. There is no evidence that Bryan did anything to excuse Davis in doing this. Bryan was engaged in hunting his mule, and must have passed on by the Davis place, notwithstanding the words between him and Davis; for when Mrs. Davis, hearing the talk between the men, but not understanding what was said, sent her daughter out, the child saw that Bryan was near to Chaney's. There is no word of testimony, and nothing upon which to base a reasonable or substantial inference, that Bryan did anything to justify Davis in remaining in wait for him armed for a deadly conflict. It is manifest from the testimony in behalf of plaintiffs, allowing it the extreme limit of inference within the bounds of reason, that, but for the unwarranted act of Davis in arming himself and going out to molest Bryan by word or deed, he being a mere traveler on the public highway, no difficulty would have occurred. And Davis did not stop at that. Whatever may have been said between them relating to a personal encounter, Bryan had passed on, and no difficulty would have occurred but for Davis taking up a position by the roadside, in the recess of his gateway, and remaining in wait for Bryan's return. These acts of Davis were unlawful—were in violation of the law of the state and of his contract with this defendant.

Let it be supposed that Bryan had gone so far as to say to Davis, when he came out of his house, that he (Bryan) would pass back in a short time, and that, if he would remain outside the house, he would kill him. There was no evidence of this, and we make use of the supposition merely by way of illustration. Davis accepted the proposition (if

made), and remained outside in wait for the mortal combat. His act was still unlawful. It would have been a voluntary combat, with murder at the door of the survivor. *State v. Underwood*, 57 Mo. 40, 50. And, even should we go so far as to allow that the conflict between the two men was sufficiently sudden to relieve the survivor of murder, yet he would at least be guilty of manslaughter. *State v. Davidson*, 95 Mo. 155, 8 S. W. 413; *State v. Parker*, 106 Mo. 223, 17 S. W. 180. Confessedly, Davis' act brought about his death, but plaintiffs urge that such act was not wrongful, and that he had a lawful right to arm himself, and go out to meet Bryan, and to remain out to meet him on his return, in order to prevent him from committing some trespass or offense against his property. We have already stated that there was no evidence whatever that Bryan had committed a trespass on his property, or had threatened to do so on his return. But, if he had, such act or threat did not justify Davis in arming himself with a deadly weapon with which to resist it. One may protect his property, and resist a trespass upon it, but he cannot go to the extent of killing the trespasser; and, if he do so, he will be guilty of manslaughter. *State v. Matthews*, 148 Mo. 194-197, 49 S. W. 1085, 71 Am. St. Rep. 594. He should have asked redress of the law, and not gone to the extremity he did. And so plaintiffs likewise insist that Davis had a right to arm himself, and go out, and remain out, even, to meet an attack from Bryan. The case of *State v. Evans*, 124 Mo. 410, 28 S. W. 8, is cited in support of the proposition. That case is, perhaps, authority to sustain the act of a man in arming himself and going to a place (for some lawful purpose) where his enemy is in the expectation that such enemy will attack him. But it by no means supports the idea that one may arm himself and go to his enemy for the purpose of being attacked, or himself attacking his adversary. Such construction of the law would break away all barrier to mutual murderous combats. In the case referred to the defendant went into a field, where his adversary was, for the purpose of getting some corn for his hog. He was armed, and expected that his adversary might attack him, and he was expecting to resist him if he did. He did not go to the field to meet his adversary for the purpose of a conflict, but he went for the lawful purpose of getting some corn; while in this case Davis, armed with a shotgun, went out to meet Bryan either in mutual combat, or to resist with such weapon some imaginary or real trespass. He broke the law in either view, and thereby broke his contract with defendant, and the beneficiary cannot recover.

We have arrived at this conclusion after a careful consideration of the evidence, and after having given to that in behalf of the plaintiffs every legitimate inference which

reason or the law permits, and, in consequence, we must hold that defendant's peremptory instruction should have been given.

The judgment is reversed. All concur.

On Rehearing.

(April 27, 1903.)

In support of a motion for rehearing our attention has for the first time been called to the cases of *Harper's Adm'r v. Ins. Co.*, 18 Mo. 109, and *Overton v. Ins. Co.*, 39 Mo. 122, 90 Am. Dec. 455. The foregoing opinion in no way conflicts with those cases. It is true that Judge Scott, because of the clause in that policy (not found in the one in controversy), viz., "if the party shall die by the hands of justice," remarked that such words showed the parties to have meant by the succeeding words, "in the known violation of any law," that the policy would not be avoided unless the killing of the insured was justifiable. Notwithstanding that expression, no one would contend that it was meant to say that, if the insured met his death in a mutual murderous combat, he would not avoid the policy, although his killing was not justifiable. If two start out to meet, each bent on murdering the other, the killing of either would not be justifiable, and yet each would be guilty of a felony—one of actual murder and the other of an attempt to murder. That this is the correct view of that decision is shown by the statement of the judge that the clause of the policy now in controversy covered those instances in which the insured died in the commission of a felony. That Davis was committing or did commit a felony when he met his death we think is sufficiently demonstrated by the facts stated in the opinion. The *Overton* Case decides that, where the insured met his death in an encounter such as that, if he had killed his adversary, he would have been justified, the terms of the policy were not violated. But no one could say that, if the effect of the shots exchanged by Bryan and Davis had been just the reverse of what they were, Davis would have been justified and exonerated in the eye of the law. If we could find ourselves supported by the law, we would readily lend our aid to these children in their effort to sustain the policy. But, finding no legal justification for the judgment, we must overrule the motion, and order its reversal. All concur.

DUCKETT v. KEET & ROUNTREE DRY GOODS CO. et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

TAKING POSSESSION UNDER MORTGAGE—ESTOPPEL TO CLAIM PLEDGE.

1. Where a creditor took possession of goods under a mortgage, and notified the world to

that effect by a written notice on the door of the store, he could not, on discovering that his mortgage was void as to other creditors, claim that he took possession under a pledge.

Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action for conversion by A. J. Duckett against the Keet & Rountree Dry Goods Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Mann, Sebree & Farrington and W. D. Tatlow, for appellants. Thurman, Wray & Timmonds, for respondent.

BROADDUS, J. This case, substantially, was before this court on a former occasion, under the title of *Keet & Rountree Dry Goods Company, Appellant, v. T. L. Brown, Jr., Defendant* (A. J. Duckett, Interpleader, Respondent), and will be found reported in 73 Mo. App. 245. For convenience, and to avoid repetition, we adopt the statement made by Judge Gill in that case.

It is claimed by respondent that the aspect of the case is different from what it formerly appeared. We will call attention to this difference. On the former appeal the case was reversed and remanded, whereupon respondent dismissed his interplea therein, and brought this suit for conversion. On his interplea in that case, plaintiff claimed the goods in controversy on the ground, as shown by the record, that he was entitled to them by virtue of his mortgage, and by reason of the fact that they were turned over to him as a pledge to secure certain indebtedness. This court held that "a mortgage which has been withheld from record in such way as to render it invalid as against creditors will not be validated as to intervening creditors by filing it of record and taking possession thereunder." And in speaking of plaintiff's claim under a pledge, the court used the following language, viz.: "The suggestion in brief for interpleader that the latter did not take possession under his mortgage, but, rather, under an independent agreement for a pledge made between him and Brown, * * * is opposed by all the evidence and the conduct of the parties at the time, as will be seen by reference to the facts set out in our statement." The defendant contends that the statement of the court quoted constitutes a finding on the issue, and is therefore *res adjudicata*.

On the trial of this case, plaintiff was asked: "What did you do when you took charge of the goods? By what authority did you take charge? Answer. By authority of Brown turning the goods over to me. The building was mine. I think it was pretty good authority. Question. Did he give them absolutely in payment of the debt? Were they your goods? Answer. He said he wanted the goods to pay the debts so far as they would go. He did not want me to have a cent more than just what was coming to me. No ar-

*Rehearing denied April 27, 1903.

those goods by virtue of the chattel mortgage? Answer. No, sir; I did not so understand it." He then states that, after taking possession, Brown talked with Young, who had drawn the mortgage, whose advice was that a notice be put on the door of the building that contained the goods that he had taken possession of them under his mortgage. Young also advised him to go to Greenfield and have his mortgage recorded. He was also asked: "Did you have any idea that your mortgage was defective in any way?" To which he answered: "I never regarded the mortgage as amounting to anything between anybody except me and Brown. I did not suppose that I would ever have any use for the mortgage whatever." There is nothing in this testimony to which our attention has been called that would in the least tend to show that plaintiff claimed the goods in the way of a pledge. What was said by Brown does not show that they were turned over to him for any other purpose than as stated—that he should proceed in whatever way he thought best. And the result showed that he thought best to base his claim to the possession of the goods under his mortgage, and notified the world to that effect by the written notice placed upon the door of the store building. And he ought not to be permitted to belie the plain purport of his own act by the subterfuge of saying that he did not understand he was taking possession under his mortgage, as he had never considered it as amounting to anything except as between himself and Brown, the mortgagor. If such a course should be encouraged, it would afford a pretext for fraud. It is true that, as a rule, it is legitimate to inquire into the motives of men in explanation of their actions, but such inquiries should not be permitted aliunde in cases where the motive is so plainly apparent from the act itself that but one legitimate conclusion can be entertained. And it is a familiar rule that the intent with which one does an act is presumed to be that which was its natural consequence. As has been said, it allows a party to a suit to play fast and loose with the courts. And no stronger example could be presented than that of the attitude of the plaintiff in this case. After having been defeated in his claim that he took possession under his mortgage, he resorts to the only alternative left to him, and is now seeking to recover on the ground that he took possession of the goods under a pledge for the payment of his debt. We are still of the same opinion entertained in the former case—that all the facts and circumstances show that plaintiff did not take possession of the goods under an independent agreement for a pledge between himself and Brown.

The cause is reversed, with directions to enter a judgment for the defendants for costs. All concur.

CO.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

CONNECTING CARRIERS — LIABILITY OF INITIAL CARRIER — CONTRACT FOR THROUGH SHIPMENT — EVIDENCE — SUFFICIENCY — AUTHORITY OF STATION AGENT — INFERENCE OF AUTHORITY — PREVIOUS DEALINGS.

1. In an action against a railroad company for injury to cattle, caused by delay of the connecting carrier in forwarding the cattle from the point of intersection with defendant's road, plaintiff's evidence, showing that the contract of shipment made with defendant's agent provided in express terms for a through shipment to a point on the intersecting line, was sufficient to submit the issue of the terms of the contract to the jury.

2. A station agent's authority to bind a railroad in a contract of carriage to a point on the line of a connecting carrier must be proved in order to hold his company liable for loss or damage occurring on the line of the connecting carrier.

3. The authority of a station agent to bind a railroad on a contract of carriage to a point beyond its terminus may be inferred from a previous course of dealing between the shipper and the carrier.

4. In an action against a railroad company for injury to cattle caused by delay of the connecting carrier, plaintiff's evidence showing previous contracts made with defendant's station agents for shipment of cattle to points on connecting lines, which contracts had been carried out by defendant, was, in the absence of knowledge by plaintiff that defendant's agents were forbidden to enter into such contracts, sufficient to submit the issue of agent's authority to enter into the contract to the jury.

Appeal from Circuit Court, Daviess County.

Action by Robert L. Faulkner against the Chicago, Rock Island & Pacific Railway Company. From a judgment setting aside a verdict for defendant and granting a new trial, defendant appeals. Affirmed.

W. F. Evans, H. C. McDougal, and Frank P. Seabee, for appellant. J. T. De Vorss and Hamilton & Dudley, for respondent.

SMITH, P. J. The plaintiff shipped from Altamont, a station on the line of defendant's railway in this state, a car load of Hereford cattle, the destination of which was Chidress, by the way of Bowie, another station on that part of defendant's said railway line which extends into the state of Texas. Chidress is a station on the Ft. Worth & Denver Railway 160 miles west of Bowie, the station where the latter railway intersects the defendant's line. The cattle arrived at Bowie in a reasonably good condition, but were layed there for something like 19 hours before the Ft. Worth & Denver Railway receive or haul them. During the delay the cattle remained in the car of the defendant as it had no pens or other facilities taking care of northern cattle when from its cars for the purpose of

*Rehearing denied April 27, 1903.

watered, and rested. The cattle, in such circumstances, were very indifferently cared for, and, as a consequence thereof, it is claimed they were very much injured; one or two of them dying after their arrival at destination. This action was brought against the defendant, the receiving carrier, for the damages that resulted from the injury. There was a trial by a jury, and at the conclusion of all the evidence the court, by an instruction, declared that upon the pleadings and evidence the plaintiff was not entitled to recover, stating at the time, as appears from the record, that the reason for so doing was that the plaintiff had adduced no evidence tending to prove that the defendant's station agent at Altamont was authorized to enter into a contract from that station to Childress, in the state of Texas. The verdict was returned for the defendant.

The evidence was conflicting as respects the terms of the contract of shipment entered into between the plaintiff and defendant, but the plaintiff's evidence abundantly shows that the contract in express terms provided for the shipment from Altamont to Childress, in the state of Texas, a station on the Ft. Worth & Denver Railroad, and not on the line of the defendant's railway. It was ample to carry the case to the jury on that issue. It was decided in *Grover v. Railroad*, 70 Mo. 672, 35 Am. Rep. 444, that a freight agent of a railway company, who was not only unauthorized, but expressly forbidden, to make a contract for the transportation of freight beyond its line, could not bind it by doing so. *Prima facie* a station agent can only bind the company in contracts of carriage to the end of its road. When a written contract entered into by a station agent of a railway company for the carriage of property to a point beyond the end of the line of such company is relied on, it is necessary to adduce some evidence tending to prove that the agent had authority, express or implied, to enter into the contract, before it will bind the company. *Grover v. Railroad*, ante; *Baker v. Railway*, 91 Mo. 152, 8 S. W. 486; *Patterson v. Railway*, 47 Mo. App. 570; *Minter v. Railway*, 56 Mo. App. 282; *White v. Railway*, 19 Mo. App. 410; *Turner v. Railway*, 20 Mo. App. 632; *Orr v. Railway*, 21 Mo. App. 338. There may be facts from which the authority of the agent to bind the carrier in contracts for carriage beyond the end of the line of its road may be inferred—as, for instance, from the holding of itself out as a common carrier to a point beyond the end of its line, or from the previous dealings between the shipper and the carrier, and the like. In the present case the plaintiff had contracted with defendant's station agents for numerous shipments of cattle to points in Texas, not on defendant's line, but on other lines of railway connecting with it in that state. These contracts, it appears, had, without exception, been carried out by

the defendant. It appears that the plaintiff was not apprised of the fact that the defendant's station agents were forbidden to enter into contracts for carriage beyond the end of its lines of road. The evidence of the previous dealings between the plaintiff and defendant in respect to the shipments, made over the lines of the latter to points on the lines of other railways connecting with it, under contracts entered into by its station agents with the latter, we must think was sufficient to carry the case to the jury upon the issue of the agent's authority to enter into the contract in the present case.

It results that the court did not err in its action setting aside the verdict and granting a new trial, and accordingly the judgment will be affirmed. All concur.

HAX et al. v. BURNES et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

PARTNERSHIP—ARTICLES—CONSTRUCTION—DEATH OF PARTNER—DISSOLUTION—GUARANTY—ESTATE OF DECEASED PARTNER—CONTRIBUTION.

1. A partnership contract for the operation of a private bank provided that, in case of the death of one of the partners, the firm should be continued by the surviving partners and the administrator or executor of the deceased until the expiration of the time agreed on. Prior to the expiration of the contract it was extended for another period, which extension authorized a majority of the stockholders of the firm to convert the same into a banking corporation. Such corporation was subsequently formed after the death of one of the partners, and the assets of the firm assigned to the corporation, among which was a note which the firm guaranteed. The estate of the deceased partner received its share of the stock of the corporation, and made no objection to its organization or the transfer of its assets. *Held*, that the firm was not dissolved by the death of such partner, and hence his estate and the distributees thereunder were bound to contribute its share of the amount which the firm was required to pay by virtue of its guaranty of such note.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by Louis W. Hax and others, as administrators of the estate of Louis Hax, deceased, against Mary S. Burnes and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Johnson, Rusk & Stringfellow, for appellants. Brown & Dolman, for respondents.

ELLISON, J. This action is for contribution. The trial court made a finding of facts, and thereupon declared the law thereon to be that plaintiffs could not recover. The action arises on a contract of guaranty, whereby a partnership, of which defendants' ancestor is alleged to have been a member, guaranteed the payment of two certain promissory notes

*Rehearing denied April 27, 1903.

to be as follows:

On the 27th of June, 1883, Louis Hax (whose administrators are the plaintiffs), James N. Burnes (whose heirs, including the administrator of one of them who is dead, are the defendants), S. A. Walker, and John Calhoun, by written agreement of that date formed a partnership, for a period of five years, for the purpose of doing business as a private bank under the name of "Schuster, Hax & Co." Of this partnership James N. Burnes owned 23 per cent. The contract of partnership contained this provision: "In case of the death of any one of the partners during the continuance of this contract, the business shall not on account thereof be discontinued, but the interest of said partner shall be kept in the business and the same shall be continued by the surviving partners, and the administrator or executor of such deceased until the expiration of the time agreed upon." On the 12th of June, 1888, shortly before such contract expired, it was extended in writing for another period of five years, which extension contained a provision that a majority of the stockholders might convert the partnership into a banking corporation at any time they deemed it practicable. It is alleged by plaintiffs that all the partners signed this extension, but defendants deny that James N. Burnes signed it. A few months after the date of this extension, on January 29, 1889, Burnes died, his widow (the defendant Mary) becoming his administratrix, and a few months after his death the surviving partners converted the partnership into a national bank known as the "Schuster-Hax National Bank," with a capital stock of \$500,000, of which stock the Burnes estate took \$50,000. At the organization of this bank the partnership transferred its assets, including two notes made to it by Ketchum as aforesaid—the notes upon which this controversy is founded—to such national bank, and upon which the following written indorsements were made: "For value received we hereby assign the within note and guarantee payment of same at maturity or at any time thereafter, waiving demand, protest and notice of non-payment. [Signed] Schuster, Hax & Co." The partnership received of the national bank, for this transfer of its business and assets, \$50,000, representing its capital, \$60,000 for its surplus, and \$50,000 for its good will; making a total of \$160,000. Ketchum died, and, his estate proving to be insolvent, plaintiffs' intestate, Louis Hax, was compelled to pay the note under the guaranty aforesaid, and they thereafter instituted this action. Defendant Mary S. Burnes, as administratrix of the Burnes estate, never took active or affirmative part in the management or direction of the partnership, her passive conduct probably resulting from the fact that the Burnes estate organized itself into a corporation (the heirs being the stockholders)

of this action.

On the foregoing facts we conclude that the trial court should have found for the plaintiffs instead of defendants. Ordinarily, the death of a partner puts an end to the partnership, except for certain necessary purposes in winding up its affairs. The prosecution of further partnership business is not permissible. But a partner may by contract provide for a continuation of the partnership business after his death, and that the interest of his estate therein shall not cease. *Edwards v. Thomas*, 66 Mo. 468; *Bank v. Tracy*, 77 Mo. 594. The above-quoted provision of the contract of partnership undoubtedly provided for a continuation of the partnership. It prevented the ordinary result of dissolution of the partnership which otherwise would have followed the death of Burnes. The extension of this contract contained an addition to the contract itself, wherein it was provided that the partnership might be converted into a corporation (state or national) whenever a majority of the stockholders so decided. The partnership merged itself into a corporation bank, at great profit to the partners on the amounts originally put in by them. In making the transfer of its assets, the partnership guaranteed the payment of the Ketchum notes as stated. We believe it to be clear that it had the power, in view of the facts stated, to make this guaranty. But, in addition to the original power, under the facts it appears that neither the Burnes estate nor any of the heirs ever objected to the transfer. They received the benefits and profits of the transaction, and joined in the association which made up the corporation bank, taking a large portion of its stock.

The briefs and arguments of counsel would indicate that the court considered that the surviving partners could not, under the terms of the contract of partnership and its provisions of extension, enter into or merge into the national bank corporation. Suppose this should be conceded, it would not affect the result which we think should have been reached in the trial court. The fact remains that the partnership survived the death of Burnes. It had the power to transact partnership business as before his death. This power included the right to guaranty the collection of an asset which it assigned for valuable consideration, a consideration which was received and accepted by the members of the partnership, including those who succeeded to Burnes' interest.

But it is said by defendants that the defence failed to show that Burnes signed extension. The court found that he; we believe there was ample evidence to support the finding.

Our conclusion is that the judgment be reversed, and the cause remanded for retrial. The other Judges concur.

RICE BROS. & NIXON v. NATIONAL BANK OF COMMERCE.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

INDEMNITY CONTRACT—PROTECTION AGAINST DAMAGES FOR TRESPASS.

1. Where plaintiffs, knowing that their chattel mortgagor was insolvent, seized certain mortgaged cattle, and also other cattle, which they knew did not bear the mortgagor's brand, and afterward delivered such other cattle to defendants, who were also creditors of the mortgagor, on defendants' agreement to indemnify plaintiffs if they should be sued for the cattle not belonging to the mortgagor the contract of indemnity was void, because providing for protection against plaintiffs' unlawful act in seizing the cattle not belonging to the mortgagor.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Rice Bros. & Nixon against the National Bank of Commerce. From a judgment for defendant, plaintiffs appeal. Affirmed.

John Burgin and Beardsley, Gregory & Kirshner, for appellants. Elijah Robinson, for respondent.

ELLISON, J. This is an action on a contract of indemnity. At the close of the evidence for plaintiffs, in consequence of the ruling of the trial court, they were compelled to take a nonsuit, and, failing to have it set aside, have come here for relief.

The substance of plaintiffs' petition, and upon which they depend for a cause of action, is that in November, 1898, they shipped from the interior of the state of Kansas to Kansas City, Mo., a large lot of cattle belonging to them; that on arriving at Kansas City they discovered, for the first time, that 128 head of these were not theirs; that they likewise learned of a number of claimants to them, each claiming adversely to the other, among whom was defendant; that it was thereupon agreed between them and defendant that, in consideration of their turning the cattle over to defendant, the latter would indemnify and protect them against damages by reason of their act; that thereafter another claimant to said cattle brought his action against plaintiffs and others in a court of competent jurisdiction in Kansas, wherein, among other allegations, he charged plaintiffs with having converted said cattle to their own use; that afterwards judgment for damages for the value of the cattle was obtained against plaintiffs; that they duly notified defendant of the institution of such suit, and demanded of it that it defend said action, which it failed to do; that afterwards plaintiffs were compelled to and did pay such judgment.

The facts developed at trial, so far as is necessary to state, in view of our conclusion, are that one Gillet, who was a large cattle dealer in Kansas, was largely indebted to

a number of persons, several being bankers and others commissionmen in Kansas City, Mo. It appears to have become suddenly known that he was insolvent. Among others, plaintiffs and defendant were his creditors, each claiming mortgage liens on certain of his cattle. When plaintiffs were advised of Gillet's condition they immediately sent an employé into Kansas to get what cattle they could, presumably those covered by their mortgage. This employé was joined by Nixon, one of the plaintiffs' firm, and together they found a large lot of cattle in two inclosures about four miles apart. They immediately took possession of them, consisting, according to Nixon's testimony, of about 850 head, and drove them about 25 miles, to a shipping point on a railroad, where they shipped them to Kansas City. Of these, 128 head were not subject to plaintiffs' claim, and to which, confessedly, they had no right. On arriving at Kansas City, plaintiffs became aware that other creditors of Gillet were likewise in search of his cattle upon which they could lay hands. Several, including defendant, made claim to a lien on the 128 head. Plaintiffs separated them from the main number, and proceeded with the latter into the state of Iowa. It was then agreed between plaintiffs and defendant that plaintiffs would turn the 128 head over to defendant, the latter agreeing to indemnify them in case they were forced to respond in damages to the true owner, or, indeed, to any one of superior right. Plaintiffs, as stated by their principal witness, were anxious to get the cattle into other hands so as to rid themselves of liability. They did not have an opinion as to which of the several claimants of liens had the best right or title, but they decided to turn the cattle over to defendant, for the reason that they thought it to be more certainly responsible than the others.

The general principle of law invoked by defendant's counsel to defeat plaintiffs' action is well settled. It is that when the consideration for a contract is illegal the contract is void, whether the illegality is disclosed by the contract itself or is established by evidence outside. *Sumner v. Sumners*, 54 Mo. 340. In furtherance of this principle, it is also well settled "that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect, and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms or by affixing a penalty to it, is unlawful, and it will not promote in one form that which it declares wrong in another." *White v. Buss*, 3 Cush. 448, quoted with approval in *Sprague v. Rooney*, 104 Mo. 349, 16 S. W. 505. And the same principle is

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nity to one for libel could be enforced. *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 280.

There is an exception, however, to the foregoing rule, which bears directly on the character of contract in controversy. Thus, as stated in the case just cited, where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request of such party does acts which are legal in themselves, but which finally prove to be in violation of the rights of the other party, and in consequence is made liable in damages, in such instance a contract of indemnity will be upheld. So, where two parties claim title adversely to personal property, and one employs a third person to assist in removing it on a promise of indemnity, such third person, believing his employer had title, may recover on the contract. *Avery v. Halsey*, 14 Pick. 174. To the same effect is *Ives v. Jones*, 25 N. C. 540, 40 Am. Dec. 421. But in those cases, and running through all others which we have examined, is the proviso, directly expressed, or else plainly implied, that the party doing the illegal act must have been an innocent party. He must not have been a willful participator in the wrong. In *Stone v. Hooker*, 9 Cow. 154, the court said that: "The distinction taken between promises of indemnity that are and those which are not void is this: If the act directed or agreed to be done is known at the time to be a trespass an express promise to indemnify would be illegal and void, but if it was not known at the time to be a trespass the promise of indemnity is a good and valid promise." See, also, *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253.

What are the facts in this case, as applicable to the law we have just stated? It is not disputed that when plaintiffs, without leave or authority, took possession of the cattle, and shipped them a great distance to Kansas City, they committed a wrongful and unlawful act against the owner of the cattle, as well as against those who had valid liens on them. That was a trespass which the law does not excuse. The contract of indemnity made with defendant was no more nor less than a contract for protection against that unlawful act. If a man may validly contract for protection against his unlawful acts, he is encouraged to continue in the commission of such acts. Taking an extreme case for illustration: Suppose one should steal property, and thereafter, becoming alarmed at what he had done, should turn the goods over to another, not the owner, on the latter's promise to protect him from civil damage; would any one say that it was a valid promise?

But plaintiffs' counsel, by way of extenuating the trespass, and in order to fortify the claim of right to indemnity, have stated that it was shown at the trial that it was dark

answer to a question on cross-examination, one of plaintiffs' witnesses said that Nixon told him that "he [Nixon] had gone down there and got the cattle in the nighttime; it was dark and he could not see the brands." The testimony of the parties themselves (Nixon and Rice) show such was not the fact. They found the cattle in two inclosures, four miles apart, and after taking them out they drove them 25 miles to a railroad, and then shipped them to Kansas City. It is wholly unreasonable to suppose that all this could have been done under cover of one night. Daylight must have overtaken them before the cattle were got aboard the cars. But, be that as it may, plaintiffs knew, of course, when they turned them over to defendant, that they had committed a grievous trespass, and with that knowledge they sought and obtained a contract of indemnity. We are satisfied that it cannot be upheld, and therefore affirm the judgment. All concur.

FOWLER v. RANDALL.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

DRUGGISTS—DISPENSING OF POISONS—"DOSES"—STATUTES—TAKING POISONOUS MEDICINE—KNOWLEDGE—CONTRIBUTORY NEGLIGENCE.

1. Rev. St. 1899, § 3040, provides for the examination of persons as registered pharmacists, and section 3044 prohibits any person from retailing any poisons enumerated, including preparations of opium, and declares that the provisions of the section shall not apply to the dispensing of poisons not in unusual quantities or doses upon the prescriptions of practitioners of medicine. *Held*, that such sections impliedly prohibited a registered pharmacist from selling morphine or other poisonous medicines in doses except on physicians' prescriptions.

2. Where plaintiff's wife sent a girl 14 years of age to a drug store to purchase morphine to be used by the wife, and the girl had knowledge of the dangerous character of the drug, and warned the wife not to take the entire contents of one packet, on the ground that she thought it was too much, the wife was charged with knowledge of the poisonous character of the drug.

3. Plaintiff's wife sent a girl 14 years of age to the drug store to purchase "10 cents' worth of morphine in doses." The druggist was not authorized to dispense such drug or sell the same "in doses," by reason of which his clerk disregarded that part of the order, and handed to the girl two five-grain packets of morphine. The girl took the packets to plaintiff's wife who put the contents of one of them in glass of water, when she was warned by the girl not to take all of the package, and thought it was too much, but the wife said that "she guessed the druggist knew what she was doing, or ought to," and drank the water from which she afterwards died. Plaintiff's wife, in so taking the morphine out knowing whether the quantity was a proper or fatal dose, was guilty of contributory negligence as a matter of law. Druggist was not liable for her death.

*Rehearing denied April 27, 1903.

Appeal from Circuit Court, Jackson County; John W. Henry, Judge.

Action by George R. A. Fowler against Mary L. Randall, as administratrix of the estate of George S. Randall, deceased. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Marley & Swearingen, for appellant. John A. Eaton and W. R. Thurmond, for respondent.

SMITH, P. J. George S. Randall, the defendant's intestate, was a statutory druggist and pharmacist who owned and carried on a drug store in which one Petrie, presumably also a statutory druggist and pharmacist, was clerk. On an occasion when Randall was absent from his store, and Petrie was in charge of it, the latter made a sale of morphine to Vehrlee Ashcraft, a girl about 14 years old. It appears that the girl who lived in the second story of the house occupied by plaintiff's wife was requested by the latter to go to a drug store and purchase 10 cents' worth of morphine in doses. Accordingly, the girl went to Randall's store, and there told his clerk that she wanted "a dime's worth of morphine, and to please dose it out," and "he went to the drawer, and got two packages, and handed them to me." As "I started away, I asked him how many grains it was, and he said he did not know. I asked him if that was the kind that made you sleep, and he said, 'Yes, that will make you sleep all right.'" The girl then took the two packages to the plaintiff's wife, who put the contents of one of them, which was in lumps, into a glass of water, when the girl told her not to take all of them (the lumps) for she (the girl) thought it was too much, but the plaintiff's wife remarked in reply to this that "she guessed the druggist knew what he was doing, or ought to," and then drank the potion. The girl testified that she did not tell the plaintiff's wife that the morphine she brought her was not in doses. It appears from the subsequent admissions of the girl that she knew that morphine was a poisonous drug. It appears that the two packets purchased by the girl of Randall's clerk contained five grains each. The plaintiff's wife died from taking one of these packets four days afterwards. This suit was brought by plaintiff against Randall on the ground that his wife's death was caused by the latter's negligence in sending her morphine in two packages in the quantities therein contained in violation of the instructions of the former's wife to put it up in doses, etc. There was a trial and judgment for the plaintiff, and defendant appealed.

Our attention has not been called by the defendant to any error or infirmity in any of the instructions given for plaintiff, nor do we find any reason assigned why any of the defendant's refused instructions, except that

in the nature of a demurrer to the evidence, should have been given. As we understand it, the defendant assails the judgment on the ground that the case was one for the court, and not for the jury to decide. While the trial was going on, the plaintiff offered to prove that the two packets of morphine that were sold to his wife by Randall were not labeled and marked, as required by section 3044, Rev. St. 1899, but the court rejected such offer on the ground that the plaintiff's wife knew what the contents of the packets were, and consequently the defendant's failure to comply with the statutory requirements was not the proximate cause of the result of which complaint is made. The question of proximate cause was in that way eliminated from the case, and is not presented to us for decision by the defendant's appeal. And as to the question of contributory negligence it is to be observed that the statute (sections 3040, 3044, Rev. St. 1899) impliedly forbid a registered pharmacist or druggist to sell poisonous medicines in quantities or doses, except upon the prescriptions of practitioners of medicine. The license of the former confers no such privilege, unless in cases falling within the exception. No one can be heard to claim ignorance of a public statute. *Townsend v. Finley*, 3 Mo. (205)-289. The plaintiff's wife either knew or ought to have known that a druggist or pharmacist was forbidden by the statute to prescribe poisonous medicines, such as morphine, in quantities or doses. When, through the girl, who was her agent, she requested Randall to sell her 10 cents' worth of that poisonous drug "in doses," she knew that he was not privileged by law to do so. But, if he had been authorized to sell it in doses without the prescription of a physician, he could not have complied with the request so made by plaintiff's wife. What would be a dose would most manifestly vary according to the condition of the health, habit, age, strength, etc., of the person intending to take it. As, for example, a dose that would be proper for one accustomed to its use would be fatal to others, and so a dose that would be proper for a strong, healthy adult would be improper, and perhaps fatal, to one who is aged, weak, infirm, or very young. Without a statement accompany the request indicating the habits, age, strength, ailment for which it was to be used, and the like, no druggist, nor even the most reckless physician, would venture to comply with it. The request as to the "doses" was so vague and uncertain in its terms that it amounted to no request at all, and was so unreasonable as to that that it could not be heeded by any one. As to all that part of it beyond the "ten cents' worth of morphine" it contained no request at all, and should, as it was, have been disregarded. The request then was no more than that for "ten cents' worth of morphine."

As just stated, Randall, or his clerk acting

for him, did not pay any attention to the "dosing" part of the request of the girl. He did not "put it in doses." The girl knew that the two packets were not doses, but she did not know the number of grains contained in each or both. She knew the nature of the contents of the two packets. She knew it to be poison. She was the agent of plaintiff's wife, interested with the purchase of the morphine. The law imputes to a principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency, which the agent acquires or obtains while acting as such agent, and within the scope of his authority. *Mechem on Agency*, § 721; *State ex rel. v. Sitlington*, 51 Mo. App., loc. cit. 257, and cases there cited. And this whether the agent has disclosed his knowledge or information to the principal or not. The law, subject to certain exceptions, not necessary here to notice, conclusively presumes that he has done so, and charges the principal accordingly. *Mechem on Agency*, supra; *The Distilled Spirit*, 11 Wall. 367, 20 L. Ed. 167. The case of *Fisher v. Golladay*, 38 Mo. App. 531, was unlike this. In that case the purchaser asked for sulphuric ether, and was given sulphuric acid; while in this case morphine was requested, and that drug was furnished. In one case the injured party was not furnished with the drug he asked for, while in the other he was. In one the purchaser did not know, independent of his agent's knowledge, of the poisonous character of the drug sent him; while the converse was true in the other. In the one, had the drug furnished been labeled "Poison," the injury would not have happened, while in the other it would have made no difference. We do not, therefore, think that the ruling in that case denying the agency can be invoked and applied in a case like this, where the facts are so different.

It results that this case at last may be stated in this wise; that is to say: That the plaintiff's wife purchased of Randall 10 cents' worth of morphine in two packets, the quantity or number of grains contained in one or both of them being unknown to her. The agent of plaintiff's wife, at the time of the purchase, was apprised of the poisonous properties of the drug, and this apprised the plaintiff's wife herself. When she was about to take the contents of one of the packets, the girl told her not to take all of it, as she thought it was too much. This was actual warning to the plaintiff's wife of the danger. But it seems that the latter, independent of the knowledge acquired through the girl in either way, knew that the drug was poisonous, for when the girl advised her, as just stated, she remarked that "she guessed the druggist knew his business." This remark implied that she understood that the contents of the packet she was about to swallow contained morphine, but it cannot be taken to imply that she supposed that each of the

packets contained but a single dose put up by the druggist, Randall, because, as we have seen, she knew, or must be held to have known, to the exact contrary. The remark must be construed with reference to the knowledge of the plaintiff's wife then had. She knew that the packet she was then about to take had not been put up by her druggist as a dose. She could not have meant to state that she was relying on a fact which she knew was not an existing fact. The plaintiff's wife therefore blindly and recklessly took a packet of morphine at a single dose, without knowing how many grains it contained, and without knowing whether the quantity if taken was a proper or fatal dose. From her act but a single inference is to be drawn, and that is of negligence. But it is contended that the question of negligence is one for the jury, and not for the court. *Young v. Railway*, 72 Mo. App. 263; *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941. It is quite true that this is most generally so, but when the facts, as in this case, are undisputed, and are such that reasonable minds can draw no other inference from them than that the plaintiff's wife was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law. *Beach on Contributory Negligence*, § 447, and cases there cited; *Lenix v. Railway*, 76 Mo. 86; *Butts v. Railway*, 98 Mo. 272, 11 S. W. 754; *Fink v. Furnace Co.*, 10 Mo. App. 61.

The negligence which will prevent a recovery is nothing more than the absence of proper care—such care as a person of ordinary prudence would exercise under similar circumstances. *Barton v. Railway*, 52 Mo. 253, 14 Am. Rep. 418; *Doss v. Railway*, 59 Mo. 27, 21 Am. Rep. 371. The facts in this case are undisputed, and are such, it seems to us, that reasonable minds can draw no other conclusion from them than that the plaintiff's wife was at fault, and therefore the trial court should have determined the question of contributory negligence as one at law, and accordingly given defendant's instruction telling the jury that under the pleadings and evidence there could be no recovery.

The judgment will be reversed. All concur.

CUTSHALL v. McGOWAN.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

GAMING—STAKEHOLDER'S LIABILITY—STATUTORY LIABILITY—COMMON-LAW LIABILITY—PETITION—SUFFICIENCY—RETRACTION OF WAGER—TIME WHEN MADE—APPEAL—PREJUDICIAL ERROR.

1. A petition in an action to recover money intrusted to a stakeholder to hold for a wager, which showed on its face that more than three months had elapsed from the time of depositing the money with such stakeholder, did not

*Rehearing denied April 27, 1903.

state a cause of action under Rev. St. §§ 3431, 3432, rendering stakeholders liable for money placed in their hands for a wager, on demand made previous to the determination of the wager, provided such action be commenced within three months from its accrual.

2. A stakeholder is liable at common law for refusal to return money deposited with him for a wager on demand made by the depositor before the determination of the event on which the wager was made.

3. Where, in an action to recover money deposited with defendant as a wager on a horse race, plaintiff's own evidence showed that he did not signify his dissent to the bet until the race was so far run that he realized that his horse was beaten, such dissent was inopportune, and his right to recovery lost.

4. Where plaintiff, on his own showing, was not entitled to recover, rulings adverse to him in the admission of evidence, or in giving instructions, or in refusing to set aside the verdict were not prejudicial on the merits.

Appeal from Circuit Court, Harrison County; Paris C. Stepp, Judge.

Action by Thomas Cutshall against B. F. McGowan. From a judgment for defendant, plaintiff appeals. Affirmed.

Peery & Lyons, for appellant. J. C. Wilson, for respondent.

SMITH, P. J. This action was commenced on April 3, 1901. The petition alleges, *inter alia*, that on November 23, 1900, the plaintiff made a bet with one Kendle on a horse race to be run, and, at the time of making the bet, plaintiff and said Kendle each deposited with the defendant \$295, and that, by the terms of the bet, if plaintiff's horse won, then the entire amount so bet was to be paid to plaintiff, and, if Kendle's horse won, then the said entire amount was to be paid to him; that defendant received and held said stake, knowing the terms and conditions of said wager as aforesaid; that by the terms of said wager said money was not to be delivered to the winner thereof until said horse race was finished, and until the judges appointed for that purpose had given their decision as to which one of said horses had won said race, of all which the said defendant was fully advised; that after the commencement of said race, and before the same was completed, this plaintiff learned that the said horse race had been gotten up as a fraudulent scheme for the purpose of defrauding this plaintiff of his money and property, and that said Kendle and the defendant, McGowan, and others, had arranged said horse race in a fraudulent manner, so that plaintiff's horse would be certain to be beaten, and so that plaintiff should be defrauded out of his money and property wagered on said race; that thereupon, and before said race was terminated, and before said judges had announced their decision thereon, and previous to the expiration of the time agreed upon for the determination of said bet or wager, this plaintiff demanded of the defendant the said sum of \$295 so

deposited with said defendant as such stakeholder, and directed said defendant not to pay the same over to said Kendle or to any other person, but that said defendant refused to pay said money over to plaintiff, etc.

The first question suggesting itself is whether or not the petition states a cause of action under the statute (chapter 32, Rev. St.). Section 3424 of said chapter provides that any person who shall lose any money or property at any game or gambling device may recover the same by civil action, and, under it, it has been held that a horse race is a game. *Swaggard v. Hancock*, 25 Mo. App. 596; *Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189; *Boynton v. Curle*, Id. 600; *Hayden v. Little*, 35 Mo. 420. Section 3431 of said chapter further provides that every stakeholder who shall knowingly receive any money or property staked upon any betting declared gaming by the foregoing provisions shall be liable to the party who placed such money or property in his hands both before and after the determination of such bet, and the delivery of the money or property to the winner shall be no defense to any action brought by the losing party for the recovery thereof, provided that no stakeholder shall be liable afterwards unless a demand has been made of such stakeholder for the money or property in his possession previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager. This section so limits the liability of the stakeholder that no action can be maintained against him if he delivers over the stakes to the winner after the determination of the bet, and before he has notice from the loser not to do so. *Williams v. Wall*, 60 Mo. 318. Section 3432 of the said chapter further provides that any action for money or property brought under that chapter shall be commenced within three months from the time the right of action accrued, and not afterwards. In analogous statutory actions it has been held that the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear from the petition; otherwise it shows no cause of action. *Barker v. Railway*, 91 Mo., loc. cit. 94, 14 S. W. 280; *McNamara v. Slavens*, 76 Mo. 329; *Dulaney v. Railway*, 21 Mo. App. 597; *Sparks v. Railway*, 31 Mo. App. 114. And so it has been ruled that, where an action is based upon said section 3431, it must be commenced within three months from the time the right of action accrues; otherwise it cannot be maintained. *Ryan v. Judy*, 7 Mo. App. 14, cited in *Connor v. Black*, 132 Mo., loc. cit. 155, 33 S. W. 783. It has been seen from the statement made at the outset that this action was not commenced until after the lapse of more than three months from the date the cause of action accrued, and therefore the petition states no cause of action under the statute; and, unless a cause

¶ 2. See *Gaming*, vol. 24, Cent. Dig. §§ 50, 62, 63, 68.

v. Magee, 13 Mo. 435, it was held that one may sue at common law and recover a stake at any time before the bet is determined, and without reference to the statute concerning gaming (chapter 73, Rev. St. 1889), and that the limitation prescribed by that chapter applies only to cases brought under it. *Ryan v. Judy*, ante. At common law one who declared his dissent to an illegal wager before the event happened might recover his money back, but after the happening of that event he could not. *Lowry v. Bourdieu*, 2 Doug. 470; *Aubert v. Walsh*, 3 Taunt. 277. In the last-cited case Lord Mansfield intimates that there can be no rescission of the illegal contract, and withdrawing of the stake, where the party seeking to withdraw has waited until the event of the wager may be foreseen. In *Hickerson v. Benson*, 8 Mo., loc. cit. 10, 40 Am. Dec. 115, it was said that it is the settled law in such cases for the courts to leave the parties where they find them, on the maxim, "Potior est conditio defendantis." If, however, either party will rescind the contract before the event is known on which the wager depended, the courts will interfere, on the ground that the parties are not then in pari delicto; the risk has not yet been determined and the parties have a locus penitentiae. *Aubat v. Walsh*, 3 Taunt. 283. In *Ryan v. Judy*, ante, it is said that, "after the relative condition and chance of the parties to a bet has materially changed, the locus penitentiae is gone; and, though a demand be then made of the stakeholder, the law will leave the man making the illegal bet to the consequences of his act, and will not help him to withdraw his bet or to recover from the stakeholder. The statute in Missouri comes to his aid, to be sure; but, to avail himself of that, he must comply with its terms, and commence suit within the time of limitation." And a similar statement of the rule is made in *Connor v. Black*, ante, and *Weaver v. Harlan*, 48 Mo. App. 319. And as the petition alleges that the plaintiff, before the race was ended or the judges had announced their decision thereon, or the expiration of the time agreed upon for the determination of the bet, declared his dissent, and demanded of the defendant stakeholder the return of the stake deposited by him, we must conclude that a cause of action good at common law is therein alleged. There is abundant evidence in the record which tends to prove that the plaintiff signified to the defendant his dissent to the bet before the result of the race had been announced by the judges, and perhaps before the race had quite ended; but his own testimony plainly discloses that at the time he signified his dissent to the bet the race had so far proceeded that he "realized" that his mare was beaten, or, as one of his witnesses testified, he (plaintiff) "knew at the

was loser, and therefore there could then be no locus penitentiae, or, in other words, the dissent then made was inopportune and unseasonable. *White v. Gilleland*, 93 Mo. App., loc. cit. 314; *Hickerson v. Benson*, ante.

After looking at the evidence in its entirety, we cannot escape the conviction that it was insufficient to justify a submission of the case to the jury; but, as the verdict was for the defendant, no harm resulted on that account.

As we are satisfied that the plaintiff, even on his own showing, was not entitled to recover, the several rulings of the court adverse to him in respect to the admission of evidence, or in the giving of instructions, or in respect to the motion to set aside the verdict, were not prejudicial to him on the merits, so that such rulings need not be reviewed by us.

It follows that the judgment must be affirmed. All concur.

REAMES v. JONES DRY GOODS CO.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

SERVANT—INJURIES—EXPOSURE—DELAY IN ADMITTING TO BUILDING.

1. On the morning that plaintiff's employment with defendant was to have begun, she went to its store, which was not opened for some time after her arrival, so that she was compelled to stand outside, where the wind was blowing about three miles an hour, and the air was very damp. She was a married woman, of mature age, and alleged that this was at the beginning of her menstrual period, and that standing in the cold and dampness caused inflammation of the ovaries, etc. Another business house was across the street, and she might have gone there for protection, and could have seen from there when the other employes were admitted. She testified that she did not do so because she expected defendant's doors to open at any time, and feared that if she was not there she would lose her employment, and because it did not occur to her that she would get cold, standing where she did. Held, that plaintiff could not recover.

Smith, P. J., dissenting.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

Action by Nora Reames against the Jo Dry Goods Company. From a judgment plaintiff, defendant appeals. Reversed.

Meservey, Pierce & German, for app
Hollis & Fidler, for respondent.

SMITH, P. J. Action to recover for personal injuries resulting from negligence of the defendant. At the of all the evidence in the case, ant requested an instruction in t a demurrer, which was by the There was a submission of t

*Rehearing denied April 27, 1903.

instructions to the jury, whose verdict was for plaintiff, and thereupon judgment was accordingly given, and defendant appealed.

The evidence for plaintiff tended to prove about these facts, viz.: That the defendant, an incorporated mercantile company, was engaged in carrying on a large and extensive department store, wherein it employed something like 650 clerks. In the year 1899, in consequence of a disastrous fire, its business was for a short time interrupted and suspended. In the month of November of that year it secured another building in which to resume its business. It had determined to open its store in its new place on December 1st, and with that view had, a few days prior thereto, engaged the services of a great many female clerks to help carry on its business then about to be resumed. The day before the opening the plaintiff was employed by defendant to work in the gentlemen's furnishing department. At the time she was employed she was directed to be present at defendant's store promptly on the next morning at 7:45 o'clock, and she accordingly appeared at the first door of its store at the time directed, where she found from 600 to 650 other employes waiting to be admitted to begin work. It appears that of these about 300 were former employes, and the others, like plaintiff, had not been previously in defendant's employment. The former employes were first admitted, and after them the new ones. The latter, after waiting some time, were directed to go to the south door for admission, but on going there they were denied admission, being directed to return to the north door; and on returning there they were again denied admission, but were directed to return to the south door, where they were finally admitted. The plaintiff and her witnesses testified that this occupied from an hour to an hour and a half; that during this time the plaintiff stood on the iron steps in front of the store, expecting every moment to be admitted. The air at 7 o'clock that morning, according to the report of the United States weather observer, was saturated with moisture; its condition being 85 per cent. of moisture out of a possible 100. The wind was blowing from the northwest with a velocity of three miles an hour. The temperature was 33 deg. The plaintiff, while standing in front of the defendant's store, waiting to be admitted, as aforesaid, felt no serious discomfort, except as to her feet. Soon after her admission she for the first time became aware of the presence of a slight uterine discharge. At the close of that day's business she went to her home, feeling quite unwell. The next day a physician was called, and he found her suffering from inflammation of the ovaries and sciatica, and for which he treated her for several months. He testified that it was probable that she would always suffer from these ailments, and that there was a permanent impairment, etc. The defendant intro-

duced a great number of its employes as witnesses, who testified that the time occupied in admitting its horde of clerks into its store was not more than from 15 to 25 minutes, so that in respect to this material fact there is a wide divergence between the testimony of the defendant's witnesses and those of the plaintiff. So the question now is whether or not, upon the evidence which tends to show the facts just stated, the court erred in its action in refusing to take the case from the jury.

Where there is a demurrer to the evidence, every fact must be conceded which it tends to reasonably establish, and in passing upon it the court is required to make every inference of fact in favor of the party offering it which the jury might with any degree of propriety have inferred in his favor. *Donohue v. Railway*, 91 Mo. 357, 2 S. W. 424. 3 S. W. 848; *Buesching v. Gas Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Lee v. Publishers Geo. Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107. At the time plaintiff went to defendant's store, she was in its employment and acting under its orders. It had directed her to be there promptly at a specified time. If, on her arrival there, it was inconvenient to it to admit and assign her to work, what duty, if any, did it owe her while she was waiting for directions to enter the store? Defendant knew that she had obeyed its order, and was present at its store door, waiting to be admitted. It also knew the season of the year, and the then prevailing atmospheric conditions. It also further knew, though she did not, the probable time that would be required in admitting and "timing in" the 300 old clerks, and how long she would probably have to wait before she could be admitted. And it also still further knew that she was waiting and expecting every minute to be admitted. It would have been an easy matter for defendant to have announced to plaintiff and the others that their presence would not be required there for the next hour and a half, so that she could have been afforded an opportunity to find a safer and more comfortable place to wait, or it might have directed her, with the others, to enter its large and spacious building and go to some designated place therein to await further orders. If there is any one rule of law better settled in this state than another, it is that which enjoins upon the master the duty to furnish the servant in his employment a reasonably safe place to perform the work assigned to him. And the same rule further provides that a default in this on the part of the master makes him guilty of negligence. What is reasonably a safe place to work, where the evidence is conflicting, is always a question for the jury; but, where it is all one way, it is one for the court. And where the facts relating to the negligence are such that reasonable minds may differ in respect thereto, the case is one for the jury. And the general rule just stated, defining the

risks as are in fact known to him, but to such as he might reasonably be expected to know under the facts and circumstances connected with the service. The hour and a half that plaintiff occupied the street in front of defendant's store was with its knowledge and by its direction. I cannot see that the case would have been different if the defendant, after employing plaintiff, had assigned her to stand for that length of time in front of its store and hand printed circulars to those passing by, announcing that its store would be open the next day for the sale of rare bargains, etc., or to perform any other service. It was necessarily implied from defendant's order to plaintiff to appear promptly at the front door of its store at the time specified that she should be there ready to enter when required to do so, whenever that should be, so that the order, in effect, was for plaintiff to wait at the front door until it should suit the convenience of the defendant for her to be admitted; hence plaintiff was so in waiting in obedience to defendant's order as master to a servant in its employment to do a particular thing at a certain place. It was probably as important in the transaction of the defendant's business that the plaintiff should wait on the outside at that time as it would be later on for her to do something else on the inside which the exigencies of its business demanded. And whether or not the place at which plaintiff was ordered to wait was a reasonably safe place to do so, in view of all the facts and circumstances detailed in the evidence, was a question for the consideration of the jury. It does not appear that the plaintiff knew the risk that was to be incurred by reason of the exposure incident to the waiting. Mere knowledge that the weather was inclement, and that a risk was to be incurred by exposing herself to it, as a matter of law, was not sufficient to defeat plaintiff's action, if the danger from waiting was not so patent and obvious as to threaten immediate injury, or if it was reasonable to suppose she might, by the exercise of due care, safely wait at the place directed until bidden by defendant to enter its store. *Smith v. Coal Co.*, 75 Mo. App. 177; *Scott v. Springfield*, 81 Mo. App. 312; *Compton v. Railway*, 82 Mo. App. 175; *Stalzer v. Packing Co.*, 84 Mo. App. 565; *Thompson v. Railway*, 86 Mo. App. 148; *Devore v. Railway*, Id. 429; *Hamman v. Coal Co.*, 156 Mo. 232, 56 S. W. 1091; *Doyle v. Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Donahoe v. Kansas City*, 136 Mo. 670, 38 S. W. 571; *Huhn v. Railway*, 92 Mo. 440, 4 S. W. 937; *Devlin v. Railway*, 87 Mo. 545; *Stoddard v. Railway*, 65 Mo. 519. Even though the evidence may be said to be such as to justify reasonable minds in drawing different inferences therefrom as to whether plaintiff did not know the danger of waiting, yet, if her knowledge in that respect was equal to that

son v. Railway, ante. And the rule is that, where the facts with respect to the negligence are such as reasonable minds might differ on the case is one for the jury. *Thompson v. Railway*, ante, and cases there cited.

It is suggested that plaintiff might have avoided exposure, and consequent injury, had she taken the precaution to enter any one of the neighboring shops or stores, and there waited until the class of clerks to which she belonged was called by defendant. But it will be remembered that there were several hundred of these clerks, and it is not likely that the proprietors of such shops and stores would have permitted their space to have been occupied by such clerks, to the probable inconvenience of their own employes and customers. And besides this, had plaintiff not been present when called to enter, the doors might have been closed to her when she reached there from where she had been waiting, so that she would have lost her place. The defendant's store on that day was closed, except when opened to admit employes, and it was not safe for the plaintiff to be away when the defendant opened its doors to its employes of her class; and especially so since she had no intimation when the doors would be open, or that she might absent herself for any particular length of time. It is difficult to discover how she could have well taken any other course than that which she did. As to whether she was guilty of contributory negligence in waiting on the outside of the store door until it was opened to her as directed was a question for the jury to determine under all the circumstances in evidence. In any view of the evidence which I have been able to take, I must conclude that the plaintiff was entitled to a submission to the jury.

The defendant objects to the plaintiff's first instruction on the ground that it is so framed as to exclude the points raised by its evidence. This objection would be well taken (*Clark v. Hammerle*, 27 Mo., loc. cit. 70; *Fitzgerald v. Hayward*, 50 Mo. 516; *Torpey v. Railway*, 64 Mo. App. 382; *Griffith v. Conway*, 45 Mo. App. 574; *Schoen v. Kansas City*, 65 Mo. App., loc. cit. 134; *Price v. Barnard*, 70 Mo. App., loc. cit. 180), were it not for the fact that the court gave others so modifying it as to fairly bring to the attention of the jury the affirmative defense pleaded by the defendant, so that the instructions, considered as one charge, fully presented both sides of the case to the jury (*L v. Humphries*, 64 Mo. App., loc. cit. Voegeli v. Pickle Marble & Granite Co. Mo. App. 643; *Schroeder v. Michel*, 43, 11 S. W. 314). The answer pleaded contributory negligence and the assumption of the risk, and the plaintiff's said instruction, as well as her second, committed the first of these defenses to the defendant's third, fourth, and fifth

mitted the latter. The only criticism to which the action of the court could possibly be subject in respect to the giving and refusing instructions is that those given for defendant are far more favorable to it than they ought to have been.

For the foregoing reasons, I think the judgment should not be disturbed.

ELLISON, J. In addition to what Judge SMITH has stated that the evidence for plaintiff tended to show, it should be said that the testimony of plaintiff herself showed that she was a woman of mature years—a married woman—and that the morning she charges she was negligently exposed to the weather by defendant was the time for the beginning of her menstrual period, and that it came upon her shortly after getting into the store. The weather was not at the freezing point, though it had rained the night preceding, and the atmosphere was very damp. The wind was not blowing a "gale," as expressed by plaintiff's counsel, but only three miles an hour, which is, perhaps, about the distance covered by a person in an ordinary walk in the same length of time. Plaintiff says she waited in front of defendant's store, as near as she could state, for about an hour and a half; that there were business houses immediately on the opposite side of the street, into which she might have gone, and where she could have waited until defendant opened the doors of its store; and that she could have seen through the glass in the doors of these stores when the doors of defendant's store opened for the admission of the several hundred waiting clerks. She gave two reasons for not going into one of these stores: One was that she was expecting the defendant's doors to open any moment, and if she was not there she was afraid she would lose her employment. The other was that it never occurred to her that she was likely to get cold standing there, as she was thinking about her work, though, "of course, I knew I was cold." I think plaintiff must fall in her case from her own showing. We stated in *Hyatt v. Ry. Co.*, 19 Mo. App., loc. cit. 293, that where one was hired to work in the cold, though with a promise to provide fire, he could not "deliberately permit himself to freeze, though surrounded with material to prevent it." Plaintiff was a married woman of mature years, and we must assume she was at least of ordinary intelligence, and yet she remained within a few feet of comfortable shelter, where she could have easily protected herself from whatever inconvenience and discomfort there was in remaining in the street. Her first reason for not seeking this shelter is no excuse at all. She says she was afraid she would lose her place with her employers if she was absent when the doors opened. But there were several hundred of them, and plaintiff, on seeing from across the street that her fellow employes were entering,

could, of course, have got over and entered before any great number had preceded her—indeed, without its being known to defendant, or perhaps any one else, that she had withdrawn from the crowd. It would be an absurdity to suppose that it would have made any difference to defendant whether she was among the first or the last of the large number who entered when the doors opened. Her second reason, if it excuses her for voluntarily staying in the street, ought certainly to excuse defendant for letting her stay. If the state of the weather was such as not to make it occur to her that she would get cold, or that she would become sick from getting cold, why ought it to have occurred to defendant? Of the two, if there was guilt to be attributed to either, it was to her, for she knew it was a delicate period of the month for her—a thing which defendant could not know. In *Yazoo Transfer Co. v. Smith*, 78 Miss. 140, 28 South. 807, several servants were directed to load 18 bales of cotton onto a boat. It was a very cold day, and the fingers of one of them were frozen in consequence of the exposure in doing the work, and had to be amputated. He brought his action for damages. The court said that "the able and ingenious arguments of counsel fail to parallel this case with cases involving superior knowledge of the person in command; and, as two of them concede, the Statutes of 1898, p. 85, c. 66, in reference to unsafe machinery, ways, or appliances, or improper loading of cars, has no application. The laborer must be presumed to have knowledge equal, if not superior, to his employer, of the effect of cold upon his feelings and person. His own temperament is better known to him than any one else, and his own sensations sound the alarm to himself. Men are presumed to have ordinary common sense, until the contrary is shown, and the law does not speculate on degrees of knowledge about weather."

To permit a recovery in this case would make the employment of servants much too hazardous for the practical operation of private business. The judgment should be reversed.

BROADDUS, J., concurs.

GASTON v. HAYDEN et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

WILLS—TRUSTEES—MISCONDUCT—REMOVAL—LEGACIES—INTEREST—COURTS—DECISIONS—AUTHORITY.

1. Where, in a prior suit for the construction of a will, the Supreme Court determined that defendant, who was appointed executor, was in possession of the fund bequeathed to certain minor legatees as trustee, and was entitled to the possession of the fund as such, such decision is conclusive on the Court of Appeals in a subsequent action by the curator of such mi-

*Rehearing denied April 27, 1903.

tees loaned the funds on securities taken in his own name, and kept no books of accounts, but so mingled the trust funds with his own that their identity was wholly lost, and mutual hostility existed between the trustee and the fathers of the legatees, such facts constituted a sufficient ground for the trustee's removal.

3. Testatrix bequeathed to her son a pecuniary legacy, to be held by her executrix in trust until the son arrived at age, and declared that such sum should be loaned by the executrix, and the interest used in keeping, maintaining, and educating the son. By the succeeding clause she bequeathed another pecuniary legacy to G., to be held in the same manner and invested and expended as provided in the preceding paragraph for the control of the other legacy. *Held*, that such legacies bore interest from the date of testatrix's death, and not from the expiration of a year from the date letters testamentary were granted.

Appeal from Circuit Court, Jasper County; H. C. Timmonds, Judge.

Action by Madge B. Gaston, by her curator, against T. C. Hayden and Ernest Webb, in which the latter filed a cross-petition. From a judgment in favor of defendant, cross-complainant, Webb, appeals. Reversed.

H. W. Currey and R. W. Coleman, for appellant. Redding & Owen, for respondent Madge B. Gaston. F. L. Forlow and Howard Gray, for respondent T. C. Hayden.

SMITH, P. J. Emma I. Webb, divorced wife of E. T. Webb, and mother of Ernest Webb, departed this life in the year 1894; first having made her last will, which, amongst other provisions, contained the following, to wit:

"Second. I give, devise and bequeath to my son, Ernest Webb, the sum of ten thousand dollars, to be held by my executrix hereinafter named in trust until my said son arrives at the age of twenty-one, and then given to him. Said sum during the infancy of my son to be loaned out by my executrix on real estate in Jasper county, Missouri, and the interest thereon to be used in keeping, maintaining and educating my said son.

"Third. I give, devise and bequeath to my niece, Madge B. Gaston, the sum of two thousand dollars, to be held in the same manner and invested and expended as is provided in the preceding paragraph for the holding, investing and expending of the ten thousand dollars bequeathed to my son, Ernest Webb. Provided, however, that in case of the death of the said Madge B. Gaston at any time during infancy, then the said sum herein bequeathed to her shall become the money and property of my son Ernest Webb, and may be used in educating him.

"Fourth. I give, devise and bequeath all the balance of the property owned by me, whether real or personal, at my death to my mother, Rebecca Hayden, and my brother, Thomas C. Hayden, share and share alike, and should either of them die before I do, then the other shall have all the property described in this paragraph.

son and niece, but have the same in property, then I desire that my executrix shall after having it appraised by three disinterested freeholders of Jasper county, appointed by the probate judge of said county, sell at public or private sale sufficient of said property to obtain said sums, provided said property shall not be sold at less than three-fourths of its appraised value.

"Sixth. I hereby constitute, nominate and appoint my mother, Rebecca Hayden, of Jasper county, Missouri, executrix of this my last will and testament, and in case of her death or refusal to act, then I desire that my brother, Thomas C. Hayden, shall become the executor of this will, and he is hereby constituted, nominated and appointed such executor in case of my mother's death or refusal to act."

Rebecca Hayden, so named as executrix of said will, refused to qualify as such, and thereupon Thomas C. Hayden, under the said clause, became executor, and qualified as such. He fully administered said estate, and made a final settlement thereof, and filed with the probate court receipts from himself as testamentary trustee of Ernest Webb and Madge B. Gaston to himself as executor of said will for the amount of the two several legacies provided for them in the second clause of said will. It appears that later on the fathers of the respective infant legatees became dissatisfied with the administration of the said trusts by the said Hayden, and this action was begun by Madge B. Gaston by her curator—her father—against him and the other legatee, Ernest Webb, having for its object the construction of the said will, and a determination of whether or not, under the terms thereof, the said Hayden was appointed trustee, or authorized to act as such, and, if so authorized, then to remove him, and to appoint some other person to act in his stead, etc. The defendant Ernest Webb, by his guardian ad litem, filed an answer and cross-petition, in which it was denied that the said \$10,000 legacy was given to the said Hayden in trust, but alleged that the same was given to him (the legatee) absolutely, etc. The cross-petition charged the said Hayden, as executor, (1) with retaining said legacy and refusing to loan the same; (2) with mismanaging the said legacy by using it for own benefit; (3) with wrongfully loan \$2,000 of said legacy on real estate in Forsyth county; (4) with loaning part of legacy on personal security; (5) with appropriating another part of the same for own use; (6) with refusing to permit, E. C. Webb, to see the papers, and funds of the said legacy, and the condition thereof, etc. In the said Madge B. Gaston it is charged that the said legacy bequeathed to her is a distinct trust from that bequeathed to Ernest Webb, but that, notwithstanding

said Hayden, trustee thereof, has inseparably commingled and intermixed the two funds; that he had failed to keep any accounts whatever of his transactions with said funds, and had refused to account with her or her curator respecting his transactions and dealing thereof; that he had refused to allow her or her curator to inspect the securities upon which he claimed said trust funds were invested, or the notes and other evidences of indebtedness taken for the loan thereof; that he had failed to pay interest on the amount of said bequest to her curator for the purpose of her education, etc., but had wrongfully retained both the fund and the interest thereon. These allegations were supplemented with others similar to those contained in the cross-petition of Ernest Webb, already referred to. A removal of the trustee was prayed in both petitions. The allegations contained in both the petition and the cross-petition were controverted by the answer of Hayden. There was a trial, and a decree for defendant, which, in substance, was (1) that defendant Hayden was the duly appointed trustee of the estates bequeathed to both of said minors; (2) that said defendant, as trustee, had in good faith cared for and preserved said estates, and ought not to be removed; (3) that the amounts due each of the legatees, respectively, should bear interest from the date of the death of the testatrix to that of the final settlement, and from the latter date 8 per cent., compounded annually, etc.; (4) that the father of the legatee Ernest Webb, being a man of large property, and willing to provide for the education and maintenance of the latter, the trustee retain the control of the whole of said bequest of such latter; (5) that, as the father of Madge B. Gaston was a man of small means, the said trustee pay over to her father, as her curator, certain specified sums for her education and maintenance, etc. Each of the parties to the record has appealed here.

1. Touching the question of whether or not the defendant Hayden was a trustee for said minors, under the provisions of the will, it will be observed that in *Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760, which was an action by E. C. Webb, curator of Ernest Webb, the legatee under the will, against T. C. Hayden, the trustee, to recover the moneys belonging to the said minor in the possession of the latter, as trustee, it was, in effect, held that the said Hayden was in the possession of the fund in the quality of trustee. It will not do to say the court did not in that case construe the will, nor that the construction so declared is but mere obiter dicta. It is true, the court might have disposed of the appeal by holding, as it did, that the plaintiff, Webb, could not maintain the action in his own name; but it elected not to do so, and proceeded, as was proper, to decide other points raised by the appeal adversely to the plaintiff, Webb. Amongst

such other points so raised was that of whether or not the defendant, Hayden, was trustee of the legacy bequeathed by the will to Ernest Webb. The decision was that Hayden was then in possession of that fund as trustee. It is not declared whether he derived his appointment from the will, or from the order of the court made in respect to the giving of the bond as trustee. It only declared in express terms that he was trustee of the fund, but whether he derived the title to that office wholly from the will, or the order of the court referred to, or from both, is not clearly stated. A reading of the entire opinion in the case will show that the question as to whether or not he (Hayden) was trustee of the legacy, and entitled, as such, to the possession and management thereof, is foreclosed, as to us, by the ruling in that case.

2. Having reached the conclusion that we are required to regard the defendant as the trustee of the bequest, it is next to be determined whether or not he should be removed on any or all of the grounds therefor alleged in the petition and cross-petition. The evidence disclosed by the record is ample to sustain the allegations of the cross-petition as respects the misconduct of the defendant trustee. It appears that, at the close of his account as executor of the estate of the testatrix, he retained in his hands as trustee for said beneficiary the \$10,000 bequest, but wholly neglected to keep clear, distinct, and accurate accounts relating to the same. Not only did he keep no such book of accounts, but the notes and securities on which said fund was loaned he made payable to himself in his individual capacity; and in that way he so merged it into his individual funds that its identity, or the securities on which it was loaned or in which it was invested, became wholly lost. When he collected moneys on the securities belonging to the trust, he deposited the same in bank to his individual credit. So far as it appeared from the entries in any book, or from any record, paper, note, or security, the trust fund had no existence. Blended and mixed with the individual funds of the trustee and the beneficiary, Webb, were also the funds which the former held as trustee for the plaintiff, Madge B. Gaston. By this blending and mixing the identity of the trust funds were as completely obliterated as if they had never existed. The trust fund was managed and used by the defendant in his own name, and in the same manner as if it were his own. No record was anywhere made of the various transactions touching the fund. No note or security taken wore the impress of the trust, or any earmark of it. A more unbusinesslike method of handling the fund could not be well imagined. If a call had been made upon him by the beneficiaries, or those representing them, to produce for inspection the books, documents, and papers relating to the fund, the call

would have been futile. It is stated in section 1076 of Pomeroy's Equity Jurisprudence that the duty of good faith prohibits mixing together the funds of the trustee with those of the beneficiary in one amount, the depositing the trust money in the trustee's own personal account with his own moneys in bank, mingling the receipts and payments of trust moneys and his own moneys in his books of account, and all similar modes of combining or failing to distinguish between the two funds. He may not thus mingle trust moneys with his own, even though he eventually accounts for the whole, and nothing is lost. This rule is to protect the trustee from temptation, from the hazard of loss, and from being a possible defaulter. In *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708, in referring to the duty of the trustee to keep the trust fund marked and separate from his own, it is said, no matter what he intends to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to an account, call it trust property. The fact that he delivered the moneys to the bank, and thus allowed them to be mingled with other funds, destroyed their identity as completely as though he had first mingled them with an equal amount of his own moneys, and then deposited the whole in bulk. The making of the deposit and taking the certificates to himself individually was therefore not only an extinguishment of the identity of the money, but an appropriation of it at law to his own personal use. And in section 1079 of Pomeroy's Equity Jurisprudence it is further said that it is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. It is accordingly made to appear that the trustee continuously and persistently violated the duties of the trust by the mode in which he administered it. The power of courts of equity over the removal of trustees, independent of any statutory authority or any direction in the instrument of trust, is well established. Pomeroy's Eq. Juris. § 1086. In *May v. May*, 167 U. S., loc. cit. 320, 17 Sup. Ct. 824, 42 L. Ed. 179, it is said that the power of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed. In section 275 of Perry on Trusts are specified a great number of grounds for the removal of a trustee, and among which is that where he misconducts himself, or deals with the trust fund for his own personal profit and advancement, or commits a breach of trust, or fails to invest as directed, or loans the funds on personal security, or where a hostile feeling exists between him and the beneficiary. In Pomeroy's Equity Jurisprudence, § 1086, it is also stated that the power of removal is con-

fined to cases of actual, express trusts. A court of equity may and will remove a trustee who has been guilty of some breach of trust or violation of duty. The exercise of this function by a court of equity belongs to what is called its "sound judicial discretion," and is not controlled by positive rules, except that the discretion must not be abused. But not only does it appear from the evidence adduced that the trustee was guilty of a long and unbroken series of breaches of his trust, but that his feelings towards the father, who is the guardian and curator and beneficiary, were extremely hostile and bitter. It is true that this feeling does not extend to the infant beneficiary himself, but it does extend to his representative, who is the only other person who would probably and most likely care for and look after the preservation of the trust fund. During the infancy of the beneficiary his father and curator would have the legal and natural right, in the name of and in the interest of his son and ward, to call upon the trustee to produce for inspection the books, papers, and documents, and for information relating to the trust fund, so that it seems that the father and curator stands in the place of the infant beneficiary, and that the practical effect of the hostility of the trustee to the former is the same as if it had existed to the latter. The hostility between the trustee and the father and curator was mutual, and had existed since the date of the divorcement of the latter from the testatrix. In *Gartside v. Gartside*, 113 Mo. 348, loc. cit. 356, 20 S. W. 669, it is said that hostility between the trustee and the cestui que trust is not of itself a sufficient ground of removal, unless it appears that the action of the former is probably controlled or might be controlled by it. In *May v. May*, supra, it was said that the power to remove a trustee may be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustee in question and the beneficiary that his continuance in office would be detrimental to the execution of the trust, even for no other reason than that human infirmity would prevent the beneficiary from working in harmony with him, and although charges of misconduct are either not made out or are greatly exaggerated. In *Scott v. Rand*, 118 Mass. 215, it is said in the opinion that the question of removing a trustee depends upon a careful consideration of all the circumstances, the existing relations, and, to some extent, the state of feeling between the parties. It is addressed to the reasonable discretion of the court. There are numerous other cases to the like effect cited in the brief of the next friend of the infant beneficiary. There is nothing in the record relating to the administration of the trust which in the slightest impugns the integrity of the trustee. All through the taking of the testimony at the trial he manifested his ill feeling towards the father of

the beneficiary, and his disinclination to furnish him with any information respecting the trust, or, indeed, to recognize any right in him to know any fact touching the trust. In view of the numerous and persistent violations by the trustee of his trust, and the probable continued repetition thereof if he be continued, the relation of the parties to the trust, and their hostility, in our opinion, makes the continuance of the trustee incompatible with the best interests of the beneficiary, and for that reason he should be removed, and another fit person appointed in his place. And the foregoing observations and conclusions are alike applicable to the defendant Hayden's trusteeship of plaintiff Madge B. Gaston, and for like reasons he should be removed from the office of the trusteeship as to her. Every ground for his removal existing in the one case exists in the other. There is no substantial difference between them.

3. In looking at the second and third clauses of the will, we must conclude that the legatees therein named were entitled to the interest accruing on the special legacies therein provided from the death of the testatrix, and that the rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary has no application in a case of this kind. The interest that accrued on the legacy was a part of the legacy itself, to which the legatees were entitled from the death of the testatrix. This is made plain by what was said by us in *In re Estate of Catron*, 82 Mo. App. 416. The object of the testatrix in making the bequest, most manifestly, was to provide for the maintenance and education of the two infant legatees from her death, without reference to the ability and willingness of their respective fathers to do so. She may have had, and probably did have, the thought that they might be unable or disinclined, for some reason, to contribute the needed support for these purposes, and so made her will to meet that contingency. Besides this, it seems that the testatrix at the time of her death had interest-bearing securities nearly equal in amount to the legacies, and that those securities came into the possession of the trustee, so that he actually received the interest with which he was charged. Therefore there was no hardship imposed by the finding of the court in that regard.

It results that the decree will be reversed, with directions to the trial court to order and decree the removal of the defendant from each of said trusteeships, and to appoint some fit and proper person in his stead, to hold and invest said trust funds for each of the said infant legatees in accordance with the terms of the will—requiring said new trustee to give a proper bond, with adequate sureties thereon, for the faithful administration of the trust, to be approved by the court—and that upon the appointment of such new trustee

the defendant Hayden be further ordered and compelled to pay to such succeeding trustee the said trust fund, with 6 per cent. interest thereon from the death of the testatrix, and that an account of said trust fund in his hands be taken and determined, and ordered to be paid over to this succeeding trustee. In other respects the decree not to be disturbed. All concur.

ZARTMAN-THALMAN CARRIAGE CO. v. REID et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

LIVERY STABLE KEEPERS—LIEN—BOARD OF HORSE—LIEN ON CARRIAGE—STATUTE—CONSTRUCTION.

1. Rev. St. 1899, § 4228, enacts that every person who shall board any horse shall have for the amount due therefor a lien on the animal, and on any vehicle or equipment "coming into his possession therewith." *Held*, that where a horse was boarded at a livery stable, and subsequently the owner of the horse sent a carriage to the stable, the stable keeper had no lien on the carriage for the board of the horse.

Ellison, J., dissenting.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Suit by the Zartman-Thalman Carriage Company against Theodore Reid and others. From a judgment for defendants, plaintiff appeals. Reversed.

Beardsley, Gregory & Kirshner, for appellant. Marley & Swearingen, for respondents.

SMITH, P. J. Defendants Reid & Lowe were livery stable keepers doing business in Kansas City. On May 5, 1900, the defendant John A. Wright brought a horse to said livery stable to be kept and cared for. The price agreed upon for the keep was \$15 per month. The horse remained continuously until the latter part of March, 1901. The Hargan-Zartman Carriage Company was a partnership in the year 1900 at Kansas City, engaged in the manufacture and sale of buggies. On August 18, 1900, said J. A. Wright came to the place of business of this manufacturing firm to buy a buggy, as he said, for his father, defendant W. M. Wright. He picked out a surrey, the agreed price of which was \$275. He paid \$75 in cash, produced a general power of attorney to act for his father, and under it and in pursuance of it executed four promissory notes, for \$50 each, due in one, two, three, and four months, and a chattel mortgage on the buggy to secure the notes. His statement to the carriage company at the time was that his horse was at the livery stable; that he wanted the buggy sent there; that it would be there but a few days, when he would take it to his place, where he was finishing a barn. Through an oversight on the part of the carriage company, the chat-

*Rehearing denied April 27, 1903.

Wright did not take the surrey away from the livery stable. Some time after the filing of the chattel mortgage the Zartman-Thalman Carriage Company, successors to the Harrigan-Zartman Company, learned that the carriage was still at the livery stable. The notes being unpaid, demand was made for the possession of the carriage, which was refused, and thereupon suit in replevin was brought against Reid & Lowe, the livery stable keepers, W. M. Wright, and J. A. Wright. The defendants Wright defaulted. Defendants Reid & Lowe set up a claim of agister's lien against the surrey. A jury was dispensed with, and the cause was tried by the court. It made special findings of fact, and rendered judgment, computing the amount which was due for the feed and care of the horse for the period beginning at the date when the buggy came into the possession of the livery stable keepers, August 19, 1900, down to the time when the buggy was replevied, at which time, also, the account for the care of the horse ceased, and held that the livery stable keepers had a lien on the surrey for this amount, which the court held was a prior and better lien than that of the chattel mortgage under which plaintiff claimed.

It is, in effect, conceded that the rights of the parties to this controversy are to be determined by the construction which shall be placed on the provisions of section 4228, Rev. St. 1899, which are as follows: "Every person who shall keep, board or train any horse, mule or any animal, shall, for the amount due therefor, have a lien on such animal, and on any vehicle, harness or equipment coming into his possession therewith." This statute is in derogation of the common law, and should for that reason be strictly construed. *Stone v. Kelley*, 59 Mo. App. 218; *Howes v. Newcomb*, 146 Mass. 79, 15 N. E. 123; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452. As to statutes in derogation of the common law, an eminent writer—Sutherland on Statutory Construction, § 400—has said that "such statutes as take away a common-law right, remove or add to common-law disabilities, or provide for proceedings unknown or contrary to that law, are construed strictly. The court cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed." And the same writer has further said that the difference between a liberal and a strict construction of a statute is that a case may come within one unless the language excludes it, while it (the case) is excluded by the other unless the language includes it. Sutherland on Stat. Constr. § 348. Now, applying the rule of strict construction to the statute which I have already quoted, can it be doubted that its language includes the case under consideration? The word "therewith" (the last in the section), according to the latest standard dictionaries of the English language (Web-

this—at the same time." And taking the definition of the word to be that just given, and it is plain that no other interpretation can be placed upon all the words with which it is associated in the statutory collocation than that what is meant by them is that the liveryman is given a lien only where the "vehicle, harness, or equipment comes into his possession at the same time with the horse, mule or other animal," for the amount of the keep or board of the latter. The language of the statute does not give a lien on a vehicle or harness for the keep or care of a horse unless such vehicle comes into the possession with or at the same time the horse does. A lien on a vehicle coming into the possession of a liveryman at a time prior or subsequent to that of the horse, for the board of the latter, is not included in the statute; and, as it is unknown to the common law, it can have no existence.

But it has been argued that, though the vehicle in the first instance came into the possession of the defendants—liverymen—long after the horse did, yet, as both were afterwards in their possession at the same time, this was equivalent to a coming into possession at the same time. If the question of the construction of section 4228 were *res nova*, as it is not—*Stone v. Kelley*, *supra*—I should be inclined to give it a liberal construction, since it is remedial in its character; but, restrained as I am by my reverence for the maxim, "*Stare decisis, et non quæta movere*"—a maxim to which the revisory courts of this state have of recent years shown little heed—I must adhere to that adopted in the case just cited. To concede the correctness of defendants' argument would, in effect, be to overthrow the construction heretofore placed upon this statute by us. It is manifest, if the statute is given a liberal construction, the defendants are entitled to the lien claimed, but, if it be given a strict construction, they are not. The vehicle in the present case, as has been stated, came into the possession of the defendants—the liverymen—several months subsequent to that of the horse for the amount of whose board a lien is claimed, and therefore it is clear that the case is not one included in the language of the statute. Whether or not the plaintiffs' mortgage on the vehicle had been recorded prior to time such vehicle went into the possession of defendants Reid & Lowe is of no consequence since the latter had no lien on such vehicle, and as the mortgage, though not duly recorded, was valid as between plaintiffs and other defendant, Wright.

I think the court erred in concluding that there was a lien in favor of Reid & Lowe on the vehicle, and accordingly I think the judgment ought to be reversed.

BROADDUS, J., concurs.

ELLISON, J. (dissenting). I do not think the construction given to the foregoing statute by Judge SMITH is the proper construction. The vehicle must be such as may be used in connection with the horse, and, when it is such, the lien attaches to it for the feed of the horse for the period that the possession has covered both at the same time. The primary meaning given to the word "therewith" is "with that, this, or it." See Webster's, the Standard, and the Century Dictionaries. Possession is a continuous act, and, when the statute uses the expression in question, it does not mean that the delivery of possession shall be simultaneous, but merely that the possession must be simultaneous. The phrase "coming into his possession therewith" is no more than if it had read, "being in his possession therewith," or "coming into his possession with such animal." Not that the vehicle shall come into his possession at the same time the animal does, but merely that it shall come into his possession with the animal; that is to say, while the animal which may be used in connection with it is in his possession. It seems to me that this construction of the statute is not a loose one, but is strictly within its meaning, under the rule adopted by us in *Stone v. Kelley*, 59 Mo. App. 214; *Baskin v. Wayne*, 62 Mo. App. 515; *Miller v. Crabbe*, 66 Mo. App. 660; and by the St. Louis Court of Appeals in *Lazarus v. Moran*, 64 Mo. App. 239. I therefore believe the judgment should be affirmed.

**CITY OF EXCELSIOR SPRINGS, to Use of
McCORMICK, v. HENRY.***

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

**TAXATION—SALE OF LAND—PRIORITY OF LIEN
—SUBSEQUENT CITY TAXES—AC-
TIONS—PARTIES.**

1. Under Acts 1893, p. 107, and Rev. St. 1899, § 9297, declaring that all taxes by the state, county, or city shall constitute a lien on real estate, a purchaser of land for delinquent state and county taxes purchases subject to all subsequent valid tax liens, whether based on state, county, or city taxes.

2. Under Acts 1893, p. 107, requiring suit on special city tax bills to be brought against the owner of the land, such suit was properly brought against a purchaser of the land who acquired title under a tax deed after the city tax lien accrued.

Appeal from Circuit Court, Clay County; J. W. Alexander, Judge.

Action by the city of Excelsior Springs, to the use of David McCormick, against Samuel D. Henry. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Harris L. Moore and W. A. Craven, for appellant. D. C. Allen and Sandusky & Sandusky, for respondent.

SMITH, P. J. Action to enforce tax bill against a certain lot in the city of Excelsior

Springs—a city of the fourth class—for a street improvement. The tax bill was dated November 5, 1894. The action thereon was begun October 31, 1899. It appears from the record that the state and county taxes for the year 1890 became delinquent, and suit was brought by the collector on April 23, 1892, against Atchison, who was then owner, for the collection of the said taxes, and judgment was recovered in June, 1895. Later on, execution was issued, and the lot was sold thereunder in 1897 to Metheny, who received a sheriff's deed therefor. By several mesne conveyances the title so acquired by him passed to the defendant, Henry. At the time this action was brought, the defendant, Henry, appeared to be the record owner.

The question presented by the record now before us is whether or not the sale made of the lot in 1897, under the judgment in 1895, upon the petition in 1892, for the delinquent state and county taxes of 1890, cut out or extinguished the tax bills issued in 1894 by the said city for street improvements conceded to have been legally made. The plaintiff contends that the sheriff's sale simply enforces the lien of the state against the lot for the taxes, and that the purchaser, on receiving the sheriff's deed, becomes invested with the title, subject to all subsequently accruing taxes, which it becomes his duty to pay in order to clear his title. It is conceded that, under the cases in this state referred to by the defendant, a prior lien of the state for taxes is superior and paramount to that created by the act of the owner—such, for example, as a mortgage—but these cases decide nothing pertinent to the question under consideration. And the same is true as to the case of *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755, for the decision of that case rests upon statutory provisions wholly dissimilar to our own. It is stated in *Black on Tax Titles*, § 427, that the general rule prevailing in a majority of the states is that a sale for taxes for any year cuts out the lien of all taxes assessed for any year prior to that for which the sale was made, or, in other words, a tax sale has the effect to divest the property of the lien for all prior and unpaid taxes, but in this state it has been held that such a sale does not have that effect. *State v. Werner*, 10 Mo. App. 41; *Wag. St.* 1872, p. 1170, § 60; *Rev. St.* 1899, § 9187. And in a jurisdiction where it was held that a sale of land for the taxes of any year would divest the lien of all taxes assessed for any prior year, it was further held that a title acquired under a tax sale for a subsequent year would prevail over a title founded on a sale for the taxes of a previous year, on the ground that it was the duty of the purchaser at the first sale to see that subsequent taxes were paid. *Anderson v. Reder*, 46 Cal. 134. It is thus seen that, where property on which the taxes for any year are delinquent, assessments for

*Rehearing denied April 27, 1903.

each succeeding year may be made on it as if it was not delinquent, and that it is the duty of the purchaser at a sale for the prior taxes to pay those subsequently accruing, or else he will lose the property if he allows it to go to sale for the latter. It would, no doubt, be otherwise if the property were forfeited to the state for the nonpayment of prior delinquent taxes, as was provided under an Ohio statute. Under such a statute, after the forfeiture the state would not assess the property while the owner of it. *Buckley's Lessee v. Osborn*, 8 Ohio, loc. cit. 187. But when it—the property—remains that of the individual, as under our statute, until actually sold for the delinquent taxes, it would still be subject to the further assessment for subsequent years. *Lumber Co. v. Anderson*, 13 Mo. App., loc. cit. 435; *State v. Heman*, 7 Mo. App. 420; *State v. Werner*, supra. The statute gives a lien for all taxes, whether state, county, or city, and whether general or special. Section 9297, Acts 1893, p. 107. It provides, however, a somewhat different method of procedure for the enforcement of the lien for the latter. Sections 9302, 9303, Acts 1893. And if state and county taxes may be assessed on property on which such taxes are delinquent for a prior year, why may not local and special taxes be also assessed thereon? If it is the duty of a purchaser at a sale under the former to pay the subsequently accruing state and county taxes, why not as well the local and special taxes subsequently assessed? It was not only the duty of Atchison to pay the taxes assessed against the property for 1890, but all the taxes subsequently assessed, whether state, county, or local, from that time until his title was divested by the sale of 1897 for the taxes of 1890. The sale of 1897 did not extinguish the liens for the taxes assessed for any year prior or subsequent to that of 1890. It did, however, extinguish all prior liens created by the owner. When Metheny, from whom the defendant derives title, in 1897, purchased under the judgment, he acquired a title good against all prior liens created by Atchison, but subject to all the valid tax liens to which the property was then or subsequently subject. The statute (Acts of 1893, supra) required the suit on the tax bills to be brought against the owner. The defendant was the then owner. The action could not be brought against Atchison, who was owner when the lien accrued, because his title had previously passed to the defendant, or to Metheny, under whom he claims. He (Atchison) was not then the owner, and therefore was not the party against whom the statute required the suit to be brought. We think the only reasonable conclusion that can be reached is that the sale for the taxes of 1890 has no other effect than to pass the title of Atchison to Metheny, divested of all prior liens created by the act of the former, but subject to all existing valid tax liens. If it

was the duty of Atchison to discharge the subsequently assessed taxes, then this burden was assumed by Metheny when he purchased. The tax cases are numerous, and are all founded on statutes variant in their provisions, and are altogether quite confusing; but it is safe to say that no case can be found where it has been held that a tax sale under a statute like ours, when the facts are as here, was given the effect contended for in this case. In view of the absolute requirement of the act of 1893 as to who shall be made the defendant in a suit in a tax bill, we cannot see that the ruling made in *Odell v. Wilson*, 63 Cal. 159, and the other cases cited with it, are pertinent or applicable.

We think the trial court took a proper view of the case, and accordingly its judgment, which was for plaintiff, will be affirmed. All concur.

J. E. DUNN & CO. v. SMITH et al.

(Supreme Court of Texas. April 30, 1903.)

WRIT OF ERROR—APPLICATION TO SUPREME COURT—SPECIFICATION OF ERROR—SUFFICIENCY.

1. On an application to the Supreme Court for a writ of error to the Court of Civil Appeals, a specification of error that the latter court erred in overruling the first assignment of error in that court, which was that the trial court erred in overruling defendant's general demurrer and special exception to plaintiff's petition, is too general.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action between J. E. Dunn & Co. and Jemima Smith and others. Judgment for Smith and others was affirmed by the Court of Civil Appeals, and J. E. Dunn & Co. applies for a writ of error. Refused.

Kenneth Foree and K. R. Craig, for plaintiffs in error.

GAINES, C. J. We are of the opinion that the application for the writ of error in this case should be refused. But in order to prevent misapprehension as to the scope of our rulings, we deem it proper to point out the errors assigned in the petition.

The first specification of error in this court is that the Court of Civil Appeals erred in overruling the first assignment of error in that court, which is that the trial court erred in overruling defendants' general demurrer and special exception to plaintiffs' petition. This assignment is too general.

The second is to the effect that the trial court erred in finding that the defendant Dunn knew of the substitution of the coffin that was delivered for that purchased by the plaintiffs. We cannot say that the finding was without evidence to support it.

The third specification of error is as to the trial court's finding that the coffin which

was actually furnished was too small. We think the assignment shows no error.

The fourth is to the effect that the court erred in permitting the plaintiffs to recover the purchase money paid for the coffin that was delivered. We think the Court of Civil Appeals also correctly disposed of this assignment, and upon satisfactory grounds.

These are all the specifications of error in this court. The opinion of the Court of Civil Appeals discusses other questions raised by the assignments in that court, about which we would have had more difficulty. But these questions, not being assigned here, are not before us, and we are not called upon to consider them.

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WILSON v. ELLIOTT.

(Supreme Court of Texas. April 27, 1903.)
DIVORCE—CUSTODY OF CHILDREN—FOREIGN
DECREE—RES ADJUDICATA—EVIDENCE.

1. A decree of another state, determining the custody of an infant child in a suit for divorce, is res judicata of all questions as to the right of custody which could have been before the court at the time the decree was entered.

2. A decree of the court of another state, determining the custody of a minor child in a divorce suit, is not a bar to a subsequent proceeding in domestic court to modify it upon proof that the situation and character of the respective parties had changed.

3. In a proceeding to modify a decree of a court of another state in awarding the custody of a minor child in a divorce suit, evidence of the situation and conduct of the parties prior to the rendition of the foreign decree is admissible in corroboration of evidence showing a similar situation or conduct since the decree, and relied upon to effect a modification thereof.

Certified Question from Court of Civil Appeals of Fourth Supreme Judicial District.

Habeas corpus by Leander F. Elliott against Effie M. Wilson to obtain custody of an infant child of the parties. Judgment for petitioner, and respondent appeals. On certified question from the Court of Civil Appeals.

S. P. Welsiger and Turney & Burges, for appellant. Clark, Fall, Hawkins & Franklin, for appellee.

GAINES, O. J. The Court of Civil Appeals for the Fourth Supreme Judicial District have certified to us the following statement and question:

"On May 4, 1899, the appellant and appellee were divorced by decree of the district court of New Mexico, where they resided. They had a daughter, who is now 11 years of age. The New Mexico court had jurisdiction of the subject-matter and of the parties, including the child. The final decree in that proceeding adjudicated that the father (appellee here) should have the custody of the child, with the provision 'that the child should be permitted to visit its mother once a year for the period of one month, during the month of

July, that said visits shall be made within the territory of New Mexico, and the said child shall not be removed from said territory by her mother.'

"The mother remarried in New Mexico, and, with her husband, removed to El Paso, Texas, she bringing with her the child, in disregard of said decree.

"This is a habeas corpus proceeding in the district court of El Paso county by the father to obtain possession of the child, and the proceeding took place in vacation.

"At the hearing the parties introduced testimony concerning the character, conduct, and fitness of each other prior to and since the date of the territorial decree, but the judge, as shown by his certificate to the statement of facts, 'did not consider as evidence on the trial any evidence of any fact that occurred prior to that decree, excepting the proceeding in said New Mexico court as set out in Exhibit A hereto attached.' The exhibit thus referred to consists only of the certified pleadings and decree of the New Mexico court. The testimony introduced, and which the judge certifies he did not consider, affected the fitness of the parents respectively, and was conflicting. The certificate to the statement of facts, and also the judge's conclusions of law, show that, in disposing of the issues involved herein, he treated the New Mexico decree as conclusive of all matters at its date, and that he could and did consider only evidence of what has occurred since that date. The case is pending in this court on rehearing, and we therefore accompany this with copy of this court's opinion and copy of the motion for rehearing.

"Question.

"Was the district judge correct in the effect given by him to the New Mexico decree?"

In treating of the effect of an order of a court of another state or country awarding the custody of children in a decree of divorce, Mr. Bishop says: "Under our national Constitution, this order is plainly a record to which, if the court has jurisdiction, the same faith and effect permitted it in the state of its rendition must be given in every other state. And the true rule in the state of its rendition is that it is res judicata, concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status, rightfully, like marriage, regulated by any state in which the parties are domiciled, does the order in one state operate as an estoppel of all future inquiry in the courts of another state where the child has acquired a domicile." 2 Bishop on Marriage and Divorce (2d Ed.) 1189. We think that this is a correct exposition of the law, and that it is sustained by the following authorities cited by the author: Dubois v. Johnson, 96 Ind. 6; Umlauf v. Umlauf, 27 Ill. App. 375; Jennings v. Jennings, 56 Iowa, 288, 9 N. W. 222; State v.

¶ 2. See Divorce, vol. 17, Cent. Dig. § 843.

Bechdel, 37 Minn. 380, 34 N. W. 334, 5 Am. St. Rep. 854; White v. White, 75 Iowa, 218, 39 N. W. 277; Sherwood v. Sherwood, 56 Iowa, 608, 10 N. W. 98; Teter v. Teter, 88 Ind. 494; Mercein v. The People, 25 Wend. 64, 35 Am. Dec. 653; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 302; Bennett v. Bennett, Deady, 290, Fed. Cas. No. 1,318. It follows that, in our opinion, the status of the father as a proper person to have the custody of the child at the time the decree of the territorial court of New Mexico was rendered was fixed by that decree, and that the judgment that he was entitled to such custody is res adjudicata, but that the order is not a bar to a subsequent proceeding to modify it upon proof that the situation and character of the respective parties have so changed as to render it to the interest of the infant that it be committed to the care of the mother. In the case of Dubois v. Johnson, previously cited, the court, after quoting from the opinion in Williams v. Williams, 13 Ind. 523, says: "The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen subsequent to the decree." The question upon the first trial in a case of a character of this is, which is the more suitable party to be intrusted with the care of the child at that time? The question in the subsequent proceeding is, which is the more suitable at the time of that trial? Since, in determining the second question, the first cannot be agitated, it follows that evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct which was developed since the original decree. As just intimated, we think, however, where testimony upon the second trial tends to show conduct on part of the one to whom the custody has been previously committed, and that he or she, since the first, has become a person not suitable for so important a charge, the rule of res adjudicata would not preclude the introduction of evidence of conduct previous to the first decree, provided it tended to corroborate the evidence of subsequent conduct of a like nature. For example, upon the second trial evidence might be introduced tending to show that the party had, since the first, become a spendthrift, has wasted his subsistence, and was incapable of maintaining and educating the child as it should be maintained and educated. In such a case we see no reason why improvident conduct previous to the first decree may not be offered in evidence. Or if, upon the second trial, evidence be introduced tending to show that since the first the party has become an habitual drunkard, we think that it might be shown in corroboration that previous to the first trial he was accustomed to use intoxicating liquors to excess.

The certificate of the Court of Civil Appeals does not set forth the evidence which

the judge had before him, and we get an unsatisfactory idea of it from the briefs to which we are referred. Without knowing all the evidence in the case bearing upon the issue presented, we cannot give a direct answer to the question, but trust the foregoing may be sufficient to guide the court in the decision of the point.

SOUTHERN KANSAS RY. CO. OF TEXAS v. COOPER.

(Supreme Court of Texas. April 30, 1903.)

COURTS—COURT OF CIVIL APPEALS—JURISDICTION—SUIT IN JUSTICE'S COURT—AMOUNT IN CONTROVERSY—CHANGE IN INTERMEDIATE TRIBUNAL.

1. Const. 1876, art. 5, § 3, provided that the Supreme Court should have appellate jurisdiction extending to civil cases of which the district courts had original or appellate jurisdiction. Section 16 provided that in all appeals from justices' courts, when the judgment rendered should not exceed \$100, the trial de novo in the county court should be final; but, if it did exceed \$100, an appeal should lie, as also in cases of original jurisdiction, to the Court of Appeals under such regulations as might be prescribed by law. Rev. St. 1879, art. 1008, gave the Court of Appeals jurisdiction of all civil cases of which the county courts had exclusive or concurrent jurisdiction, and of all civil cases of which the county court had appellate jurisdiction, where the judgment rendered or the amount in controversy exceeded \$100. Under these provisions it had been held that the Supreme Court had jurisdiction of an appeal from the district court in a case originally appealed from the justice court, though the amount in controversy and the judgment appealed from were less than \$100. In 1891, Const. art. 5, was amended to provide that the Courts of Civil Appeals should have appellate jurisdiction extending to civil cases of which the district or county courts had original or appellate jurisdiction, under such restrictions as might be prescribed by law. Rev. St. 1895, art. 996, enacted in pursuance of this amendment, invested the Courts of Civil Appeals with jurisdiction in civil cases of which the district courts had original or appellate jurisdiction, in which the county court had original jurisdiction, and in which the county court had appellate jurisdiction, when the judgment or amount in controversy exceeded \$100. Held, that the Court of Civil Appeals had jurisdiction of an appeal from the district court in a suit brought before a justice for less than \$100, though, when the suit was commenced, appeal lay to the county court, and by statute was afterwards changed to the district court.

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by J. R. Cooper against the Southern Kansas Railway Company of Texas. On certified question from Court of Civil Appeals. 72 S. W. 409. Question answered.

J. W. Terry and H. E. Hoover, for appellant. L. C. Heare and C. Coffee, for appellee.

GAINES, O. J. This suit was brought by the appellee against the appellant in a justice court to recover the sum of \$75. A judgment was rendered in that court, but, the civil jurisdiction of the county court of the

county having been conferred by an act of the Legislature upon the district court, the cause was appealed to the latter court, in which the plaintiff recovered a judgment for the amount claimed in the suit. The cause having been appealed to the Court of Civil Appeals for the Second District that court has certified for our determination the question whether or not they have jurisdiction of the appeal.

Under article 5 of the Constitution as amended in 1891, the Legislature, in the act which provided for the organization of the Courts of Civil Appeals, defined their jurisdiction in part as follows: "The appellate jurisdiction of the Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts—(1) Of which the district courts have original or appellate jurisdiction. (2) Of which the county court has original jurisdiction. (3) Of which the county court has appellate jurisdiction when the judgment or amount in controversy or the judgment rendered shall exceed one hundred dollars, exclusive of interest and costs." Rev. St. 1895, art. 996. This provision, as contemplated by the amended article, made the Courts of Civil Appeals the successors to the jurisdiction of the Supreme Court and of the old Court of Appeals as defined by the original article and the statutes passed in pursuance thereof. Section 16 of the original article contained this provision: "In all appeals from justices' courts, there shall be a trial de novo in the county court, and when the judgment rendered or fine imposed by the county court shall not exceed one hundred dollars such trial shall be final; but if the judgment rendered or fine imposed shall exceed one hundred dollars, as well as in all cases, civil and criminal, of which the county court has exclusive or concurrent original jurisdiction, an appeal shall lie to the Court of Appeals, under such regulations as may be prescribed by law." Article 1068 of the Revised Statutes of 1879 gave the Court of Appeals jurisdiction "of all civil cases of which the county courts have exclusive or concurrent original jurisdiction, except," etc., "of all civil cases of which the county courts have appellate jurisdiction, where the judgment rendered, or the amount in controversy shall exceed one hundred dollars exclusive of interest and costs, and in such other cases as are, or may be, provided by law," etc. Original section 3 of article 5 of the Constitution defined the jurisdiction of the Supreme Court as follows: "The Supreme Court shall have appellate jurisdiction only, which shall be co-extensive with the limits of the state; but shall only extend to civil cases of which the district courts have original or appellate jurisdiction." It is apparent that with one exception, to be hereinafter noted, it will be seen that the same language is employed in the original Constitution and in the old statute, respectively, in defining the cases in which appeals were allowed to the Supreme

Court and to the Court of Appeals as is used in the present statute in describing those that are made appealable to the Courts of Civil Appeals, under the present law. The exception is that the article of the Revised Statutes of 1879 adds to the words "the judgment rendered" the phrase "or the amount in controversy"; and it may at least be doubted whether, in view of the constitutional provision first quoted, this latter phrase has any effect. See *Pevito v. Rodgers*, 52 Tex. 581. But we deem this unimportant. In the case just cited the court say: "The jurisdiction of this court is not limited, in the Constitution or statutes enacted in pursuance thereof, by the amount of the judgment appealed from. Its jurisdiction is co-extensive with the limits of the state of all judgments in civil cases of which the district courts have original or appellate jurisdiction. As the district court confessedly had appellate jurisdiction of the judgment of the justice's court in this case, it must follow that the Constitution gives this court jurisdiction to inquire whether or not the district court erred in refusing to exercise that jurisdiction and try the case de novo." Again, in *Davidson v. Patton*, 57 Tex. 481, both the amount in controversy and the judgment appealed from were for an amount less than \$100, and upon a motion to dismiss for want of jurisdiction it was held that the court had jurisdiction, and the motion was overruled. From that time until amended article 5 of the Constitution was adopted it seems to have been the settled rule of the Supreme Court to entertain jurisdiction of such cases. Within the knowledge of the writer the rule has been observed without question from the Galveston term, 1887, until the jurisdiction of the court was taken away by the amendment just mentioned. For example, in *Moore v. Jordan*, 67 Tex. 394, 3 S. W. 317, the court entertained jurisdiction in a case appealed from a justice court to the district court, when the amount in controversy was \$35 only, and the judgment of the district court was for the defendant. So, also, in *Southern Pacific Railway Company v. Stanley*, 76 Tex. 418, 13 S. W. 480, which arose in a justice court, and was appealed to the district court, and then to the Supreme Court, this court heard the appeal, reversed the judgment, and remanded the cause, though the amount of the judgment was \$58.50. To these cases others might, doubtless, be added, but it would serve no useful purpose to do so. The cases cited are sufficient to show that at the time article 996 of the present Revised Statutes became a law it was the settled rule of construction that under the previous law the Supreme Court had jurisdiction to entertain an appeal from a judgment of the district court for a sum less than \$100, where the suit had originated in a justice court and had been properly appealed to that court. Since the article last cited defines the jurisdiction of the Court of

Civil Appeals over appeals from the district court in the same language that was employed to define the jurisdiction of the Supreme Court under the former law, and since the old law at the time of the passage of the new had been construed as giving jurisdiction to the Supreme Court in cases like that now before us, by a familiar rule it is to be presumed that the Legislature intended that the new statute receive the same construction.

We answer that, in our opinion, the Court of Civil Appeals had jurisdiction of the appeal in this case.

HARPER v. TERRELL.

(Supreme Court of Texas. April 30, 1908.)

SCHOOL LAND—MISTAKEN CLASSIFICATION—SALE—CANCELLATION BY COMMISSIONER—AUTHORITY.

1. Laws 1897, p. 184, c. 129, and Rev. St. 1895, arts. 4218e, 4218f, give the commissioner of the General Land Office authority to classify school lands, and declare that when classified the lands "shall be subject to sale." Article 4218f recognizes the right of the state to sue to enforce forfeitures, etc., "or to protect any other right to such lands." Other articles define the duties of the commissioner after sale, authorizing him to see to the performance of conditions subsequent, to complete the title, and to forfeit sales for nonperformance of certain conditions; but he is nowhere authorized to cancel a sale because of a mistake in the classification of lands. Held that, even if the state had a right to avoid a sale for such mistake, the commissioner's cancellation of a sale on that account was invalid.

Original proceedings for mandamus by William Harper against J. J. Terrell, Commissioner of the General Land Office. Writ awarded.

D. W. Doom and D. H. Doom, for relator. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondents.

WILLIAMS, J. Relator has applied to this court for a writ of mandamus to require respondent, the Commissioner of the General Land Office, to reinstate upon the record of his office a sale which had been awarded to relator of a tract of school land, and afterwards canceled by respondent for the reason stated below. The pleadings show this state of facts: The land was in fact covered with valuable pine timber, and was worth \$8 per acre, but in 1901 was classified as dry agricultural land, and valued at \$2 per acre. On the 26th day of April, 1902, relator made application to buy the land, as classified, complying in all respects with the law. The application was accepted by the commissioner, and the land was awarded to applicant May 1, 1902. The commissioner, having thereafter learned of the mistake in the classification and appraisal, canceled the sale on the 1st day of August, 1902; basing his action on such mistake alone. Relator's home was on another tract adjoining that in controversy, and upon this fact it is charged

that, when he bought, he must have known of the error in classification, and that the commissioner, in selling, was acting upon a mistake of fact. We shall assume, for the purpose of decision, that this is true.

The law in force when the classification and appraisal were made gave to the commissioner full authority to classify all of the school lands as "agricultural, grazing or timbered land," and declared that when such classification had been made the lands "shall be subject to sale." Laws 1897, p. 184, c. 129; Rev. St. 1895, arts. 4218e, 4218f. The conditions precedent to the power to sell having been thus complied with, and the purchaser, by his application, having accepted the offer to sell thus held out by the statute through such action of the commissioner, and having complied with the statutory requirements, there was a complete executory contract of sale. *Jumbo Cattle Co. v. Bacon & Graves*, 79 Tex. 12, 14 S. W. 840. It might be conceded that the state, as vendor, would still have the same right in equity that any other vendor would have under similar facts to repudiate or set aside such a contract for fraud or mistake; and still it does not follow that the commissioner had authority to cancel the contract, and thus by his own action put an end to the right of the purchaser. The sale was not void. It was made in the exercise of a power clearly vested in the commissioner, and must stand until set aside by competent authority. An individual who had made such a contract might have the right, upon discovery of a fraud or mistake in its execution, to refuse to proceed further in carrying it out; and a court of equity might, upon a showing of such fraud or mistake as justified his refusal, decline to compel specific performance. But in order to say that the Commissioner of the General Land Office could, upon this idea, cancel the contract in question, it must be held that he is invested with the power to represent the vendor in such matters, and we do not find such a power among those conferred upon him by the statutes. He does represent and bind the state in making a sale in compliance with the law, but when the sale has been made his further duties are defined in the statute; and, stated in a general way, they are simply to see to the performance by the purchaser of the subsequent conditions of the sale, and to complete the title when such conditions have been performed. He is empowered to forfeit sales for nonperformance of such conditions, such as continued occupancy, payment of interest, and the like, but there is no trace of authority to determine and put an end to the rights of a purchaser upon such grounds as those existing here. The statute itself seems to contemplate occasion for action in behalf of the state, other than that which the commissioner may take. After authorizing the forfeiture of sales for nonpayment of interest, the statute (article 4218f, Rev. St. 1895) says: "Provided, fur-

ther, that nothing in this article contained, shall be construed to inhibit the state from instituting such legal proceedings as may be necessary to enforce such forfeiture or recover the full amount of the interest and such penalties as may be due the state at the time such forfeiture occurred, or to protect any other right to such land, which suits may be instituted by the Attorney General or under his direction," etc. The commissioner is authorized to forfeit for the specified causes, and the Attorney General is authorized to cause suits to be brought "for the protection of any other right." The contract not being void, the purchaser is entitled to have the evidence which the statute prescribes of its existence and of his compliance with its terms preserved and kept up in the land office by the action of the commissioner, until his rights under it have been terminated by the state. The state, or those who represent it in such matters, may never see fit to set up the facts upon which the contract may be avoided, if they exist; and until this has been done the purchaser is entitled to have the proper action taken in the land office, in order that he may continue his payments. *Hazlewood v. Rogan* (Tex. Sup.) 67 S. W. 80. That the commissioner is not, in all matters pertaining to these lands, the representative of the state, is established by a number of decisions of this court. *Savings Bank v. Dowlarn*, 94 Tex. 388, 60 S. W. 754; *Ketner v. Rogan*, 68 S. W. 774, 5 Tex. Ct. Rep. 121; *Walker v. Rogan*, 93 Tex. 254, 54 S. W. 1018.

We are not to be understood as deciding definitely that the facts stated show a right in the state to avoid the sale. That question is left open. We merely hold that, if the existence of such right be assumed, it furnishes no answer to this application. Mandamus awarded.

COX et al. v. THOMPSON.

(Supreme Court of Texas. April 27, 1903.)

LIQUOR DEALER'S BOND—PERMITTING MINOR TO ENTER AND REMAIN IN SALOON—DEFENSES—GOOD FAITH OF DEALER—EMANCIPATION.

1. Under Sess. Laws 1901, p. 314, c. 136, requiring a liquor dealer to give bond that he will not sell to a minor, or permit a minor to enter or remain in his place of business, and providing that a sale to a minor in good faith, with good ground for belief that he is of age, shall be a valid defense on his bond, a well-grounded belief that a minor is of age is not a defense to an action for permitting him to enter and remain in a saloon.

2. The emancipation of a minor by a parent is not a defense to the parent's action on a liquor dealer's bond for permitting the minor to enter and remain in a saloon.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action on a liquor dealer's bond by W. B. Thompson against P. O. Cox and others. From a judgment for plaintiff, defendants appeal. On certified questions from the Court of Civil Appeals.

Dewey Langford, for appellants. Main & Chesley, for appellee.

WILLIAMS, J. The nature of the case and the questions presented are stated in the following certificate:

"The Court of Civil Appeals of the Third Supreme Judicial District, desiring to certify the hereinafter stated question to the Supreme Court of the state of Texas, makes known to that court that the above styled and numbered cause is now pending in the Court of Civil Appeals, and is a suit brought by appellee, Thompson, against Cox and the sureties on his liquor dealer's bond, to recover \$3,000 for six alleged infractions of the conditions of the bond. Three infractions were for selling intoxicating liquors to a minor, and three for permitting the minor to enter and remain in the saloon of P. O. Cox in the town of Hico, Hamilton county, Texas.

"The case was tried before a jury, and resulted in a verdict and judgment in favor of plaintiff, the father of the minor, for three infractions of the bond in permitting the minor to enter and remain in the saloon. The total amount recovered was \$1,500.

"Appellants' eighth assignment of error, which complains of a charge of the trial court, we think is well taken, and have concluded that for the error in giving the charge pointed out the judgment below will have to be reversed, and the case remanded.

"Appellants, as a part of their answer, pleaded as follows: 'And for further answer herein defendants say and allege that if, on the date alleged, defendant P. O. Cox, or any of his agents or employes, permitted William W. Thompson, he being a minor, to enter and remain in the saloon of P. O. Cox, and sold or permitted to be sold to said William W. Thompson intoxicating liquors—which is not admitted, but denied—that on said day and date, and for a long time prior thereto, the father of the said William W. Thompson, who is plaintiff herein, had emancipated the said William W. Thompson, permitting and agreeing that said William W. Thompson should act for himself, and relinquishing all control over the said William W. Thompson; and this the defendants are ready to verify.' The trial court sustained a demurrer to that part of the answer above quoted. There is a bill of exceptions in the record which shows that the appellants offered to prove substantially the facts alleged in the answer, as above stated, which testimony, on objection, was not admitted.

"The court, in instructing the jury, submitted to them the question whether or not the sale made to the minor by the liquor dealer was in good faith; and the effect of the verdict of the jury is to find for the appellants on this issue. This issue was pleaded by the appellants, and also the fact that they acted in good faith in permitting the minor to enter and remain in the saloon. To this part of the answer a demurrer was sus-

pellee's consent, and upon this issue the verdict of the jury is justified by the evidence.

"In view of the above statement, the Court of Civil Appeals of the Third Supreme Judicial District of Texas certifies to the Supreme Court of Texas the following questions:

"(1) As, under the act of April 27, 1901 (chapter 136, p. 314, of the Session Laws of the Twenty-Seventh Legislature), a sale made to a minor in good faith, under a well-grounded belief that he is of age, will excuse the liquor dealer, can a well-grounded belief, in good faith entertained, that the minor is an adult, be interposed as a defense to permitting the minor to enter and remain in the saloon?

"(2) Did the court err in sustaining a demurrer to that part of appellants' pleading which set up the emancipation of the minor, William Thompson, by his father, the appellee? Or, to put it more pointedly, is emancipation of the minor by a parent a defense to the parent's action on a liquor dealer's bond for permitting the minor to enter and remain in a saloon?"

The act of 1901, upon which the action is based, required of a liquor dealer a bond conditioned that he would not, among other things, sell liquor to "any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard," etc., and that he would not "permit any person under the age of twenty-one years to enter and remain in such house or place of business." Prior to 1893 ignorance on the part of the liquor dealer that a person to whom he was making a sale was one of a class to whom his bond obligated him not to sell was no defense to an action on the bond. *Peacock v. Limburger*, 66 S. W. 764, and authorities cited. The Legislature in that year introduced a proviso (Laws 1893, p. 179, c. 121, § 9) "that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense." In 1901 a further proviso was inserted "that where the sale to an habitual drunkard is made in good faith, with the belief that he was not an habitual drunkard, and there is good ground for such belief, that shall be a valid defense." The questions stated are to be determined under the law thus standing.

1. The first question is answered in the negative. The only changes made by the acts of 1893 and 1901 in the pre-existing rule is defined in the provisions quoted, and they apply only to sales. The courts cannot so extend them as to make them apply to other conditions of the bond. If, within the meaning of the statute, a minor was permitted to enter and remain in the house or place, the good faith of the owner would not prevent this from being a breach of the bond. The

three sales. Whether or not such a state of facts would constitute breaches of the condition against permitting the minor to enter and remain, or should be treated merely as sales, defensible if made under the conditions specified in the proviso, is a question not raised by the certificate, which does not show the existence of the facts assumed by the argument. The case is submitted to us upon the assumption that there were distinct breaches of the bond in permitting the minor to enter and remain, unless the proviso of the statute is to be extended to such cases.

2. The so-called emancipation of the minor by his father did not take the former out of the language of the statute, nor out of its spirit and purpose. He was a "person under the age of twenty-one years," and within the conditions of the bond. The court did not err in sustaining the demurrer to the part of the answer asserting the action of the father as a defense.

STATE v. LAREDO ICE CO. et al.

(Supreme Court of Texas. April 27, 1903.)

ANTI-TRUST ACT—CONSTITUTIONALITY—COMPULSORY INCRIMINATION—EXCESSIVE FINE—INCORPORATION OF ACT OF 1895.

1. Acts 1899, p. 251, c. 146, § 14 (Anti-Trust Law of 1899), providing that the provisions of the act shall be held to be cumulative of all laws now in force in this state, does not make the act of 1899 a part of the anti-trust act of 1895 (Acts 1895, p. 112, c. 83), so as to incorporate into the former the provisions of section 12 of the latter, exempting certain organizations from the operation of the latter act.

2. Acts 1899, p. 248, c. 146, § 8, prescribing a form of affidavit by corporations for the Secretary of State, and providing that on refusal to make oath in answer to such inquiry, or on failure to do so within 30 days, such failure shall be prima facie proof that such incorporated company is transacting business in the state, and has violated the provisions of the act, etc., may be eliminated from the act without impairing its efficiency for the accomplishment of the general purpose of its enactment; and hence, if it be conceded that section 8 is unconstitutional, as requiring a party to give evidence against himself, the act is not unconstitutional as a whole.

3. Acts 1899, p. 246, c. 146 (Anti-Trust Law of 1899), is not in violation of Const. art. 1, § 13, providing that excessive fines shall not be imposed; the act giving a wide range between minimum and maximum penalties, and the former not being excessive.

Certified Question from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by the state of Texas against the Laredo Ice Company and others. From an order sustaining a demurrer to the petition, plaintiff appealed to the Court of Civil Appeals. On certified question from the Court of Civil Appeals.

O. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for the State. E. A. Atlee and Nicholson & Mullally, for appellees.

BROWN, J. Certified question from the Court of Civil Appeals for the Fourth Supreme Judicial District, as follows:

"This is a suit brought by the state of Texas against the defendants, the Laredo Ice Company, a corporation composed of H. A. and P. M. Sauvignet, and the Consumers' Ice Company, a copartnership organized under the laws of the state of Texas, for the purpose of recovering penalties for a violation of the anti-trust law of 1899. It was alleged that the defendants had entered into a combination or agreement with each other by which they had formed a pool, trust, agreement, combination, confederation, understanding, and association with each other to regulate and fix, and that they did regulate and fix, the price of ice in the county of Webb, in the state of Texas; that such agreement was maintained from about the 19th day of June, 1902, to the date of the filing of the petition. The defendants filed a general demurrer to plaintiff's petition, which presented the question of the constitutionality of the anti-trust law of the state of Texas, approved March 25, 1899. The court, sustaining the demurrer, held the law to be unconstitutional, and dismissed the case, from which judgment this appeal was taken.

"Question. Is the act of the Twenty-Sixth Legislature (chapter 146, Acts 1899, p. 246) under which this action is brought, constitutional?"

It is claimed by counsel for appellees that the act referred to, known as the "Anti-Trust Law of 1899" (Laws 26th Leg. p. 246, c. 146), is void for the following reasons: (1) Because the fourteenth section has the effect to make it a part of the act of 1895, and to incorporate into the act of 1899 the proviso of section 12, c. 83, p. 115, of the law of 1895. (2) Because the act of 1899 prescribes for those who shall violate it excessive fines, contrary to section 13, art. 1, of the Constitution of this state. (3) Because the provision of the law which makes the failure of a party to respond to the demand of the Secretary of State for an affidavit prima facie evidence of a violation of the law is in conflict with section 10, art. 1, of the Constitution, in that it makes the accused testify against itself.

The fourteenth section of the act of 1899 concerning trusts and monopolies is in this language: "The provisions of the foregoing sections, and the fines and penalties provided for violations of this act shall be held and construed to be cumulative of all laws now in force in this state." Counsel for appellees earnestly contend that the effect of this provision is to consolidate and to make one law of the act of 1895 and the act of 1899, and thereby to give exemption from prosecution under the law of 1899 to those persons who are exempted by the provisions of the law of 1895. The term "cumulative" indicates an harmonious coexistence and co-operation, rather than a consolidation of two things in-

to one. An amendment to a statute is not "cumulative" because it repeals and takes the place of the part of the law that it amends, thereby becoming a part of the law amended. It is true that, in seeking the meaning of language used in a statute, it is proper to consider all of the acts of the same legislative body which are in *pari materia*, because "it is supposed that there has been no change in the legislative intent and purpose," unless it is manifested by some change of language. Sutherland, Stat. Constr. § 283. But this is a rule of construction, merely, and does not constitute each act a part of every other act on the same subject. Laws which are said to be in *pari materia* are parts of a common system or policy, but are not one and the same law. Counsel press that rule of construction with force and earnestness, stopping little short of the logical conclusion that an unconstitutional provision in one of many laws on the same subject would destroy all of those laws.

Appellees attack the law of 1899 upon the ground that it makes the accused testify against himself. The eighth section of the act of 1899 (Laws 1899, p. 248, c. 146) prescribes the form of affidavit which must be required of corporations by the Secretary of State, and provides as follows: "And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, such failure shall be prima facie proof that such incorporated company is transacting business in the state of Texas, and has violated the provisions of this act, every day after the expiration of the thirty days from the mailing of said letter of inquiry." It is unnecessary for us to determine the question presented as to the validity of the clause of law above quoted, for if it be granted that it does require the corporation to testify against itself, in violation of section 10, art. 1, of the Constitution of this state, still the obnoxious provision may be eliminated from the statute, and the remaining provisions would be sufficient to accomplish the general purpose that the Legislature had in its enactment. Therefore the law would not fall with the unconstitutional provision above quoted. Treating of the effect of an unconstitutional part of a law upon the whole act, Mr. Cooley says: "In any such case the portion which conflicts with the Constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional because it is not within the scope of legislative authority. It may either propose to accomplish something prohibited by the Constitution, or to accomplish some lawful and even

state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the Legislature, and being in form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

It is also contended by appellees that the act of 1899 is unconstitutional and void because it imposes upon persons who may violate its provisions excessive and unreasonable penalties, in violation of section 13, art. 1, of the Constitution, which provides that "excessive bail shall not be required nor excessive fines imposed nor cruel nor unusual punishment inflicted." Prescribing fines and other punishments which may be imposed upon violators of the law is a matter peculiarly within the power and discretion of the Legislature, and courts have no right to control or restrain that discretion, except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind. Am. & Eng. Ency. Law, vol. 13, p. 60; Express Co. v. Commonwealth, 92 Va. 66, 22 S. E. 809, 41 L. R. A. 436. In the case cited the court said: "The imposition and regulations of fines belong to the Legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be fixed with reference to the object they are designed to accomplish. * * * What is to be the legislative guide in performance of its duty, but its sound judgment and the wisdom of experience? And how can courts with reason or propriety question the action of the Legislature or control or restrain its discretion, except where the minimum penalty is so plainly disproportioned to the offense or act for the violation of which it is affixed as to shock the sense of mankind." There is a wide range for the discretion of the jury between the minimum and the maximum penalties fixed by this act, and we are not able to say that the minimum penalty inflict-

we conclude and answer that the law of 1899 known as the "Anti-Trust Law" is not unconstitutional.

POLLARD v. STATE.

(Court of Criminal Appeals of Texas. April 29, 1903.)

MURDER — APPEAL — BILL OF EXCEPTIONS — FAILURE TO FILE IN TERM TIME — INSTRUCTIONS — MANSLAUGHTER — PROVOKING DIFFICULTY — SUDDEN PASSION — ADEQUATE CAUSE.

1. Failure to file a bill of exceptions in a criminal case until after term time was not cured by an agreement between the attorneys stating that the bills of exceptions were to have been filed in term time, and the failure to do so was due to an oversight of the clerk, and that the prosecuting attorney agreed to the filing of the bills when filed.

2. The court is authorized to overrule a motion for a new trial without having the same read, when informed that it is on the ground of error in charges given and refused.

3. In a prosecution for murder it appeared that deceased had a difficulty with defendant's father the day before the killing, and that defendant and his brother went to see deceased, both being armed, and, on finding deceased in his field, accosted him, whereupon deceased advanced towards defendant and his brother without answering, making a demonstration as if to draw a pistol. *Held*, that a charge on manslaughter was not required by the evidence.

4. Where, in a prosecution for murder the court had charged that defendant would be guilty of murder in the second degree if he shot deceased in a sudden transport of passion, aroused without adequate cause, etc., it was error not to give a charge on manslaughter defining adequate cause.

5. In a prosecution for murder it appeared that deceased had had a difficulty with defendant's father on the day before the killing, and that defendant and his brother, learning of this, went to see deceased, and, on finding him, spoke to him, whereupon deceased, without replying, advanced towards them, making a motion as if to draw a pistol, and defendant and his brother both fired, killing deceased. *Held*, that a charge on provoking the difficulty was without support in the evidence.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

W. H. Pollard was convicted of murder, and appeals. Reversed.

S. A. Crawford and Jno. C. Williams, for appellant. S. A. McCall, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years.

The evidence, in effect, shows that deceased, Spencer Davis, and Littleton Pollard, the father of appellant, had a difficulty on Monday, February 18, 1901, in which Littleton was worsted. Appellant and his brother, Washington Pollard, were at Willis, several miles distant, but, having heard of the transaction that evening, they came on horseback

to their father's house and remained there a short time, and went a short distance to their grandfather's, Isaac Pollard's, and stayed all night. Early the next morning appellant and his brother, Washington, both armed, went to where deceased was working in his field, and, as he approached where they were, leading two horses, the difficulty occurred. As far as the state's testimony was concerned, there was no eyewitness to the homicide. The state evidently relied upon the fact that appellant and his brother entertained a grudge against deceased because he had beaten and severely injured their father on the day before, and the further fact that they armed themselves on that Tuesday morning, and went rapidly to the field of deceased, and, as soon as they reached the point where deceased was subsequently found, the shooting occurred. The parties then rapidly left the scene. Appellant himself testified that when he heard deceased had beaten his father he came to see about it, and, after staying all night at his grandfather's, he determined to go and see deceased in regard to it; that he went on foot, and did not expect his brother, Washington, to go with him; that he carried a pistol because he knew deceased was a dangerous man; that his brother, Washington, followed, and caught up with him, and he was armed with a shotgun. When his brother came up, he said, "I thought I told you to stay at home." However, they went together to the place of the homicide, and when they got down near the branch in the field where deceased farmed, they met deceased, who was riding one horse and leading another. Appellant said to him, "Hello, Spence, I want to talk to you about what you did to father." Deceased did not speak, but kept approaching, and attempted to draw his pistol with his left hand; that he and his brother both fired at deceased about the same time; that he missed deceased, but his brother killed him. When deceased's body was found, his pistol was on the ground near his lefthand. This is substantially the testimony adduced.

Appellant contends the court committed an error in overruling his motion for continuance. However, the bill of exceptions taken by appellant to the overruling of said motion was filed on February 5th, whereas the term of the court adjourned on January 28th. To cure this failure to file the bill in term time appellant has presented to this court an agreement entered into between the district attorney, representing the state, and counsel representing appellant, to the effect that certain bills of exception could be filed after term, and considered as filed during the term. The recitation on this point in the agreement is as follows: "It is agreed that the bills of exception in this cause were to have been filed as in term time, and they show that the reason why said bills of exceptions were not filed and dated in term time was due to an

oversight of the clerk of the court, and the district attorney here shows that he urged no objection, and agreed to the filing of the bills of exception at the time they were filed, and knows that it was understood that they should have been filed before the court adjourned." The wording of this agreement is peculiar, but we do not understand it to exonerate appellant's attorney for failing to file the bills during the term. We cannot consider the question as coming within that line of decisions which would authorize the bill to be considered though not filed during the term, on the ground that there was no laches on part of appellant or his counsel, and that the neglect to file the same was solely due to the clerk or some other officer. *Stanford v. State* (Tex. Cr. App.) 60 S. W. 253. This case comes rather within the rule laid down in the decisions of *Riojas v. State*, 36 Tex. Cr. R. 182, 36 S. W. 268; *Nichols v. State*, 37 Tex. Cr. R. 616, 40 S. W. 502. Accordingly, the action of the court overruling the motion for continuance cannot be considered.

What we have said as to this bill of exceptions disposes of appellant's first, second, and fourth bills, which are to the action of the court with reference to the admission of certain testimony. As explained by the court, there is nothing in appellant's bill of exceptions No. 3. The court was authorized to overrule the motion for new trial and in arrest of judgment, when informed that the same was merely to the action of the court giving and refusing charges, and it was not necessary to have the same read.

In appellant's motion for new trial he questions the action of the court in regard to giving certain charges. Amongst other things, appellant strongly insists that the court should have given a charge on manslaughter predicated on the fact that deceased on the day before assaulted the father of appellant, and severely beat him; and the further fact that appellant knew deceased was a dangerous man, and had previously threatened his and his brother's life, and that at the time of the homicide he came suddenly and unexpectedly upon deceased on a lonely road; that when he accosted deceased he refused to speak to them; and that he then asked deceased for an explanation of his assault upon their father, and he refused to give any explanation, but advanced upon them, and made a demonstration as if to draw a pistol. This is a substantial summary of the facts on which appellant contends that the court should have given a charge on manslaughter. We have examined the record carefully, and, in our opinion, the facts do not show manslaughter. The fact that deceased refused to speak to appellant when accosted, and that he refused to give any explanation as to why he had assaulted defendant's father on the day before, would not constitute provocation, under our statute, sufficient to reduce the offense to manslaughter. If it is true, according to appellant's testimony, that

deceased advanced upon him in a threatening attitude, and made a demonstration as if to draw a pistol, this gave appellant the full right of self-defense; and he had the benefit of this in the court's charge. But, in our opinion, it did not raise the issue of manslaughter, and the court did not err in refusing and failing to submit this issue to the jury.

In this connection appellant insists that under the peculiar phraseology of the court's charge on murder in the second degree it became necessary for the court to have defined manslaughter. The court's charge in this respect is as follows: "If you believe from the evidence beyond a reasonable doubt that defendant, with a gun, or instrument reasonably calculated and likely to produce death, * * * in a sudden transport of passion, aroused without adequate cause, and not in defense of himself or Washington Pollard against an unlawful attack, * * * shot and killed deceased, to find him guilty of murder in the second degree;" the contention being that, the court having stated that the transport of passion must be without adequate cause, it became necessary for the court to state what would constitute adequate cause, so that the jury might know that the sudden passion was engendered without adequate cause. It would seem, from the authorities cited by appellant, that this contention is sound. *Whitaker v. State*, 12 Tex. App. 443; *Brunet v. State*, Id. 534; *Neyland v. State*, 13 Tex. App. 547. In the latter case Judge White, speaking for the court, said: "It is only necessary for the court to charge on manslaughter when that phase of the case is raised from the evidence; and it is not necessary, where there is no manslaughter, but only murder, for the court to define manslaughter." In speaking of the two cases above cited, which were invoked, he further says: "In both of those cases the charge given, in effect, made implied malice, or murder of the second degree, actually depend upon the absence of facts and circumstances sufficient to reduce the offense to manslaughter or negligent homicide, or which would excuse or justify the killing. This, as we have seen, is not a proper charge to be given where a lower grade is not involved. If it be given, however, when not demanded, we do not see how the jury is to understand and comprehend it unless the lower grades mentioned are explained, with the law governing them." In accordance with the above cases, we hold that, inasmuch as the court, in its charge on murder in the second degree, made it depend on a transport of passion aroused without adequate cause, then it became necessary for the court to further define adequate cause. The court might have submitted a charge on murder in the second degree without involving the question of manslaughter, but this was not done here. Indeed, the court, in submitting the question of murder in the second degree,

did not require the homicide to be committed upon malice at all, but authorized the jury, if they believed appellant killed deceased in a sudden transport of passion, without adequate cause, and not in self-defense or in defense of his brother, to find him guilty of murder in the second degree. Of course, in order that a homicide be murder in the second degree, it must be upon malice; and, if the court had properly defined implied malice, without involving it with the question of adequate cause, he might then have submitted the issue of murder in the second degree without a definition of adequate cause, as it appertains to manslaughter.

Appellant also assigns as error the action of the court charging on provoking the difficulty. He maintains that there is nothing in the statement of facts authorizing a charge on this subject. We have repeatedly held that a charge on provocation should only be given where the testimony raises this issue. The testimony on this point, it occurs to us, simply involves the question as to who made the first attack, and does not raise the issue of provoking the difficulty. If, when appellant met deceased, he made the first demonstration, and was in the attitude of attacking deceased, then he would be guilty. If, on the other hand, when the parties met, deceased first attacked appellant, and appellant only acted in his self-defense, then he would not be guilty. As stated, we do not believe that the court was authorized to give a charge on provocation. *McCandless v. State* (Tex. Cr. App.) 57 S. W. 672; *Casner v. State*, 62 S. W. 914, 2 Tex. Ct. Rep. 559.

We have examined the other portions of the court's charge which are criticised, and would suggest that on another trial, if the facts should be the same, the court should instruct on the doctrine of principals, and how far appellant would be bound by the acts and conduct of his brother, Washington. Besides, there are some clerical errors in the charge which should be corrected.

For the errors discussed, the judgment is reversed, and the cause remanded.

BLOCKER v. STATE.

(Court of Criminal Appeals of Texas. April 29, 1903.)

RAILROADS — OBSTRUCTIONS ON TRACK — INDICTMENT—EVIDENCE—SUFFICIENCY.

1. Where an indictment charges a defendant with willfully and maliciously placing obstructions on the track of a particular railroad company, naming it, this becomes descriptive of the track, and must be proved as alleged.

Appeal from District Court, Limestone County; L. B. Cobb, Judge.

Fulton Blocker was convicted of crime, and appeals. Reversed.

Kimbell & Harper and Wm. Kennedy, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of willfully and maliciously placing an obstruction, to wit, a large piece of iron, upon the track of the Houston & Texas Central Railroad, and his punishment assessed at two years' confinement in the reformatory.

In order to constitute this offense as charged, it must not only appear that appellant placed the obstruction, such as endangered life, upon the railroad track, but when the indictment, as in this instance, charges that said obstruction was placed on the track of the Houston & Texas Central Railroad, this becomes descriptive of the track, and must be proved as alleged. A careful examination of the testimony before us shows this was not done, unless by inference. The following is an excerpt from the testimony on this matter: Witness Beard testified: "I am in the employ of the H. & T. C. Railroad Co. as a detective. My business is to ferret out the guilty persons in cases like this. I worked up this case in conjunction with the sheriff of this county. I made no offer of money to any person, nor paid any person money, to testify or to furnish evidence in this case." C. S. Bradley testified: "I am local attorney for the H. & T. C. Railroad Co.; do not know the man Smith" (the record shows that Smith had been to see the father of defendant about obstructions being placed on the railroad). We apprehend that the obstructions, if placed upon the railroad track, were upon the Houston & Texas Central Railroad, but this is only inferentially stated, and we cannot indulge in inferences as to statements of facts.

Because the evidence does not correspond with the allegations of the indictment, the judgment is reversed and the cause remanded.

STONE v. STATE.

(Court of Criminal Appeals of Texas. April 29, 1903.)

RAPE—INSTRUCTIONS—EVIDENCE—AGE OF PROSECUTRIX.

1. Where in a prosecution for rape there was evidence of many acts of intercourse between defendant and the girl, covering many months, and the state was required to elect on which act it would rely, and elected to rely on the first full act of intercourse happening at a particular schoolhouse, the jury should have been restricted to a consideration of this act alone, and not to any act occurring within 12 months at such schoolhouse, whether it was the first or any subsequent act.

2. On the issue as to the age of the prosecuting witness in a prosecution for rape, a fly leaf torn from a notebook, on which her father had written down in pencil the date of her birth, was not admissible as original testimony, where the father and mother were both present and testified in the case.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Ernest Stone was convicted of rape, and appeals. Reversed.

Anderson & Anderson and Jack Beall, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

The evidence introduced covered a period of several months, and many acts occurring between appellant and the girl. There was a serious contention as to the age of the girl, with the preponderance of the evidence, as we view the record, decidedly in favor of the conclusion that she was over 15 years of age at the time of the alleged rape. The language of the alleged ravished girl and her sister show them to be women of the most abandoned order. Their deportment, manner of narrating the events, and their conduct, glorying in their own shame, was better worthy, or perhaps unworthy, of inmates of the brothel, than that of respectable women whose honor and virtue were to be upheld by the punishment of a rapist.

As stated, the transaction covered several months of time and many acts, which went before the jury without objection. Motion was made to require the state to elect upon which transaction it would ask conviction. This was partially granted; that is, the state elected "the first full act of intercourse happening at Dunn's schoolhouse, as shown by the testimony of Annie Heury," the alleged injured female. There is some confusion in the testimony in regard to when this full act of intercourse happened at Dunn's schoolhouse, as testified by Annie Heury. The state should have been required to select some specific act as to time and place. In this connection, the court charged the jury: "If they believe from the evidence before them, beyond a reasonable doubt, that the defendant, Earnest Stone, did, in the county of Ellis and state of Texas, and in Dunn's schoolhouse, at any time within one year previous to the filing of the indictment herein—January 14, 1903—penetrate the female organ of Annie Heury, with the male member of his, defendant's body, and did have carnal knowledge of the person of Annie Heury, either with or without her consent, or with or without the use of force, threats, or fraud, and that it was the first time he, defendant, had carnal knowledge of the person of Annie Heury in Dunn's schoolhouse, if he had such; and if you further believe from the evidence, beyond a reasonable doubt, that at the time defendant Earnest Stone had such carnal knowledge of the person of Annie Heury, if he did, that she, the said Annie Heury, was under the age of 15 years, and was not the wife of defendant—then it would be the duty of the jury to find defendant guilty as charged," etc. In this connection the court further charged the jury: "That the state, upon motion of defendant, has been required to elect and state upon

what particular act of unlawful carnal intercourse, if any, which defendant may have had with Annie Heury, it relies for a conviction; and the counsel for the state have made such election, and they insist and charge that defendant did have carnal knowledge of the person of Annie Heury in Dunn's schoolhouse, in Ellis county, Tex., several times; and they further elect to rely upon the first act of unlawful carnal intercourse, if it was committed, which they charge defendant had with Annie Heury in Dunn's schoolhouse (if he had such an unlawful intercourse with Annie Heury at such place); and the jury are further instructed that the state is bound by such election, and cannot find defendant guilty of rape on account of his having carnal knowledge of the person of Annie Heury, if he had such, at any other time and place than the alleged offense at Dunn's schoolhouse charged to have been committed by defendant, and elected by the state's counsel, and relied upon by them to convict defendant." The same objections are urged to these charges: First, that they are contradictory one with the other; second, that they do not submit the act of intercourse elected by the state, which was "the first full act of intercourse happening at Dunn's schoolhouse, as shown by the testimony of Annie Heury" and by her sister; and they vary in their testimony as to when these acts occurred, and the circumstances under which they occurred. The evidence is somewhat in conflict, so far as these witnesses are concerned, as to which was the first act, and when it occurred. If the election was valid, the state had selected a particular act, and that act was the first act happening at Dunn's schoolhouse, as testified by Annie Heury. The jury should have been restricted to the consideration of this act alone, and not any act occurring within 12 months at Dunn's schoolhouse, whether it was the first or any other subsequent act, if it was not the particular act fixed by the testimony of Annie Heury as the first act. To meet this weakness in the charge, appellant asked a special charge submitting pertinently the very question which was refused by the court; and this is urged as error. The court's charge was wrong, and it was error to refuse the special instructions requested, submitting this issue sharply and pointedly as set forth by said special charge.

During the trial, the state's witness, Louis Heury, the father of the injured female, testified in regard to the age of his two daughters, and became somewhat confused, his memory being anything but distinct and clear as to their ages. In this attitude of his testimony, he was permitted to introduce before the jury a leaf torn from a notebook or butcher's book, on which was written in ink the ages of two of his children, while the names of the others, including the two daughters in question, were written in pencil, in the following language: "Goldie, born 30

December, '86. Annie Heury, born Oct. 25, 1888." This instrument was finally admitted before the jury as evidence, without objection. Subsequently, and after the argument, appellant presented a written charge asking the court to withdraw this instrument from the consideration of the jury. As presented, we believe this testimony should have been withdrawn. It was not original testimony. It could not serve the purpose of being the act or declaration of the father, who testified that he made the entries, because he was present and testified in the case. *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67. The mother also testified, and, so far as the record discloses, this memorandum went before the jury as original testimony. We do not believe it was admissible as original testimony under the circumstances above stated. It did not seem to be admitted as corroborative of the testimony of the father. It is therefore unnecessary to discuss the question from that standpoint.

There are some questions suggested for revision with reference to the argument of counsel. We deem it unnecessary to enter into a discussion of these matters, as they ought not, and perhaps will not, occur on another trial, and would hardly arise in the same way again.

Because of the confusion and uncertainty of the election by the state of the act on which it relied for conviction, and because of the failure of the court in its charge to specify the act as elected by the state, and the refusal of the court to charge the jury as requested by appellant in regard to this matter, the judgment is reversed and the cause remanded.

BARNARD v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—ADVERSE WITNESS—IMPEACHMENT—EVIDENCE—MOTIVE—RELATIONSHIP OF PARTIES—OPINION—OBJECTION TO EVIDENCE—MOTION TO STRIKE—REQUEST FOR CHARGE—NECESSITY.

1. Under Code Cr. Proc. 1895, art. 795, providing that a party may attack the testimony of his own witness in any manner, except by proving the witness' bad character, when facts stated by the witness are injurious to his cause, where prosecutrix in a prosecution for assault with intent to murder testified that the shooting was accidental, and admitted that she had testified before the grand jury that defendant shot her intentionally and during a difficulty with reference to another, it was error for the court to permit the introduction of her testimony before the grand jury to the effect that prosecutrix was unmarried, but was being kept by F., and that defendant shot her by reason of defendant's jealousy of F.'s attentions.

2. Where, in a prosecution for assault with intent to kill, it was shown that both defendant and prosecutrix lived on F.'s farm, and worked for him, and that the assault was occasioned by defendant's jealousy of prosecutrix, arising from F.'s attentions to her, evidence that F. whipped people on the farm, and made them do as he pleased, was inadmissible

to show a motive for the assault, or to show the relationship which defendant bore to F. or to prosecutrix.

3. In a prosecution for assault, the opinion of a witness, after having described the position of the furniture in the room where prosecutrix was shot by defendant, that such shooting could not have been accidental, was incompetent.

4. Failure of the defendant to request that objectionable testimony be stricken out, or that the court charge thereon, did not deprive her of the right to complain of its admission.

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Lydia Barnard was convicted of assault with intent to murder, and she appeals. Reversed.

Kinard & Goodman and John E. Crawford, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to murder, and her punishment assessed at confinement in the penitentiary for a term of two years.

The record shows that appellant is a white woman, and that she made an assault upon a negress. By the third bill of exception, complaint is made that Millie Jackson was asked the following questions: "Are you a married woman?" To which she answered, "No." "How many children have you?" To which she answered, "Four." "What is the color of those children? Aren't they mulattoes?" To which she answered, "They are bright-colored." "Millie, who is the father of your children?" To which she answered, "I do not know." "Don't you know that Joe Fulton is the father of your children?" To which she answered, "I don't know." "Didn't you swear before the grand jury that Joe Fulton had been keeping you for fifteen years, and that he was the father of your children?" To which she replied, "I said it up there because I was scared. You had been pulling me around and threatened to put me in jail." To which questions and the answers defendant objected, which objections were overruled. State's counsel then called for the grand jury statement as made by witness, and was permitted to read said testimony of Millie Jackson, which contained, among other things, the following: "Fulton has been keeping me for the past fifteen years, and he is the father of my four children." To which defendant objected because said questions and answers related to no issue in the case, were upon an immaterial matter, entirely foreign to any issue; that by the introduction of the written testimony he was attempting to impeach his own witness upon immaterial matters, no way connected with the case, and which tended only to show bad character of Millie Jackson, and was calculated to prejudice and poison the minds of the jury against defendant. To this bill is appended the following explanation: "Witness had been shown to be hostile to the state, and testified upon the stand that she had

shot herself accidentally, and then the state was permitted to ask if she didn't testify as follows before the grand jury: 'Millie Jackson, being sworn, says: She was standing in her house last summer, about September, 1902, when Mrs. Barnard "came to my house with a gun and said she would kill me, and asked me what I was following Mr. Fulton for down at the well, and if I did not stay away from him she would fix me up. I was in the house, talking to her. I told her she had no right to shoot me about Fulton; that he was as much mine as he was hers. I was standing upon the floor with my hands down, had nothing in my hands and was doing nothing to her, was not trying to fight her, was not making any demonstration toward her, when she shot me. She brought the gun from her house, and took it back with her. I never had the gun at my house. When she shot me, she ran off with the gun towards home. When I met Fulton, and told him Mrs. Barnard had shot me, I did not tell him that it was an accident. I did not tell him that the gun fell down and shot me. He asked me why I let her shoot me, and I told him I could not help myself, and he said it was awful bad, and I said I was going to make her pay for it. He said he would just let it alone, and not have anything to do with it; that it was just one of Mrs. Barnard's crazy spells. My girl, Lillie May, was present when I was shot, and I sent her to tell Mrs. Fulton that I was shot, and that Mrs. Barnard had shot me. Fulton has been keeping me for the past fifteen years, and he is the father of my four children,"' etc.

The rule in reference to this question is clearly expressed in *Blake v. State*, 38 Tex. Cr. R. 385, 43 S. W. 107, from which we quote as follows: "Article 795 of the Code of Criminal Procedure of 1895 provides: 'The rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness.' At common law this could not be done unless the party was surprised by the testimony of his witness, or unless the party had been misled by a witness, and, when put upon the stand, testified, not in his favor, but against him. Our statute does not provide or require that the party must be surprised; but it is clear that, if the testimony of his witness is injurious to him, he can attack his testimony in any method other than proof of bad character. We are not to be understood as holding that where the party introduces a witness, knowing that the witness is going to testify against him, and without any reason to believe that the witness will testify in his favor, we would reverse the judgment because the party, under such state of facts, was deprived of the right of impeaching the witness by proof of contradictory statement. But in this case this witness, Stella McKen-

zie, had testified in the Harbolt Case. She had sworn to facts which, if true, established an alibi for the defendant. Now, the defendant had a right to believe that she would not perjure herself by swearing to facts in conflict with those already testified to; and this, although she may have told him that she would so testify. It frequently occurs that a witness will deny knowing anything about a fact or case, making an effort not to be used as a witness, but, when placed upon the stand and sworn, tells the truth. Was appellant surprised? Being informed that she had deliberately sworn to facts sustaining his alibi, would he not have been surprised if she had sworn otherwise—especially to facts and circumstances disproving his alibi? We are of opinion that the court erred in not permitting this witness to be impeached." Now, reverting to the bill of exceptions under consideration, it appears from this and a previous bill, which we do not deem necessary to set out, that, at the time the state placed the witness on the stand, it had been apprised of the fact—perhaps, by her own statement—that she would swear that defendant shot her; and, after placing her on the stand and being sworn, under the Blake Case, *supra*, the prosecuting attorney could presume that, having previously sworn in behalf of the state, she would still so swear, although she may have told state's counsel that she would not. However, the bill of exceptions before us shows that the witness did not deny making the statement imputed to her before the grand jury, but, on the contrary, with the utmost alacrity, admitted having done so. Then, for what purpose could this testimony have been introduced? We can conceive of none, except, as appellant insists, to prejudice her rights; that is, as a criminative fact against appellant, tending to show that she fired the shot at prosecuting witness and wounded her. This testimony was not admissible for that purpose. It is a well-known rule that, if a witness on cross-examination admits having made a contradictory statement to that to which she is then testifying, such admission is absolutely conclusive, and cannot be proved in the face of her admissions.

The state's witness Joe Fulton, while on the stand, was asked by the district attorney the following questions, over appellant's objections, to which witness replied, as stated: "How many acres of land do you own? A. 380 acres, mostly in cultivation. Don't Millie Jackson live on your place? A. Yes; she lives between my house and Mrs. Barnard's. How many children has she? A. Four. Don't Mrs. Lydia Barnard live on your place? A. Yes. Don't you whip people out there, and make them do as you please? A. They are free people. I don't whip and control them. What is the color of Millie Jackson's children? A. They are bright color." Appellant excepted to the asking of the questions, be-

cause illegal, irrelevant, and inadmissible; that said questions were remote and entirely foreign to any issue in the trial of Lydia Barnard for assault with intent to murder Millie Jackson; for the reason the same tended to couple defendant with witness Joe Fulton in the management of his affairs on his farm, and to develop illicit acts by and between state's witness Joe Fulton and Millie Jackson, and was thereby calculated to prejudice the rights of defendant before the jury. The court appends the following explanation: "It was shown that Joe Fulton was hostile to the state, and that witness Millie Jackson was under the influence of said witness, and also to show the condition on Fulton's farm, and the relation of the women to Fulton, to show the motive for the alleged assault." Of course, it is always permissible to prove motive for an assault, though frequently it is not necessary. It was also proper to show the condition of Fulton's farm, and the relation of the women to Fulton. But we do not understand this testimony comes within either of these rules. That Fulton whipped people on his farm would not indicate any motive on the part of appellant to shoot prosecuting witness, nor would it indicate the relationship appellant bore to witness or to prosecuting witness. We do not think this testimony was admissible.

The fifth bill complains of the introduction of the testimony of state's witness J. B. Dunn. This witness makes a long statement as to the condition and relative position of the bed, gun, and gun rack, and the hole in the wall where prosecuting witness had alleged the gun fell and was accidentally discharged. However, the proof shows that the bed and other furniture were not in the same positions they were at the time prosecuting witness Millie Jackson claims to have been accidentally shot. This would merely go to the weight of the testimony, and not to its admissibility. This bill also shows that witness was permitted to state that, in his opinion, Millie Jackson could not have been shot accidentally in the manner testified by her. This was the issue to be tried by the jury, and the opinion of the witness would not be testimony. He can state the relative position of the furniture, gun rack, location of the house, and other matters, and then leave the jury to draw conclusions legitimately from the testimony. The opinion of the witness should not have been admitted.

The sixth bill complains of the introduction of Sims, who testified substantially as did Dunn, and also gave his opinion as to whether Millie Jackson could have been accidentally shot in the manner she claimed. The court states in his explanation to the bill: "Defendant did not ask to have the testimony stricken out, and did not request a charge upon same." This would not deprive appellant of the right to complain by bill and on motion for new trial of the admissibility

of the illegal testimony. It was clearly inadmissible for the witness to give his opinion as indicated.

The judgment is reversed, and the cause remanded.

BLACKWELL v. STATE.*

(Court of Criminal Appeals of Texas. March 25, 1903.)

BURGLARY—EVIDENCE—SUFFICIENCY—OWNERSHIP OF PROPERTY—TEMPORARY OWNERSHIP—NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVIT OF JUROR.

1. An affidavit of a juror in a criminal case that there was some discussion among the jurors as to the evidence of a witness, and that he agreed to a verdict because he understood such witness to testify to a certain effect, does not show misconduct of the jury.

2. Affidavits of jurors are not admissible to show upon what ground they found their verdict.

3. In a prosecution for burglary, evidence held sufficient to sustain a conviction.

4. In a prosecution for burglary, evidence showing that the party occupying the house burglarized was the one alleged in the indictment, and the stolen property was left in his possession pending transportation to another state, was sufficient to show temporary ownership, or actual control and management of the property.

5. Temporary ownership or actual care and control of stolen property constitutes ownership in the sense used in an indictment for burglary.

Appeal from District Court, Montague County; D. E. Barrett, Judge.

J. S. Blackwell was convicted of burglary, and appeals. Affirmed.

Foshee & March and W. S. Jameson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and given two years in the penitentiary.

The affidavit of the juror S. A. McCarley is appended to the motion for new trial, stating, in effect, that there was some discussion among the jurors as to the evidence of the witness Russell in regard to appellant's connection with breaking into the house alleged to have been burglarized, and that he agreed to the verdict because he understood said Russell to testify, in effect, that he saw defendant open a door sufficiently to enable him (appellant) to enter, and then shut the door behind him, and, owing to this fact, he swears he agreed to the verdict. It will be noticed that this is not misconduct of the jury, but simply a contention as to the effect of Russell's testimony. This is not a legal reason for granting a new trial. Affidavits of jurors are not admissible to show upon what ground they found the verdict. *Christian v. State* (Tex. Cr. App.) 21 S. W. 252;

*Rehearing denied April 29, 1903.

† 2. See Criminal Law, vol. 15, Cent. Dig. §§ 2392, 2393.

Weatherford v. State, 31 Tex. Cr. App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

The other matters set up for reversal are based upon the supposed insufficiency of the evidence to justify the verdict. Russell testified to facts, and he is corroborated by other testimony, which fully sustains the verdict. Appellant was seen by him, in connection with another party, at the burglarized store. Appellant opened the door and stepped inside. A light was seen in the house just afterwards, and property was taken therefrom. Appellant was seen with the same kind of property during the evening subsequent to the burglary. Appellant also borrowed a gimlet just prior to the burglary. The barrel from which the whisky was taken was bored by a gimlet, and thus the whisky extracted from the barrel. This evidence is sufficient.

It is also insisted there is a variance between the alleged ownership and that proved. The ownership of the house and possession of the stolen property was alleged in the party who was shown to have been occupying the house, and the whisky was left in his possession until it could be transported from Montague county into the Indian Territory, and it so remained in his possession until such transportation was secured and the whisky removed. We are of opinion the testimony is sufficient to show temporary ownership, or actual care, control, and management of the property, which constitutes ownership in this character of case; and there was no variance.

The judgment is affirmed.

WESLEY v. STATE.

(Court of Criminal Appeals of Texas. April 15, 1903.)

THEFT—INDICTMENT—SUFFICIENCY—VARIANCE.

1. An indictment for theft charging generally that the property was taken without the consent of the owners (a partnership) is sufficient, and need not specifically negative the consent of each owner.

2. An indictment for theft charged that the property belonged to M. and another. The proof showed that there were two, M.'s and that the M. intended was M. "Jr.," Held no variance.

Appeal from McLennan County Court; G. B. Gerald, Judge.

E. Wesley, alias Antony West, was convicted of theft, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for theft, the penalty assessed being one year's confinement in the county jail.

The indictment is questioned by motion in arrest of judgment because it does not sufficiently negative the consent of the owners. It is charged that the ownership was in the firm of McMullen & Marshall, consisting of T. N. McMullen and Ned Marshall. The

proof shows there were two T. N. McMullens, and the McMullen mentioned in the indictment under the evidence was "Jr.," and that by reason of this fact there is a variance; and also that the general allegation that the property was taken without the consent of the owners is not sufficient; that the indictment should have specifically negatived the consent of each owner. The indictment is sufficient with reference to the allegation of want of consent of the owners. *Williams v. State*, 19 Tex. App. 276. There is no variance by reason of the fact that the alleged owner was "Jr.," and not "Sr." *Windom v. State*, 6 Tex. Ct. Rep. 908, 72 S. W. 193.

With reference to those matters which pertain to the facts or grow out of supposed errors committed by the court in the charge, the evidence cannot be considered. The statement of facts is in the same condition as in *Hess v. State*, 30 Tex. Cr. App. 437, 17 S. W. 1099. And see, also, *Morse v. State*, 39 Tex. Cr. App. 568, 47 S. W. 645, 50 S. W. 342; *Wilson v. State*, 34 Tex. Cr. App. 355, 32 S. W. 529.

As the record is presented, no error is shown, and the judgment is affirmed.

HOLLAR v. STATE.

(Court of Criminal Appeals of Texas April 15, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW — CRIMINAL PROSECUTION — COMPLAINT — SUFFICIENCY — EVIDENCE — TESTIMONY OF DISTINCT OFFENSE — PURPOSE — INSTRUCTIONS—WRIGHT OF EVIDENCE—TRIAL—ABSENCE OF CLERK—ARREST OF JUDGMENT—WAIVER OF OBJECTIONS.

1. A complaint for violating the local option law, which was made on the 26th of March, 1902, and alleged that the offense was committed on the 26th of March, 1902, although it does not state "theretofore" on said day, is good.

2. On a prosecution for violating the local option law, an objection made in arrest, after conviction, that the information did not state on what day it was filed, was made too late.

3. On a prosecution for violation of the local option law, it was shown that the county clerk and deputy county clerk were absent at the time of trial, and a person who had previously been appointed deputy clerk, and to whom a commission had been issued, was sent for and acted as deputy clerk. There was no evidence of a revocation of such person's appointment or resignation, although she had not acted for over a year. *Held*, that an objection that there was no county or deputy county clerk in attendance on court was not well taken.

4. A complaint for a violation of the local option law, alleging that an election took place on the 15th of October, 1901, and that such local option law passed and became a law, and that thereafter, on the 26th of March, 1902, defendant unlawfully sold, etc., one bottle of whisky, sufficiently shows that the local option law was in force in the county at the time of the commission of the offense.

5. In a prosecution for violating the local option law, the testimony of the state was circumstantial, and defendant denied that there was a sale, or that any money was paid in the transaction. The sale alleged was of a round-about character; the money passed through several hands, and the whisky was delivered

to the prosecutor in the same manner. *Held*, evidence of other sales conducted in the same manner was admissible to show the system of defendant, and that money was paid for liquor disposed of in that way.

6. In a prosecution for violating the local option law, an instruction that the state had sought to introduce evidence "tending to show" other and different sales of intoxicating liquor than the one alleged in the information was error, as being on the weight of the evidence.

7. In a prosecution for violating the local option law, it was error to permit bottles of whisky to be exhibited to the jury which were not identified as the same bottles as those bought from defendant.

Appeal from Eastland County Court; John R. Stubblefield, Judge.

D. F. Hollar was convicted of violating the local option law, and appeals. Reversed.

W. E. Conner and J. J. Butts, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100 and 60 days' confinement in the county jail.

Appellant filed a motion in arrest of judgment, on the ground that the complaint did not show that the offense was committed prior to the swearing thereto, and also that the information was not filed. From the complaint it appears that it was made and sworn to on the 26th of March, 1902, and that it alleged the offense was committed on the 26th of March, 1902, without stating "theretofore" on said date. The information does not contain any file mark, and is said to have been among the papers of the case at the trial. It has been held that a complaint of this character was good (*Williams v. State*, 17 Tex. App. 521) though the contrary has been held with reference to an information (*Wilson v. State*, 15 Tex. App. 150). But we can see no reason for the difference, and yet we do not feel inclined to overrule the decisions. The information alleges that the offense was committed "heretofore," which is sufficient, if it was filed on the 26th of March, the date the affidavit was filed, which we will presume was the case. If an objection had been made to the information prior to going into the trial or at the time thereof, and the state had declined to have the same filed, a different question would arise. Where the objection is made after the conviction, as here, it is too late to raise the objection. *Jessel v. State* (Tex. Cr. App.) 57 S. W. 826; *Will Taylor v. State* (decided at present term) 72 S. W. 181.

Appellant also set up what he terms a "plea to the jurisdiction of the court" to try him, because he alleges there was no county or deputy county clerk in attendance on the court. It was proven that the county clerk, Cox, and June Kimbell, deputy county clerk, were absent in Dallas at the time this trial came on. When the question was raised, it appears that Miss Maude Gray, who had been appointed deputy county clerk in No-

vember, 1900, and acted up to and during the January term, 1901, and to whom a commission had been issued at the time of her appointment, was sent for, and came into court and acted as deputy clerk. The insistence is that she had abandoned the office of deputy clerk, and was not authorized to act. There is no evidence of the revocation of her appointment or of any resignation on her part. It does not occur to us that the objection to her acting as deputy county clerk was well taken.

Appellant objected to the introduction of certain records, being the records of the county court of Eastland county, on the ground that the same did not come from the proper custody. This is but another form of raising an objection to Miss Maude Gray acting as deputy clerk, which we have already disposed of.

Appellant also insists that the complaint does not show that the local option law was in force in Eastland county at the time of the commission of the offense. We do not think this objection well taken. The complaint alleges the requisites of local option being in force; that the election took place on the 15th of October, 1901; and further alleges it passed and became a law, and that thereafter, on the 26th of March, 1902, appellant unlawfully sold, etc., one bottle of whisky.

Objection is urged to the court permitting state's witnesses Thomas and Alexander to testify to other and different sales of intoxicating liquors made by defendant than that with which he was charged. The objection urged to this testimony was that the same was immaterial and irrelevant, and calculated to prejudice the jury against defendant. We have examined the testimony as contained in the statement of facts, and it occurs to us that it was competent in order to meet an issue made by defendant. The testimony on the part of the state to prove the sale was of a circumstantial character, and defendant denied that there was a sale, or that any money was paid in the transaction. The sale itself was of a circumlocutory character—that is, prosecutor, Thomas, is shown to have given Ward 50 cents to purchase two bottles of whisky, and that Ward took a circuitous route, going to the house of one Isom; Isom then went to Susie Geeter; Susie Geeter went to the residence of Hollar, who lived a short distance, and came back through her own house, and delivered the whisky to Ward, who subsequently delivered it to Thomas. The sales proven were conducted in much the same way, and in one of said sales the witness testified to following a party at night, and seeing the money paid. This testimony, it occurs to us, was admissible for the purpose of showing system in conducting his business and making the sales of liquor, and also to show that money was paid for liquor disposed of in that way. *Pitner v. State* (Tex. Cr. App.) 39 S. W. 662;

Walker v. State (Dallas Term, 1903) 72 S. W. 861; *Underhill*, Crim. Ev. § 91.

The court gave a charge on this subject, as follows: "The state has sought to introduce evidence tending to show other and different sales of intoxicating liquor than the one alleged in the information to have been made to Susie Geeter. If such evidence has been introduced, you are instructed that it was permitted to be introduced for the sole and only purpose of showing the course of business—if defendant was following any business—of the defendant with reference to the sale of intoxicating liquor, and as having a bearing on the question as to whether or not defendant made the sale of the intoxicating liquor charged in the indictment, and you will consider such evidence, if any such evidence was introduced, for no other purpose than those herein stated." The objection made is that said charge is on the weight of testimony, inasmuch as the jury were told that the state had sought to introduce evidence "tending to show," etc., other and different sales. The charge of the court in this case is not exactly like some of the charges which have been held by this court to be upon the weight of testimony, yet it occurs to us that the charge is objectionable on that ground. *Santee v. State* (Tex. Cr. App.) 37 S. W. 436.

Appellant also insists that said testimony was admissible alone for the purpose of showing intent in the sale. We do not understand this to be the doctrine. The testimony was evidently introduced for the purpose of showing a system, and as tending to show that money was paid; and in our opinion the court correctly informed the jury that they could consider this testimony for such purpose only.

Appellant also assigns as error the action of the court with reference to the admission of certain bottles of whisky, and their exhibition before the jury and inspection by them. These bottles of whisky were not identified as being the same bottles bought from the defendant, and the testimony in regard to them and their introduction should not have been admitted.

For the errors pointed out, the judgment is reversed, and the cause remanded.

STALING v. STATE

(Court of Criminal Appeals of Texas. April 15, 1903.)

CRIMINAL LAW—APPEAL—SUFFICIENCY OF EVIDENCE—ABSENCE OF STATEMENT OF FACTS.

1. Where there is no statement of facts, the sufficiency of evidence to support a conviction cannot be reviewed.

Appeal from McLennan County Court; G. B. Gerald, Judge.

W. H. Staling was convicted of a misdemeanor, and appeals. Affirmed.

HENDERSON, J. Appellant was convicted of a misdemeanor, and prosecutes this appeal. There is no statement of facts in the record. The only bill of exceptions in the record raises the question as to the insufficiency of the evidence. In the absence of the facts, of course, this cannot be considered.

There being no errors in the record, the judgment is affirmed.

STUART v. STATE.

(Court of Criminal Appeals of Texas. April 15, 1903.)

CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—FILING—EVIDENCE.

1. A statement of facts will not be considered on appeal when it was not filed until five days after term, and no ten-day order allowing such filing appears.

2. The sufficiency of evidence to sustain a conviction cannot be considered on appeal in the absence of a statement of facts.

Appeal from Limestone County Court; James Kimbrell, Judge.

J. W. Stuart was convicted of violating the local option law, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The term of court at which appellant was convicted adjourned on March 14, 1903, and the statement of facts was filed on March 19, 1903. Inasmuch as the statement of facts was filed after term time, and no 10-day order appears in the record permitting such filing, the same cannot be considered. The motion for new trial insists that the evidence is not sufficient to support the conviction, which contention cannot be reviewed in the condition of the record. The indictment is in good form, and, no error appearing in the record, the judgment is affirmed.

BOTTOMS v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

VIOLATION OF LOCAL OPTION LAW—EVIDENCE.

1. A conviction for violation of the local option law cannot be sustained where the evidence does not show that the local option law was in force in the county where the conviction was had.

Appeal from Jack County Court; R. S. Blair, Judge.

W. F. Bottoms was convicted of violating the local option law, and appeals. Reversed.

State.

DAVIDSON, P. J. This is a conviction for violating the local option law. The indictment is in the usual form. The statement of facts was filed after the adjournment of the term, without an order appearing of record authorizing such filing. The case was tried by the court without the intervention of a jury. There are no bills of exceptions. No error appearing, the judgment is affirmed.

On Rehearing.

(April 29, 1903.)

At the recent Dallas term, the judgment herein was affirmed, without reference to the statement of facts, which was filed after term time, without an order having been entered for that purpose. On motion for rehearing it is made satisfactorily to appear to this court that the transcript was deficient, and that, in fact, the order allowing 10 days in which to file statement of facts after the adjournment of the court was made and entered. The motion for rehearing is granted, and the judgment must be reversed, because the statement of facts does not show that the local option law was in effect in Jack county, this conviction being for a violation of said law. There is not the slightest allusion in the statement of facts indicating that the law was in force, much less evidence of that fact. The judgment is reversed and the cause remanded.

BOTTOMS v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

VIOLATION OF LOCAL OPTION LAW—EVIDENCE.

1. A conviction for violation of the local option law cannot be sustained where the evidence does not show that the local option law was in force in the county where the conviction was had.

Appeal from Jack County Court; R. S. Blair, Judge.

W. F. Bottoms was convicted of violating the local option law, and appeals. Reversed.

Nicholson & Fitzgerald, for appellee.
Howard Martin, Asst. Atty. Gen., for State.

HENDERSON, J. Appellant was convicted of violating the local option law, punishment assessed at a fine of \$25, and 20 days' confinement in the county jail. This appeal.

There is no bill of exceptions. The statement of facts was filed after adjournment of the term of court, and the record does not contain any order authorizing the statement of facts.

after the adjournment of the term. We have examined the assignments of error, and, in the absence of the facts, they fail to point out any reversible error. The judgment is affirmed.

On Rehearing.

(April 29, 1903.)

The judgment was affirmed at the Dallas term, the statement of facts not having been considered, because filed after adjournment of the term. On motion for rehearing it is made to appear that an order allowing 10 days after the adjournment of the term to file statement of facts was properly entered. Upon an inspection of the evidence adduced on the trial, the judgment must be reversed, because it fails to show that local option was in force in Jack county, this trial and conviction being had for violating the local option law. Therefore the motion for rehearing is granted, and the judgment is accordingly reversed and the cause remanded.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. April 15, 1903.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—INSTRUCTIONS—ACCIDENTAL SHOOTING—ABSENCE OF WITNESS—CONTINUANCE—HARMLESS ERROR.

1. In a prosecution for assault with intent to kill, defendant moved for a continuance because of the absence of a witness by whom defendant expected to prove that, prior to the assault, defendant had been taking large doses of a medicine, which the absent witness would testify rendered defendant temporarily insane. The application did not show that witness was an expert, nor state any conduct on the part of defendant to which the witness might have testified as a nonexpert on the question of defendant's insanity. Neither did it appear that the witness was with defendant shortly before the shooting, so that he might testify as to defendant's condition of mind at that time. A witness for defendant testified as to the composition of the medicine in question, and it otherwise appeared that he had been taking the mixture for several days prior to the assault. *Held*, that the motion for a continuance was properly overruled.

2. In a prosecution for assault with intent to murder, it appeared that defendant and his wife lived unhappily together, and that she left home because he ordered her to do so, and that when he went after her, and she refused to return home with him, he shot her, there was no evidence requiring a charge on aggravated assault.

3. In a prosecution for assault with intent to kill, error in giving a charge on insanity not justified by the evidence was not prejudicial to defendant.

Appeal from District Court, Burleson County; Ed R. Sinks, Judge.

Dave Wilson was convicted of assault with intent to murder, and appeals. Affirmed.

Davis & Hale, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and his pun-

ishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The proof shows that the alleged assault was made by appellant on his wife; that they were not living happily together; that on the morning of the shooting they had a quarrel, and he told her to leave their home, and she did so. Subsequently he went to the house where she had gone, and insisted on her returning home. He started a quarrel with her there because she refused. She left the house, going in the opposite direction from their home. He accompanied her some distance, until they got to a creek or branch. In the meantime he was quarreling at her, and insisting on her going home. She refused. Just as they got to the edge of the branch, appellant grabbed prosecutrix by the shoulder and whirled her around, and, as she fell against him, he shot her in the breast, and then left her. She afterwards got up and went to the neighbor's house, where she had been stopping. There is also evidence in the case tending to show that shortly afterwards he met one of the witnesses, and told her that he had killed his wife. Subsequently, when he learned that she was not dead, he went to the house where she was, and insisted on seeing her, so that he could "finish her up." This was refused, and he then shot himself. This is substantially the testimony for the state. Some testimony was introduced by the defendant which tends to show that a few days previous he had been taking a drink composed of hemlock and tanic acid, and his wife testified that he looked strange out of his eyes on the morning of the shooting, and he was quarreling with her at their home. An expert witness testified that a mixture containing 50 per cent. extract of hemlock bark would be a very powerful and dangerous narcotic; a man who took such a mixture for two or three days in any considerable doses, if it did not kill him, would be practically delirious and irresponsible; it would affect the mind powerfully. This witness further testified that the effect of tanic acid on hemlock was to neutralize to some extent the effect of the latter, though to what extent he could not say. This was, in effect, all the testimony introduced by appellant, except that he proved by his wife that she did not believe defendant meant to shoot or kill her.

When the case was called for trial, the state announced "Ready," and appellant interposed a motion for continuance based on the absence of Amos Smith and J. S. Baker. Smith was present, and, of course, he is eliminated from the application. The diligence as to Baker was sufficient. Appellant stated he expected to prove by said witness that, for two or three days prior to the shooting of Jennie Wilson by defendant, he had been taking as a medicine large doses of a mixture of tanic acid and other substances unknown to defendant, but which are known to witness Baker, and that from the effect

in the application that said Baker was an expert. The application does not show any acts or conduct on the part of appellant to which said witness would testify on which he might predicate testimony as a nonexpert on the question of appellant's insanity. Nor does the application show that said witness was with appellant shortly before or at the time of the shooting, so that he might testify as to appellant's condition of mind at that time. The application would seem to be insufficient on this ground. In addition to this witness, Smith was present; and he testified that the mixture in question was composed of hemlock bark, about 50 per cent., and 40 per cent. or 50 per cent. of tannic acid, and some other ingredient. His wife testified that he had been taking the mixture for two or three days, and we do not understand that this matter was controverted by the state. Therefore we do not believe the court erred in overruling the application for continuance, or in refusing a new trial based on the court's action overruling said motion. *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773

Appellant also complains because the court failed to charge on aggravated assault; that is, he contends that the evidence suggested an accidental shooting by appellant, and that the court, instead of giving a charge to acquit, based on such accident, should have given a charge on aggravated assault. We have examined the record carefully, and, in our opinion, there is nothing to indicate that the pistol was fired accidentally. As stated previously, the parties (appellant and his wife) did not live happily together, but were continuously fussing and quarrelling. She left home on this account, and because she was ordered to do so by appellant. He subsequently went after her, and was endeavoring to get her to go home, which she refused, and he caught her, turned her around, and shot her, and then he left her for dead. There is no suggestion in this, so far as we discover, that he did not intend to do what he did, or that said pistol was fired by any character of accident.

We would observe that, while the court charged on insanity, we see nothing in the case to have authorized a charge on this subject. From the testimony, appellant's conduct appears to have been actuated by malice, such as is too often seen in difficulties between man and wife, in which no suggestion of insanity is apparent. He acted from a motive. While his wife says that in the morning he looked strange out of his eyes, there is no testimony which shows that at the time he was laboring under any species of insanity. Nor is there any testimony as to his conduct subsequently, except the fact that he shot himself when he was refused permission to enter the room where his wife was. We fail to see any insanity in the case. However, the court gave appellant the benefit of a

There being no error in the record, the judgment is affirmed.

vs. The State 54.

BISMARCK v. STATE.

(Court of Criminal Appeals of Texas. April 15, 1903.)

RECEIVING STOLEN PROPERTY—ABSENT WITNESS—CONTINUANCE—MATERIALITY OF TESTIMONY—CORROBORATION—ACCOMPLICE—DISQUALIFICATION OF JUDGE.

1. When a criminal case was called, the district attorney suggested that he would file a motion to dismiss on the ground that the offense was not sufficient to authorize a conviction, whereupon the trial judge, not in the presence of the jury, but in private conversation with the district attorney, the clerk, and counsel for accused, stated that he thought he was disqualified to enter any order, because he knew that the defendant was a liar and a perjurer. *Held*, that such remark did not disqualify the judge from trying the cause, although it was improper, and would cause a more rigid scrutiny of alleged errors.

2. On a prosecution for receiving stolen goods, defendant moved for a continuance because of the absence of a witness by whom he expected to prove the possession of a letter which had been written by the one who sold the goods to defendant, and who was the principal witness for the state, and which letter was written in jail, and sent out to one other than defendant, and which demanded the payment of a certain sum by persons including defendant, and contained a threat that in case of refusal the writer "intended to give them away." *Held*, that the testimony was material, as going to the credit of the one who sold the goods.

3. It was no answer to the proposition that the contents of the letter were proven by other witnesses, where such witnesses did not remember that defendant's name was among those of whom money was demanded.

4. It appeared that defendant had caused a subpoena to issue for a witness on November 3d, which was served, and on November 29th another subpoena was issued, commanding him to bring with him a certain letter; and, on disobedience of such subpoena, attachment was issued on the 6th of December, returnable on the 9th—the day set for trial—but at the time of trial the process had not been returned, and the witness was not there. On October 2d a subpoena was issued by the state for the witness, which was served November 1st, another was issued by the state for him on November 15th, but was not served; it stated that the witness was in Oklahoma. That proper diligence was shown.

5. On a prosecution for receiving stolen property, the proof on the part of the state showed the sale of the goods was made to defendant, who was the state's main witness. 8 o'clock in the morning, at the town and E. testified that he took the goods from defendant according to a prearrangement. Defendant had moved for a continuance of the absence of a witness, who, if called, would testify that he saw E. to sell the goods at the town of 8 o'clock in the morning. *Held*, that testimony of the absent witness would not controvert the testimony of the other, have shown that the goods were the due course of trade.

6. On a prosecution for receiving stolen property, which had been stolen on the

state was permitted to show two other thefts committed on the 10th and 18th days of July, and that defendant was present at the commission of such thefts, and in one of them received the goods in a wagon, and in the other was there for the purpose of receiving them. *Held* that, if such evidence was intended to show guilty intent in receiving the goods involved in the charge, it was inadmissible, because not taken from the same person as charged in the indictment, and not a part of the same transaction, and so removed in point of time as to form different transactions.

7. Where one had charge of a store belonging to another, with full authority to sell goods out of it, and to receive money therefor, and to draw checks, and carried the key, and knew the combination of the safe, he was not a mere servant; and hence an entry of the store by him, and taking therefrom of goods, could not amount to a theft, but was a mere breach of trust.

8. On a prosecution for receiving stolen goods, where the testimony was conflicting as to the amount of goods taken, and some of it tended to show an amount not sufficient to constitute a felony, the court should have charged on misdemeanor.

9. On a prosecution for receiving stolen goods, the evidence relied on as corroborative of an accomplice was to the effect that accused had stated that the one who sold him the goods told him that a friend was about to break up in business, and that he was selling the goods cheap, but that accused stated that he did not believe the statement when it was made to him. *Held*, that such evidence did not amount to a corroboration of the testimony of the accomplice.

Appeal from District Court, Travis County; N. A. Rector, Judge.

H. Bismarck was convicted of receiving stolen property, and he appeals. Reversed.

Hart & Kemp, Moore & Moore, and Walton & Walton, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of receiving stolen property, knowing the same to have been so acquired, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant made a motion to require the judge to recuse himself on the ground that he was prejudiced against defendant. The motion shows that, when the case was called, the district attorney suggested that he would file a motion to dismiss the case on the ground that the evidence was not sufficient to authorize the conviction. At this juncture the motion shows the judge to have stated that he thought he was disqualified to enter any order in said case, because he knew defendant to be a liar and perjurer. The judge, in his qualification to the bill, says that he made some such remark when he thought the case would be dismissed; that he made it in view of his knowledge of the defendant, and his testimony in a former trial in a civil suit in which he had acted as counsel; that said statement was not made in the presence of the jury, but in private conversation between the judge, district attorney, appellant's counsel, and the district

clerk; that the remarks were of a jocular character, and without any knowledge of the facts in the case at bar. After this the district attorney stated he had discovered that he could corroborate the accomplice, and would not dismiss the case. While the remarks in question, under the circumstances, were not proper, and should not have been made, yet, as was held in *Gaines v. State*, 38 Tex. Cr. App. 202, 42 S. W. 385, said remarks did not disqualify the judge from trying said cause. Such remarks, emanating from a judge, will cause a closer and more rigid scrutiny of the errors complained of.

Appellant made a motion to continue the case, based on the absence of three witnesses, to wit, George S. Walton, John Kennerly, and W. C. Puckett; the first two alleged to be residents of Travis county, and the latter formerly a resident of said county, but that he had changed his residence, and his present abode was unknown. It appears: That defendant caused a subpoena to issue for George S. Walton on November 3, 1902, which was served. Subsequently, on November 29th, appellant caused another subpoena to issue to said Walton, commanding him to bring with him a certain note which had been written by Charles Edwards, state's witness, to certain parties named in said application. On disobedience of said subpoena, it appears, attachment was issued on the 6th day of December to Jefferson county for said witness, returnable on December 9th, the day the case was set for trial. At the time of trial said process had not been returned, and witness was not in attendance on the court at the trial. On October 29th a subpoena was issued by the state for said witness Puckett to Travis county, which was served on November 1st. That another subpoena was issued by the state for said witness November 15th, but same was not served; it being stated that witness was in Oklahoma. On December 6th the state issued process for Kennerly, which was served, and said witness was not in attendance on the court. Appellant relied on the state's process for the two last-named witnesses. Appellant says he expected to prove by witness Walton the possession of a certain letter or note which was written and sent out of jail by Charles Edwards to one H. Joseph, an Assyrian. Said letter demanded the payment of \$250 by certain Assyrians, including appellant. In case of refusal, Edwards proposed to give them away, etc. It occurs to us, under the circumstances of this case, that this was material testimony, as going to the credit of the witness Edwards; and, inasmuch as the application shows that demands were made of others for payment of money, it was no answer to the proposition that the contents of said letter were permitted to be proven by other witnesses. The witness was not certain that Bismarck's name was in the letter. It also occurs to us that the testimony of Puckett was material.

On the part of the state the proof showed that the sale of the goods was made to appellant by Edwards in the town of Manor, some 15 miles from Austin, about 8 o'clock in the morning; and by Puckett it was proposed to be shown that he saw Edwards at Manor, endeavoring to sell goods to other parties, about 11 o'clock on said day. This testimony would directly controvert the testimony of the state's main witness, and would furthermore tend to show that appellant bought the goods in due course of trade, inasmuch as Edwards was endeavoring to sell the goods to other parties, whereas Edwards' testimony shows that he took the goods to appellant early in the morning, and disposed of them to him as prearranged between them. It does not occur to us that the testimony of the witness Kennerly is material, but the testimony of the other two witnesses was material, and the diligence used appears to have been sufficient.

The state was permitted to prove over appellant's objections two other cases of burglary and theft from another party, to wit, George Cryser, who had a store in the city of Austin—both subsequent to the alleged burglary and theft in this case. The indictment alleges and the proof shows that the offense here charged, if committed, occurred on the 1st of July. The other two offenses admitted in evidence occurred on the 10th and 18th days of July. In every case of receiving stolen property, it is incumbent on the state to establish two propositions: First, that the property was stolen; and, second, that the party charged with receiving the same did so with guilty intent; and all evidence tending to prove either of these propositions is admissible. As to these subsequent offenses, it does not occur to us that it was any part of the *res gestæ* of the offense charged against appellant, or any part of a system showing that Edwards, because he committed said subsequent thefts, committed the theft in question. The bill shows that appellant was present at the commission of the two subsequent thefts, and evidently participated therein; that is, it shows he remained in the alley at the time said theft was being committed, and in one of said thefts received the goods in a wagon, and in the other was there for the purpose of receiving the goods, but Edwards was detected and arrested before the completion of the theft. If by this it was intended to introduce evidence for the purpose of showing guilty intent of appellant in receiving the goods charged to have been burglarized in this case, it occurs to us it is too remote. Mr. Wharton, in his work on *Crim. Evidence*, § 44, says: "Guilty knowledge being the gist of the offense of receiving stolen goods, receptions about the same time of other goods of the same character, stolen from the same person or persons connected with him, may be put in evidence on the trial of an alleged

receiver; but the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions." In this case the goods were not taken from the same person charged in the indictment, or persons connected with him; and, moreover, they were no part of the same transaction, but subsequent thereto, and were so removed in point of time as to form different transactions. Accordingly the testimony was not admissible.

Appellant insists that, if the evidence shows any offense was committed by Edwards, it was not theft on his part, but embezzlement, inasmuch as, according to his testimony, Angelo Franzetti, who participated with him in the offense, had full custody of the store, he having the key thereto, and the goods being at the time in his possession. On this subject the proof shows, without any controversy, that Angelo Franzetti was the brother of Carlo Franzetti, who was the owner of the store, and that Angelo had as full management and control of the store, and as full authority to dispose of the goods, as Carlo, the owner. It has been held in a number of cases (and this is the received doctrine) that temporary custody, as of a servant, is not a bailment, and that the taking by such servant is theft, and not embezzlement. See *Livingston v. State*, 38 Tex. Cr. App. 535, 43 S. W. 1008; *Roeder v. State* (Tex. Cr. App.) 45 S. W. 570. However, it occurs to us that the case at bar, in its facts, goes much farther, as to the management and control of the said store and goods, than either of the cases cited. Carlo Franzetti, the owner, testified that his brother Angelo worked for him as a clerk, and had full authority to sell goods out of said store, and to receive the money therefor, and slept in the rear room of the store; that he had authority to draw checks, and knew the combination of the safe. However, he says that if Carlo went in with Edwards to take the goods at night, sell them, and divide the proceeds, as testified by witness Edwards, he acted without his authority and consent. Of course, Angelo was not entitled to the possession of said goods as against Carlo, the owner, but he seems to have had as much control of the store as his brother. He was more than a mere servant. He was intrusted with the management and control of the store and goods. And being in possession, his disposition of them, if he disposed of them as testified by the witness Edwards, was a breach of his trust as a bailee of said goods, and not a theft of the same. Consequently appellant could not be convicted in this case of receiving stolen property.

It is also contended that the state failed to prove the receipt by appellant of a sufficient amount of goods charged in the indictment to constitute a felony. The record shows some confusion on this point, and the

court should certainly have submitted a charge on misdemeanor, in view of the testimony.

It is further strongly urged that the proof is not sufficient to sustain a conviction because there is no evidence tending to corroborate the accomplice. We would remark, in view of the contradictory testimony of the accomplice, and his impeachment, if there ever was a case in which the strict rule of law with reference to corroboration should be applied, this is such a case; and, in our opinion, the evidence of corroboration is not sufficient. True, appellant, according to the testimony of Meredith, a state's witness, while he was in jail, and after he had been warned, stated that he bought from Edwards, at his store, in Manor, the goods charged in the indictment, and paid him \$40 for the same; that Edwards brought them in a buggy, and told him that a friend of his was about to break in Austin, and he was selling them cheap. However, when he was asked if he believed the statement of Edwards, appellant said "No." Now, he may not have believed the statement of Edwards, but it does not occur to us that this simple reply would be evidence sufficient to show guilty knowledge that the goods were stolen property. He may not have believed the statement of Edwards, and yet this would not imply guilty knowledge on his part that the goods were acquired by theft. And from our examination of the record, this is all the testimony bearing on this question of corroboration.

Appellant raises other questions, but we do not deem it necessary to discuss them. For the errors pointed out, the judgment is reversed and the cause remanded.

RACER v. STATE.*

(Court of Criminal Appeals of Texas. March 25, 1903.)

LOCAL OPTION — ORDER OF ELECTION — ABSENCE OF COUNTY JUDGE — EFFECT — TRANSFER OF INDICTMENT.

1. A local option law was not invalid because the county judge was not present at the opening day of the term of the commissioners' court which ordered the election; Sayles' Rev. Civ. St. arts. 1533, 1534, providing that such court is authorized to transact its business whenever there is a quorum present which consists of three members.

2. It was not error to transfer an indictment from the district court to the county court at the term of the district court at which the presentment occurred.

3. An order of the commissioners' court prohibiting the sale of intoxicants was sufficient, though it did not contain the statutory exceptions.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Walter Racer was convicted of violating the local option law, and appeals. Affirmed.

F. G. Thurmond, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

*Rehearing denied April 29, 1903.

DAVIDSON, P. J. This is a local option conviction. The indictment is criticised. We deem it unnecessary to go into a discussion of the questions involved in the criticism, because indictments practically the same as this have been so frequently before the court and approved. Key v. State, 38 S. W. 773; Dollins v. State, 38 S. W. 775; English v. State, 38 S. W. 778; Zollicoffer v. State, 38 S. W. 775; Williams v. State, 39 S. W. 664; Hall v. State, 39 S. W. 117; Williams v. State, 70 S. W. 213, 5 Tex. Ct. Rep. 911; Brown v. State, 39 S. W. 578.

The validity of the law is attacked because on Monday, the opening day of the term of the commissioners' court which ordered the election, it was not presided over by the county judge; that is, he was absent. This is wholly immaterial. A county commissioners' court is authorized to transact its business whenever there is a quorum present, and this consists of three members. Sayles' Rev. Civ. St. arts. 1533, 1534. In this connection it may be further stated that the court did not err in refusing to permit appellant to prove the absence of the county judge on the day on which the commissioners' court convened.

Nor was there any error in overruling appellant's contention that the indictment could not be transferred from the district court to the county court at the term of said district court at which the presentment occurred. Williams v. State (Tex. Cr. App.) 39 S. W. 664.

Appellant contends that the order of the commissioners' court prohibiting the sale of intoxicants should contain the statutory exceptions. The order is sufficient without containing these exceptions. Zollicoffer v. State (Tex. Cr. App.) 38 S. W. 775.

The judgment is affirmed.

MORGAN v. STATE.*

(Court of Criminal Appeals of Texas. March 25, 1903.)

INDICTMENT—SUFFICIENCY—DESCRIPTION OF ACCUSED.

1. An indictment of "one Morgan, whose given name is to the grand jury unknown," is not defective for insufficient description of accused.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

One Morgan was convicted of violating the local option law, and he appeals. Affirmed.

F. G. Thurmond, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law. This case has the same questions involved as those in cause No. 2,736, Racer v. State (just decided) supra, with the further contention that

*Rehearing denied April 29, 1903.

¶ 1. See Indictment and Information, vol. 37, Cent. Dig. §§ 216, 217.

the description of defendant, as contained in the indictment, is not sufficiently accurate. The indictment presents that one Morgan, whose given name is to the grand jury unknown, etc. The contention is that there should have been a more accurate description. This question was fully discussed in *Wilcox v. State*, 35 Tex. Cr. R. 631, 34 S. W. 958, and the authorities fully reviewed, where a similar indictment was upheld. This case is identical with the *Wilcox Case*, supra.

The judgment is affirmed.

FLOYD v. STATE.

(Court of Criminal Appeals of Texas. April 15, 1903.)

APPEAL—DEFECTIVE RECOGNIZANCE—DISMISSAL.

1. The appeal in a criminal case will be dismissed if the recognizance does not state the amount of the punishment assessed against the defendant as required by Code Cr. Proc. 1895, art. 887.

Appeal from Wharton County Court; G. S. Gordon, Judge.

Mary Floyd was convicted of crime, and appeals. Appeal dismissed.

M. D. Ivey, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General moves to dismiss this appeal on the ground that the recognizance is defective, and does not comply with article 887, Code Cr. Proc. 1895, since the same does not state the amount of the punishment assessed against appellant. This is a prerequisite to a valid recognizance. *May v. State*, 40 Tex. Cr. R. 196, 49 S. W. 402. The appeal is accordingly dismissed.

CHAPMAN v. HALLWOOD CASH REGISTER CO.*

(Court of Civil Appeals of Texas. April 4, 1903.)

CORPORATIONS — FOREIGN CORPORATIONS — RIGHT TO TRANSACT BUSINESS—PREREQUISITES—PLEADING—CONDITIONS PRECEDENT.

1. A corporation, being a mere creation of the local law, can have no legal existence beyond the sovereignty where created.

2. The recognition of the existence of a foreign corporation, and the enforcement of its contracts made within a state, depend purely on comity, which will not be extended when the existence or exercise of powers by such corporation is prejudicial to the interests or repugnant to the policy of the state.

3. Under Rev. St. arts. 745, 746, providing that foreign corporations for pecuniary profit except as thereafter provided, transacting business in the state, must file with the Secretary of State a certified copy of their articles of incorporation, and that no such corporation can maintain any action until it has so filed its articles of incorporation, a foreign corpora-

tion, on instituting suit on a contract made within the state, must allege in its petition a compliance with the provisions of the statute, or show that it is within one of the exceptions.

Error from Dallas County Court; E. S. Lauderdale, Judge.

Action by Hallwood Cash Register Company against J. G. Chapman. There was judgment for plaintiff, and defendant brings error. Reversed.

Henry & Henry, for plaintiff in error. Bell & Seay, for defendant in error.

BOOKHOUT, J. This suit was instituted by the Hallwood Cash Register Company against J. G. Chapman to recover the contract price for one cash register. The petition alleged, in substance, that the plaintiff is a corporation duly incorporated under the laws of the state of Ohio, and has an office in the city of Dallas, Dallas county, Tex., and that defendant is a citizen of Travis county, Tex.; that the defendant ordered and directed the plaintiff to ship to him one cash register, describing same, to be delivered f. o. b. cars at Austin, Tex., for which defendant agreed to pay \$220, as follows: \$25 cash on delivery of said cash register and \$15 each month until the balance was paid; and to execute his notes for such deferred payments, said notes to provide for interest and attorney's fees. It was further stipulated that all sums of money to be paid by defendant were to become due and payable at Dallas, Dallas county, Tex. It was alleged that the plaintiff shipped and delivered the said cash register as provided by the contract, but that defendant, though requested, had failed and refused to pay the \$25 cash and execute his notes for the deferred payments. Plaintiff prayed judgment for its debt, principal, interest, and attorney's fees. The defendant, having been duly cited, answered by general exception and general denial filed March 5, 1900. On the 16th day of June, 1902, a judgment was rendered for plaintiff for the amount claimed, the judgment reciting that defendant failed to appear and defend, although he had filed his answer. No motion for new trial or statement of facts was filed. On the 10th day of November, 1902, the defendant sued out a writ of error to this court.

It is contended by the plaintiff in error that the petition shows that the defendant in error was and is a foreign corporation incorporated under the laws of the state of Ohio, and that the petition failed to allege that at the time the contract sued upon was made, or at any time thereafter, plaintiff corporation had filed its articles of incorporation, as required by the statutes of the state of Texas, in the office of the Secretary of State, for the purpose of securing a permit to transact business in this state, or that defendant has such a permit, and for this reason it would not support a judgment. The corporation, being a mere creation of the local law, can have

*Rehearing denied April 25, 1903.

¶ 3. See Corporations, vol. 12, Cent. Dig. § 2647.

no legs' existence beyond the sovereignty where created. It must dwell in the place of its creation, and cannot migrate to another sovereignty. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274. The recognition of its existence by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states. The doctrine of comity will not be extended where the existence of the corporation or the exercise of its powers is prejudicial to the interests of the state or repugnant to its policy. As stated in the case of *Paul v. Virginia*, 8 Wall. 181, 19 L. Ed. 357: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interests. The whole matter rests in their discretion." The views expressed by the Supreme Court of the United States in the above case have been approved by this court and by the Supreme Court of the state. *Huffman v. Western Mortgage & Investment Co.*, 36 S. W. 306; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339. This state has, by statute, prescribed the terms upon which foreign corporations created for pecuniary profit may transact business in this state. The statute (article 745) provides that: "Any corporation for pecuniary profit except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state, shall be and the same is hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this state." By article 746, Rev. St. 1895, it is provided, in effect, that no such corporation can maintain any suit or action in any of the courts of this state unless it has filed its articles of incorporation in the office of the Secretary of State for the purpose of securing its permit. Our Supreme Court have held that this statute must be complied with, and that a foreign corporation must plead and prove that it has obtained a permit to entitle it to judgment in the courts of this state. *Taber v. Interstate Bldg. & Loan Co.*, 91 Tex. 92, 40 S. W. 954. It has been held by the Supreme Court of the United States that there are two exceptions to the right of a state to prescribe terms upon which a foreign cor-

poration shall be permitted to transact business therein—one being that the corporation is engaged in interstate commerce, and another where the corporation is in the employ of the general government. *Horn Silver Mining Co. v. New York*, 143 U. S. 314, 12 Sup. Ct. 403, 36 L. Ed. 164. A further exception is made by our statute in that it is stipulated that its provisions are not to apply to railway corporations. The statutory rule is that all foreign corporations created for pecuniary profit must file their articles of incorporation in the office of the Secretary of State and procure a permit to do business in this state. If for any reason a foreign corporation suing as plaintiff is excepted from the rule, it should set out the facts showing that it comes within one of the exceptions. *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Allen v. Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714. This the petition in this case does not do. It does not show that the transaction between the parties was interstate commerce. The petition shows that the plaintiff corporation has an office in Dallas, Dallas county, Tex., and that the consideration for the sale of the cash register was payable at its office in Dallas, Tex. We conclude that the petition did not entitle plaintiff to recover, and the action of the court in rendering judgment thereon in favor of plaintiff was fundamental error. *Taber v. Interstate Bldg. & Loan Co.*, supra.

In the case of *Lane & Bodley v. City Electric Light & Water Works Co.*, 72 S. W. 425, 6 Tex. Ct. Rep. 889, the petition on its face showed that the transaction was interstate commerce. In the case of *Brin v. Wachusett Shirt Co.* (Tex. Civ. App.) 43 S. W. 295, the petition was treated as showing that the transaction out of which the suit grew was interstate commerce. While there may be expressions in the opinions in those cases which seem to be in conflict with this case, yet, when the facts are considered, the holding in those cases is in line with this. The exact point here decided was not raised in those cases.

For the error indicated, the judgment is reversed, and the cause remanded.

LAMKIN v. MATSLER.

(Court of Civil Appeals of Texas. April 11, 1903.)

PUBLIC LANDS—SCHOOL LANDS—PURCHASE—SETTLEMENT—LAND OFFICE CERTIFICATE—ATTACK ON CERTIFICATE—SHOWING ABANDONMENT.

1. Rev. St. art. 4218j, relative to the sale of free public school lands, provides for the giving of a certificate of three years' continuous occupancy by the Commissioner of the General Land Office. *Held*, that where the Commissioner has not declared a forfeiture by reason of an abandonment of a settlement, and a certificate has been issued to the settler, a subsequent applicant cannot show the prior purchase forfeited by reason of an abandonment.

2. An actual settler, who has complied with the statute in an effort to purchase school

lands, may show that a previous award, made within less than three years from the date of his own application and settlement, was a nullity by reason of the fact that the prior applicant had not complied with the requirement as to actual settlement at the time of the application under which such prior award had been made, notwithstanding that a certificate of occupancy had been issued.

Appeal from District Court, Hale County; Jo A. P. Dickson, Judge.

Suit by M. A. Lamkin, Jr., against A. T. Matsler. From a judgment for defendant, plaintiff appeals. Reversed.

G. E. Hamilton, for appellant. R. P. Smythe and H. C. Randolph, for appellee.

CONNOR, C. J. The question presented on this appeal is whether a certificate of three years' continuous occupancy of state school land, issued by the Commissioner of the General Land Office in accordance with the terms of Rev. St. art. 4218j, will preclude inquiry as to whether such occupant was an actual settler at the time of his original application to purchase, and whether, if so, thereafter his right is forfeited by mere abandonment. The question arises under the following state of facts: The appellee applied to purchase the state school section of land involved in this controversy on the 13th day of May, 1899, and the land was awarded to him by the Commissioner of the General Land Office on May 16, 1899, and on July 11, 1902, the Commissioner of the General Land Office in due form issued certificate of appellee's continued occupancy for three years, as required by the article of the statute cited. Appellant, Lamkin, became an actual settler upon said section, and made due application, obligation, and first payment as required by law, causing his application and obligation to be filed in the General Land Office on April 22, 1902, and, an award to him being refused by the Commissioner on account of the previous sale to appellee (there existing no other legal objection thereto), appellant instituted this suit May 6, 1902, in trespass to try title. Upon the trial appellant offered evidence tending to show, among other things, that appellee was not an actual settler at the time of his application and award nor thereafter until a short time prior to the issuance of the certificate in May, 1902, which proof the court excluded because of the Commissioner's certificate. The court also, upon the facts stated that relate to appellee's title, peremptorily instructed the jury to return a verdict for him.

Appellee's purchase was under the act of 1895, as amended by the act of 1897, and the court's ruling, in so far as appellant sought to show that appellee's purchase had become forfeited by reason of an abandonment of the premises after his purchase, was correct, the Commissioner not having declared a forfeiture therefor. See *O'Keefe v. McPherson* (Civ. App.) 61 S. W. 534; *Bates v. Bratton*

(Sup.) 72 S. W. 157. We, however, think the court was in error in excluding the proof in so far as it tended to show that appellee was not an actual settler at the time of his purchase. With exception not applicable to the facts of this case, actual settlement has long been held to be a *sine qua non* in the acquisition of title to the public free school lands of this state. See Rev. St. art. 4218f; *Metzler v. Johnson*, 1 Tex. Civ. App. 137, 20 S. W. 1116; *Schwarz v. McCall* (Sup.) 57 S. W. 31; *Lee v. Green* (Civ. App.) 58 S. W. 196.

In the case of *Logan v. Curry*, 66 S. W. 81, we held, in effect, in an opinion by Justice Hunter, that the jurisdiction of the Commissioner of the General Land Office to pass upon the question of continued occupancy did not arise where it was shown that the applicant to whom the award was made was not an actual settler at the time of the award to him; and hence that a certificate of the kind now under consideration would not prevent a subsequent actual settler and applicant from proving, in aid of his own right, that the original award was a nullity by reason of the nonsettlement of the person to whom the award was made. In this ruling, however, our Supreme Court in the same case (69 S. W. 129) differed with us, holding that the issuance of the certificate was conclusive of this issue, and this opinion of the Supreme Court is invoked by appellee in aid of the ruling of the court below. We think, however, that the case of *Logan v. Curry*, by the Supreme Court, falls to support appellee's proposition. In that case it is clear that the right asserted by the subsequent applicant to purchase had its inception after proof of three consecutive years of actual occupancy under the original application and award, and after certificate of such fact had been issued by the Commissioner of the General Land Office. But in the case now before us it is uncontroverted that appellant made actual settlement and application to purchase the land in controversy, making payment and giving obligation in the form required by law less than three years from the date of appellee's application and settlement; if any, and we find nothing in the case of *Logan v. Curry* by the Supreme Court which requires us to extend the rule there announced. On the contrary, we think it is to be implied from the decision relied upon that there is nothing in our law that will prevent an actual settler who has complied with the statute in an effort to purchase school lands from showing that a previous award, made within less than three years from the date of his own application and settlement, was a nullity by reason of the fact that such prior applicant did not comply with the essential requirement of actual settlement at the time of the application under which such prior award had been made. We at least think that such should be the rule, and, until required to do so, are certainly not inclined to so extend the doctrine de-

clared by the Supreme Court in the case referred to as to prevent the application of the rule as we think it should be.

It is accordingly ordered that the judgment be reversed, and the cause remanded for a new trial in accord with the views herein expressed. Reversed and remanded.

SMYE v. GROESBECK et al.

(Court of Civil Appeals of Texas. Dec. 17, 1902.)

PRINCIPAL AND AGENT—REAL ESTATE BROKER'S COMMISSIONS—CONDITIONAL CONTRACT—NONCOMPLETION OF PURCHASE—MARKETABLE TITLE—OPINION OF ATTORNEY—EVIDENCE—CROSS-EXAMINATION—IMPEACHMENT.

1. When a broker produces a purchaser ready, able, and willing to buy upon the terms and at the price fixed by the seller, he has discharged his duty, and is entitled to his commissions, regardless of whether the sale is ever consummated or not, if the failure to consummate the trade is not the fault of the broker.

2. Where a principal told her broker that the title to property entrusted to him was good, she cannot evade payment of commissions to him by proof of a lien on the property.

3. A broker cannot be held responsible for a disagreement between the purchaser, secured by him, and his principal, as to title to the property.

4. Whether a real estate broker had secured a purchaser ready, able, and willing to take the property, so as to entitle him to a commission from his principal, by the execution of a contract with such purchaser conditioned that the abstract of title prove satisfactory to the purchaser's attorney, was a question for the jury.

5. Where a principal had expressly stated to his broker that her title to the property was perfect, evidence in an action by the broker for his commissions, of what the purchaser secured by him would have done had there been an incumbrance of several thousand dollars upon the property, was properly excluded.

6. On the issue of the amount at which a principal had listed her property with a broker, the principal denied on cross-examination that she had ever placed her property in the hands of other agents for sale at a certain price. The alleged agents were called to contradict her, and testified that the principal had listed the property with them at the price named. *Held*, that the testimony of the agents was inadmissible.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by J. N. Groesbeck and another against Mary Smye. From a judgment for plaintiffs, defendant appeals. Reversed.

J. A. Buckler, for appellant. Ball & Ingram, for appellees.

FLY, J. This is a suit brought by appellees for \$250 alleged to be due them by appellant as commissions on a sale of land made by them for appellant. The cause was tried by jury, and resulted in a verdict and judgment for \$225.

It is well settled that when a broker produces a purchaser ready, able, and willing to buy upon the terms and at the price fixed by the seller, he has discharged his duty, and is

entitled to his commissions, regardless of whether the sale is ever consummated or not, if the failure to consummate the trade is not the fault of the broker. *Gibson v. Gray* (Tex. Civ. App.) 43 S. W. 922. Appellees testified that appellant told them that her title was good, and she cannot evade payment of commissions by proof that there was a lien on the property. Mrs. Smye denied in her testimony that there was any incumbrance on the property, but, if there had been, she could not, by proof of such defect, defeat appellees' claim for commissions. *Sullivan v. Hampton* (Tex. Civ. App.) 32 S. W. 235. There was no disagreement between appellant and the intending purchaser in regard to the title, but, if there had been, appellees had performed their duty in getting the purchaser, and could not be responsible for any disagreement about the title. *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Berg v. Street Railway*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929. The contract entered into by appellees and the purchaser was as follows: "Deposited as earnest money on the purchase of Mrs. J. H. Smye's homestead No. 163 North street at \$5250.00 cash to be paid on delivery of her warranty deed, and conditioned that the abstract of title proves satisfactory to the attorney of Jesse Sumner. The abstract to be furnished in the next three or four days." It is contended by appellant that, as a matter of law, the contract was not one capable of being enforced, and had no binding effect on the purchaser, because the matter of title was left to the caprice of the attorney of the proposed purchaser. We are of the opinion that the question as to whether appellees had procured a purchaser ready, able, and willing to take the property was one of fact, which was properly submitted to the jury by the charge of the court. The court had no authority to assume that the attorney of the purchaser would act in an arbitrary and capricious manner, and reject a title that appellant swore was without spot or blemish.

In a similar case to this the Supreme Court of Pennsylvania said: "The brief memorandum of acceptance by the Fidelity Company contained the words, 'Opinion of J. C. Stillwell, Esq.' This does not necessarily mean anything more than the suggestion of Mr. Stillwell as counsel whose opinion should be obtained in the first instance. There is no provision that he is to be final arbiter in the matter, and such stipulation will not be understood as intended without express words to support it. But, even if he were made the arbiter, the question whether the plaintiff went outside of his authority in submitting the matter to him would depend on the nature of the objections raised against the title. The plaintiff had the right to stipulate that the title should be marketable in the opinion of counsel. If Mr. Stillwell's opinion required nothing more, then plaintiff did not exceed his authority. If, on the other hand,

¶ 1. See *Brokers*, vol. 2, Cent. Dig. §§ 75, 81.

Mr. Stillwell, through overcaution or excessive particularity, raised objections not sufficient to destroy the marketability of the title in the general opinion of the profession, and the refusal of the Fidelity Company to lend was based on those objections, then the plaintiff would be held to have failed to produce a willing customer, within the requirements of his contract with defendants. But these questions would be for the jury. From the foregoing it follows that the defendants failed to raise any defense which was sufficient to prevent the plaintiff's recovery as a conclusion of law, or to justify a blinding direction that he could not recover his commissions. He was entitled to go to the jury on the question whether he had completed his agreement by procuring a party able and willing to make the loan, and, if so, whether the loan finally failed through no fault of the plaintiff, but through defects in the title of defendants, which were sufficient, in the usual course of such business, to justify the proposed lender in declining to go on with the proposition." *Middleton v. Thompson* (Pa.) 29 Atl. 796.

In this case appellant never permitted the abstract of title to go before the attorney, but is seeking to justify a refusal to sell her property at a certain price on the ground that a trade was not made because an attorney had to be satisfied as to her title. When she employed a broker to sell her land, she impliedly warranted the title to it, and the broker was authorized by his employment to agree that the title should be such a one as was satisfactory to an attorney; and in the very nature of things it should be the attorney for the man who is to be satisfied as to the title. The agreement is one that is made expressly or impliedly in almost every contract of sale. *Brackenridge v. Claridge* (Tex. Sup.) 48 L. R. A. 593, and notes. If the circumstances of the case tended to show that the clause was inserted in the contract to furnish a loophole of escape for a man who did not intend to purchase, then appellees could not recover, because they had not procured a person ready, able, and willing to purchase; but if, on the other hand, the clause in the contract was inserted in good faith, merely to secure a good title, then appellees should recover. It was, therefore, a question of fact ascertainable by a jury, as to whether a purchaser had been procured by appellees.

It was not incumbent on appellees to procure a purchaser who would buy the property regardless of incumbrances, and the court very properly excluded testimony as to what the intending purchaser would have done if there had been an incumbrance of several thousand dollars resting upon it. Appellant had not only impliedly warranted the title to her property when she placed it in the hands of the broker, but had in terms told him her title was perfect, and the record

bears out her assertion that there was no incumbrance on it.

The charge submitted very fully the issues made by the pleading and proof, and the court properly refused to give the special instructions requested by appellant.

On the cross-examination of appellant she was asked if she had not placed her property in the hands of certain agents for sale at a certain price, and she denied that she had. Appellees then placed the agents upon the stand, and they were permitted to testify, over the objections of appellant, that she had listed the property with them at the price named. The evidence drawn out on cross-examination from appellant was immaterial and irrelevant to the issue, which was as to the amount she had asked for the land when she placed it in the hands of appellees for sale. The sum at which she had authorized other agents to sell her land did not throw any light on her transaction with appellees. The issue as to what had been done with other agents was a collateral one; and it is a rule that, if a party cross-examines in regard to such an issue, he is not at liberty to introduce evidence to the contrary, and cannot impeach upon such issue. Appellees doubtless had the right to cross-examine appellant as they did, but it was error to permit the introduction of testimony to contradict her on an immaterial matter brought out on the cross-examination. The testimony may have had great weight with the jury.

For the error indicated, the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

(April 29, 1903.)

On the motion for rehearing on the part of appellees our original decision reversing the judgment and remanding the cause was reconsidered, and the judgment affirmed. We are now convinced that action was error, and, for the reasons stated in the original opinion, the first action of the court was correct. *Railway v. Moore*, 24 Tex. Civ. App. 491, 59 S. W. 282.

The motion for rehearing is granted, and the second opinion of the court withdrawn, and the original opinion will be reinstated as the decision of this court.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. SPIVEY.*

(Court of Civil Appeals of Texas. April 4, 1903.)

INJURY TO SERVANT — DANGEROUS CONDITIONS — FAILURE TO GIVE WARNING — OBSTRUCTIONS NEAR RAILROAD TRACK.

1. Where a railroad company had knowledge that it was customary among call boys employed in its yards to ride on passing trains, and that certain scales were erected so near a track as

*Rehearing denied April 25, 1903.

to injure a person hanging on the side of a passing freight car, failure to warn a call boy of the danger of being injured by such scales was actionable negligence.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by Norman Spivey against St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins, Perkins & Craddock, and Crosby & Dinsmore, for appellant. Looney & Clark, for appellee.

TEMPLETON, J. Suit by Norman Spivey, a minor, by next friend, against the railway company, to recover damages for personal injuries. A jury trial resulted in a judgment for plaintiff for \$875.

It was alleged in the petition that the plaintiff, who is 18 years old, was employed as a call boy in and around the company's shops, yards, and depots at Commerce; that it was his duty to carry orders to employees of the company working in the said shops, yards, and depots; that one night he was sent by his boss to carry certain orders from the freight depot to the passenger depot; that a freight train was passing in that direction, and that he swung onto the side of one of the box cars thereof for the purpose of riding to his destination; that while he was so riding in said position his body came in contact with the upright portion of a set of the company's scales for weighing cars, whereby he was injured; that the scales were erected in such close proximity to the track as to endanger the safety of any one riding as he was, and that he did not know the fact; that he had not been warned of the said danger; that it was dark, and there was no light at or near the scales; that he was engaged in the performance of the duties of his position when he was injured; that it was customary for call boys and all other employees of the company at Commerce to swing onto passing engines and trains whenever it was convenient for them to do so in going from point to point in the yards in discharge of their duties; that the custom was known to and acquiesced in by the company, and that it facilitated the dispatch of the company's business for them to so ride on such engines and trains.

The petition stated a good cause of action. It is true, as contended by appellant, that, if it was necessary to erect the scales at the point where the same were placed, a charge of negligence could not be based on the proximity of the scales to the track. But as we understand the petition, the negligence charged against the company was in employing the boy at a business in which, in the course of the performance of the duties of his position, he would be exposed to danger, without warning him of the danger or taking the proper precautions to make it manifest. The boy was justified, under the custom alleged,

in riding on the train as he did, and if he did not know the danger of riding past the scales in the position he was in at the time, and had not been warned of the danger, negligence on the part of the company might be inferred.

The evidence was sufficient to sustain the allegations of the petition, and the issues were submitted to the jury in accordance with the theory above stated. We find no error in the judgment, and it will therefore be affirmed. Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. McDOWELL.*

(Court of Civil Appeals of Texas. April 4, 1903.)

INJURIES TO SERVANT—EVIDENCE—CHARGE—WEIGHT OF EVIDENCE—ASSUMPTION OF RISK.

1. In an action by a freight conductor against a railroad company for personal injuries, where plaintiff had testified as to the duties of a freight conductor, the character and extent of his injuries, and the effect of the same upon his eyesight and power of locomotion, evidence that he would not be strong enough to perform the duties of a freight conductor, and that he was not able to read and could not distinguish colors, was not objectionable as stating conclusions.

2. In an action by a freight conductor against a railroad company for personal injuries, the court charged that if, prior to the injury, it was the custom of defendant's conductors to sleep in their cabooses, as plaintiff was doing when injured, and the caboose was violently run into by an engine, and that such collision injured plaintiff, and that defendant's servants were guilty of negligence in striking plaintiff's caboose, and such negligence was the proximate cause of plaintiff's injury, and the plaintiff was not guilty of negligence, they should find for plaintiff. *Held* not erroneous, as on the weight of evidence.

3. A freight conductor, in sleeping in his caboose while awaiting orders in the freight yard, does not assume the risk of the caboose being negligently run into by switch engines, though such occurrences had taken place before.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by Lee McDowell against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Perkins & Craddock, for appellant. Looney & Clark, for appellee.

BOOKHOUT, J. This is a suit for damages instituted by appellee against appellant in the district court of Hunt county, Tex., to recover damages for personal injuries alleged to have been received on the night of December 31, 1901. In his petition, appellee alleges that on said date he was employed by appellant as a freight conductor, and, with its knowledge and consent, was sleeping in a caboose in the yards at Texarkana, when a switch engine or some other train ran into

*Rehearing denied April 26, 1903, and writ of error denied by Supreme Court.

the caboose, throwing appellee against the walls of same, thereby seriously and permanently injuring him. Appellant answered by general denial, and special answer that, if appellee was sleeping in said caboose, it was without the knowledge or consent of appellant, and that he assumed the risk of going to sleep in said caboose. A trial by jury resulted in a judgment for appellee for \$1,825, and, a motion for new trial being overruled, appellant in due time and proper form perfected its appeal.

Conclusions of Fact.

Appellee, Lee McDowell, was a conductor on a freight train belonging to and operated by appellant between the towns of Commerce, in Hunt county, and Texarkana, in Bowie county. His usual run was from Commerce to Texarkana, at which place he would await orders from the company as to the time of his return to Commerce. It was usual and customary for freight conductors and brakemen, while awaiting orders at Texarkana, to sleep in the caboose of their train, and for this purpose they carried blankets, etc. The company had knowledge of this custom. On the 30th day of December, 1901, appellee left Commerce as conductor in charge of one of appellant's freight trains for Texarkana. He arrived in Texarkana on that day, and turned his train over to the yard master, and registered at the office of the company, showing where he could be found. He slept that night in the caboose, and remained there during the next day awaiting orders. On the night of December 31, 1901, while sleeping in his caboose and awaiting orders, the caboose was run into by appellant's switch train, and given an unusual and extraordinary knock or jolt, causing appellee to be thrown against the car, whereby he was injured in the head, back of the neck, and in the muscles of his back, and sustained damages in the amount found by the jury. The agents of appellant were negligent in operating said switch engine, for which negligence the appellant is responsible. The appellee did not assume the risk resulting from the negligent operation by appellant's agents of its switch engine.

Conclusions of Law.

1. It is contended that the trial court erred in overruling appellant's exception to the following questions propounded to the plaintiff: "You have described the duties of conductor and brakeman, and that it was necessary for him to go through the train and go forward. State whether or not, in your present condition, you can do that?" To which question the witness, after the court had overruled the objection, answered: "I do not feel that I would be strong enough. I would not risk going from the caboose to the engine over twenty cars at any rate of speed. If standing still, all right, but not moving in the wind. If I should happen to step from one

to another, and my back would happen to catch, as it has done, I would go down between the cars." Also the question: "How long since you did any reading of any consequence?" Answer: "I do not remember. I cannot recall to mind how long since I have had a book in my hand to read at all. It has been quite a while—say three months—since I have read anything more than a sign on a store. I have not had a paper in my hand—never try to read a paper." Thereupon his attorney asked him the following question: "Because, for what reason?" To which said last-named question the defendant objected. The objection was overruled, and the plaintiff answered: "The last time I tried to read a paper, the letters all run together after reading two or three words. My eyes would sting and burn, and the letters all seemed to go together. I have abandoned reading on that account." Also the following question and answer: "As to your ability at this time to distinguish colors—how long since you were examining catalogues with different colored leaves?" To which the plaintiff replied as follows: "How long since I examined any of them?" Thereupon his attorney replied as follows: "Yes." "As I told you a while ago, I have not been making out orders lately." Thereupon his attorney asked him to state why, to which the defendant objected. The objection was overruled, and the plaintiff answered: "My reason for not making out my orders is because I could not tell the different colored sheets. I could not get the benefit of the special prices on the yellow sheets." The objection to each of the above questions was that it called for the opinion and conclusion of the witness. There was no error in overruling said objections and admitting the evidence. The same was admissible as tending to prove independent facts. The plaintiff had testified fully as to the duties and requirements of a freight conductor, the manner in which he was injured, the character and extent of his injuries, and the effect of the same upon his eyesight and locomotion. He was experienced in the business of handling freight trains, and with the duties of a freight conductor.

2. It is insisted that the court erred in instructing the jury as follows: "If you believe from the evidence that on and prior to December 31, 1901, it was the custom of defendant's freight-train conductors to sleep in the caboose while waiting in Texarkana overnight; and if you believe that such was the custom of the plaintiff; and if you believe such custom, if any, was known to, and acquiesced in by, defendant; and if you believe from the evidence that on the night of December 31, 1901, the plaintiff was in the employment of defendant as freight conductor; and if you believe on said night the plaintiff was waiting over in Texarkana under the orders of defendant; and if you believe on said night the plaintiff was sleeping

in his caboose on the siding in the yards of the defendant; and if you believe, while so sleeping, if he was, his caboose was violently run into and collided by some train, engine, or cars under the control of defendant; and if you believe such collision, if there was such, threw the plaintiff against said caboose and injured him as alleged by the plaintiff; and if you believe that the servants of the defendant were guilty of negligence, as that is above defined, in striking the plaintiff's caboose, if you find they did; and if you believe such negligence, if any, was the direct and proximate cause of plaintiff's injuries, if any; and if you believe that the plaintiff, in sleeping in his caboose, if he was, was not guilty of negligence—then and in that event you will find for the plaintiff. But if you believe from the evidence that it was not the custom of the plaintiff and other such employes of the defendant to sleep in their cabooses; or if you believe there was such custom, but the same was not known to and acquiesced in by the defendant; or if you believe that the plaintiff's injuries, if any, were caused by the usual and ordinary operation of the engines and trains in defendant's yards; or if you believe that the plaintiff was guilty of negligence, as hereinbefore described, in sleeping in his caboose—then, in either event, you will find for the defendant." The contention is that the above charge is upon the weight of evidence. This contention is not tenable. The charge grouped the facts alleged, and left it for the jury to determine whether the evidence supported the same, and whether they constituted negligence on the part of the railway company.

3. It is contended that the court erred in refusing the following special charge requested by the defendant: "The servant not only assumes the ordinary and natural risk of danger incident to his employment, but, in addition thereto, he assumes all other open and obvious risks, and all others that are known to him. If, therefore, you believe from the evidence that defendant's servants engaged in switching in the yards at Texarkana would at times strike the cars and cabooses with extraordinary force or in a negligent manner, and if you further believe that the plaintiff knew that this was the case, then and in that event he assumed all risk of danger to so doing, and would not be entitled to recover, and you will return a verdict for the defendant." It is insisted by appellant that appellee voluntarily chose to sleep in the caboose, knowing that it would be struck by other cars in switching, and that in so doing he assumed all risk of going to sleep in a dangerous place. Appellee, in voluntarily going to sleep in his caboose, assumed all the usual and ordinary risks incident thereto, but he did not assume any extraordinary risk arising from the negligence of the railway company. The testimony shows that a switch engine handled with ordinary care, as it usually was, coming in con-

tact with a caboose, would not affect persons sleeping in such caboose. The evidence further shows that the switch engine which was doing the switching, and which came in contact with and struck the caboose in which appellee was sleeping, was not handled with ordinary care or in the usual way, in that it struck against such caboose with unusual and extraordinary force, thereby injuring the appellee. The appellee did not assume the risk resulting from such negligent handling by appellant of its switch engine. It is shown that the appellee was sleeping in his caboose with the knowledge and acquiescence of the appellant company.

We conclude that there is no error presented in appellant's brief, and that the judgment should be affirmed. Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HUGHES.*

(Court of Civil Appeals of Texas. April 1, 1903.)

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—EVIDENCE—VALUE OF PROPERTY—MEASURE OF VALUE—APPEAL—WAIVED OBJECTIONS—INSTRUCTIONS.

1. An objection to evidence not taken on trial will not be considered on appeal.

2. Evidence admitted, in condemnation proceedings, of the sale price of other lands, was not open to the objection of irrelevancy and immateriality "because the market value of this property was at issue, and not what other property sold for."

3. In proceedings to condemn land near a city, where testimony had been introduced showing a reasonable probability of the development of the region by extension of a car line, evidence as to its probable character and condition as high-class suburban property was admissible.

4. The measure of damages in condemnation proceedings by a railroad is the diminution in the value of the property resulting from the construction and operation of the railroad, to be determined by ascertaining the difference between the market value of the property just before and just after the construction of the road.

5. Where a charge embraced a correct rule of law in general terms, if more particular instructions were desired by a party he should have requested them.

6. The erroneous admission of testimony should not work a reversal where substantially the same testimony was allowed to be introduced without objection.

Appeal from Dallas County Court; Ed S. Lauderdale, Judge.

Condemnation proceedings by the St. Louis Southwestern Railway Company of Texas against W. E. Hughes. Judgment rendered, and plaintiff appeals. Affirmed.

Bonner & Gilbert, for appellant. Coke & Coke, for appellee.

JAMES, C. J. Appellant instituted this proceeding to condemn a right of way across two tracts of land belonging to appellee near Dallas.

*Writ of error dismissed by Supreme Court for want of jurisdiction.

¶ 4. See Eminent Domain, vol. 12, Cent. Dig. § 372.

The proposition under appellant's first assignment of error is: "The value of other lands, or what other lands sold for, cannot be taken into consideration in arriving at the market value of the land in controversy." We have had this question under consideration, and it is discussed at length in *Sullivan v. Ry. Co.* (Tex. Civ. App.) 68 S. W. 747, which we need not repeat. The testimony, we think, did not relate to a period so remote as to render it clearly improper. But if it did, this was not the objection made at the trial. The objection was that the evidence was irrelevant and immaterial because the market value of this property is at issue, and not what other property was sold for. This precise objection is all we should consider, and it was not well taken.

Under the second assignment we have this proposition: "The market value of the land in the shape it was when taken is the true measure of damages. Its value must be considered in the aggregate, and not what it would be if divided into lots and blocks, and large sums of money spent thereon." The soundness of this proposition will not be disputed. It is, however, presented in the following connection: Certain witnesses were asked this question, "Do you know of any reason why it would be difficult or specially inaccessible to run a street car here or run electric lights or gas or any other city utility?" Answer, "None at all." "You say this property is valuable as suburban property. Is that capable of being made a high-class suburban property?" Answer, "Yes, sir." To each of which questions objection was made by appellant because "It is not a question of what the property is capable of being made into—what it is capable of producing in the future—but it is the market value of the property at the time of the taking that should be inquired about. To indulge in speculation as to what might be in the future, and what might affect the value of it in the future, is inadmissible." It must be seen at once that the proposition relied on is not entirely applicable to the testimony stated in the bill of exceptions. The testimony related to the capabilities or adaptability of the property in view of its situation and conditions. At least one witness—Martin—for plaintiff testified with reference to the property as suburban residence property in all aspects, showing its advantages and disadvantages (chiefly disadvantages). He testified that there is no good reason why a car line should not be run out there, and he thought the people ought to get it. "I see that they now have a very flattering prospect for getting it. * * * The appearances look like they are about to get it now." Testimony of this character, showing a reasonable probability of development in that direction, being introduced, the evidence objected to was admissible. *Ry. v. Burger* (Tex. Civ. App.) 45 S. W. 613; *Sullivan v. Ry.* (Tex. Civ. App.) 68 S. W. 746.

The sixth assignment objects to the charge
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wherein the court stated that the diminution of the value of the remaining portion of the land would be the measure of damages, for the reason, as appellant puts it, "the difference in the market value of the balance of the land just before and just after the construction of the railway would be the measure." The precise language of the paragraph complained of is as follows: "You will consider the injuries, if any, and also the benefits, if any, sustained or received by the defendant as to the remaining portion of his land. You will determine whether such remaining portion is increased or diminished in value by the construction and operation of the railway, and, if you find from the evidence that the remainder of defendant's land is diminished in value by the construction and operation of plaintiff's railway, then the amount of such diminution in value will be the measure of damages as to the remaining property." The charge announced in general terms the correct rule as stated in *Ry. v. Eddings* (Tex. Civ. App.) 70 S. W. 98: The measure of damages is the diminution of the value of the property resulting from the construction and operation of the railroad, to be determined by ascertaining the difference between the market value of the property just before the construction of the railroad and its value just after such construction. If appellant desired the more particular instruction on this subject, it should have requested it. It made no requests whatever, and we must take it that appellant was more satisfied at the time with the general declaration of the rule.

Affirmed.

On Motion for Rehearing.

(April 29, 1903.)

The motion insists that we erred in not sustaining the second assignment of error. We think the testimony complained of was admissible under the rule recognized in *Sullivan v. Ry.* (Tex. Civ. App.) 68 S. W. 745, and *Ry. v. Burger* (Tex. Civ. App.) 45 S. W. 613. A special reason why the testimony, even if improper, should not cause a reversal is that substantially the same testimony was allowed to be introduced without objection. One answer complained of is: "This property is capable of being made a high-class suburban property." Substantially the same testimony by a number of other witnesses than those named in the bill of exceptions was given without any objection.

The other answer is: "We know of no reason why it would be difficult or specially inaccessible to run a street car here, or run electric lights or gas or any other public utility." Other witnesses testified to this also without objection, notably the witness Jackson, who stated: "I don't know that there is any insuperable obstacle to carry them (gas and electricity) that far. Mr. Hughes may have electric lights, telephones

and everything else they have got in town. I suppose there would not be much use for gas and electric lights there in that 300 acres for one man, but if there is a demand for it, a person could have that very easily there." And the witness Martin testified without objection as stated in the original opinion.

Motion overruled.

TRAVELERS' INS. CO. v. JONES.*

(Court of Civil Appeals of Texas. March 28, 1903.)

INSURANCE—COMPLETION OF CONTRACT—RESCISSION—REFUSAL OF OFFER—DEATH OF INSURED—EFFECT ON POLICY—ESTOPPEL.

1. The execution and delivery of a policy by an insurance company in accordance with a written application evidences a completed transaction, and constitutes a contract between the parties.

2. In order to set aside a contract on the ground of mistake, the mistake must have been mutual, and the party must seek relief, without delay, upon discovering it.

3. Where an insurance policy provided that insured should leave with his employer each month sufficient funds to meet the premiums thereon, and insured wrote to insurer, offering to rescind the contract, but insurer nevertheless sent in its claim for the premium to insured's employer, such action on its part was a rejection of insured's offer of rescission.

4. Death of insured revokes all offers of cancellation made by him prior to his death, and not accepted by insurer prior thereto.

5. Where an insurance company, in pursuance to the terms of a policy, sent in its claim for a premium to insured's employer, and, before its payment, insured, who had requested a cancellation, died, the rights of the parties having then become fixed, the insurance company could not alter them, and accept insured's offer of cancellation, by withdrawing its claim on his wages.

6. Plaintiff's husband took out an accident policy which provided that insured should leave with his employer sufficient funds earned in the preceding month to pay premium installments. Insured, shortly after receiving the policy, sent it to defendant's state agent, asking that it be canceled. This the agent refused to do, and sent in a claim to his employer for a premium thereon. Before payment of the same, insured was killed, and defendant thereupon wired the paymaster to return to it the order for the premium, which was done. Plaintiff received the full amount of wages earned by her husband for that month. It was not shown that plaintiff knew that defendant's agent had not canceled the policy, or that she knew that defendant had sent in its order to the paymaster for the first installment of premiums. *Held*, that plaintiff was not estopped, by her conduct in receiving her husband's wages, from enforcing collection of the policy.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Action by Minnie Jones against the Travelers' Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bomar & Bomar, for appellant. Bennett & Jones and Maurice El. Locke, for appellee.

BOOKHOUT, J. This suit was filed in the district court of Hunt county on the 25th day of July, 1902, by appellee, to recover

*Rehearing denied April 25, 1903, and writ of error denied by Supreme Court.

against the Travelers' Insurance Company the sum of \$2,000, the amount of an accident insurance policy issued by said insurance company to W. W. Jones, the husband of plaintiff. A trial resulted in a verdict and judgment for plaintiff, and the defendant company appealed.

Conclusions of Fact.

On July 29, 1901, W. W. Jones, who was in the employ of the Missouri, Kansas & Texas Railway Company of Texas as car repairer, executed and delivered to the Travelers' Insurance Company, through its special agent, J. J. Farley, a written and printed application for an accident insurance policy in the amount of \$2,000 in case of accidental death. The application was accepted by said special agent, and on July 30, 1901, said company, through said agent, in consideration of a premium of \$25, executed and delivered to said W. W. Jones its policy of insurance in accordance with said application. By the terms of the policy, the premium was to be paid in separate consecutive periods of two, three, and five months, in the sum of \$6.25 for each payment, each to only apply to its corresponding insurance period, and, further, said Jones was to leave in the hands of the paymaster of the said railway company sufficient funds earned in the preceding month to pay said installments of premium; and it was provided that, in case the assured should fail to leave in the hands of the paymaster any of the premium as it should fall due, the policy should be void in the case of the premium for the first period and in case of the premium for any later period the policy should terminate with the period for which the next preceding premium should have been paid. After receiving the policy on July 30, 1901, Jones wrote a letter, and sent same, with the policy inclosed, by mail, to John L. Way, defendant's state agent for Texas, at St. Louis, Mo., in which letter he stated that it would be impossible for him to pay the premium stipulated in the policy, and for this reason he returned the policy, and requested said agent to cancel the application therefor. On the same day he wrote and mailed a letter to the defendant company, at its home office, in Hartford, Conn., stating that a policy had been written, but that he found it would be impossible to pay the assessment, and asking the company to cancel the application for insurance. On August 9, 1901, defendant's state agent, John L. Way, wrote to W. W. Jones a letter, which was duly received by Jones, in substance as follows: "Replying to your letter of the 30th ulto., would say that the enclosed Accident Policy #1148085 was written for you on July 30th, and was placed in full force and effect on that date. It is therefore too late for me to interfere in the arrangement made at that time, and I trust that you will be able to meet the payments of the premium as they become due. The insurance was issued in the best of faith and the company expects to do its

part in every particular. The contract is a most liberal one, and you are permitted to pay for the protection which it affords in installments, thereby making it most convenient for you. The contract is identical with that carried by a great number of men engaged in the same occupation that you are, and I have heard no complaints from any source." In this letter he returned the policy to Jones. On August 12, 1901, Jones replied: "Mr. Jno. L. Way, St. Louis, Mo. Sir: Yours of the 9th to hand and will state that if your terms are as your agent stated, I am willing to keep up the policy #1148085. He told me that it would cost me \$6.25 per quarter, that is, \$6.25 for Aug. Sept. and Oct. Now if this statement be correct, I am willing to comply with my part of the contract. But after he had left one of the men informed me that it was \$6.25 per month. Now if this be the case I positively will not pay it at all. As I have talked to some of the best attorneys in this place and find out from them that I am only bound to the contract as I understood it, and I have witnesses to prove that quarterly was the space of time mentioned all the way through, but I find now after you have returned the policy, Sept. 20, \$6.25; Oct. 20, \$6.25; Nov. 20, \$6.25, Dec. 20, \$6.25 written on the sealing part of the envelope. Now Mr. Way, I propose to be a gentleman in every respect and pay all honest debts but positively refuse to pay \$6.25 per month for the money I am laboring for now is really not mine as I owed it long before I heard of your robbing business and expect for my money to go for honest debts. I wrote the Ins. Co. at Hartford the same time I wrote you. I will return the policy again and if you make your agents word good I will make mine good to pay \$6.25 for Aug., Sept. & Oct., and in case such thing be the case you may return the policy, otherwise, you may burn it for I have no use whatever for it. There is no law in this Union to force a laboring man to give up his hard earnings to any such business as you represent. Hoping you will burn the policy and say nothing more about it, I am Yours for Business, W. W. Jones." At the end of this letter was the following statement: "Mr. Jno. L. Way: This is to certify that I heard the agreement between your agent and Mr. Jones that he was to pay \$6.25 per quarter. [Signed] R. Walter Anderson." This letter, with the policy, was received in due course of mail at St. Louis, Mo., by defendant's state agent. After its receipt, and on or about August 20, 1901, said state agent sent to the auditor of the Missouri, Kansas & Texas Railway Company of Texas, at Dallas, Tex., his "deduction list," showing the amounts which the paymaster of the railway company was requested to deduct from the wages of the railway company's employees for that month, to pay the defendant for premiums, in pursuance of orders received from such employees. Jones' wages for the month of August were payable by the railway com-

pany on September 20, 1901, according to the custom of the company. The insurance company, among other deductions, requested said railway company to deduct the sum of \$6.25 from the August wages of W. W. Jones, and pay the same to it, as a premium on policy No. 1,148,085, being the policy sued on. On August 24, 1901, after being informed of the death of W. W. Jones, said state agent telegraphed said railway company, requesting it to return said order, which was done by the railway company. On August 17, 1901, W. W. Jones, while pursuing his occupation of car repairer, met with an accident and sustained injuries while working underneath a standing car. Such injuries were caused by one of the railway company's trains being propelled against the car under which Jones was working, causing the same to run over him, crushing and mangling him, from which injuries he immediately died. His injuries were external, violent, and accidental, and not intended by said Jones or the persons operating and directing said train, and, independent of all other causes, produced the death of said Jones.

Conclusions of Law.

The execution and delivery of the policy by the insurance company in accordance with the written application evidence a completed transaction, and constitute a contract between the parties. In order to have the contract set aside on the ground of mistake, the mistake must have been mutual, and the party must seek relief, without delay, upon discovering it. When W. W. Jones wrote the letter of July 30, 1901, he did not claim that there was any mistake in the face of the policy, relating to the time of payment of the premiums. No complaint was made by him prior to the letter of August 12, 1901. By the terms of that letter, Jones seems to have been under the impression that the policy required the payment of \$6.25 per month premium. He admits that he was to make four payments, of \$6.25 each. The policy did not require him to pay \$6.25 each month the same was in force. It did require him to pay \$6.25 in four payments—each in two, two, three, and five months. It is not believed that, had Jones' contention been true, and had there been a mistake in the policy, in not making the payments become due quarterly, such mistake, in the absence of fraud, would have entitled him to a rescission of the contract. The mistake was not mutual. *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; 2 *Pomeroy's Eq. § 856*. There was no mistake on the part of the insurance company. The policy was in accordance with the application. There was no pleading on the part of either party alleging fraud in the making of the contract, and no fraud is shown by the record. It is true that the company could have, had it so desired, accepted the terms offered by Mr. Jones in his letter of August 12th, and can-

celed the contract, but it did not do so. After the receipt of the letter, it sent to the auditor of the railway company for which Jones was working an order on that company for the purpose of having it paid as the first installment of premium of \$6.25 out of Jones' wages for that month. This action was in accordance with the terms of the policy. In so doing, the company rejected the offer of Jones to rescind the contract. Jones died on August 17, 1901, which revoked all offers of cancellation made by him, and which the company had not accepted, prior to his death. When Jones died the insurance company was insisting on the validity of the contract. The policy not having been canceled during the lifetime of Jones, upon his death the rights of the appellee as beneficiary thereunder became absolute, and were not affected by the action of the insurance company in wiring to the paymaster of the railway company on August 24th to return to it the order for \$6.25, and its return by the railway company. *McAlister v. New England Mut. Life Ins. Co.*, 101 Mass. 558, 3 Am. Rep. 404; *Porter v. Mutual Life Ins. Co.*, 70 Vt. 504, 41 Atl. 970; *Shields v. Equitable Life Assurance Soc.*, 121 Mich. 690, 80 N. W. 793; *New York Life Ins. Co. v. Miller* (Tex. Civ. App.) 32 S. W. 550.

Nor did the fact that Mrs. Jones thereafter, on September 11, 1901, received from the railway company \$24.50, the amount of the wages earned by W. W. Jones in the month of August, and standing to his credit on the books of the company, amount to a ratification by her of the cancellation of the policy, or estop her from enforcing collection of the same. Prior to that time defendant's agent had recalled its order from the railway company, and had, in his letters of September 9th and September 11th, respectively, denied that the policy was in force. The record does not show that the plaintiff knew that defendant's agent had not accepted the offer made in Mr. Jones' letter of August 12th, and canceled the policy, or that she knew that defendant company had sent its order to the paymaster of the railway company for the payment of the first installment of premium out of the wages of her husband for the month of August. The company, having denied that the policy was in force, and having withdrawn its order from the railway company, could not complain of the action of Mrs. Jones in receiving from said railway company said wages.

Upon the death of Jones the company became indebted to the appellee for the face of the policy, and it had authority to collect the premium due from that sum. The plaintiff sued to recover the amount of the policy, less \$6.25, the amount then due for premium. The judgment was for this sum, with interest, attorney's fees, etc.

The appellant having failed to point out any reversible error, the judgment is affirmed.

CITY OF DALLAS v. STRAYER*

(Court of Civil Appeals of Texas. March 21, 1903.)

MUNICIPAL CORPORATIONS—REPAIR OF SIDEWALKS—POLICE POWER—INJURIES—CHARTER PROVISIONS.

1. Lack of funds on the part of a municipality is no justification for its failure to repair streets and sidewalks.

2. A city charter gave the city control of its sidewalks, provided that the expense of keeping them in repair should be borne by the property owners, provided for a method of enforcing the construction of walks by resolution, assessment, sale, etc., and that, if for any reason the city should be unable to compel the owner to construct or repair a sidewalk, the city should not be liable for damages to any person by reason of any defect, not immediately occasioned by the direct act of the city. Held that, though the procedure providing for collecting the cost of construction and repair of sidewalks is unconstitutional and unenforceable, the exemption clause of the charter did not release the city from liability for injuries resulting from a failure to repair a hole in a sidewalk, as it should make such repairs in the exercise of its police powers.

Appeal from District Court, Dallas County; Thos. F. Nash, Judge.

Action by W. R. Strayer against the city of Dallas. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Henry and J. J. Collins, for appellant. Carden, Senter & Carden, for appellee.

BOOKHOUT, J. This is a suit instituted by the appellee against the appellant to recover damages for personal injuries to the wife of appellee. A trial resulted in a verdict and judgment for appellee, and the city has appealed.

Conclusions of Fact.

On the 14th day of November, 1900, appellee's wife, while walking on the sidewalk along the north side of Main street, east of Hawkins street, in the city of Dallas, in the evening, about dark, fell into a ditch or hole in the sidewalk and was injured. The ditch ran across the sidewalk in an irregular way, and varied in depth from 8 inches at the inner edge of the sidewalk to 18 inches at the curb, and in width from 6 to 12 inches. It was caused by the water flowing through the same from the adjoining lot. It had been in existence a sufficient length of time for the city, in the exercise of ordinary care and diligence, to have discovered and remedied the defect in the sidewalk. In failing to do so, the city was guilty of negligence. Appellee's wife was exercising ordinary care at the time she was injured.

Conclusions of Law.

But one question is raised by the appeal: Is the city, by the terms of its charter, exempted from liability for damages resulting from a defective sidewalk, the defect consist-

*Rehearing denied April 25, 1903, and writ of error denied by Supreme Court.

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1594.

ing of a hole or ditch therein? By the terms of its charter the city is given exclusive control over its streets, alleys, crossings, highways, and public grounds. It has authority to regulate, establish, and change the grade of sidewalks, and may compel the filling up and raising of the same. As a general rule a city is liable for damages resulting from defective streets when, by the terms of its charter, the city is given control over same. And it may be stated, generally, that lack of funds on the part of the municipality is not justification for a failure to repair, and is, therefore, not a defense to an action for damages for personal injuries. *Lord v. City of Mobile*, 113 Ala. 360, 21 South. 366; *Evans-ton v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Carney v. Village of Marseilles*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328.

Section 159 of the charter of the city of Dallas (Sp. Laws 1899, p. 128, c. 8) provides that the cost of constructing all sidewalks, including curbing and keeping the same in repair, shall be defrayed entirely by the property owners of the lots or blocks fronting on the sidewalks to be constructed, according to the number of feet frontage owned by each. The section defines the method of procedure on the part of the city to fix a lien for such cost on the abutting property, and the manner of enforcing the same. It further provides that: "In the event that because the same adjoins a homestead, or for any other reason, the city is unable to lawfully compel the owner to construct and repair a sidewalk by fixing a lien on his property for the cost, the city of Dallas shall never be liable for damages to any person or property by reason of any defect in any sidewalk not immediately occasioned by the direct act of the city, or some officer for whose acts the city is responsible at law; and in all cases the property owner on whose property any sidewalk abuts shall be under the duty to the public, as well as to the city, to keep said sidewalk in repair, and shall be primarily liable to any and all persons for any injuries whatever occasioned to them or their property by reason of any such defect occurring by reason of the neglect or omission of such property owner to repair such sidewalk and to keep the same in repair, or by reason of his unlawful or wrongful act. In the event of a judgment against the city in all such cases where the property owner is made liable for damages by the provisions of this section, the city shall be entitled to a recovery over against any such property owner held to be primarily liable for such damages under the provisions aforesaid." The contention of appellant is that, by reason of the procedure provided for collecting the cost of construction and repair of sidewalks having been declared unconstitutional (*Hutcherson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884), it cannot lawfully compel the abutting property owner to construct and repair a sidewalk, and

therefore it is exempted from liability, by the above-quoted clause of its charter, for damages resulting from defects therein. The contention is not tenable. The defect was one which the city, it would seem, could have repaired with slight cost. By its charter it was given exclusive control over its streets, and it should have, in the exercise of its police powers, repaired the defect. The contention of appellant was passed upon by the Supreme Court on a state of facts quite similar to those shown by the record in this case, and that court held that the city was not exempted from liability for damages by the clause of the charter quoted. *Lentz v. City of Dallas* (Tex. Sup.) 72 S. W. 59. The exhaustive discussion of the question by the Supreme Court in the *Lentz* Case renders any extended remarks by us unnecessary.

The judgment is affirmed.

HOUSTON & T. CENT. R. CO. v. BATCHLER.

(Court of Civil Appeals of Texas. March 25, 1903.)

CARRIERS—PASSENGERS—DURATION OF RELATION—ASSAULT—DAMAGES—PROVOCATION.

1. The relation of carrier and passenger continues not only until the passenger has left the car, but until he has left the station, or until a reasonable time has been given him to leave the premises, and during such time he is entitled to the protection of the carrier, without regard to the object of his journey or his reason for stopping at such station.

2. Where a passenger on a railroad train used grossly insulting language to the conductor, and just after leaving the car and while on the depot platform was struck by the conductor with a piece of iron and injured, in an action against the railroad company for damages the jury should consider the conduct of such passenger in fixing his damages, and whether the assault was committed under the immediate influence of passion engendered by the insulting words, or was the outcome of cool deliberation.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by W. W. Batchler against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frost, Neblett & Blanding, for appellant. G. C. Groce and S. P. Skinner, for appellee.

FLY, J. Appellee recovered a judgment against appellant for \$5,125 for damages received by him through an assault committed on him by a conductor in the employ of appellant.

It appears from the statement of facts that appellee was in Waxahachie, and purchased a ticket over appellant's railroad to Ferris, where he resided. It seems that it was necessary to change cars at Garrett and take another train to Ferris, and, finding that he would have to stay there for some time be-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 992, 993.

fore the train arrived, he concluded to go to Ennis and wait there for the train. It was only three miles from Garrett to Ennis, and when the conductor, Grange Ashe, came for the fare, appellee, not having purchased a ticket to Ennis, tendered 10 cents in payment. The conductor demanded 25 cents, which appellee paid, but told the conductor that he would appropriate the money to his own use. The conductor made out a receipt for the money and tendered it to appellee, who refused it, and reiterated the charge that appellant was a thief, and called him a "damned son of a bitch." This occurred a very short time before the train stopped at Ennis. At that place appellee got off, and while moving off the platform was struck by Ashe with a piece of iron, and a fight ensued.

The court charged the jury that the relation of carrier and passenger continues until the journey paid for is ended, and not only until the passenger has left the car, but until he has left the station, or until a reasonable time, to be determined by the circumstances, has been given him to leave the premises. Appellant admits that the charge embodies the law usually applicable to passengers, but contends that, because appellee went to Ennis merely to pass the time until the next train going north should arrive, the moment he left the car at Ennis the relation of passenger and carrier ceased. There is no merit whatever in the contention. The relation of passenger and carrier cannot be made dependent on the object that a passenger has in view in making a journey. Appellee had the right to go to Ennis or any other point for any purpose he deemed necessary for his convenience, comfort, or pleasure, and he was entitled to the same rights, protection, and privileges as though he had gone on affairs of state or the most momentous matters of business. It may have been necessary for appellee to stay at the station so as to be there when the other train came in, and, if so, he was entitled to protection while so waiting. *Railway v. Dick* (Tex. Civ. App.) 63 S. W. 895.

In its answer, appellant stated that appellee should not recover because he had willfully insulted the conductor and provoked the difficulty with him, and therefore the contention that the charge, as a verbal provocation not justifying an assault, was not applicable to the pleadings and facts, cannot be sustained. The charge was as follows: "You are further instructed that, under the laws of this state, insulting words do not justify an assault; and though you may believe, should you so believe, that the plaintiff, while on defendant's train, used insulting words to the conductor in charge of said train, yet such words, if used, would not justify a subsequent assault by such conductor on plaintiff; but such subsequent assault, if committed, would be unlawful." This charge is the law, and no cause of complaint could

have arisen in connection had no special charges been asked by appellant. But, in connection therewith, appellant requested that the following instructions be given: "You are instructed that, though a railway company owes the duty of protection to all persons on its train as passengers, and to those lawfully and rightfully at its station houses and depot premises, yet a passenger also owes a corresponding duty of so demeaning himself as is not reasonably calculated to provoke a personal assault upon himself by any employé of the carrier; and, if such person willfully insults an employé of such carrier in such manner as that an assault may reasonably be expected to ensue as a result, then such insult may be considered by the jury, on the trial of a suit by such person for damages, in mitigation of damages, if any damages are, or ought to be, recoverable on account of such assault." "You are also instructed that, though insulting words will not justify an assault, yet if you do believe from the evidence before you, under the instructions given you by the court, that at the time the assault was made by Ashe upon the plaintiff, Batchler, he, the plaintiff, was still a passenger of the railway company, and believe he is entitled to recover damages in this suit, and you do also believe that such assault was provoked or caused by any insulting epithets or words used by Batchler towards Ashe, then such insulting language may be considered by you in mitigation of the amount or measure of damages, if you should believe the plaintiff is entitled to recover any damages against the defendant."

It was established beyond question that the difficulty between the conductor and appellee was precipitated by the unprovoked and outrageous language of the latter towards the conductor while in the lawful discharge of the duties incumbent upon him, and the direct question is presented as to whether a railroad company can offer in mitigation of damages such conduct upon the part of the passenger. There are two lines of decisions in the different states of the Union on this question, the one holding that verbal provocation does not justify an assault, and does not mitigate actual damages, but may be shown in mitigation of exemplary damages, while the other holds that insulting language may be shown in mitigation of actual, as well as exemplary, damages. A short review of some of the cases will be instructive, and cast light upon the position of the court.

Among those states holding that verbal provocation to an assault and battery may mitigate punitive, but not compensatory, damages, are Maine, New Jersey, Wisconsin, and a few others. In the case of *Osler v. Walton*, 50 Atl. 590, in the Supreme Court of New Jersey, it was said that only one case, that of *Robison v. Rupert*, 23 Pa. 523, sustains the position that verbal provocation

will mitigate damages resulting from an assault, and all other adjudged cases examined by the court hold that, while such provocation may mitigate punitive damages, it must not be allowed to reduce actual damages. It is said by that court that most of the decisions are collected in 4 Century Dig. p. 935, and a reference to that work discloses that a majority of the decisions are opposed to the doctrine of the New Jersey court.

In the case of *Ward v. White*, 9 S. E. 1021, 19 Am. St. Rep. 883, speaking of verbal provocation, the Supreme Court of Virginia said: "They caused the assault—provoked it; were of a character to greatly excite and inflame the passions of the defendant; and, while the time extended itself through the period during which the whereabouts of the plaintiff were unknown, the subsequent meeting brought the whole matter vividly before the mind, and again ignited the passions, of a man thus put under the ban of a newspaper insult, which was at the very time of the assault under the eyes of thousands of his fellow men, and which tended towards his utter degradation. He was taunted with the matter on every hand, and, so far from cooling, time—the lapse of time itself short, and enforced by the absence of the offender—had only more and more excited the outraged passions of the defendant, and caused him to do an act which it is unreasonable to suppose he would have committed without them. They were properly admitted in mitigation of damages, and were as essentially a part of the case as the assault itself."

In the case of *Railway v. Barger*, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319, where a conductor of a railroad company had assaulted a passenger, the Court of Appeals of Maryland said: "Whilst the provocation of the plaintiff may not justify an assault, yet if it be of such character as would naturally arouse the anger and passions of men of ordinary temperaments, and if it is not too remote, it is admissible in mitigation of damages. The authorities differ somewhat as to whether evidence of recent provocation can be admitted in mitigation of compensatory damages. In Wisconsin it has been held that it cannot be, whilst in New York (*Kliff v. Youmans*, 86 N. Y. 330 [40 Am. Rep. 543]), and in Pennsylvania (*Robison v. Rupert*, 23 Pa. 523) it has been decided that it may mitigate compensatory, as well as punitive, damages. It is said in *Robison v. Rupert*, supra, that when there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself."

In the New York case above cited, the court said: "It still remains that the plain-

tiff provoked the trespass—was himself guilty of the act which led to the disturbance of the public peace. Although this provocation falls to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass (*Avery v. Ray*, 1 Mass. 12; *Richardson v. Hine*, 42 Conn. 206; *Thomas v. Powell*, 7 C. & P. 807; *Lee v. Woolsey*, 19 Johns. 319 [10 Am. Dec. 230]; *Corning v. Corning*, 6 N. Y. 103; *Cushman v. Ryan*, 1 Story, 100 [Fed. Cas. No. 3,515]), and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them."

In the case of *Daniel v. Giles* (Tenn.) 66 S. W. 1128, it was held: "The court properly charged the jury that no words or insults or opprobrious epithets would justify an assault. It is well settled, however, that any provocation calculated to heat the blood or arouse the passions of a reasonable man, if offered at the time of the assault, or so recently as to become a part of the *res gestæ*, is admissible in evidence, and must be considered by the jury in mitigation of damages."

The courts of Massachusetts, Connecticut, Iowa, South Carolina, Alabama, Georgia, and Louisiana are in accord with the courts from whose decisions the foregoing quotations have been made, and the English courts have uniformly held that insulting words which provoke an assault should be considered in mitigation of damages, compensatory as well as exemplary. *Tyson v. Booth*, 100 Mass. 258; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Bartram v. Stone*, 31 Conn. 159; *Thrall v. Knapp*, 17 Iowa, 469; *Kelse v. Smith*, 71 Ala. 481, 46 Am. Rep. 312; *Hayes v. Sease* (S. C.) 29 S. E. 259; *Cross v. Carter* (Ga.) 28 S. E. 390.

The question has never been directly passed upon in the courts of Texas, and "the way is clear for a choice between the doctrine advanced by Vermont, Maine, New Jersey, Wisconsin, Illinois, and Michigan, and that held by the states whose decisions have been above cited. It is argued by the courts holding that mitigation of damages cannot be allowed for words of provocation that, if they may mitigate, they may reduce the damages to a mere nominal sum, or even fully justify. We can readily conceive of cases of such outrageous provocation that should justify the reduction of damages for an assault to a nominal sum, and, were it not for the unbroken precedents, we would be inclined to go further and hold that it should preclude the assaulted party from recovery. An injured person is not permitted to recover damages when his negligence has contributed to his injury, no matter how negligent the party who inflicted the injury may have been; and when a man has, by his willful and inexcusable conduct, brought upon himself an assault, the jury should at least be permitted to con-

sider such conduct in arriving at the amount of damages that should be awarded him. The criminal law recognizes human frailty under the influence of sudden passion arising from an adequate cause, and the punishment for assaults and batteries may be mitigated by proof of insulting words, and the crime of murder reduced to a lower degree of homicide, and we can see no reason why damages brought about by the misconduct of a person should not be mitigated by proof of such misconduct.

Railroads should be held to a strict accountability in the protection of passengers from the violence of their employes, and should be made to respond in damages for injury inflicted by such violence; but the passenger should not be licensed to trample upon the feelings and disregard the rights of the employes. It is true that the assault and battery in this case was a violation of the criminal statute, and can neither be wholly excused nor justified; but in a civil action, where the assaulted party is claiming damages for injuries to his person, he should not reap the full harvest of compensation for injuries which he forced by a violation of law in using words calculated to produce an assault. The use of the opprobrious epithets and abusive language upon the part of appellee was a violation of one of the penal laws of the state (article 599, Pen. Code 1895), and, having by such crime caused an attack upon his person, the jury should be allowed to consider his conduct in fixing his damages. The justice of such a rule appealed with such force to the minds of the jury that they asked the court if they could not consider such conduct in arriving at their verdict.

The provocation that may be considered in mitigation of such damages should be so recent as to induce the presumption that the violence was committed under the immediate influence of the passion thus excited. The mitigating effect of the provoking words would be lost if there had been time for cool reflection. The jury should, in the light of the circumstances, consider as to whether the assault was committed under the immediate influence of passion engendered by the insulting words, or was the outcome of cool deliberation.

The other errors assigned will not be considered, as they will not probably occur on another trial.

For the reason that the court erred in refusing to charge the jury that insulting words provoking the assault might be considered in mitigation of the damages, the judgment is reversed and the cause remanded.

On Motion for Rehearing.

(April 29, 1903.)

It is contended by appellee that the opinion in this case is based entirely on assault cases between individuals, and that no case in which a carrier was a party has been cit-

ed, and that none has been discovered by appellant. While the same principle would prevail as to corporations as applies to individuals in cases of this character, still this court not only cited a case of the application of the principle in which the conductor of a railway company had assaulted a passenger, but quoted extensively from it. *Railway v. Barger* (Md.) 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319. Not only did the court in that case hold that verbal provocation might mitigate or completely destroy punitive damages, but that it might mitigate compensatory damages. The following charge asked by the appellant was commended: "That from all the evidence in the cause the plaintiff is not entitled to recover exemplary damages, but such damages only as will compensate him for the injury done him, in estimating which the jury are at liberty to consider the offensive language of the plaintiff (if they should find he used such language) in mitigation of the damages." The court said: "We agree fully with the learned counsel for the appellant in his contention that, if the jury believed the assault was provoked by the language used by the plaintiff, as testified to by the conductor and others, they were authorized to take the provocation into consideration in mitigation of damages."

Appellee in his testimony admitted that he applied provoking epithets to the conductor, justifying himself on the ground that the conductor spoke abruptly to him. The language used by the conductor was, "You can pay or get off." This occurred during the first conversation. The conductor returned to appellee with a receipt for the money, and it was during this second conversation that appellee again charged the conductor with appropriating money belonging to the railroad company, and applied the other vile epithet to him. A female passenger on the train testified that, when the conductor handed the receipt to appellee, the latter threw it into the former's face, and again told him he would appropriate the money. The baggage master accounted for the language of the conductor about appellee paying or getting off, by the fact that appellee seemed like he was not going to pay. He also testified that the receipt was thrown into the face of the conductor by appellee, and the abusive language used in the first conversation repeated. We think the statement of facts justified this court in concluding that the language used by appellee was unprovoked. However, on another trial of this cause it will be the province of the jury to determine the character of the language used by appellee to the conductor, as well as to determine whether the assault was made under the immediate influence of sudden passion engendered by the provoking language, and to what extent it should mitigate the damages. The judgment in this case is reversed, because the court refused to allow the jury to pass upon these facts in the trial of the case.

While appellee admits that he does not know whether the question of "cooling time" is one of law or fact, it is contended that under the facts of the case the assault was calmly and deliberately made, and the question should not have been submitted to the jury. Only a few minutes at furthest could have elapsed between the time the verbal provocation was given and the assault was committed, and men might differ as to the length of time it would take for a man to become calm and sedate after receiving such insults. It was peculiarly a question of fact to be decided upon by a jury. Sutherland, in discussing words or provocation for an assault, says: "The mitigating effect of a provocation in words is spent when there has been time for reflection, and for the passion excited by it to cool. Other antecedent facts, however, may be proved in mitigation, where they are connected with the acts complained of, and afford an explanation of the motives and conduct of the defendant, and show him less culpable than he would otherwise appear." *Suth. Dam.* § 151. A Maine case is cited by the author in which an affray in the afternoon was allowed in evidence, in a suit brought for damages arising from an assault in the evening, as bearing upon the amount of the damages.

The motion for rehearing is overruled.

WATSON v. BOSWELL et al.*

(Court of Civil Appeals of Texas. April 1, 1903.)

APPEAL—REMAND—TIME FOR FILING—DISMISSAL—COSTS.

1. Gen. Laws 1901, p. 122, c. 54, provides that no mandate shall be taken out of the Supreme Court or Courts of Civil Appeals unless within 12 months after final judgment therein, and if any cause is reversed and remanded by said courts, and the mandate is not taken out, then, on the filing in the trial court of a certificate of the clerk of the court rendering such judgment that no mandate has been taken out, the case shall be dismissed from the docket of such trial court, "provided that in any cause which has heretofore been reversed and remanded, * * * the mandate in all such cases shall be taken out within twelve months from and after the passage of this act." Before such act took effect a judgment against plaintiff was, on his appeal, reversed and remanded, with costs against defendant. Defendant did not pay the costs, and, more than a year after the act took effect, plaintiff paid the costs and procured a remand, which he filed in the trial court, whereupon, on defendant's motion, the action was dismissed from the docket. *Held*, that the mandate, showing on its face that it was issued more than a year from the passage of the act, formed a sufficient basis for the judgment of dismissal.

2. The statute deprived plaintiff of no vested right, and is constitutional.

3. On the dismissal of the action, costs were properly adjudged against plaintiff.

Appeal from Ellis County Court; J. E. Lancaster, Judge.

Action by S. H. Watson against R. C. Bos-

well and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

C. M. Supple, for appellant.

FLY, J. This is an appeal from a judgment dismissing the cause of action. It appears that in April, 1900, appellees recovered judgment against appellant on a plea in reconvention and for costs of suit, and a supersedeas bond was given, and the judgment was on February 13, 1901, reversed by this court, and the cause remanded; costs being taxed against appellees. The costs were not paid by appellees, nor was any affidavit of inability to pay the costs made by them. On July 14, 1902, appellant paid the costs of the appeal, and a mandate was issued by the clerk of this court. Upon motion of appellees the cause was dismissed because no mandate was issued within 12 months from the date that judgment was rendered in the Court of Civil Appeals.

By an act of the Legislature of April 10, 1901 (*Gen. Laws* 27th Leg. p. 122, c. 54), it is provided: "No mandate shall be taken out of the Supreme Court or Courts of Civil Appeals, and filed in the court wherein said cause originated unless the same is so taken within the period of twelve months after the rendition of final judgment of the Supreme Court or Courts of Civil Appeals, or the overruling of a motion for rehearing. The provisions of this act shall only apply to cases which are by the Supreme Court, or Courts of Civil Appeals, reversed and remanded, and if any cause is reversed and remanded by said Supreme Court, or Courts of Civil Appeals, and the mandate is not taken out within twelve months as hereinbefore provided, then upon the filing in the court below of a certificate of the clerk of the Supreme Court, or Courts of Civil Appeals, that no mandate has been taken out the case shall be dismissed from the docket of said lower court: provided, that in any case which has heretofore been reversed and remanded by the Supreme Court, or the Courts of Civil Appeals, the mandate in all such cases shall be taken out within twelve months from and after the passage of this act, and not thereafter." The law in question went into effect on July 10, 1901, and the mandate was issued on July 14, 1902—more than 12 months thereafter. The law declares that "no mandate shall be taken out of the Supreme Court or Courts of Civil Appeals" unless within the period of 12 months after rendition of judgment or the overruling of a motion for rehearing, and the mandate was therefore issued by the clerk of this court not only without warrant of law, but in the very face of the statute, and should not have been filed in the trial court. It does not matter against whom the costs were taxed. The law is mandatory that the mandate shall not issue after 12 months in causes in which the judgment is reversed and the cause remanded, and it is made the duty of the trial court to dismiss the cause

*Rehearing denied April 29, 1903.

from the docket upon a certificate showing that a mandate was not issued in 12 months. The mandate issued in this cause showed on its face that it was issued more than 12 months from the passage of the act, and formed a sufficient basis for the judgment of dismissal.

The statute deprived appellant of no vested right, and does not violate any provision of the Constitution. It provides, in terms, that, in causes in which judgment had been reversed and the causes remanded before the passage of the act, the 12 months should begin to run from and after the passage of the act. The issuance of a mandate is merely a remedy which may be altered, and there can be no vested right in any particular remedy. *De Cordova v. Galveston*, 4 Tex. 470; *Treasurer v. Wygall*, 46 Tex. 447. The state is bound to afford adequate process for the enforcement of rights, but is not tied down to any particular mode of procedure. *Worsham v. Stevens*, 66 Tex. 89, 17 S. W. 404.

It does not matter against whom the costs were adjudged. Appellant was the one to be benefited by the issuance of the mandate, and the duty devolved upon him to have the mandate issued within 12 months from the passage of the law, and it was right and proper that the costs of the lower court should be taxed against him when his cause was dismissed.

The judgment is affirmed.

WATSON v. MIRIKE.*

(Court of Civil Appeals of Texas. April 1, 1903.)

APPEAL—REMAND—TIME—DISMISSAL—COSTS.

1. Under Gen. Laws 1901, p. 122, c. 54, providing that where a cause is reversed and remanded, when the mandate is not taken out within 12 months thereafter, or after the passage of that act, on the filing in the trial court of a certificate of the clerk of the court rendering such judgment that no mandate has been taken out within such time the action shall be dismissed, on the filing of such certificate the trial court must dismiss the action, and in such case costs are properly taxed against the plaintiff.

Appeal from Ellis County Court; J. E. Lancaster, Judge.

Action by S. H. Watson against T. M. Mirike. From a judgment dismissing the action, plaintiff appeals. Affirmed.

C. M. Supple, for appellant.

FLY, J. On a former appeal of this cause to the Court of Civil Appeals of the Fifth Supreme Judicial District (61 S. W. 538), the judgment was reversed and the cause remanded at cost of appellee. The judgment of the appellate court was rendered on February 23, 1901. No mandate was issued in the case, and on August 4, 1902, more than 12 months after the law of 1901 went into

effect, which prohibits the issuance of a mandate, in causes reversed and remanded prior to its passage after the expiration of 12 months from the passage of the law (Laws 1901, p. 122, c. 54), the cause was dismissed upon a certificate from the clerk of the Court of Civil Appeals that no mandate had been issued. The law is imperative, and the court did not err in dismissing the cause from the docket, and in taxing the costs of the court against appellant. *Watson v. Boswell* (this day decided by this court) 73 S. W. 985; *Scales v. Marshall* (Tex. Sup.) 70 S. W. 945.

The judgment is affirmed.

CURLEE v. TEXAS HOME FIRE INS. CO. (Court of Civil Appeals of Texas. April 25, 1903.)

Appeal from District Court, Milam County; J. C. Scott, Judge.

In response to motion requesting conclusions of fact. Findings made.

For opinion, see 73 S. W. 831.

Henderson & Freeman and Morrison & Wallace, for appellant. D. A. McFall and G. W. Allen, for appellee.

Conclusions of Fact.

KEY, J. In response to appellant's motion requesting conclusions of fact on specified points, we make the following findings:

(1) The contract of insurance was solicited by the appellee, and not by the appellant.

(2) The appellee asked no questions and made no inquiries in reference to an incumbrance on the land at or before the time of the issuance of the policy. If inquiry had been made, we presume appellee would have ascertained the existence of the lien on the property.

(3) At the time the policy was issued, appellant owed a vendor's lien note on the land upon which the house was situated. The note was for \$181 principal, and was not due at that time.

(4) It was not shown that appellant had any sinister motive in failing to disclose to appellee's agent the existence of the lien at or before the time the policy was issued.

(5) At the time of the destruction of the property by fire, it exceeded in value the amount of the policy and the incumbrance, taken together.

(6) The deed to the land upon which the insured property was situated disclosed the existence of the vendor's lien, and was duly recorded in the county where the land was situated at the time that the policy was issued.

(7) Appellant paid the premium charged by appellee for the policy, and appellee retained the same.

(8) After the blanks in the proofs of loss

*Rehearing denied April 29, 1903.

had been filled out, and after the adjuster and plaintiff had made inquiries about town in reference to the value of the goods, the adjuster did state to appellant that, if he would make a reasonable concession on said property, he would settle the loss. Then followed some parleying between the adjuster and appellant as to what would constitute a reasonable compromise, but no agreement was reached.

ST. LOUIS S. W. RY. CO. OF TEXAS v. PATTERSON et al.

(Court of Civil Appeals of Texas. April 15, 1903.)

DEPOSITIONS — CROSS-INTERROGATORIES — INCONSISTENT STATEMENTS — RES GESTÆ — INSTRUCTIONS.

1. Plaintiff's witness having testified for him in a deposition that on the day in question it was not pleasant, even out of the wind, defendant could show by cross-interrogatory that he had made a written statement that it was very pleasant standing on the outside, that day, in the sun.

2. In an action by a passenger against a carrier on the ground that she got sick because the depot where she had to wait for a train was not heated, the real issue being whether a fire was built, defendant is entitled to have admitted the answer of the depot agent's wife, given to a cross-interrogatory of plaintiff, that she heard said agent tell a boy to go to a car and get some coal, and saw him give the boy a key to unlock the car where the coal was, it being part of the res gestæ.

3. A passenger having sued a carrier on the ground that she got sick because the depot where she had to wait for a train was not heated, defendant's requested charge that, if plaintiff sat out doors after a fire was built in the depot, and that caused her sickness, and a person of ordinary care would not have remained outside under the circumstances, she could not recover, which presented affirmatively defendant's theory as made by the evidence, and would have assisted the jury, should have been given.

Appeal from District Court, Titus County; J. M. Talbot, Judge.

Action by Lucy Patterson and another against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiffs. Defendant appeals. Reversed.

E. B. Perkins and Glass, Estes & King, for appellant. S. P. Paunders and Todd & Armistead, for appellees.

STREETMAN, J. This suit was based upon the alleged failure of appellant to keep its waiting room at Winfield, Tex., properly warmed. Appellee Mrs. Patterson alleged that she went to the depot about 12 o'clock m. on December 23, 1900, to take the passenger train to Ft. Worth, and at once bought a ticket and became a passenger; but the train then due did not arrive until late that evening, and, there being no telegraph office or other means of ascertaining when the train would arrive, she had to remain at the depot, and thus contracted a cold, which culminated in pneumonia. Appellees introduced

the depositions of one W. B. Garner, and said witness testified, among other things, as follows: "The 23d day of December, 1900, was a cold, disagreeable day out in the wind. The wind was blowing from the north." In answer to cross-interrogatories he further testified that Mrs. Patterson "was standing on the outside of the depot, on the south side, in the sun. * * * The sun was shining. It was not pleasant where one was out of the wind, or where the wind could not strike them; but it was not cold enough for a person to get very cold." Appellant offered in evidence the answer of said witness to cross-interrogatory No. 6, which was excluded by the court. The cross-interrogatory and answer were as follows: "Q. Did you, on April 22, 1901, make a written statement concerning this matter, and did you not in said written statement say that Mrs. Patterson came into the depot about four o'clock, but never made any complaint about the depot being cold, and that Mrs. Patterson and her children stood outside of the depot four or five hours; that she stood in the sun, as the sun was shining that day; and that your wife nor children neither caught cold in the depot that day? And did you not state further as follows? 'I do not think Mrs. Patterson came to the depot after I built the fire. It was very pleasant, standing on the outside, that day—standing in the sun. Mrs. Patterson stood on the south side of the depot, where the wind could not strike her.' Did you not make the above statements in writing, and is it not a fact that the statements made by you are true?" The answer to the said interrogatory in the said deposition is as follows: "A. I signed a written statement on that date. I did make that statement that she come in about four o'clock, and did not complain of the depot being cold, and that Mrs. Patterson and her children stood on the outside of the depot four or five hours, and that she stood in the sun, as the sun was shining that day; that my wife and children neither caught cold in the depot that day. I did make the statement that I did not think that Mrs. Patterson came into the depot after I built the fire. It was very pleasant, standing on the outside, that day—standing in the sun. Mrs. Patterson stood on the south side of the depot, where the wind could not strike her. I signed it. To the best of my knowledge they are." This evidence should have been admitted. It was the plaintiff's witness, and he had testified for the plaintiff that it was not pleasant, even out of the wind. It was certainly permissible for defendant to show that he had made a written statement in which he said that "it was very pleasant standing on the outside that day, standing in the sun."

The fifth assignment of error is based upon the exclusion of certain evidence of Mrs. J. E. White. Some of the plaintiff's evidence was to the effect that for most of the time

Mrs. Patterson was waiting at the depot, there was no fire. Some of the witnesses testified that a fire was built at one time, but soon burned out, and no fire was built afterwards. Other witnesses testified that there was no coal there to make a fire. The station agent, J. E. White, testified that he and one Garner made a fire, and it was twice renewed during the evening, by different parties. He also testified that he had plenty of coal, which he kept in a box car; that he had a key to the box car, and once during the evening he let some one have the key to go and get coal to build a fire with. Mrs. J. E. White, the agent's wife, testified by deposition, and the following cross-interrogatory was propounded to her by plaintiff: "If you have further stated, in answer to said interrogatory, that there was a fire in the waiting room, state who built said fire. Is it not a fact that some of the passengers or persons who were waiting for the train put some trash or shingles in the stove, and set it on fire, and that it burned out in a minute or two, and that was all the fire there that day? Did you not hear the passengers or persons there ask for fire, and hear the defendant's agent say that he had no coal, or was no coal? Did you see any coal there; if so, where was it? Did you see Tom Killingsworth come into the waiting room, and put his hand on the stove, and did you hear him say it was cold, and that it was a shame that there was no fire there, or words to that effect?" To which cross-interrogatory the witness answered in said deposition as follows: "I do not know just what time I went, neither what time I left the depot. I was there off and on at different intervals during the day. I don't know who built the fire in the waiting room. No, it is not a fact that passengers built a fire out of shingles in the stove in the waiting room. I did not hear anybody ask the agent for fire that day (but I heard him tell a boy to go to a car, and get some coal, and saw him give the boy a key to unlock the car where the coal was). I saw some coal in the waiting room. My recollection now is that I saw the coal in an old tin bucket. No, I did not see Tom Killingsworth put his hands on the stove, or hear him remark anything about the fire." This answer was offered in evidence by defendant, and upon the objection of plaintiff the court refused to admit the portion in parentheses. We think it was error to exclude this evidence. The real issue was whether a fire was built, but that did not require the evidence to be confined to the bare statement of the fact whether the fire was built or not. As a part of the *res gestæ*, it was admissible for the agent to testify that he had the coal in a box car, that he gave the key to some one, and that such person went to the box car and got the coal and made the fire. That is, he could not only state the fact that he, or some one else, made a fire, but he could tell circumstantial-

ly just when and how it was made. If his wife knew of some of these circumstances, though she may not have known or remembered them all, we think defendant was entitled to her evidence as to such as she did remember.

We are also of the opinion that the special charge No. 1 requested by defendant should have been given. This charge was as follows: "Gentlemen of the jury, if you believe from the evidence that the plaintiff Lucy Johnson (formerly Patterson) sat out in the open air or cold for three or four hours after a fire was built in the depot, if one was built, and that that caused her sickness, and that a person of ordinary care would not have remained out of the depot under the circumstances of the case, then she would be guilty of contributory negligence, and if you so find you will find for the defendant." It presented affirmatively to the jury the defendant's theory, as made by the evidence, and, we believe, would have assisted the jury in reaching a verdict.

Special charge No. 2 requested by defendant does not seem to us to have been called for by the evidence. The plaintiff testified that she had been picking cotton before the day in question, but there is no evidence, aside from this, that there was any exposure to cold or bad weather, or any other cause likely to produce illness.

We have carefully examined the other assignments, but find no errors except those mentioned. For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

MAY v. JACKSON.*

(Court of Civil Appeals of Texas. April 8, 1903.)

TAXES—SALES—SALE FOR COSTS AND TAXES.

1. A sale of land by a city for taxes and costs is void in the absence of any provision by charter or ordinance authorizing a sale for costs.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by A. W. May against Annie Jackson. From a judgment for defendant, plaintiff appeals. Affirmed.

M. T. Connors, for appellant. F. D. Cosby, for appellee.

STREETMAN, J. This was an action of trespass to try title, brought by appellant, to recover of appellee a lot in the city of Dallas. The judgment was for appellee. Appellant claimed title under deeds executed by the tax collector of said city. The deeds showed upon their face that the sales were made to pay the taxes due upon said property, and the further sum of \$2.50 costs. The charter and the ordinances of the city of Dallas

*Rehearing denied April 29, 1903, and writ of error denied by Supreme Court.

bearing upon the question are set out in full in the record, and it is unnecessary to copy them here. It is sufficient to say that they nowhere authorize a sale for costs, and inasmuch as the sale was made for costs, as well as taxes, it was void and passed no title. *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340; *Eustis v. Henrietta*, 91 Tex. 325, 43 S. W. 259. Appellant relies upon the case of *City of Dallas v. Martyn*, 68 S. W. 710, 5 Tex. Ct. Rep. 297, in which it is held that the tax collector might compel the city to pay him for acknowledgments made to tax deeds. This may be true, and yet, in order to authorize a sale for costs, the power must be expressly conferred to sell for this purpose.

There being no error in the judgment, it is affirmed. Affirmed.

GILBERT v. GOSSARD.*

(Court of Civil Appeals of Texas. March 18, 1903.)

ACTION ON NOTES — DEFENSE — PARTIAL BREACH OF WARRANTY — EVIDENCE.

1. Where, in an action on notes given for machinery, a defense of breach of warranty was set up, and the evidence showed that there had been only a partial breach, defendant could not recover therefor without showing the particular items of damages sustained.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by A. R. Gossard against George Gilbert. Judgment for plaintiff, and defendant appeals. Affirmed.

Z. T. Fulmore, for appellant. Brooks & Shelley, D. W. Doom, and D. H. Doem, for appellee.

FISHER, C. J. This suit was brought in the district court of Travis county, Tex., by appellee, as plaintiff, against appellant, as defendant, to recover the amount due on two promissory notes—one for \$725, and the other for \$700—besides interest and attorney's fees, secured by lien retained in the notes and by chattel mortgage on certain machinery, and to foreclose the lien and chattel mortgage, and, in addition, to recover the amount of freight paid by plaintiff for defendant on the machinery, amounting to \$183.75, besides interest, and also the amount due on a promissory note executed and delivered to plaintiff by defendant for \$71, besides interest and attorney's fees, and also the amount of \$36.10 due by defendant to plaintiff on open account. The case was tried before the court and jury, and resulted in a verdict and judgment in favor of plaintiff against defendant for the amount due on the three notes sued on, principal, interest, and attorney's fees, and the amount due for freight, principal and interest, and \$14.10 on the open account, and for foreclosure of the chattel mortgage. Defendant, for answer, filed general demur-

rer and general denial, and averred that a contract was entered into between him and the plaintiff whereby the engine, gin, and appurtenances should be of good material and well made, and do as good work as any machinery of the same class, if properly operated, manufactured in the United States; that the warranty was breached; that the engine, gin, appurtenances, etc., if they had been as represented would have ginned 25 bales of cotton a day, which they did not and could not do; and that the machinery was entirely worthless. Other facts were pleaded, which are fully disclosed in the answer of appellant.

The trial court instructed the jury as follows: "That you will find for plaintiff on the two notes dated 8—24—1897, for \$700 and \$725, respectively, for the amount of said two notes, with interest thereon at the rate of ten per cent. per annum from August 24, 1897, to this date, and ten per cent. additional on the amount of said two notes and interest, as attorney's fees, with a foreclosure of plaintiff's chattel mortgage on the property described in plaintiff's petition. You are also instructed that you will find for the plaintiff for the amount of the note for \$71, dated, August 3, 1899, with ten per cent. interest per annum on said sum from that date to this date, and ten per cent. additional on such principal and interest, as attorney's fee. You will also find for the plaintiff for the \$183.75 freight paid on the machinery involved in this suit, with interest thereon at the rate of six per cent. per annum from August 24, 1897, up to this date, unless you should find that the defendant is entitled to a credit of \$100 on such freight, in which event you will find for the plaintiff on the freight account for \$83.75, with six per cent. interest per annum from said August 24, 1897. If you believe from the evidence that the \$100 paid by defendant to plaintiff on August 19, 1897, was credited to plaintiff in a settlement between plaintiff and defendant of accounts between them (exclusive of such freight claim) at the time the \$71 note was given, and that said note for \$71 was given for the balance then owing plaintiff by defendant upon open account (not including the freight claim) after allowing defendant credit for said \$100, then you will not allow any credit upon said freight claim. If you do not believe that defendant was given credit for said \$100 in a settlement made between the parties hereto at the time said \$71 note was given, then you will apply said \$100 as a payment on said claim for freight. If you believe from the evidence that the plaintiff sold and delivered to the defendant any or all of the items of goods described in the account attached to plaintiff's petition, then you will find for the plaintiff for the fair market value of such, if any, of such goods as you may find were sold and delivered by plaintiff to defendant at the instance and request of defendant, with interest at the

*Rehearing denied April 29, 1903, and writ of error denied by Supreme Court.

rate of six per cent. per annum from January 1, 1900. The form of your verdict will be as follows: 'We, the jury, find for the plaintiff for [here state the amount, principal, interest, and attorney's fees, of the \$700 note and the \$725 note] to bear ten per cent. interest per annum from this date, with foreclosure of plaintiff's chattel mortgage as prayed for. We also find for plaintiff for [here state the amount, principal, interest, and attorney's fees, of the \$71 note], to bear 10 per cent. interest per annum from this date. We also find for plaintiff for the sum of [here state the amount, principal, and interest, which you may find owing by defendant on the freight]. We also find for plaintiff for [here state the amount and interest which you may find owing by defendant to plaintiff upon the open account.]' The jury are the exclusive judges of the facts proved, of the weight to be given to the evidence, and of the credibility of the witnesses; but you are bound to receive the law from the court, which is herein given you, and be governed thereby." The evidence in the record authorized the charge of the court.

The contract containing the warranty is as follows:

"Austin, 9-10-1897.

"I hereby certify that I this day purchased of A. R. Gossard:

One 48x12 Tublar Boiler.
One 10x12 Automatic Engine, all complete with all connections.
One 70 saw feeder for Pratt Gln R. H.
One 70 saw Smith Gln complete L. H.
One 30 inch Jumbo Thomas Press.
One Pneumatic Distributor for 2-70 Glns.
One 85 Fan for same.
One Automatic Valve.
One Countershaft complete for same.
3 Elbows.
One Suction.
16 ft. 12 in. square wood fan connection.

No Interest on first note if paid at maturity.

Purchaser paying freight from factory, to be delivered at Austin, Tex., for the undersigned, and warranted to be well made, of good material, and to do as good work as any machinery of same class if properly operated manufactured in the U. S. Title or ownership does not pass from A. R. Gossard until settled for as herein specified.

"On receipt of said machinery, I hereby agree to pay to A. R. Gossard the sum of Fourteen Hundred and Seventy-Five Dollars, as follows: On October 15th, 1897, \$725; on October 15th, 1898, \$700, and the old boiler with its tirings for \$75, delivered to Austin. Said notes to draw 8 per cent. interest from date until paid; if not paid at maturity, ten per cent. from date of notes. Should the collection of said notes be made by process of law, then an additional sum of ten per cent. on amount due is to be paid in liquidation of attorney's fees.

"All notes and accounts to be made payable to A. R. Gossard at Austin, Texas, with sat-

isfactory endorsements and secured by liens on said machinery, also on the following described personal property: * * * Said machinery to be kept insured in a reliable company. Loss, if any, to be paid to A. R. Gossard as his interest may appear.

"If this machinery fails to fulfill its warranty, notice must be given to A. R. Gossard, whose duty it shall be to readjust such machinery and if necessary, substitute any parts which prove defective, at his own expense. Necessary time will be given for such change to be made. But should the failure to perform right be on the part of the operators all expense shall be paid by purchaser. 10 days' use, without notice otherwise, shall be conclusive evidence of entire satisfaction. In the setting and adjusting all asked-for material shall be furnished by purchaser, and all necessary assistance free of charge.

"The failure of any part of the above machinery shall in no way affect this contract on any parts not so affected. Failure on purchaser's part not to receive said machinery on arrival, shall entail on him the loss sustained by A. R. Gossard. Should A. R. Gossard fail to deliver said machinery as per contract, he is not to be held liable, if the fault is on account of manufacturers or railroads.

"On failure or refusal to pay the notes given for purchase of this machinery, or any one of said notes, A. R. Gossard shall have authority to declare all notes due, and after ten days' notice, by posting one written notice in courthouse in — county, shall proceed to sell said machinery to highest bidder and apply said amount to liquidate said debt. Should the amount exceed the amount due, it is to be paid to the purchaser.

"Geo. Gilbert."

The evidence in the record does not show that the machinery mentioned in the contract was entirely worthless, but there is testimony to the effect that some of its parts were defective, and the machinery, in its operation, could not accomplish the full amount and character of work expected from it at the time that it was purchased by appellant. It is expressly stipulated in the contract that the failure of any part of the machinery shall in no way affect the contract as to those parts of the machinery that may not be found defective. The court correctly construed the warranty to apply to those parts of the machinery that were defective. While there is abundant evidence in the record tending to show substantial defects in some parts of the machinery, there is no evidence which shows the amount of the damage sustained by reason of such defective parts, or the value of those parts, or what it would cost to replace them. Under the facts of the case, there was not a total breach of the warranty, for much of the machinery was not defective; and, such being the case, if the defendant desired to recover the damages sustained by

reason of a partial breach, he should have proved such items of damages, which was not done.

As said before, we think the charge of the court was correct, in the manner in which some of the items were submitted to the jury, and in peremptorily instructing them how to find as to others. There was no error in refusing the instructions requested.

With reference to the point raised in the second assignment of error, it is sufficient to say that the question of mistake as to the \$71 note was not pleaded by defendant. Consequently no such issue was in the case.

We find no error in the record, and the judgment is affirmed. Affirmed.

ANDRAE v. WATSON.

(Court of Civil Appeals of Texas. April 15, 1903.)

BREACH OF CONTRACT—COMPLAINT—INSTRUCTIONS—TIME FOR DOING WORK.

1. The complaint by a contractor against the owner of a house for not letting him do the work thereon according to his contract should allege the character and amount of the labor which plaintiff alleges he did preparatory to the work, and that he would have made a profit, and the amount thereof.

2. No time being prescribed in a contract to do work on a house, defendant in an action by the contractor against the owner for not letting him do the work is entitled to an instruction that the jury shall find for him if plaintiff failed to begin or prosecute the work in a reasonable time.

Error from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by Alexander Watson against E. H. Andrae. Judgment for plaintiff. Defendant brings error. Reversed.

Plowman & Baker, for plaintiff in error. Holloway & Holloway, for defendant in error.

STREETMAN, J. Defendant in error, Watson, sued to recover the amount of expenses incurred by him, and the loss of profits, on account of the refusal of plaintiff in error, Andrae, to allow him to finish a contract to erect certain improvements for said plaintiff in error. Plaintiff's petition stated the cause of action as follows: "That heretofore, to wit, on the 1st day of March, 1901, the plaintiff and defendant entered into a written agreement, whereby the plaintiff agreed to make certain changes and improvements in a certain house in the city of Dallas, Texas, known as No. 340 Main street; said changes and improvements being more specifically set out in the specifications in said contract, a copy of which contract, including said specifications, is hereto attached, marked 'Exhibit A,' and made a part of this petition. That also by said contract the defendant, in consideration of the said work so to be done and performed by the plaintiff, agreed to pay to the plaintiff the sum of seven hundred and

seventy-five dollars (\$775). That thereafter the plaintiff, in pursuance of said contract, began the work so agreed to be done by him, and performed a portion of the same, and delivered at said house certain materials for said improvements, consisting of brick, sand, and lumber, and that the plaintiff has ever since been ready, able, and willing to complete said work in exact accordance with said agreement; but the defendant on, to wit, March 13, 1901, notwithstanding said contract, and in violation of the rights of plaintiff thereunder, refused to allow the plaintiff to go ahead with said work and to complete the same, but, on the contrary, procured said work to be done by other persons. That thereby there was lost to the plaintiff his time and labor in preparing the details for said work, and in performing the work so done by him, and the cost of labor used in said work, and in delivering the said materials and removing the same, and also the reasonable profit he could and would have made if allowed to complete the said contract—in all, the sum of three hundred dollars (\$300), to which amount the plaintiff has suffered damages by reason of the said acts and defaults of the defendant." A number of special exceptions were directed to the petition, and form the basis of several assignments of error. We think the petition was insufficient, in some respects, as against the special exceptions. It will be seen that the allegations are very general, and much is left to inference. Without treating said assignments in detail, we deem it sufficient to say that the petition should have alleged the character and extent of the labor performed by plaintiff in preparing the details for the work, and the character and amount of labor used by plaintiff in delivering and removing the materials, and that he should have made a profit, and the amount of such profit.

The court's general charge is as follows:

"If you believe from the evidence before you that there was a breach of the contract in evidence before you, between plaintiff and defendant, in that the defendant refused, without the fault of plaintiff, to allow the plaintiff to proceed to carry out his (plaintiff's) part of the contract, and you believe from the evidence that the plaintiff was ready, willing, and able to perform and carry out the contract, as he had agreed and stipulated to do in the contract, and you further believe from the evidence that plaintiff has sustained damages by reason of the refusal, if any, of the defendant to allow the plaintiff to proceed with the work in accordance with the said contract, then you will find for the plaintiff, and assess his damages in such sum as you may believe from the evidence the plaintiff would have realized as profits on said contract, had said contract been completed and carried out by both parties to same according to its terms and stipulations.

"If you believe from the evidence that the plaintiff, after a reasonable time had elapsed,

failed to begin and carry on the work according to the terms of the contract, or that the defendant had reasonable grounds (that is, such grounds as a reasonably prudent person would act upon) for believing that the plaintiff did not intend to begin and carry on the work according to the terms of the contract, after waiting a reasonable length of time for the plaintiff to begin and carry on the same, and that the defendant made contracts and arrangements for other parties to do the work contracted to be done and performed by the plaintiff, which you are instructed he had the right to do, and you further believe from the evidence that the plaintiff was ready, able, and willing to carry on the work according to the contract, and that he (plaintiff) had already given his time and services and had expended any sum or sums of money in arranging for the carrying on of said work, and in beginning to carry on the same, according to the contract, thereby causing loss to plaintiff, then you will find for the plaintiff, and assess his damages in any sum that you may believe from the evidence was the reasonable worth and value of labor done and performed by plaintiff or others under his directions, and for any and all sums of money expended by plaintiff for any purpose in arranging to do the work and for doing any part of the work under the contract between the plaintiff and defendant, and for no profits, if any, that plaintiff would have made, the burden of proof is upon the plaintiff to establish his case by a preponderance of the testimony, and if he fails to do so, you will find for the defendant.

"You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony."

Several assignments of error are urged against this charge, and some of them must be sustained. The first paragraph seems to be a correct statement of the law. At least, we see no error of which the defendant might complain. An inspection of the second paragraph, however, indicates that something has been omitted, and the result is a clear misdirection as to the rights of the parties. The first portion of this paragraph submits, after a fashion, the defendant's theory of the case, and if the court had told the jury that, if they found the facts as stated, they should return a verdict for the defendant, it would have been correct; but, instead of this, the charge proceeds to instruct the jury that, notwithstanding the plaintiff may have failed to begin and carry on the work within a reasonable time, etc., still they might find for the plaintiff. Under no theory of the case are they authorized to find for defendant. The court seems to have had a proper conception of the law applicable to the case, but, in the preparation of the charge, failed to instruct the jury as he intended.

The special charges requested by defend-

ant, while in the main correct, were not entirely so, and should not have been given in the form asked. The contract itself did not prescribe the time in which it should be completed. The plaintiff, therefore, had a reasonable time within which to perform it. If he failed to do so within a reasonable time, the defendant had a right to have the work performed by other persons. What was a reasonable time was a question of fact to be determined by the jury from all the circumstances in evidence. These principles were stated in the special charges given at the instance of the plaintiff, but they were only presented from the standpoint of the plaintiff, and the jury are nowhere instructed to find for defendant if the plaintiff failed to begin or prosecute the work in a reasonable time.

We find no error, except as above pointed out, but for the errors mentioned the judgment is reversed and the cause remanded. Reversed and remanded.

M. A. COOPER & CO. et al. v. SAWYER.*
(Court of Civil Appeals of Texas. March 18, 1903.)

FRAUDULENT CONVEYANCES—EVIDENCE—ADMISSIBILITY—RULE EXCLUDING WITNESSES—ENFORCEMENT—DISCRETION OF COURT—HUSBAND AND WIFE—NOTICE TO HUSBAND—AGENCY—APPEAL.

1. A son, to secure named creditors, executed a deed of trust on merchandise formerly owned by his father. One of the debts preferred was a debt of \$820 to his mother. The trustee claimed that the father had borrowed \$820 from the mother, and had given his note to secure the same, which was assumed by the son, and secured by the deed of trust in question. Other creditors of the son attacked the debt as fraudulent. *Held* proper to permit the son to testify that several years before the execution of the deed of trust he heard his father and mother say that the father owed the mother \$820.

2. In an action for wrongful attachment, plaintiff claimed the property under a deed of trust to secure named creditors. The mother of the maker of the deed of trust was one of the creditors preferred, and her husband was permitted to remain in the courtroom during the time; the rule as to witnesses not being enforced against him. *Held* not an abuse of discretion; he having, doubtless, been permitted to remain as representative of his wife's claim.

3. To charge a wife, who has been preferred in a deed of trust executed by her son, with notice that the deed is fraudulent as to other creditors, on account of knowledge in her husband, it must appear that he was authorized by her to act as her agent in accepting the deed of trust.

4. Agency cannot be proved by the acts or declarations of the agent which are not shown to have been known by the principal.

5. The court, on appeal, will not pass on the weight of the evidence.

Appeal from District Court, Hamilton County; W. J. Oxford, Judge.

Action by L. M. Sawyer against M. A. Cooper & Co. and others. Judgment for plaintiff, and defendants appeal. *Affirmed*.

*Rehearing denied April 25, 1903.

Eidson & Eidson, for appellants. Martin & George, J. Van Steenwyk, and Dewey Langford, for appellee.

STREETMAN, J. This was an action brought by appellee, L. M. Sawyer, to recover damages for the levy of a writ of attachment upon a stock of merchandise. The plaintiff claimed the property by virtue of a deed of trust executed to him by J. E. Cline to secure certain creditors therein named. The defendants were the sheriff who levied the writ, M. A. Cooper & Co., the plaintiffs in the attachment, and the sureties upon the bonds executed to procure the issuance and levy of the writ. In accordance with the verdict of a jury, judgment was rendered for the plaintiff against all of the defendants, and in favor of the sheriff as against his co-defendants.

The defendants alleged that the debts mentioned in the deed of trust were fictitious and fraudulent; that the deed of trust was executed to hinder, delay, and defraud the creditors of J. E. Cline and his father, J. K. P. Cline, who had formerly owned the stock of goods; that the trustee had not taken possession of the goods when the writ was levied, and that none of the creditors had accepted under the deed of trust before the levy of the writ. The verdict of the jury settled all of these issues against the defendants; and a careful examination of the statement of facts convinces us that there was evidence to sustain the finding of the jury upon each of these issues.

The first assignment of error complains that the court permitted J. E. Cline to testify that three or four years before the execution of the deed of trust he heard his father and mother say that his father owed his mother the sum of \$820. One of the debts preferred was a debt of \$820 to Mrs. H. C. Cline, mother of H. E. Cline. Plaintiff claimed that this indebtedness grew out of a transaction in which J. K. P. Cline had sold a tract of land, part of which was the separate property of Mrs. Cline, and that J. K. P. Cline had borrowed from Mrs. Cline \$820, which represented her separate interest in this property, and afterwards executed to her the note which was assumed by J. E. Cline, and secured by the deed of trust in question. Defendants attacked this debt as fictitious and fraudulent, and the good faith of J. E. Cline in naming this debt in the deed of trust was an issue in the case. Upon this issue, we think that the evidence was clearly admissible.

The second assignment is directed to the action of the court in permitting J. K. P. Cline to remain in the courtroom during the trial, and not enforcing against him the rule invoked as to the witnesses in the case. He was not a party to the case, and the record does not give the reasons of the court for excepting him from the rule. It is evident, however, that the plaintiff, Sawyer, was only

slightly interested in the suit, and the real parties to the suit were the creditors named in the deed of trust. One of these creditors was Mrs. H. C. Cline, wife of said J. K. P. Cline, and the court doubtless permitted him to remain in the courtroom as the representative of his wife's claim. The manner in which the rule as to witnesses is enforced is lodged very largely in the discretion of the court, and we are unable to say that any abuse of the discretion was shown.

The defendants requested the following special charge: "If you believe from the evidence that J. K. P. Cline and H. C. Cline were husband and wife at the time of the alleged execution of the note by J. K. P. Cline to the said H. C. Cline, and that the said J. K. P. Cline was the agent of the said H. C. Cline for the purpose of collecting said note, then notice of the fraudulent intent on the part of J. E. Cline to defraud his creditors, to J. K. P. Cline, would be notice to Mrs. H. C. Cline, and participation on the part of J. K. P. Cline with and in the fraudulent intent and purpose of J. E. Cline to hinder or delay his (J. E. Cline's) creditors in the collection of their debts against J. E. Cline would be participation in same on the part of Mrs. H. C. Cline." The proposition of law announced in this charge is correct, but we are unable to find any evidence which required it to be given in this case. It is true that the husband is vested by law with the control and management of the wife's separate estate, but he is not, in the absence of special authority, such an agent that notice to him will constitute notice to his wife. *Speer, Law of Mar. Women, § 35.* To affect her with notice of the fraud by reason of his knowledge, it was necessary to have shown that he was authorized by her to act as her agent in accepting the deed of trust. There was evidence that he had assumed to act as her agent in accepting the deed of trust, but no evidence whatever that she had authorized him to do so; and the agency could not be proved by the declarations or acts of the agent which were not shown to have been known to the wife.

Special charges were requested with reference to the acceptance of the deed of trust by the creditors, the possession of the trustee, and the knowledge of the creditors of the fraudulent purpose of the deed of trust. The charge of the court upon all of these issues was very full and very fair to the defendants, and all of the special charges which were proper were fully embraced in it.

It is insisted that the verdict as to the amount of the damages was excessive. It is true that, if the jury had credited the testimony of the witnesses of defendants, the verdict should have been for a less amount, but there was evidence which tended to show that the value of the property was even greater than the amount assessed by the jury. It was the province of the jury to pass

upon the weight of this evidence, and we are not authorized, under these circumstances, to disturb their verdict.

There being no error in the judgment, it is affirmed. Affirmed.

Additional Findings of Fact.

(April 29, 1903.)

In response to the request of appellants, made in their motion for rehearing, we make the following specific findings of fact:

On December 9, 1895, J. E. Cline was the owner of a stock of merchandise in Hamilton County, Tex., the items of which are set out in the exhibit to plaintiff's original petition in this suit. On that day, in order to secure the payment of certain indebtedness therein described, he executed a deed of trust conveying said property to L. M. Sawyer, as trustee. There being no dispute as to the terms of said deed of trust, it is unnecessary to further describe it.

L. M. Sawyer, the trustee, at once accepted as such trustee, took immediate possession of said property, and was proceeding to execute his trust, when, on December 10, 1895, M. A. Cooper & Co., having instituted suit against said J. E. Cline and J. K. P. Cline in the district court of McLennan county, Tex., procured the issuance of a writ of attachment therein, placed said writ in the hands of R. C. Moore, sheriff of Hamilton county, Tex., and caused him to levy the same upon said stock of goods; and the said property was thus taken from the possession of said L. M. Sawyer, and has never been returned to him.

One or more of the debts secured by said deed of trust were genuine, and one or more of the creditors therein named, whose debts were genuine, without any knowledge of any fraudulent purpose on the part of said J. E. Cline, if he had any such purpose, accepted the said deed of trust before the levy of said writ of attachment.

Said deed of trust was, immediately after its execution, filed for registration in the office of the county clerk of Hamilton county, Tex.

The property levied on under said writ of attachment was at the time of the levy of the market value of \$1,700.

VERMILLION v. PARSONS (PARSONS, Intervener).

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

ATTACHMENT—INTERPLEADER—DEFENDANT'S TESTIMONY IN OTHER SUIT—ADMISSIBILITY—WRONGFUL ATTACHMENT—BAILEE'S RIGHT TO RECOVER.

1. The self-serving declaration of a husband, given in his testimony in a prior attachment suit against him, as to his ownership of goods then in the sheriff's possession, is not admissible against his wife, who interpleads in a sub-

sequent attachment suit, claiming title adversely to her husband.

2. A bailee of third persons can recover possession of the property as against the levy of an attachment running against her husband's goods.

Appeal from Circuit Court, Barry County; H. C. Pepper, Judge.

Attachment by J. U. Vermillion against L. C. Parsons, in which Mrs. L. C. Parsons interpleads, claiming title to the property. From a judgment for plaintiff, intervener appeals. Reversed.

Jos. French, for appellant. D. H. Kemp, for respondent.

Statement of Facts and Opinion.

GOODE, J. This is a contest between the respondent, as an attaching creditor of L. C. Parsons, and Mrs. Parsons, the defendant's wife, as interpleader, for the attached property, which consists largely of household furniture. The issue was whether the property belonged to Parsons, and was subject to process for his debt, or to his wife in her own right; and there was contradictory evidence for the jury to pass on, we think. We therefore overrule the appellant's contention that the evidence was insufficient to support the verdict.

There was another attachment action against Parsons, wherein J. R. Williams was plaintiff. On the trial of that action before a justice of the peace, Parsons testified about the ownership of the furniture contained in a hotel at Monett which he and Mrs. Parsons conducted; and the testimony he gave bore on the ownership of the property involved in the present controversy, on the trial of which in the circuit court Williams, the attaching plaintiff in the other case, was a witness for Vermillion. Williams was asked about what Parsons testified with reference to the title to the goods in question, and was permitted to answer that Parsons swore in the justice's court that he (Parsons) owned the attached goods, and nobody else had any claim on them. Respondent also put on the stand a witness named Clover, who was a juror in the Williams case, and asked him this question: "State what Mr. Parsons testified in the trial of that case?" Clover answered as follows: "There was a portion of the goods that he did not claim to own, and there was a portion he said was his. He did not claim to own his daughter's piano, iron bed, and bedroom suite. The rest of the goods he claimed was his, and that he had property in Springfield, and that he was going to sell it and pay off all his debts." The appellant objected and excepted to the admission of the foregoing testimony. The respondent's counsel argues that it was competent, under the rule that the declarations of a person in possession of personal property are admissible as evidence against himself and every one claiming under him by a subsequent transfer. The rule is that declara-

tions made against the ownership of property by the party in possession are competent evidence, because made against his interest, but declarations in favor of his ownership are inadmissible. *Cavin v. Smith*, 21 Mo. 444; *Darrett v. Donnelly*, 38 Mo. 494; *Clafin v. Sommers*, 89 Mo. App. 419. The statement Parsons made before the justice of the peace was that he owned the disputed goods, which was a self-serving declaration; and at that time Parsons was not in possession of the goods, as they had already been seized and taken under attachment writs. Nor does Mrs. Parsons claim under Parsons by a subsequent transfer. She claims in opposition to his title. The admitted testimony was therefore incompetent, and should have been excluded.

There was evidence that some of the property in dispute belonged to two friends of Mrs. Parsons, and had been deposited with her; and, as bailee, she can recover it if the bailment is satisfactorily proven. *Wyeth Hardware Co. v. Carthage Hardware Co.*, 75 Mo. App. 518. As to those articles, the instructions ought to be framed with reference to Mrs. Parsons' right to their possession, instead of their ownership—a point which both parties lost sight of at the trial, as the instructions show. So no error can be assigned by the appellant on that score.

Because of the admission of the testimony mentioned, the judgment is reversed and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

COWGILL v. JONES et al.*

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

BILLS AND NOTES—USURY—FOREIGN STATUTES—CUSTOMS—REBATE OF INTEREST—ELIMINATION OF USURY.

1. Under the Kansas statute providing that any rate of interest contracted for, not exceeding 10 per cent., may be charged, all interest above such rate is usurious.

2. Where plaintiff, who was a member of a live stock exchange, loaned defendant money with which to purchase cattle, but himself performed no services for the purchase of the cattle, a custom of such exchange to charge a buying commission, under such circumstances, did not authorize plaintiff to charge such a commission in addition to interest which rendered the loan usurious.

3. Where, in an action on a note which was usurious, plaintiff and defendants both testified that plaintiff agreed to make a rebate of unearned interest, which removed the taint of usury, plaintiff was entitled to recover on the contract, which was invalidated only to the extent of the usury charged.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by James Cowgill against William C. Jones and others. From a judgment in

favor of defendants, plaintiff appeals. Reversed.

Arthur F. Smith, C. O. Dickinson, and Frank Hagerman, for appellant. W. E. Owen and Peyton A. Parks, for respondents.

BROADDUS, J. This is a suit to recover \$418.87, alleged balance due on the following promissory note executed by defendants, to wit: "Kansas City, Kans., Nov. 7, 1899. Six (6) months after date, I promise to pay to the order of Cowgill Live Stock Commission Co., at their office at the Kansas City Stock Yards, Kansas City, Kansas, thirty-eight hundred forty-six and 60-100 dollars, \$3,846.60, with interest from maturity at the rate of 8 per cent. per annum until paid. Value received. Wm. C. Jones. West & Bernethy. G. N. West." On the back of said note were the following credits: "Received as part payment proceeds 130 cat. \$3,402.73 on Feby. 21, 1900." "Rebate Int. Mch. 10, 1900,—\$25.00." The defendant Jones, by his separate answer, admitted the execution of the note, and that it became due May 10, 1900; and for a defense and counterclaim to the same he alleged that said note was secured by his chattel mortgage upon 130 head of cattle, of even date with the same; that on or about the 20th day of February, 1900, he shipped said cattle to the plaintiff for the purpose of paying off said note, with directions for the manner in which he was to sell the same; that the plaintiff disobeyed said directions, which resulted in a loss to defendant of \$1,000, and for which he says he was damaged in that amount. For a second defense he alleges that prior to the shipment of said cattle to the plaintiff the latter agreed with him that he would give him a rebate of all the unearned interest and part of the commission for making the sale of said cattle, and that under said agreement he is entitled, in addition to the sum of \$25 credited on said note as a rebate on the same, to the further sum of \$113 for said unearned interest. For a further defense he alleges that the remainder of said note—to wit, \$204.10—exceeds the legal rate of interest of 10 per cent. The other defendants, who were the securities of defendant Jones, in substance adopt his answer.

The evidence disclosed that defendants lived in the vicinity of Windsor, Mo.; that defendant West was the owner of 130 head of cattle, which defendant Jones was desirous of buying on credit; that the price of \$28 per head was agreed upon between them as the value of the same; that the plaintiff, who was engaged in the commission business at the stock yards in Kansas City, Kan., was requested to advance the money to Jones in order that he might be enabled to make the purchase; that plaintiff agreed to advance the money upon condition that defendant Jones, in addition to giving a mortgage upon the cattle, would further secure the money

*Rehearing denied April 27, 1903.

to be so advanced by giving defendants West and Bernethy as securities on the note; and that, defendants having so agreed, plaintiff prepared the note in question and the mortgage, and sent them to defendants. Both the note and mortgage were signed and returned to plaintiff at his place of business in Kansas City, Kan. When the plaintiff sent the note and mortgage to defendant Jones it was accompanied by the following statement, to wit:

"Kansas City Stock Yards, Nov. 7, 1899.

"Wm. C. Jones,

"Cowgill Live Stock Commission Co.,
Rooms 106, 107, and 108 Live Stock Exchange.

"Cattle.		Price.	Amount.
130	cost	\$28	\$3,640 00
	commission		48 00
	interest		156 10
	Rev. S. etc.		2 50
			<hr/> Total \$3,846 60"

It was shown that said statement contained the items that constituted the consideration for the note. There was evidence tending to prove defendant's counterclaim, and that plaintiff agreed to give or obtain a rebate of the unearned interest on the note. Plaintiff Cowgill testified that it was one of the rules of the Live Stock Exchange, of which he was a member, for the commission-man who advanced money to a purchaser of cattle to charge a commission, and rules to that effect were offered in evidence, but excluded. The statutes of Kansas regulating interest were also in evidence. The jury returned a verdict for the plaintiff in the sum of \$258.50, whereupon the court adjudged him to pay the costs. The plaintiff appealed.

The court instructed the jury that the contract in suit was a Kansas contract, and that they should take \$3,642.50 as the principal of the note, instead of \$3,846.60, the amount named; compute interest on the same at 6 per cent. from date to the 21st day of February, 1900; from the amount thus obtained deduct \$3,402.75, the amount realized from the sale of the cattle, and from the balance found compute interest from said last-named date at the same rate of interest until the date of trial. The jury were also instructed upon the issue raised by defendants' counterclaim. Computation shows that the jury allowed defendants on one or more of said counterclaims about \$61.88.

The plaintiff contends that as the contract was executed in Kansas there was no usury in the transaction, that the charge for commission was legitimate, and that no usury was claimed and none ever paid.

As the contract was executed in Kansas, we must look to the Kansas statute to determine whether the element of usury is contained in the note, and if it is found that under the laws of said state it did so contain such element it would be so regarded by the

courts of this state. Under the Kansas statute there is no established legal rate of interest, but it is made a matter of contract, the maximum rate being 10 per cent., above which all interest is usurious.

The interest and commission contained in the note amounted to \$204.10; at the rate of 10 per cent. the interest was \$182.17; therefore the note contained an excess of \$21.93 over the highest contract rate of interest of the state of Kansas. The plaintiff seems to have entertained the opinion that as it was a custom of the Live Stock Exchange, of which he was a member, to charge a buying commission under the circumstances, it was lawful to do so. A custom sometimes makes the law, but a custom in direct conflict with positive law has no such effect. It is nugatory and binds no one. We are satisfied that the excess in the note over the amount of the principal and 10 per cent. thereon was usurious. There was no consideration for the commission charged, as the cattle were not bought through the agency of the plaintiff. We think it clear that the excess was usurious.

It is claimed by plaintiff, however, that, notwithstanding said note may have contained the element of usury by reason of said excess, that element was removed by the rebate of \$25. Both the plaintiff and defendants testified that plaintiff was to make a rebate of unearned interest, although they differ as to the extent of such rebate. It is sufficient to say that it was made by agreement. In such cases the law is that the taint of usury has been removed. In *Peters Shoe Co. v. Arnold*, 82 Mo. App. 2, it was held that, "while the taint of usury will follow an indebtedness through all its renewals, however remote, yet the parties are not incapacitated from legalizing the illegal contract by withdrawing from it the element which made it unlawful."

The element of usury in a contract does not render it void; it is only void as to the usury. Section 3709, Rev. St. 1899, imposes the penalty upon a party only when he has been guilty of exacting usury.

Applying the statute to the facts of this case, the trial court was in error for two reasons, viz.: First, because the element of usury had been removed by agreement of parties; second, because plaintiff was not guilty of exacting usury. The plaintiff was entitled to judgment on the principal of his note, less the \$25 rebate, less payment made on February 21, 1900, of \$3,402.75, less whatever the jury found for defendants on their counterclaims, with interest at 8 per cent. after maturity, with his costs.

We have noticed only the controlling questions in the case. For reasons given, the cause is reversed and remanded.

SMITH, P. J., concurs. ELLISON, J., not sitting.

DONNELL v. LEE.*

(Court of Appeals at St. Louis, Mo. Dec. 23, 1902.)

ELECTIONS—CONTESTS—SCOPE OF INQUIRY—FINDINGS OF TRIERS—REGISTRATION—STATUTE—CONSTRUCTION—REPEAL—AMENDMENTS.

1. In contested election cases the appellate court will adopt the findings of the trier or triers of the issues of fact, when there is any substantial evidence in support thereof.

2. Rev. St. 1899, § 7104, providing that on any day of election of public officers the two judges of election having charge of the ballots shall write their names or initials on the back of the ballots, applies only to an election of public officers, and is not controlling in the election of a city officer.

3. Rev. St. 1899, § 6995, art. 1, c. 102, entitled "Elections," provides that, whenever a registration is required by law, in addition to the current number the registration number of the voter shall be indorsed on his ballot, and that no ballot not so numbered shall be counted. Rev. St. 1899, § 7104, directs that the two judges of the election having charge of the ballots shall write their names or initials upon the backs of the ballots. Rev. St. 1889, § 4785, providing that "no judge of election shall deposit any ballot on which the names or initials of two of the judges as hereinbefore provided for does not appear," was amended by Acts 1891, § 11, so as to read: "Every ballot shall be numbered in the order in which it shall be received. No judge of election shall deposit any ballot, on which the names or initials of the judges, as hereinbefore provided for, do not appear." Acts 1891, § 13, provides that "all acts or parts of acts inconsistent with this act are hereby repealed." Section 7210, Rev. St. 1899, provides that all elections in a city of 25,000 and under 100,000 inhabitants shall be subject to all the provisions of the chapter entitled "Elections." *Held*, that the two acts (section 6995, Rev. St. 1899, and section 4785, Rev. St. 1889, as amended) were not inconsistent or repugnant to each other, and that the act of 1891 manifested no intent on the part of the Legislature to repeal or modify the mandatory words of section 6995, when applied to city elections.

4. The ballots in a contested election case can under no circumstances be produced in open court and be made a record of.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Contest of an election by James A. Donnell, contestant, against Arthur R. Lee, contestee. Judgment for contestee, and contestant appeals. Affirmed.

The city of Springfield is a city of the third class, and is divided into eight wards. On the 1st day of April, 1902, a city election was held in said city for the election of city officers. There were three tickets in the field—a Democratic, a Republican, and a Socialist ticket. James A. Donnell was the Democratic nominee for the office of city collector. Arthur R. Lee was the nominee of the Republican party, and F. M. Johnson of the Socialist party, for the same office. In each of the eight wards there was a polling place. The returns of the election were certified and delivered by the judges and clerks of the election to the city clerk on the even-

ing of the election, except those from one ward, in which the election is not contested. On the 8th day of April the voting list or pollbooks, tally sheets, and ballots from all the wards were produced by the clerk to the city council. The council, in compliance with an ordinance of the city, cast up the vote of the entire city as shown by the voting list, and declared the result. The result, as ascertained by the city council, showed that Lee had received 2,300 votes for collector, Donnell, 2,291, and Johnson 104. The certificate of election was delivered to Lee, who afterwards qualified and took possession of the office and is now in possession of the same. On the 14th day of May, 1902, James A. Donnell, the contestant, filed in the circuit court of Greene county his notice of contest. The principal grounds set forth in the notice with sufficient particularity are that a number of persons voted for Lee who were not legally qualified voters, and that a number of ballots in each of the wards were cast for contestant that were not counted for him; that there were a number of ballots cast for contestant that were counted for the contestee, and that a number of ballots counted for contestee were not numbered, or properly numbered; and that the face of the ballots, as returned to the clerk of the city, if properly counted, will show that contestant received a plurality of 458 votes over the contestee. The contestee filed in the same court a counter notice of contest, the main features of which are that in the First Ward there were nine ballots cast for contestee that had been changed by erasing the name of the contestee therefrom, and writing in the name of contestant, after the ballots had been returned to the clerk; that in the Fifth Ward 35 ballots had been changed in a like manner, and in the Eighth Ward 33 ballots had also been changed in the same way; that in some of the wards ballots had been prepared by the voter, or by some one for him, on the outside of the polling place, and had then been deposited with the judges of the election, and these illegal ballots had been received by the judges and counted for the contestant; that the voter voting these ballots had abstracted the ballots furnished by the judges of the election, and substituted the illegal ballots in their stead (these illegal ballots are termed "Indian ballots" in the pleadings and transcript); that a large number of ballots had been cast for the contestant by persons who were not legally qualified voters (naming them), and that a number of votes were cast for contestant that were not numbered with the current number of the ballot, or with any number showing the current and registration number of the person who cast the ballot; that in the Third Ward 241 ballots were cast for the contestant that were not numbered by the registration number of the voter.

The evidence shows that from several of the wards, and especially from the Eighth,

*Rehearing denied April 14, 1903.

¶ 4. See Elections, vol. 18. Cent. Dig. § 294.

the ballots cast at the election were delivered to the city clerk in an unsafe condition; that they were placed in torn and mutilated envelopes, and those from the Eighth Ward were in an ordinary grocer's paper sack, tied up with a string; that this paper sack and some of the envelopes containing the ballots were so torn as to expose the ballots; that in this condition they were placed on the top of a desk by the clerk in his office, where they remained during the night. On the next day the clerk placed them in a compartment of an ordinary writing desk in his office, and locked it. They remained in this compartment until they were taken out on the 8th of April by the clerk and taken before the city council. The clerk testified that the office was locked on the night the ballots were delivered to him, and, so far as he could tell, they were in the same condition as when received when he took them before the council on the 8th of April; that there was no tally sheet delivered with the poll list or ballots from the Eighth Ward. Two of the judges of the election in the Eighth Ward, however, testified that one of the tally sheets was delivered with the pollbook from that ward. It is also in evidence that the office of the clerk was guarded for two nights, after the pollbooks and ballots had been delivered, by persons remaining in the office. The contestant had his office in the room with the city clerk, and the desks were near each other, but he was in the office only for a few minutes at a time from the day of the election until the count was made by the city council, and then in the daytime, and did not know where the ballots were kept. There were four keys to the office—one in the possession of the clerk; one usually in the possession of Donnell, the contestant, who was then city collector; one in the possession of the janitor of the building; and one in the possession of the mayor. The key in the possession of Donnell was, some time before the election, delivered to a Mrs. Williams, who was an assistant of the clerk and also of Donnell, and was retained in her possession for some time after the election. There is no evidence that any of these persons having possession of the keys to the office, except the clerk, knew where the ballots were kept, or any intimation that they, or either of them, tampered with the ballots. The office was in the second story of the building. The windows on the south side of the office were not fastened, and could have been reached by a ladder from the outside, and an entrance made into the office through them.

After the result of the election had been ascertained by the city council, the city clerk placed the ballots in two ballot boxes, locked them, and secured them with strings, and placed a seal on them. Over the keyholes of the boxes he pasted a paper upon which were the initials of his name. In this condition they remained until they were after-

wards opened by the clerk in pursuance of the following order made by the court at the instance of the parties to this proceeding: "That G. W. Hackney, the city clerk, at a time to suit his convenience, within 30 days from this date, first having given five days' notice in writing to each of the parties, taking to himself such assistance as may be necessary, proceed to open the ballots cast at the late election on April 1, 1902, in the city of Springfield, in the respective wards, in the presence of the counsel for both contestant and contestee; first having given them notice of the time and place of such count, and all of such persons present (the parties and their respective counsel, the clerk and his assistants) first having taken and subscribed the oath as to secrecy required by the statute in that behalf. That he proceed to open, count, compare, and exhibit the ballots as to such election in the following manner: That he exhibit to the parties and their attorneys the face of each ballot cast, and at the time of so doing conceal from such parties and their attorneys the number of such ballot, until the count is complete in the ward counted at that time, and that he cast up and count the votes so cast for each candidate in such ward or precinct. That thereafter, and in a manner so as not to disclose what candidate was voted for on such ballot, and by keeping the face of the ballot concealed at the time, he proceed to exhibit the numbers and backs of such ballots to the parties and their attorneys, and compare the numbers of such ballots with the pollbooks and registration books of such ward, so as to ascertain that the numbers on such ballots correspond with the numbers on such pollbooks and registration books; and, if any ballots cast at such election do not correspond in numbers to the numbers on the pollbooks and registration books, he shall take a note thereof. That in each and every ballot in each and every ward he shall make note of and make a certificate to this court of all the facts appearing upon the ballot which either party shall desire to be brought before this court, or a note taken of, and he shall count and add up the number of votes cast in the whole city for each of the said candidates, and certify the same to this court in this manner, and that he make a tabulated statement to this court, showing the official count in each ward, as well as the count made by this order." In compliance with this order the count was made by the clerk in the presence of the counsel for the respective parties, after administering to them an oath of secrecy. A recount of the ballots, under the order of the court, showed that Lee had received 2,269 votes, Donnell 2,306, and Johnson 111; giving Donnell a plurality of 37. During the count the contestee's counsel discovered what they believed to be a number of suspicious ballots, and had the clerk number each of them on their face, and then amended the con-

testee's notice of contest, alleging that the name of Lee had been erased and Donnell's substituted on these ballots after the ballots had left the hands of the judges of the election, and moved the court to require the clerk to produce them for examination by the court. It was alleged that 9 ballots cast in the First Ward, 33 in the Fifth Ward, and 33 in the Eighth Ward had been changed after they had been cast by the voter, and after the election was closed, by the erasure of the name of Lee for collector, and the insertion therein of the name of Donnell. This motion was denied at the time. Evidence was then introduced that the ballots which the contestee asked to have produced in his motion were Republican tickets, with the exception of one, which was a Socialist ticket, and that the name of Arthur R. Lee for collector had been erased, and the name of James A. Donnell had been written in lieu thereof; that the name of Donnell had been written in these ballots by the same person; and that the handwriting was the same on all of them.

There was countervailing evidence, but after hearing the evidence pro and con, the court granted the order, in words and figures as follows:

"And now, pending the trial of this cause, and after the evidence has been heard for the contestor and the contestee, it becomes necessary, in the opinion of the court, in order to determine the issues, to examine ballots in the contest described as bearing clerk's numbers 8, 88, 141, 168, 264, 330, 413, 435, 441, in the First Ward, and certain ballots bearing clerk's numbers 49, 67, 84, 125, 129, 136, 188, 150, in the Fifth Ward, and also ballots bearing clerk's numbers 225, 234, 235, 326, 327, 339, 341, 425, 426, 428, 434, 499, 503, 508, 509, 511, 513, 516, 517, 600, 602, 604, 611, 614, and bearing clerk's numbers 82, 90, 91, 102, 104, 106, 107, 113, 125, 127, 134, 137, 173, 174, 186, 187, 195, 199, 222, 237, 249, 250, 251, 333, 471, 521, 528, 582, 600, in the Eighth Ward of said city; that it is also necessary to a complete and full determination of the cause and the issues therein that the clerk certify the names of the voters who voted said ballots as they appear by the pollbooks of said wards. The court therefore makes the following additional orders upon the city clerk:

"First. You are commanded to reopen the ballots of the First Ward voted at the city election, and take therefrom the following ballots, numbered with your number: 8, 88, 141, 168, 264, 330, 413, 435, and 441. You are to compare these ballots and the voting number thereon with the pollbooks, and ascertain and report to the court who voted each of said ballots, respectively. You are to open again the ballots voted in the Fifth Ward at said election, and take therefrom ballots numbered with your numbers 49, 81, 67, 126, 129, 146, 148, and 150; also the following ballots in said ward, numbered

with your number: 225, 234, 235, 326, 327, 339, 341, 425, 426, 427, 434, 428, 499, 503, 508, 509, 511, 513, 516, 517, 600, 692, 604, 611, and 614. You are to compare those several ballots with the pollbooks, and ascertain and report to the court the names of the persons voting such ballots, respectively. You are to open the ballots in the Eighth Ward, and take therefrom ballots numbered with your numbers: 82, 90, 91, 102, 104, 106, 107, 113, 125, 127, 134, 137, 173, 174, 186, 187, 195, 199, 222, 237, 249, 250, 251, 333, 471, 521, 525, 528, 582, and 600. And you are to compare said ballots with the pollbooks, and ascertain and report to the court the names of the voters voting said ballots, respectively.

"Second. You are to bring said ballots, and each and every one of them, before the circuit court of Greene county, Missouri, immediately, for the use of the court and the parties in the trial of said cause. You are to allow the parties and their attorneys to be present during the opening of said ballots for the examination thereof. In all things pertaining to the comparing and production of said ballots, you are to be careful to preserve the same, and to carefully preserve and seal the remaining ballots, and prevent their exposure; and, after the use of the ballots in court, you are to return the same to the proper place, with the other of said ballots, and seal all of same properly. You are also to compare the pollbooks with the ballots of L. D. Fultz and Thomas Fultz and Oscar Lowery in the Seventh Ward, J. M. King and N. W. Murphy in the Third Ward, and Frank McNells in the Sixth Ward, and report to the court for whom said voters voted." To which order of the court the contestant duly objected and excepted at the time.

To the order the clerk made the following return:

"Hon. James T. Neville, Judge of Circuit Court, Greene County, Missouri: In compliance with your order in the contest case of James A. Donnell v. Arthur R. Lee for the office of city collector of the city of Springfield, Missouri, I did, in the presence of the attorneys for the contestant and contestee, reopen the ballots cast at the election for city officers of said city on the 1st day of April, 1902, and did select from said ballots, in conformity with your order, ballots from the First Ward numbered 8, 88, 141, 168, 264, 330, 413, 435, and 441; from the Fifth Ward, ballots numbered 49, 67, 81, 126, 129, 146, 148, and 150, also ballots numbered 225, 234, 235, 326, 327, 339, 341, 425, 426, 427, 428, 434, 499, 503, 508, 509, 511, 513, 516, 600, 602, 604, 611, and 614; and from the Eighth Ward, ballots numbered, 82, 90, 102, 104, 106, 107, 113, 125, 127, 134, 137, 173, 174, 186, 187, 195, 199, 237, 249, 250, 251, 333, 471, 521, 525, 528, 582, and 600. The above numbers are the numbers placed upon the face of the ballots by me in the original recount under the order of your honorable court. Upon comparing

these ballots—the numbers upon the backs with the corresponding numbers on the poll-books—I found that the clerk's number compared with voting numbers on back of ballots, and that said ballots were voted by persons, as follows:

First Ward.			Name.
Ballot.	Clerk's No.	Voting No.	
"	8	99	Tolbert Foster.
"	88	49	J. Earl Ford.
"	141	154	W. W. Whitaker.
"	168	106	E. C. Jones.
"	264	210	Q. E. Robb.
"	330	242	F. P. Agnew.
"	413	420	S. R. Bowers.
"	435	431	Lewis Potter.
"	441	453	Arthur Wagstaff.

Fifth Ward.			Name.
Ballot.	Clerk's No.	Voting No.	
"	49	663	W. H. Ford.
"	67	624	Julius Selfert.
"	81	644	Chas. Elliott.
"	126	583	Edward McClure.
"	129	563	Budd Hancock.
"	146	547	Clark Hancock.
"	148	540	Chas. Blakey.
"	50	594	E. H. Smith.
"	225	491	W. B. Stewart.
"	224	454	C. H. Miller.
"	235	493	S. L. Haynes.
"	328	363	I. C. Sherwood.
"	327	372	E. Knabb.
"	339	311	M. G. Molst.
"	341	303	H. S. Merritt.
"	423	296	O. L. Peak.
"	426	269	M. E. Hambleton.
"	427	266	C. H. Rippey.
"	428	265	W. W. Hargis.
"	434	249	A. P. Hall.
"	499	218	H. P. Douglas.
"	503	183	M. L. Chaudet.
"	508	156	F. C. Bentley.
"	509	181	J. C. Flanner.
"	511	210	E. W. Ball.
"	513	144	J. F. G. Bentley.
"	614	4	N. L. Long.
"	516	208	A. B. Conklin.
"	517	147	J. T. Carr.
"	600	86	H. C. Garlick.
"	602	106	W. J. Conkling.
"	604	83	J. E. Hitt.
"	611	137	E. E. Stringfield.

Eighth Ward.			Name.
Ballot.	Clerk's No.	Voting No.	
"	82	59	W. R. Smith.
"	90	160	W. M. Haymes.
"	91	186	W. E. Sawyer.
"	102	148	J. T. Wicker.
"	104	112	W. D. Agnew.
"	106	126	R. B. Wallace.
"	107	139	Ed Haskill.
"	112	111	G. H. Brooks, Sr.
"	126	138	A. J. Lowery.
"	127	149	J. L. Conley.
"	134	188	A. S. Latimer.
"	137	196	Z. J. Brashears.
"	173	233	L. Schofield.
"	174	225	C. F. Baker.
"	186	153	A. F. Butts.
"	187	161	J. L. Ormsbee.
"	195	168	J. T. Creson.
"	199	170	W. H. Foss.
"	222	219	Chas. Hoyt.
"	237	228	J. R. Andrews.
"	249	223	J. C. Smithmier.
"	250	215	C. J. Negus.
"	251	254	Joe Kerr.
"	333	351	Otis Fuls.
"	471	475	P. A. Dirth.
"	521	498	A. C. Fender.
"	525	578	B. Laker.
"	528	526	C. E. Reed.
"	532	587	E. J. De Witt.
"	600	614	J. W. Wilks.

"In further compliance with your order, I examined the ballots cast by J. M. King and N. W. Murphy in the Third Ward; by Frank McNellis in the Sixth Ward; L. D. Fultz and Chas. Fultz and Oscar Lowery in the Seventh Ward; and I find the parties voted as follows: J. M. King, voting number 259, voted for James A. Donnell for city collector.

N. W. Murphy, voting number 332, voted for James A. Donnell for city collector. Frank McNeeley, voting number 332, voted for James A. Donnell for city collector. L. D. Fultz, voting number 308, voted for James A. Donnell for city collector. Chas. Fultz, voting number 611, voted for James A. Donnell for city collector. Oscar Lowery, voting number 600, voted for James A. Donnell for city collector.

"I herewith transmit to the court the ballots asked for, in the First, Fifth, and Eighth Wards, that were voted at the election for city officials April 1, 1902.

"Respectfully submitted.

"G. W. Hackney, City Clerk."

The persons named in the return as having voted the tickets shown by the current number opposite the names of each were brought before the court and examined in respect to how they voted for the office of collector, and whether or not they made or authorized the substitution of the name of Donnell in lieu of Lee's. All of these witnesses testified without making any objections themselves to revealing how they had voted, nor did the counsel for either party make any objection to their testifying.

The ballots cast in the Third Ward were numbered by the judges of the election in the order they were cast, but the registration numbers of the voters were not placed upon any of them. The registration list showed that a number of persons who voted at the election were not registered voters, and the evidence shows that others who voted were not legally qualified voters. The evidence also tends to show that several persons whose votes were contested were, in the language of the pleadings, "Indians"; that is, that the ballots cast by them had been prepared outside of the polling place, and substituted for the ballots furnished by the judges, and then voted. It is also shown that a few of the ballots that had been voted were erroneously numbered by the receiving judges. W. N. Harris testified that on the morning after the election he was sent with a wagon and team to the polling place in the Eighth Ward to take away the booths and ballot boxes; that he found, on a table where the ballot boxes were, a bunch of from seven to ten tickets, numbered with an indelible pencil, with the initials "R. L. S." (the initials of one of the judges of the election) on the back of them; that he looked at the heading of three or four of these tickets, and saw they were Democratic tickets; that they had no holes through them showing that they had been strung; that he put these ballots in one of the ballot boxes. He was corroborated by the owner of the building, who opened the door for him, and saw the bunch of tickets when his attention was called to them by Harris.

At the close of the evidence the contestant filed a motion requesting the court to make a special finding of facts. In compliance with

said motion, the court made a finding of facts as follows: "The court finds that Dan Hogan, who voted for Lee, was not a qualified voter; that George Conley, who voted for Lee, is not a qualified voter; that Charles Huntington, who voted for Lee, is not a qualified voter; that Earl Weaver, who voted for Lee, is not a qualified voter; that Sam Crowder, who voted for Lee, is not a qualified voter; that W. T. Moxley, who voted for Donnell, is not a qualified voter; that Ed Robinson, who voted for Donnell, is not a qualified voter; that Noah Pierpont, who voted for Donnell, is not a qualified voter; that L. D. Foltz, who voted for Donnell, is not a qualified voter; that Thomas Foltz, who voted for Donnell, is not a qualified voter; that Joseph D. Cooper, who voted for Donnell, is not a qualified voter; that J. M. King, who voted for Donnell, is not a qualified voter; that N. W. Murphy, who voted for Donnell, is not a qualified voter; that Frank McNellis, who voted for Donnell, is not a qualified voter; and that Oscar Lowery, who voted for Donnell, is not a qualified voter. The court sustains the challenges of the respective parties to the voters heretofore set forth, and overrules the challenges made by the contestee as to M. J. Murphy, J. T. Leedy, and Dan Wilkerson, making a sustaining of five (5) challenges made by the contestant on account of qualification of voters, and ten (10) on the part of the contestee as to persons who voted for contestant. The court overrules the exceptions to the clerk's count in the First Ward, and adopts said count as the ruling of the court on the exceptions saved to the ballots counted therein; giving to Donnell 189 votes, and to Lee 283 votes, as reported by the clerk. The court overrules all exceptions to the count of the clerk in the Second Ward, and adopts the count made by him as the count of the court; giving to Donnell 295 votes, and to Lee 377 votes. The court overrules all exceptions to the count of the clerk in the Third Ward, and adopts the count as made by him as the count of the court; giving to Donnell 241 votes, and to Lee 198 votes. The court overrules all exceptions to the count of the clerk in the Fourth Ward, and adopts his count as the count of the court; giving Donnell 157 votes, and to Lee 256 votes. The court finds that the clerk's rulings in reference to the form of the ballots, the erasures, etc., in the Fifth Ward, are correct, and that by such count Donnell received 364 votes, and Lee 340 votes. The court further finds from the evidence to be hereafter spoken of that five such votes cast in the Fifth Ward, commonly known as 'Indian ballots,' bearing clerk's numbers 120, 81, 49, 150, and 126, were on ballots or paper not delivered to the voter by the judges of election in said ward, but were delivered to him by some other person; and as to these five the court holds that they should be rejected, and should not be counted for the contestant. The court overrules all

exceptions to the clerk's count in the sixth ward and adopts the count of the clerk in said ward as the count of the court, giving Donnell 328 votes, and Lee 308 votes. The court overrules all exceptions to the clerk's count in the Seventh Ward, and adopts the count of said clerk as the count of the court; giving Donnell 389 votes, and Lee 260 votes. The court sustains the clerk's ruling as to the form of the ballots, the erasure of the title of the office and the placing in of the names of the Eighth Ward, which gives to Donnell 343 votes, and Lee 256 votes. The court further finds the facts to be as follows, in reference to the Eighth Ward: That the election was conducted in a loose manner; that the ballots were not sealed up after the election, as required by law, but were placed in a paper sack and tied up with a string, and in that condition delivered to the city clerk; that after they had been deposited with the said clerk, or at some time after they were cast, a number of them have been changed—certainly as many as eight or nine, and probably as many as 17 or 18. The court finds these facts from the last order made by the court, allowing the ballots to be brought before the court, and upon the evidence prior to that order the court could not have found the same to be true, as is abundantly shown by the order itself, and by the results of the order; that is to say, the court on bringing the ballots before it, and, on bringing the witnesses that voted the ballots, has shown that the evidence of the contestee with reference to the handwriting was not reliable, and that they were in error in a vast majority of instances, and the court, without bringing them before it, and without making this last order, could not have found the facts as they are abundantly shown to the court by the order, and the evidence thereunder to be and could not have been found to be changed under the evidence as it existed at that time. The court further finds that the count of the judges and clerks in the Eighth Ward was not satisfactory, and that the contestant was probably prejudiced somewhere between seven and seventeen votes in that ward in the original count. The court also finds that the contestee had no knowledge of such defects or inaccuracies in said Eighth Ward, and also finds that the contestant is not guilty of changing the ballots in the Eighth Ward after they were voted, or of any knowledge of such change prior to the time. The court finds that the following ballots were changed in the Eighth Ward after said ballots were cast and counted by the judges and clerks of election by erasing the name Lee and writing in the name Donnell, to wit, numbers 195, 237, 113, 91, 90, 199, 125, 137, and 173. The court finds that in the Fifth Ward there were no alterations of the ballots after they were cast. The court finds that there were no alterations of the ballots in the First Ward. The court finds that there were changes in

the Eighth Ward after said ballots were cast and counted by the judges and clerks of election at the following place as aforesaid, and therefore rejects the recount of that ward. The court finds that there were no alterations of the ballots in the Second Ward, but finds that the ballots were not sealed up by the judges and clerks of the election, but were delivered to the city in a bursted pouch." To which finding the contestant excepts generally, especially in respect to its finding in reference to the Eighth Ward. His exceptions are as follows: "The contestant excepts generally to the finding of the court, and especially to its findings in reference to the Eighth Ward. Contestant objects and excepts to the court's finding as to the nine ballots being changed in the Eighth Ward, for the reason that the finding is not based upon competent evidence, and the finding itself shows that it is based exclusively upon an examination of the ballots by the court, and his opinion from an inspection of the ballots, and of the parties produced before the court relating thereto, and contestant objects thereto for the reason that the court had no right, power, or authority to make the second order to produce said ballots in court, or to require the city clerk to certify the names of the parties voting said ballots objected to in the First, Fifth, and Eighth Wards, and now moves the court to strike out said finding, and objects and excepts thereto for those reasons, and because the said finding has no legal evidence to support it, and is against the evidence and against the law and the evidence."

The court found the issues for the contestee, and rendered judgment accordingly. A timely motion for new trial was filed, which the court overruled. The contestant appealed to the Supreme Court, from which court, on November 10, 1902, the cause was transferred to this court.

Hamlin & Mason and Tatlow & Mitchel, for appellant. Patterson & Patterson and Vaughan & Coltraine, for respondent.

BLAND, P. J. (after stating the facts). 1. It is not the province of an appellate court to determine disputes in doubtful questions of fact in contested election cases. *Turner v. Drake*, 71 Mo. 285; *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312. But it will, as in a law case, adopt the findings of the trier or triers of the issues of fact, when there is any substantial evidence in support. There is substantial evidence in the record to support each and every special finding of fact made by the learned circuit judge, and these findings will not be disturbed by us.

2. There are two questions of law presented by the record that are discussed in the briefs and arguments of counsel. One is, may a ballot cast at an election in a city that comes under the registration act be counted,

upon which the registration number of the person casting the ballot was not indorsed? If it may not, then, by the admitted facts, the contestant must fail, for the reason that in the Third Ward, where he received 43 votes more than the contestee, none of the ballots were marked with the registration number of the voter. The other question is, was it within the power of the circuit court to require the city clerk to produce the ballots alleged by contestant to have been fraudulently changed after they had been voted, and to make a record of them, and of the persons who had voted them, and for whom they had actually voted? The first question depends upon whether or not the mandatory words of section 6995, Rev. St. 1899, requiring the current number and registration number of the voter to be indorsed upon each ballot, is in force in cities of \$25,000 and under 100,000 inhabitants. As the city of Springfield is a city of this class, in respect to elections in this class of cities, articles 7, c. 102, Rev. St. 1899, governs specially. Section 7210 of the article provides that "all elections in such city shall be conducted in all respects as provided in the article, and subject to all the provisions of the Revised Statutes entitled 'Elections,' so far as the same do not conflict with this article." Section 6995, art. 1, c. 102, entitled "Elections," provides that, whenever a registration is required by law, in addition to the current number the registration number of the voter shall be indorsed on his ballot, and that no ballot not so numbered shall be counted. The form of the poll-book prescribed by section 7199, art. 7, has a blank space for the registration number of the voter, and for the current number of his vote. Section 7210, supra, reads into article 7, c. 102, the provisions of section 6995 of article 1, in the same chapter, requiring the registration number of the voter to be indorsed on his ballot. The ballots cast in the Third Ward should therefore be excluded from the count unless the mandatory words of section 6995 are taken out by the act of 1891, passed after the enactment of section 6995. The act of 1891 repeals 12 sections of article 3, c. 60, Rev. St. 1889, and enacts 12 new sections in lieu thereof, and a new section extending the provisions of the act, as amended, to all election precincts in the state; thus extending the Australian ballot system to all parts of the state. The sections of article 3, c. 60, Rev. St. 1889, not repealed, but amended, by the act of 1891, are grouped with the act of 1891 in article 4, c. 102, Rev. St. 1899. Section 6995, supra, is the same as section 4672, art. 1, c. 60, Rev. St. 1889, and was not, in terms, repealed or amended by the act of 1891, and should be held to be in force, unless repealed by section 13 of the act of 1891, which, in terms, repeals all acts or parts of acts inconsistent with it. Section 4785, Rev. St. 1889, provides that "no judge of election shall deposit any ballot upon which

the names or initials of two of the judges as hereinbefore provided for does not appear." The provision referred to is contained in section 4780 of the article, which requires that "the two judges of the election having charge of the ballots shall write their names or initials upon the back of the ballot, within two inches of the top thereof." Section 4785 was amended by the act of 1891 so as to read as follows: "Every ballot shall be numbered in the order in which it shall be received. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, does not appear." The amendment is merely to require the ballot to be numbered. Before the amendment the law required the ballots to be numbered. Section 4672, Rev. St. 1889. After amendment they were required to be numbered by two statutes, to wit, by section 4672, art. 1, c. 60, and by section 4785 of article 3 of the same chapter, as amended by the act of 1891. And of course they can stand together in so far as they require the ballots to be numbered consecutively. In 1897 the Legislature repealed section 4780, Rev. St. 1889, and enacted a new section in lieu thereof (now section 7104, Rev. St. 1899), which reads as follows: "On any day of election of public officers in any election district each qualified elector shall be entitled to receive from the judges of election one ballot of each political party voted for at said election. It shall be the duty of such judges of election to deliver such ballots to the elector. Before delivering any ballots to the electors the two judges of election having charge of the ballots shall write their names or initials upon the back of the ballots, with ink or indelible pencil, and no other writing shall be on the back of the ballot, except the number of the ballot voted." This section applies only to an election of public officers, and does not control in the election of a city officer, who is not a public officer, within the meaning of the section, as was decided by the Supreme Court by its order transferring this cause to this court. The question, then, is, does section 11 of the act of 1891 repeal so much of section 4672 (now section 6995, Rev. St. 1899) as requires the ballot to have indorsed upon it the registration number of the voter, where registration is required, in an election of city officers? It is a well-settled rule of construction that a former statute is repealed by implication when a later statute covers the same subject-matter, and was intended to be substituted for the former, and that, where two statutes on the same subject are so inconsistent that both cannot stand, the last in date supersedes the other. On the other hand, it is equally well settled that a later statute will not have the effect to repeal a former one by implication unless there is such repugnancy between them that both cannot stand together or be reconciled. *State ex rel. v. Spencer*, 164 Mo., loc. cit. 48, 63 S. W.

1118. No registration of voters has ever been required in this state, outside of cities of 25,000 inhabitants or over. The law of 1891 is a general law applicable to every precinct in the state. The law requiring the registration number of the voter, as well as the current number of his vote, to be indorsed upon his ballot, is special. There are no words in the act of 1891 that negative any of the mandatory provisions of section 6995, as applied to city elections. On the contrary, the provisions of this section requiring that the current number of the voter be indorsed on his ballot is re-enacted by section 13 of the act of 1891. The law is that a general affirmative statute does not repeal a prior and special one unless words negating the continuance of the prior act are used, or the two acts are repugnant to each other or are wholly irreconcilable, or the legislative intent to repeal the prior act is clearly manifested. *City of St. Louis v. Ins. Co.*, 47 Mo. 146; *City of St. Louis v. The Life Ass'n of America*, 53 Mo. 466; *The St. Joseph & Iowa Ry. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *State ex rel. v. St. Joseph's Convent of Mercy*, 116 Mo. 575, 22 S. W. 811; *State ex rel. v. School Board*, 181 Mo. 505, 33 S. W. 3; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *State ex inf. v. Hogan*, 163 Mo. 48, 63 S. W. 378. The two acts are not inconsistent; they are not repugnant to each other; nor is there any intent on the part of the Legislature manifested by the act of 1891 to repeal or modify the mandatory words of section 6995 when applied to city elections. The act of 1891 does not directly or indirectly amend any of the sections of the article in which section 4672, Rev. St. 1889 (now 6995, Rev. St. 1899) occurs, nor does it purport to legislate upon the whole subject of elections, but is merely an amendment of one article out of four devoted to that subject. The primary purpose of the amendment was to extend the Australian ballot system to every precinct in the state, to regulate the nomination of candidates for public office by political parties, and to provide some additional safeguards for conducting an election. There is certainly nowhere to be found in the amendment any purpose on the part of the Legislature to withdraw any safeguard that then existed, which purpose we would have to find before we could say that the mandatory words in section 6995, applied to an election for city officers, were abrogated by the amendment. One of the purposes to be effectuated by indorsing the current number of the voter on his ballot, and writing the corresponding number on the pollbooks opposite his name, is to connect the voter with his ballot in case of contest, and to show for whom he voted. The purpose to be attained by writing the registration number of the voter on his ballot is, first, to show by the ballot itself that he was legally qualified to vote; and, second, to prevent more than one person voting on the same registration number. And it seems to us that

It is as essential to a fair election, and as necessary in case of contest, that the registration number should be written on the ballot, as that the voting number should be written thereon. We conclude that it was not in the mind of the Legislature, when the act of 1891 was passed, to dispense with either of these requirements in an election for city officers. *Hehl v. Guion*, 155 Mo., loc. cit. 82, 55 S. W. 1024.

3. Did the court err by making the order on the city clerk to produce the alleged forged ballots, etc., in court, for inspection and examination? It is apparent from a reading of the evidence in respect to the alleged forgeries heard by the court before making the order and from the subsequent proceedings that the court was in the dark as to whether or not any of the ballots had been altered. The count made by the city council gave Lee 9 more votes than Donnell received. The count made by the clerk gave Donnell a plurality of 37 over Lee. This discrepancy is not accounted for by the clerk in his return. The ballots had been exposed after they came into the custody of the city clerk. A number of expert witnesses testified that, in their opinion, a number of the ballots had been changed by scratching out the name of Lee and writing in its stead the name of Donnell. An equal number of experts testified that these ballots furnished no evidence that any such changes had been made. The city clerk, who made the recount, and was required to certify the facts as he found them, was in doubt as to whether or not the changes had been made on the ballots. All that he was willing to say was that there was a similarity in the writing on the ballots alleged to have been tampered with. In this condition of the evidence, the judge, as an honest and fair-minded man, could not decide the issues with any degree of satisfaction to himself. The evidence was in existence, and near at hand, by which the truth of the matter could be ascertained; and the judge had it produced in open court, and made a record of it, and from it found out the facts as they were, and on these facts awarded the office to the contestee. But the Supreme Court, in the case of *State ex rel. v. Spencer*, 164 Mo. 23, 63 S. W. 1112, and again in *State ex rel. v. Spencer*, 166 Mo. 271, 65 S. W. 981, has construed the election law adversely to the rulings made by the circuit court, by holding that under no conditions can the ballots in a contested election case be produced in open court and be made a record of; that the authority of the court in this respect is exhausted when it grants the order provided for by section 7044, Rev. St. 1889. Hence it seems that the Legislature according to the controlling construction of the law, which binds this court, in its zeal to prevent A. from finding out how B. voted, has also prohibited B. from ever finding out for whom his vote was counted, or whether it was counted at all; that it has placed the

secrecy of the ballot above its integrity, and has so framed the law that the "Indian," after the ballots have reached their final custodian, may break or steal in and tomahawk them; and that then no inquest can be held on their corpses adequate to identify the marks of his hatchet.

By excluding from the count the ballots voted in the Third Ward, Lee has a clear plurality over Donnell; and, for the reasons stated in the second paragraph of this opinion, the judgment is affirmed.

BARCLAY, J., concurs. GOODE, J., not sitting.

MORRIS v. MISSOURI, K. & T. RY. CO.*
(Court of Appeals at Kansas City, Mo. April 6, 1903.)

RAILROADS—INJURIES TO ANIMALS—ACTIONS
—INSTRUCTIONS—APPEAL—EX-
CEPTIONS—PROOF.

1. Where plaintiff's petition charged that his horses were killed by defendant railway company at a public crossing in consequence of defendant's negligence in failing to give any signals, an instruction merely submitting the question whether the horses were killed in consequence of defendant's failure to signal, without reference to the place where the horses got on the track, was erroneous.

2. Where the original bill of exceptions, showing the overruling of the motion for a new trial, recited that defendant excepted to such ruling at the time, but the words "duly excepted at the time," though not crossed out, were partially obliterated, by fading or otherwise, but were plain enough to be made out, and affidavits filed averred that an exception was duly taken, an objection that the overruling of the motion was not excepted to was unsustainable.

Appeal from Circuit Court, Boone County; John A. Hockaday, Judge.

Action by R. M. Morris against the Missouri, Kansas & Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Geo. P. B. Jackson, for appellant. Webster Gordon, for respondent.

ELLISON, J. This action is for damages alleged to have accrued to plaintiff by reason of defendant's train running against and killing two of his horses. The judgment in the trial court was for plaintiff. The petition in the cause contains three counts, each charging a killing of the same horses. The second charges that the horses were killed at or near a public crossing in consequence of the negligence of defendant in not ringing the bell or sounding the whistle of its locomotive, and concluded with a prayer for single damages. The third count was for killing in an inclosed field at a point where the road was not fenced as required by statute, and where there were no public crossings, and concluded with a prayer for double damages, as provided by statute. The plaintiff dismissed the first count

*Rehearing denied April 27, 1903.

at the close of the evidence, and the jury returned a verdict for him on the second count, and for defendant on the third count, whereupon the court ordered judgment for the plaintiff on the second count, and for defendant on the first and third counts.

The first instruction given for plaintiff was erroneous, in that it omits any reference to where the horses got upon the track, and merely submits the question whether they were killed in consequence of not ringing the bell or sounding the whistle. The charge in the count of the petition upon which he recovered is that they were struck and killed at a public crossing. The instruction should have been based on the case stated. *Wasson v. McCook*, 80 Mo. App. 488.

The point is made by plaintiff that defendant did not except to the court's action in overruling the motion for new trial. The defendant denies this, and on its motion there has been sent to us by the clerk of the Boone county circuit court the original bill of exceptions. Defendant claims that exceptions were duly saved, and several affidavits (not denied by plaintiff) are filed here, showing that to be the fact. These affidavits show that immediately following the filing of the motion for new trial is this entry: "Which motion was duly taken up and submitted to the court, and was by the court overruled, to which action of the court in overruling said motion to grant a new trial on the second count of the petition the defendant duly excepted at the time." The bill of exceptions shows the same entry in plain typewriter type down to and including the words "the defendant." The remaining words of the sentence, "duly excepted at the time," are not crossed out, but had become partially obliterated by fading or otherwise. These words do not appear to have been touched with pen or ink, but by some means they have become quite obscure, yet they are not wholly obliterated. They are yet plain enough to be made out, and we consider the bill as showing that exceptions were saved.

The judgment is reversed and the cause remanded. The other judges concur.

POTTER v. MT. VERNON ROLLER
MILL CO.*

(Court of Appeals at St. Louis, Mo. April 14,
1903.)

SALES—WHEAT ELEVATOR—CONSTRUCTION OF
CONTRACT—EVIDENCE.

1. Defendant owned a flouring mill, and in connection therewith an elevator, in which wheat of varying grades was received from different owners for storage without charge, commingled in a general bulk, and taken out by defendant both for sale and for manufacture into flour. Defendant would return to depositors, at their option, wheat, or its market value in flour or bran or cash, but no return of the identical wheat delivered was expected or made.

Plaintiff and his assignors received slips of paper containing the name of the party delivering the wheat, the date, and the quantity delivered. The evidence showed that plaintiff was to receive flour and bran for his wheat, and his assignors were to be paid in cash at the market rate. The elevator and the wheat therein were destroyed by fire. *Held* to constitute a sale.

Appeal from Circuit Court, Lawrence County; H. C. Pepper, Judge.

Action by James T. Potter against the Mt. Vernon Roller Mill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Brumback, for appellant.

REYBURN, J. The evidence in this case discloses that defendant owned and operated a flouring mill at Mt. Vernon, and connected therewith an elevator, in which, without charge for storage, was stored wheat obtained from different owners, varying in quality and value, and commingled in a general bulk, from which wheat was taken by defendant in course of its business both for sale and for manufacture into flour. It appeared to be a custom firmly established and well understood, to receive wheat from producers and owners, and return them, on demand, at their option, wheat, or the equivalent of its market value in flour and bran, or make actual payment of its market price in cash. It was also known and understood that wheat so delivered would be used and consumed by defendant, and that no return of the identical wheat delivered was expected or would be made. In lieu of receipts or certificates for the wheat delivered by them to defendant, plaintiff and his assignors had received mere slips of paper, containing the name of the party delivering it, the date of delivery, the quantity in bushels and pounds, and in one instance the grade. The proof tended to show that plaintiff was to receive flour and bran for the wheat delivered by him to defendant, and his assignors were to be paid in cash, on demand, at the market rate, for such grain delivered by them to defendant. On August 31, 1901, the mill and elevator were destroyed by fire, at which time defendant had stored in its elevator, ready for delivery, wheat of the quality and exceeding the quantity received from its customers, including plaintiff and his assignors. The case was submitted to the court without a jury, and a finding and judgment for plaintiff made and rendered.

The sole question presented to this court, and answered in the affirmative by the trial court in its finding, was whether, under the circumstances and conditions detailed in the evidence, the delivery of the wheat constituted a sale or exchange, and not a bailment. It is well settled that where a warehouseman has received grain on deposit for its owner, in a common granary or depository, where it is mingled with other grain of himself or others, or both, in such receptacle, to which, from day to day, other grain of va-

*Rehearing denied April 28, 1903.

rious owners, of like kind and quality, is added, and from which, from time to time, sales and delivery of grain are made, and the warehouseman keeps constantly on hand grain of the quality received, prepared for delivery on call to all depositors, the contract is a bailment, and not a sale. The circumstances that the identical grain is commingled with other grain, and is not to be returned to the depositor, but a like quantity of the same kind and quality are not sufficient to convert the contract into a sale. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Nelson v. Brown*, 44 Iowa, 455; *Id.*, 53 Iowa, 555, 5 N. W. 719; *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430, and cases therein cited. But the law is equally well settled, and supported by overwhelming weight of authority, that where there is no obligation to return the specific article to its original owner, nor to restore to him property of like quality, and the receiver is free to return another thing of value, he becomes a debtor, and owner of the property delivered. The distinction is thus recognized by the highest tribunal of America: "Thus where logs are delivered to be sawed into boards, or leather to be made into shoes, rags, into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer." *Powder Co. v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973. To the same effect, from a great array of decisions and text-writers, may be cited the following: *Story, Bailments* (9th Ed.) § 47; *Schouler, Bailments* (3d Ed.) § 6; *Kent's Commentaries* (14th Ed.) vol. 2, § 590, and note; *Beach, Modern Law Contracts*, vol. 1, § 746; *Benjamin, Sales*, vol. 1, p. 2; *Lawson, Bailments*, par. 8; *Martin v. Mill Co.*, 49 Mo. App. 23; *O'Neal v. Stone*, 79 Mo. App. 279; *Welland v. Sunwall* (Minn.) 65 N. W. 628; *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Bretz v. Diehl*, 117 Pa. 539, 11 Atl. 893, 2 Am. St. Rep. 706. In brief, the distinction recognized by the above and other authorities is that, to create the relation of bailor and bailee, it is imperative that the agreement, whether by express contract or implied by law, shall intend that the property received by the bailee shall be returned to the bailor. The recent case invoked and relied on by appellant is not opposed to the conclusion herein, for the decision therein is expressly made dependent upon the language of the contract evidenced by the certificate of deposit, which imposed the loss by fire upon the depositor, not the miller; and the court therein says: "It is immaterial whether the transaction be considered one of bailment,

sale, or exchange; whether it was intended that title of the wheat passed immediately on placing it in defendant's bins, or whether the property in the flour to be taken in exchange was vested in the depositor then, or was to become vested in the future. The contract remains the same, to wit, that, if the flour and bran held in the mill to answer the demands for such depositors should be destroyed by fire, it should be the loss of such depositors, to the extent of whatever balance they might then have there to their credit." *Wells v. Porter*, 169 Mo. 252, 69 S. W. 282.

The judgment of the court below is abundantly supported by the evidence, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

HEAGY v. IRONDALE LEAD CO.

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

SERVANT—WRONGFUL DISCHARGE—EVIDENCE—INSTRUCTIONS.

1. Where the instructions, as a whole, fully covered the case, and fairly presented it to the jury, and the instructions given for appellant remedied and neutralized the error, if any, in a certain instruction given at the request of the respondent, there was no ground for reversal.

2. In an action by a servant for his wrongful discharge prior to the expiration of the year for which he was hired, it appeared that he afterwards, and during the year, engaged in another occupation, which was unprofitable. *Held* proper to exclude evidence offered by defendant to show why it was unprofitable.

Appeal from Circuit Court, Washington County; F. R. Dearing, Judge.

Action by Louis W. Heagy against the Irondale Lead Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. W. Huff, E. H. Angert, and E. M. Dearing, for appellant. B. H. Marbury, for respondent.

REYBURN, J. Plaintiff, in his petition, averred that on or about March 12, 1901, defendant, a corporation organized under the laws of Missouri, engaged in the business of mining and manufacturing lead ore, employed plaintiff as a civil engineer in its mines at Irondale, in Washington county, Mo., for the period of one year, and promised to pay him for his services a salary of \$1,200, in monthly installments of \$100 per month; that he entered upon and performed his duties as such civil engineer until October 1, 1901, when, without just cause, he was discharged by defendant, and prevented from further performance of his duties, to his damage in the sum of \$540. The issues joined upon the answer of defendant—a general denial—were tried before a jury, which rendered a verdict for plaintiff in the amount prayed. Plaintiff had formerly worked for G. J. Cole, and in February, 1901, while at his father's home, in Columbus, Ind., received a letter, written by

that Cole wanted to employ plaintiff. At the time, Morris was general manager of Cole, and the latter was president of defendant, and, adopting his own words, was absolute owner of the stock of defendant. The correspondence thus begun was continued between plaintiff and Morris, and a proposition contained in a letter of the latter, on behalf of Cole, for employment for a year at \$100 per month, was accepted by plaintiff by letters to Morris in reply; and in March he arrived at Irondale, and began work on property of defendant, and continued until discharged, October 1st. The correspondence containing the contract of employment was clear as to the period of employment and the rate of compensation, and contained references to the place of the performance, but mentions Cole's name, not that of defendant. The testimony was conflicting. Plaintiff's declarations in his own behalf that he was employed by the corporation, and such employment and its duration expressly approved by Cole as president of defendant, were, in a degree, corroborated by the testimony of Morris, who conducted the correspondence for Cole. Cole, however, claimed he individually engaged plaintiff for a term of six months only, and not in his capacity of president of defendant, and, if Morris sought to make any other agreement with plaintiff, he exceeded his authority. Cole's version of the contract existing was supported by the method of payment of plaintiff's salary, and by the testimony of George M. Seeley, a resident of New York, who appeared to have represented capitalists who acquired the property of defendant and other property adjacent of Cole during the period of plaintiff's services.

The assignments of error consist first of a criticism of the third instruction given on behalf of the plaintiff, to the following effect: "The court instructs you in this case that if you believe and find from the evidence in this case that George J. Cole, the manager of the Irondale Lead Company, authorized C. E. Morris to write the letters introduced in evidence as written by the said C. E. Morris, then and in that event the said letters and propositions therein stated are binding on the defendant herein, the Irondale Lead Company, as much as if they had been written by the said George J. Cole as manager of the defendant Irondale Lead Company." The instructions given were six in number, three being on behalf of each party to the controversy, and no complaint is made of the refusal of the court to give any further instructions to the jury. Considering the instructions together, they fully covered the issues in the case, and fairly presented the case for the deliberation and determination of the jury, and the instructions given for defendant remedied and neutralized the tendency in this instruction complained of, if any there be, as charged by appellant, to warrant the jury to find that if Cole, through Morris, engaged plaintiff, such employment

behalf of Cole individually.

2. Appellant contends that the court erred in excluding evidence tending to show in what manner plaintiff had lost money through a third party in the business in which he was engaged during the portion of the year covered by his contract subsequent to his discharge. As it appeared that such occupation had been unprofitable, we cannot see how it became material or proper subject of inquiry why such result was brought about, and the extent of the liability of defendant, if any had been lawfully created and existed, could not have been lessened by the introduction of such testimony.

3. The respondent concedes that appellant was entitled to a credit of \$20, being amount established as earned by respondent during the term of his employment, and that to that extent the recovery is excessive, and offers to enter a remittitur for that sum in this court, which, if done, the judgment of the court below, to the extent of the remaining amount in favor of respondent, will be affirmed; respondent to pay the costs of this court.

BLAND, P. J., and GOODE, J., concur.

STATE v. HENSLEY.

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

CRIMINAL LAW—APPEAL—RECORD—ABSENCE OF EVIDENCE—QUESTIONS REVIEWABLE—SUFFICIENCY OF INDICTMENT.

1. Where, on the appeal of a criminal case, no evidence is preserved in the record, nor does it appear that a bill of exceptions was taken, and no briefs or assignments of error have been filed, nothing can be reviewed except the sufficiency of the indictment.

Appeal from Circuit Court, Christian County; G. W. Thornberry, Judge.

B. W. Hensley was convicted of an illegal sale of intoxicating liquors, and appeals. Affirmed.

R. C. Ford and J. C. Long, for appellant. J. C. West for the State.

Opinion.

GOODE, J. This is an appeal from a conviction of the defendant for selling one-half pint of whisky on August 22, 1897, in Christian county, Mo., as a registered pharmacist, but without a prescription from a physician. No evidence is preserved in the record, nor, indeed, is there any showing that a bill of exceptions was taken. No briefs or assignments of error have been filed in the case, and hence there is nothing before us for review except the indictment, which we have examined, and find to be in all respects sufficient.

The judgment, therefore, is affirmed. All concur.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2921.

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R. C. Ford and J. C. Long, for appellant. J. O. West, for the State.

Opinion.

GOODE, J. This is an appeal from a conviction of the defendant for selling one half pint of whisky on August 1, 1897, in Christian county, Mo., as a registered pharmacist, but without a prescription from a physician. No evidence is preserved in the record, nor, indeed, is there any showing that a bill of exceptions was taken. No briefs or assignments of error have been filed in the case, and hence there is nothing before us for review except the indictment, which we have examined, and find to be in all respects sufficient.

The judgment, therefore, is affirmed. All concur.

LEDWIDGE v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. March 31, 1903.)

STREET RAILROADS—COLLISIONS WITH VEHICLES—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EXCESSIVE SPEED—ORDINANCE.

1. Defendant's street car ran into plaintiff's hack while he was attempting to cross the track. He testified that he had an unobstructed view of the car, which was about 150 feet away when he first saw it, and was approaching at a speed of 20 miles per hour; that he did not stop or whip up his horses until the car was within 40 or 50 feet of him. There was nothing to prevent him from stopping until it passed, and he could have crossed in safety, had he whipped up his horses when he first drove on the track. *Held* to show contributory negligence, precluding his recovery.

2. Where plaintiff saw a car about 150 feet away, approaching at a speed of 20 miles per hour, but did not stop or whip up his horses until the car was within 40 or 50 feet from him, and it struck his hack before he got across the track, and injured him, he had no right to assume that those in charge of the car would regulate its speed to conform to that limited by the ordinance.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by John Ledwidge against the St.

Louis Transit Company. Judgment for plaintiff, and defendant appeals. Reversed.

Market street, in the city of St. Louis, runs east and west, and has in its center a double street railway track, over which the defendant corporation operates its cars by electric power. The street is crossed at right angles by Seventeenth street, running north and south. The plaintiff is a carriage driver of 40 years' experience in said city. On November 29, 1902, he was driving his carriage on Seventeenth street in a funeral procession moving south. His vehicle was the rear one in the procession, and was from 16 to 18 feet behind the next carriage in front. Plaintiff testified that when he reached Market street he looked west, and saw a car coming on the south track at a speed of about 20 miles per hour, from 100 to 150 feet distant from him; that he judged he "had any amount of time to cross" the street before the car would arrive; that he did not stop, but drove on in a walk until his horses were over the south track, when he saw the car was close upon him; that he then quickened the speed of his horses, but not in time to clear the track, and the hind wheel of the carriage was struck by the car, and he and the carriage were thrown against a trolley pole with great force; that he received severe injuries to his hip and other portions of his body, and his carriage was badly damaged. On cross-examination the plaintiff testified as follows: "Q. Now, when you drove into Market street, following the funeral procession, how far away was the car, if you saw it, that finally collided with your carriage? A. The car was about 150 feet west of me; it was about a half block. Q. By the Court: When you drove into Market street? A. Yes, sir. Q. On Seventeenth? A. Yes, sir; and the car went half the next block before he could stop it—before he tried to stop it. Q. How were you driving as you drove into Market street, and across the first track and into the second track? A. Very close to a walk. Could not go faster, because there was a carriage ahead of me. I could not do that. I could not run into people. I had to keep out in line with the procession. Q. How far had your carriage gotten cross the track before this alleged collision took place? A. I was leaving the south rail. In fact, it hit the hind wheel of the carriage. Q. How was the car running when it struck the hind wheel? A. It was running east. Q. How was it running with reference to speed? A. It was running at a rate of about twenty miles an hour, in my opinion. Q. Now, when you turned onto Market street, did you look east and west for the cars that might be approaching? A. Certainly I did. Yes. Q. And how far away you say you saw the car coming from the west? A. To the best of my opinion, it must have been from 100 to 150 feet away from me. * * * Q. Now, when you drove on to Market street the car was between 100 and 150 feet away? A. Yes, sir; fully that. Q.

*Rehearing denied April 28, 1903.

You saw the car coming? A. I did. Yes, sir. * * * Q. Over the track that you had to cross? A. Yes, sir. Q. By the Court: Well, did you look for the car from the time you got into Seventeenth street until you drove on the tracks? A. I did, sir. Yes, sir. Q. by Mr. Jourdan: Then you knew about the rate of speed it was approaching? A. I did, sir. Q. And notwithstanding that you drove upon the track? A. I was— Q. Just answer my question. Notwithstanding your having seen the car coming? A. Yes, sir. Q. Observing the speed? A. Yes, sir. Q. You drove upon the track? A. Yes, sir. Q. Upon the theory that you could get across the track before the car struck you? A. Yes, sir; I had plenty of time. * * * Q. And you drove at a walk across Market street? A. I did. Yes. To the last rail. I had to do the best I could to get off of it. Q. Well, your team was walking until you got to the last rail, you say? A. Yes, sir. Q. And there you quickened them up, did you? A. Yes, sir; but I could not go very far. I could not quicken up very far, because I had caught the carriage ahead of me. Q. The carriage ahead of you kept you from getting along faster? A. No; it did not keep me from getting along faster. I could not pull out. Q. Well, what did you mean when you said you could not go faster for the carriage ahead of you? A. Well, the funeral procession was not going any faster. Q. And you had caught up with this carriage ahead of you, had you? A. I was the same distance from it all the time. Q. Well, then, it was not in your way? A. No; it was not in the way. Q. And there was nothing to hinder you from driving faster? A. Nothing. No. Q. Nothing obstructed your view either up or down Market street? A. No, sir; there was nothing to obstruct my view. Q. Was there anything between you and the car? A. Not ever that I seen. No, sir; not a thing that ever I saw. Q. Not a thing that you saw between you and the car? A. Not a thing that ever I saw. No, sir." The occupants of plaintiff's carriage were called as witnesses for him. None of them saw the car until it was within 50 or 60 feet of the carriage. One of them testified that the car was running at a speed of about 15 miles per hour; another, that it hit the carriage "like a cannon ball"; and several of them testified that the car did not stop until it ran 70 feet or more after it struck the carriage. Those who saw the motorman said that he did nothing at all to stop or check the speed of the car. Plaintiff produced evidence that there is an up grade on Market street from Twentieth to Sixteenth street, and that a car running east on that street between Twentieth and Sixteenth streets at a speed of 15 miles per hour could be stopped by the use of the brake in 60 feet, and with the reverse in 80 feet. The vigilant watch and speed ordinances were admitted in evidence. The defendant offered countervailing evidence, which, if true, exonerated the defendant's

servants in charge of the car from all blame for the accident. The verdict and judgment were for the plaintiff. After the usual motion for new trial was overruled, defendant appealed.

Boyle, Priest & Lehmann, for appellant.
A. R. Taylor, for respondent.

BLAND, P. J. (after stating the facts). 1. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved the court to give the jury a peremptory instruction to find for the defendant. The refusal to grant these motions is assigned as error. The contention is that, conceding plaintiff's evidence shows that the defendant was negligent in running the car at a prohibited rate of speed, and that the motorman in charge of the car was negligent in failing to make any effort to check or stop the car to avoid the collision, the plaintiff was guilty of such contributory or concurring negligence as to preclude his right of recovery. Plaintiff testified that he had an unobstructed view of the car; that he saw it from 100 to 150 feet to the west when he drove into Market street; that he judged it was running at a speed of 20 miles per hour; that he did not stop, but drove on across the street in a walk, keeping the same distance (about 16 or 18 feet) from the carriage in front that he had maintained before reaching Market street; that he thought he had plenty of time to cross before the car came; that he saw the car all the time, but he did not whip up his horses until the car was within 40 or 50 feet of him, running at a speed of 20 miles per hour. There was nothing to prevent plaintiff from stopping until the car passed; nothing to prevent him from crossing in safety if he had whipped up his horses when he first drove on the track. With this situation before him, he took his chance of beating the car past the point of danger; and this he might have done, had he been more diligent in accelerating the speed of his team. The danger of crossing the street, in the circumstances detailed by the plaintiff, was known to him. He was an experienced carriage driver; was familiar with the running of street cars. The danger was apparent and imminent, yet, in the face of this danger, he took the chance of crossing before the car arrived, and assumed the risk, and must be held to have contributed to the accident which caused his injury. His negligence was contemporaneous with the alleged negligence of defendant's servants, and the catastrophe was the result of the concurring or mutual acts of the plaintiff and of the defendant's servants. When an injury is thus shown to be the result of mutual or concurring negligence, the law is well settled that the plaintiff cannot recover. *Boyd v. Railway*, 105 Mo. 371, 16 S. W. 809; *Watson v. Railway*, 133 Mo. 246, 34 S. W. 573; *McManamee v. Railway*, 135 Mo. 440, 37 S. W.

119; *Kreis v. Railway*, 148 Mo. 321, 49 S. W. 877; *Peterson v. Railway*, 156 Mo. 552, 57 S. W. 709; *Holwerson v. Railway*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, 80 Am. St. Rep. 625; *McCarty v. Rood Hotel Co.*, 144 Mo., loc. cit. 402, 403, 46 S. W. 172; *Kellny v. Railway*, 101 Mo., loc. cit. 77, 13 S. W. 806, 8 L. R. A. 783; *Tanner v. Railway*, 161 Mo. 497, 61 S. W. 826; *Conrad Grocer Co. v. Railroad*, 89 Mo. App. 534; *Gahagan v. Railroad (N. H.)* 55 L. R. A. 428, and note.

2. It is contended by respondent that plaintiff had a right to assume that defendant's servants in charge of the car would obey the ordinance, in regard to its speed, and that, had they done so, the catastrophe would not have occurred; citing *Hutchinson v. Railway*, 161 Mo., loc. cit. 254, 61 S. W. 635, 852, 84 Am. St. Rep. 710. In the *Hutchinson* Case the deceased saw in the nighttime only the headlight of the approaching train, and did not and could not, from what she saw, form any idea of the speed at which the train was approaching. In the case at bar the plaintiff saw the car in broad daylight, saw the speed at which it was approaching, and estimated that speed at 20 miles an hour. It would be absurd to say that he had a right to rely upon that which he knew was not a fact. As a general proposition, one in the lawful regulation of his own conduct has the right to assume that all others will observe the law as to him and as to his movements, but when he sees and knows that his movements, if continued, will bring him into collision with a force unlawfully operated by another, and that injury will probably result, he can no longer act upon the assumption, but must regulate his conduct as the law of common prudence enjoins. He can only act on the assumption when he knows no better. *Weller v. Railway*, 120 Mo. 652, 23 S. W. 1061, 25 S. W. 532; *Sullivan v. Railway*, 117 Mo. 239, 23 S. W. 149; *Hutchinson v. Railway*, 161 Mo. 257, 61 S. W. 635, 852, 84 Am. St. Rep. 710.

3. An instruction was given plaintiff incorporating the vigilant watch ordinance. The writer expressed his individual views in respect to such an instruction in the recent case of *Gebhardt v. Railway*, 71 S. W. 448, and does not care to repeat them here. He is, however, persuaded that there can be no harmony of decisions in respect to the question of negligence and contributory negligence in personal injury cases against the street railway companies of the city of St. Louis until it is authoritatively decided that the vigilant watch ordinance is but declaratory of the common-law rule in regard to negligence. But whatever else may be said

in respect to the multiplicity of conflicting decisions on the ordinance, not one can be found that holds that the ordinance abolishes the common-law doctrine of contributory negligence. The law is that the traveling public and the street cars both have a right to the use of the streets, but it seems to us that the companies have the right of way over their tracks. The Supreme Court of California, in *Bailey v. Railroad*, 42 Pac., loc. cit. 916, 917, in respect to this matter, used the following language: "It is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: (1) That the car cannot turn out or leave the track, while the vehicle or passenger can. (2) These companies are chartered, nominally at least, for the convenience of the public. Their duties to that public require them to move with regularity and with all reasonable celerity. Manifestly, this cannot be accomplished if they must pause or give way to every foot passenger or vehicle whose convenience or pleasure may prompt an obstruction of the way. The latter can cross and pass elsewhere. The former cannot. The duties of the car companies and of the public are each enhanced by the peculiar conditions. The former must see to it that their servants are on the alert, not only at street crossings, but everywhere upon the tracks, to see that citizens are not run down and injured. The citizen, if upon the track, must leave it when the car approaches. If about to cross it, he must use his senses of sight and hearing before stepping on the track, to ascertain whether a car is approaching, and, in the absence of some well-known custom or regulation at crossings which renders such a precaution on his part unnecessary, he is guilty of negligence if he fails to look before he passes upon the track; and if all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt, it is negligence, in law." This opinion is in harmony with the best-considered cases of our appellate courts, and is a very clear exposition of the law in respect to the reciprocal rights of the public and the street car companies to the use of the streets in a populous city, and, to my mind, shows the utter fallacy of the contention that the vigilant watch ordinance, rightfully construed, requires a higher degree of care on the part of companies operating street cars than does the common law.

By his own evidence the plaintiff convicted himself of contributory negligence, which, under the law, precludes his right to recover, wherefore the judgment is reversed. All concur.

CITY OF GEORGETOWN v. COMMON-WEALTH.

(Court of Appeals of Kentucky. April 29, 1903.)

MUNICIPAL CORPORATION—FAILURE TO ABATE NUISANCE—CRIMINAL LIABILITY.

1. A municipal corporation is not liable to indictment and fine for permitting a nuisance, to which it has not contributed, to continue on private property within its limits, though it has passed ordinances punishing the maintenance of nuisances, and possesses power to abate them; its functions in this regard being exercised merely as an agency of the state, and not for its own peculiar purposes.

Appeal from Circuit Court, Scott County.
"To be officially reported."

The city of Georgetown was convicted of permitting a nuisance within its limits, and appeals. Reversed.

W. S. Kelly, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

NUNN, J. At the May term, 1902, of the Scott circuit court, an indictment was returned against appellant, a city of the fourth class, in the usual and proper form, charging, in substance, that it did unlawfully suffer and permit in an open gutter, drain, and sewer between the gas plant and "Big Spring Branch," two points within the limits of the city, all sorts of filth, excrement, vegetable and animal matter, refuse and waste from the gas plant, and the ordinary sewerage of the community in, through, and along the open gutter, drain, and sewer to flow therein, and to remain rotting and festering, and giving forth and emitting noxious and poisonous gases, charging and burdening the atmosphere with dangerous and offensive odors, and disturbing the comfort of all good people, etc. On the plea of not guilty the evidence showed, in substance, the following facts: That there was a natural drain running from the gas plant to "Big Spring Branch," the drain passing along through the city, and into this drain the waste from the gas plant was permitted to flow, likewise the filth from privies on private property along this drain, and especially during the dry seasons of the year, when water was not flowing in this drain, it became very obnoxious and offensive to the smell and was in fact a nuisance. The gas plant was not owned or operated by the city. It was shown by the record that the city council had passed ordinances making it an offense, and fixing the penalties therefor, for causing, maintaining, or permitting in the city limits noxious or unhealthy matter in such a drain or in any place within the city. The trial resulted in a verdict against the appellant for \$490, and, the court refusing to set aside the verdict and grant a new trial, the case is here on appeal.

If the corporation, the appellant, is liable to be indicted and fined for such an offense

as proven in this case, then the judgment ought to stand. The only question to be determined is whether or not it is liable. As this is an important question to the state and all the cities and towns in the state, we have taken great pains to examine all the authorities touching the subject within our reach. This direct question, so far as we have been able to find, has never been before this court before; that is, as to whether or not a municipal corporation can be indicted and fined for its failure to cause the abatement of a nuisance, or cause the punishment of the individuals creating and suffering the same on their private property. There is no pretense that the city or its officials created or caused the nuisance, or that it exists on any property belonging to or under the control of the appellant, except the ordinary police control as the agent of the state. In the case of *Dudley v. The City of Flemingsburg* (Ky.) 72 S. W. 327, the court said: "There are two general principles underlying the administration of government of municipal corporations. The one is that a municipal corporation, in the preservation of peace, maintenance of good order, and enforcement of the laws for the safety of the public, possesses governmental functions and represents the state. The other is where the municipal corporation exercises those powers and privileges conferred for private, local, or merely corporate purposes peculiarly for the benefit of the corporation. Under the former the city is not liable for malfeasance, misfeasance, or nonfeasance of its officers. Under the latter it is." This prosecution is based upon the theory that the city is liable to punishment for the failure of its officials to abate a nuisance and to prosecute the individuals responsible therefor. Nuisances are offenses at common law, and the persons creating or permitting them are liable to indictment wherever committed; and when the state grants to a city the power to abate or pass ordinances to punish persons guilty of such offenses this right is exercised only in aid of sovereignty in the enforcement of its laws for the comfort, safety, and health of the public. The city, in such a case, becomes a part of the sovereignty, and therefore is not liable to indictment. A municipal corporation is not liable for the acts of its officers in enforcing or the failure to enforce the criminal or penal laws of the commonwealth or the penal ordinances of the city. In *Taylor v. City of Owensboro* (Ky.) 32 S. W. 950, the court, in an action seeking to make the city liable for the malfeasance and misfeasance of its officers, said: "The municipal corporation in all these and the like cases represents the state or the public. The police officers are not the servants of the corporation. The principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability. The cases rest on the ground that municipalities represent

the commonwealth, and municipal officers, while engaged in duties relating to public safety and in the maintenance of public order, are the servants of the commonwealth"—and refers to *Dillon on Municipal Corporations*, §§ 974, 975; *Pollock's Adm'r v. City of Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Jolly's Adm'r v. Hawesville*, 89 Ky. 279, 12 S. W. 313; and *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585. The case of *State v. Town of Burlington*, 36 Vt. 524, was where the city was indicted for suffering and permitting a nuisance wherein the slop and waste water from the premises of several individuals was conducted into a ditch, from which offensive and unwholesome odors arose, offensive to the inhabitants living on the street. The court, after discussing the liability of the city upon statutory questions, decided the case upon broader principles, and said: "But we are also of opinion that the removal or abatement of nuisances erected or created by private persons cannot be considered as a corporate duty imposed by law upon towns. * * * This cannot be considered as creating a corporate duty on the town, unless we can assume that all and every duty which by general laws is devolved upon officers elected by the town is a corporate duty, and that the failure of every town officer to perform his official duty subjects the town to suit or indictment if the consequence is injurious either to any individual or to the community generally. But no such principle has ever been understood to prevail, except where the liability was created by statute. * * * The general supervision of the business affairs and concerns of towns is given to selectmen, and in the performance of such duties they are the agent of the town, and they may bind the town by their acts, and the town be liable for their acts, in much the same manner and upon the same principles that obtain between ordinary principals and agents. But when the Legislature by general laws devolve certain duties relative to the general police upon selectmen, they do not become corporate duties and obligations of the town, any more than such duties required to be performed by constables, grand jurors, or justices of the peace. If there is any liability to individuals or to the public growing out of their failure to perform such duties, it is upon the officers, and not upon the town." Cities are liable for the malfeasance of their officials in matters peculiarly pertaining to their benefit and advantage, but not for their failure to enforce or for nonenforcement of the criminal and penal laws of the sovereignty. Upon this principle the town of Marion was made liable to McGraw. The town imprisoned him for the failure to pay a license fee, unconstitutionally imposed, for the peddling of spectacles in the town. The court, in substance, said that the license fee was for the sole benefit of the town, and McGraw had not committed any offense

against the criminal or penal laws of the state, and therefore the officials of the town were not in that matter acting as agents of and in aid of the state in the enforcement of her laws, but were acting as the agents for the town, and solely for its pecuniary benefit. *McGraw v. Town of Marion* (Ky.) 34 S. W. 18.

Council cite, as sustaining the judgment of the lower court, *Dillon on Municipal Cor.* § 933; *A. & E. Enc. of Law*, vol. 20 (2d Ed.) 1209-31; *Hammar v. City of Covington*, 3 Metc. 494; *Commonwealth v. Trustees of Hopkinsville*, 7 B. Mon. 38; *Bragg v. City of Bangor*, 51 Me. 532; *State v. Barksdale*, 5 Humph. (Tenn.) 154; *Mayor, etc., of Town of Chattanooga v. State*, 5 Sneed (Tenn.) 578; and *Selfried v. Hays*, 81 Ky. 377, 50 Am. Rep. 167.

Dillon on Municipal Corporations, § 933, is as follows: "Neglect of duty in respect of repair of streets, etc. In Tennessee a municipal corporation is considered liable, upon the general principles of common law, to indictment for neglecting its duty to keep its streets in reasonable repair, and it is no defense that the street is little used, and is in a remote part of the town. And the mayor and aldermen may also be personally indicted for like neglect of duty. So in the same state it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary 'to preserve the health of the town and to prevent and to remove nuisances,' it is its positive duty to exercise this power, and that for a neglect of this public duty it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for permitting a slaughterhouse to be kept upon the private property of the citizen or the town, to the annoyance of the inhabitants and the endangering of the public health; the court remarking that 'an indictment against the corporation is the proper mode of redress by the public for a grievance of this nature.' In Vermont a town is liable to an indictment as at common law for not erecting a bridge pursuant to an order from a competent tribunal. In Maine towns charged with the maintenance of public highways are by statute indicted for failing to discharge their duty in this respect. and the general principle is asserted in such cases that, where the town is civilly liable in damages, it may be indicted." It will be noticed that the part of this section which refers to making corporations criminally liable for the failure to abate or permitting nuisances on private property refers solely to authorities in the state of Tennessee in support thereof. The authorities referred to are *State v. Shelbyville*, 4 Sneed, 176, *Hill v. State*, Id. 443, and *McCrowell v. Bristol*, 5 Lea, 685. The case of *State v. Shelbyville* was where an indictment was against the mayor and aldermen of the town for permit-

ting a public nuisance, to wit, a slaughterhouse, to be kept by a private citizen in the town, alleged to be a nuisance, and for their failure to abate or suppress it. The court said that they were liable, and the court stated in that opinion that the corporation was also liable to indictment. This was mere dictum, and the court did not cite any authority to support the statement. In the case of *Hill v. State* the mayor and aldermen of an incorporated town were indicted and punished individually for their failure to keep in repair the public streets of the town. The court sustained the judgment of the court below. It will be seen that this case is not in point, because it has reference to the public streets of the town. The case of *McCrowell v. Bristol* was where *McCrowell* sued the mayor and aldermen of the town of Bristol, alleging that they had aided in establishing a nuisance, to wit, a saloon, on property adjoining his dwelling, and suffered and permitted drunken and bolsterous persons to assemble, congregate, and remain there, to his annoyance and damage. The court in that case said that he could not recover.

A. & E. Enc. of Law (2d Ed.) vol. 20, page 1209, is as follows: "A municipal corporation is liable for the creation or maintenance of a nuisance whereby an individual sustains special injury. And a city is also liable if it licenses the creation or maintenance of a nuisance by third persons. But though cities have, as a rule, the power to abate nuisances, and it is their duty to abate them, yet, there is no liability in damages for a failure to exercise the power of abatement. But a municipal corporation has been held liable to indictment for a dereliction of duty in such respect. If a city, having power to prevent and remove nuisances, invades and trespasses upon the rights of an individual in undertaking to exercise such power, it is liable in damages therefor." The author, in the use of this language, "But a municipal corporation has been held liable to indictment for a dereliction of duty in such respect," refers only to the case of *State v. Shelbyville*, 4 Sneed, 176, to uphold it. Again, in same book, page 1231, this language is found: "Where duties of a public nature are imposed upon municipal corporations, such corporations are liable to indictment if they fail to discharge those duties according to law;" and refers, as authorities to sustain it, to the Tennessee cases above referred to. Also the cases of *Richardson v. Boston*, 24 How. (U. S.) 188, 16 L. Ed. 625; *Hammar v. Covington*, 3 Metc. (Ky.) 494; *Bragg v. Bangor*, 51 Me. 532; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; and *State v. Canterbury*, 28 N. H. 195.

We have already discussed the Tennessee cases referred to.

The case of *Richardson v. Boston* was where the plaintiff, *Richardson*, was the owner of two wharves running from high to low water mark. The city owned a strip of

ground 30 feet wide between the two wharves. The plaintiff sued the city for creating and maintaining a nuisance upon its property. The statement of the case shows that it has no application to the case involved here. The case of *Hammar v. Covington* was where the court said that individuals whose property was about to be destroyed by the giving away of a street of a city had the right to a writ of mandamus against the council to compel them to have the street repaired. The case of *Bragg v. Bangor* was where the court said, "Towns may be indicted and fined for allowing their highways to become unsafe and inconvenient." The case of *Commonwealth v. New Bedford Bridge* was where the proprietors of a private corporation, called the "New Bedford Bridge," were indicted for creating and maintaining a nuisance in the manner of erection and maintenance of its bridge. The case of *State v. Canterbury* was where the town was made liable to indictment for not building and repairing bridges as parts of the highway in which they are situated. The case of *Commonwealth v. Trustees of Hopkinsville*, 7 B. Mon. 38, was where the trustees of the town were indicted for their failure to keep the streets clean. The case of *Selfried v. Hays, etc.*, 81 Ky. 377, 50 Am. Rep. 167, was where *Selfried* was running a slaughterhouse on his own property, and the appellees sought an injunction restraining him from continuing the nuisance, and the court enjoined and restrained him from keeping dead animals, or any parts of dead animals, on his premises in such manner as would cause the offensive odor and stench complained of. And in the opinion the court remarked that an indictment against the appellant would have been the proper remedy. It will appear from the statement of all the cases referred to that they have no application to the question before us.

We have found two cases decided by the superior court of this state which are apparently in conflict with the views herein expressed by this court. One case is *The City of Paris v. Commonwealth* (opinion by Judge Richards) 4 Ky. Law Rep. 599. After announcing the true doctrine, he uses this language: "But whenever the ministerial powers or duties of municipal corporations are involved, they stand before the criminal law upon the same footing with all other corporations. To this class belongs the duty to abate public nuisances." He then refers to the case of *State v. Shelbyville*, 4 Sneed, 177, *supra*, as the only authority to sustain such a proposition. The other case is *Commonwealth v. The City of Paducah*, opinion by Judge Ward, 6 Ky. Law Rep. 292. We have examined the manuscript opinion in this case, and find that he refers to, as authority, only *Morawetz on Private Corporations*, § 94, *Dillon on Municipal Corporations*, § 933, and *Angell & Ames on Corporations*, §§ 894-6. We have in this opinion quoted and dis-

have examined the sections referred to in Morawetz and Angell & Ames on Corporations, and find that they have reference alone to private corporations, and have no application to this case.

We have been unable to find any authority in any state sustaining the contention of the commonwealth, except the case of *State v. Shelbyville*, 4 Sneed, 176, above referred to. Wherefore the case is reversed, and the cause remanded for further proceedings consistent herewith.

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BUTTON v. GAST et al.

(Court of Appeals of Kentucky. April 29, 1903.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—REVIEW—NECESSITY OF PREJUDICE—SUIT TO ENFORCE—FILING OF PLANS AND SPECIFICATIONS—SUFFICIENCY OF ALLEGATIONS.

1. A street or alley assessment will not be disturbed unless it affirmatively appears that under a proper method the defendant would be charged materially less.

2. Where a petition in a suit to enforce a special assessment alleges newspaper advertisements for bids according to the plans and specifications on file with the board of public works, and the ordinance filed with the petition shows that at its passage, which was prior to the letting of the contract, the plans and specifications were so filed, it sufficiently appears, in view of the presumption of the discharge of official duty, that the plans and specifications were on file before the contract was let.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by J. Gast and others against A. Button. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wm. Furlong, for appellant. Lane & Harrison, for appellees.

NUNN, J. This is an action to enforce apportionment liens for the original construction of an alley in the city of Louisville, running from Brandels avenue south 1,375 feet, and lying between old Third street, now called "Park Place," and Fourth street and Fourth street extended. The description of the property, as given in the petition and the ordinance filed with it, shows that the territory contiguous to the alley is not defined into squares by principal public streets, and the answer, in the following language, admits this to be true: "The defendant says that the territory contiguous to this alley, and on each side thereof, is not now, and never was, defined into squares." It is shown by the record that this alleyway has been improved by original construction, by ordinance and contract approved by the city council; that the improvement had been inspected and received; that the cost had been apportioned among the respective owners of property within the limits subject to assessment; and that the notice required to be published in the newspapers had been properly given.

that an apportionment of the costs of improving or constructing a street or alley will not be disturbed unless it affirmatively appears that under a different and proper method of assessment the defendant would be charged materially less, and that the apportionment as made by the city would be prejudicial to his interest. And it is impossible from this record to tell what effect on the defendant a change in the manner of assessment would have. The indications are that the change in manner of assessment sought by him would very materially increase the cost to him in making the improvement. In the case of *Barrett v. Falls City Artificial Stone Co.*, 52 S. W. 947, this court, in discussing this question, said: "In order to raise this question, appellant should have pleaded and proved the facts showing that a wrong basis of apportionment was followed, and that under the proper method they would be required to pay less than under the methods adopted." Also see *McHenry v. Selvage*, 99 Ky. 235, 35 S. W. 645, in which the court said: "It appears that the method of apportionment was based on the assumption that the contiguous property was not divided into squares by principal streets, and it is the appellant's contention that the property was in fact so divided, and that therefore the method applied was erroneous. While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but, if it were otherwise, it does not appear that, under a different method of apportionment, the appellant would be required to pay less than under the method adopted."

The appellant also contends that the petition fails to show that the plans and specifications of the work were filed with the board of public works before the letting of the contract. The petition does show that the newspapers advertised, in three issues each, that proposals or bids for the improvement of the alley according to the provisions of the ordinance and the plans and specifications for the work were on file in the office of the board of public works; and the ordinance passed by the council with reference thereto shows that the plans and specifications were on file with the board of public works at the time of the passing of the ordinance, and before the letting of the contract. While these allegations are possibly not specific enough, yet this court has decided in several cases that the law presumes that the officers performed their duty in this respect. In the case of *Henning, etc., v. Stengel and Bickel*, 66 S. W. 41, 67 S. W. 64, in discussing this subject, the court said: "The law presumes the officers did their duty, and, if they failed to do it in this case, positive proof of it could have been made. The presumption of regularity is not overthrown by the evidence."

We have been unable to find any preju-

wherefore the judgment of the lower court is affirmed.

HOFF v. HAHN.

(Court of Appeals of Kentucky. April 28, 1903.)

MASTER AND SERVANT—INJURIES TO THIRD PARTIES—LIABILITY OF MASTER.

1. Plaintiff, five years of age, ran out into the street to a car track, returned, and started out again. When he was four or five feet from the curb, he was struck and knocked down by a horse driven by defendant's servant, which was moving at a slow trot. The wheels of the wagon were not more than two or three feet from the curb, and no negligence on the driver's part was shown. *Held*, defendant was not liable.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Walter Hoff, an infant, by his next friend, against Jacob Hahn. Judgment for defendant, and plaintiff appeals. Affirmed.

Aubrey Barbour, for appellant. S. C. Bailey, for appellee.

HOBSON, J. Appellant, Walter Hoff, an infant five years old, by his father as next friend, brought this suit to recover of the defendant for personal injuries received by the child from being run over by a horse and wagon belonging to appellee. At the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The proof shows that appellee is a butcher, and the wagon referred to was driven by his servant delivering meat to his customers. The little boy was playing with some children in a lot, and ran out into the street to the street car track. He then returned in a run to the curb, then turned and ran back toward the street car track, and, as he got about four or five feet from the curb, was struck by the horse and knocked down. There were two tracks in the street of the street car company. The wheels of the wagon were not more than two or three feet from the curb. The horse was moving in a slow trot, and, from the evidence, there could not have been much difference in his speed and that of the child as he ran out from the curb. We see nothing in the evidence to indicate that the driver should have anticipated that the child would run immediately back into the street after reaching the curb; and, from the nearness of the wagon to the curb, it is evident that the driver was without power to avert the danger after the little fellow left the curb and started back into the street. To hold the drivers of vehicles responsible for accidents under such circumstances would be to impose upon them more than ordinary care, and in fact to make them responsible for in-

The accident did not occur at a public crossing. The speed of the wagon was usual, and, from the facts shown by other witnesses who saw the occurrence, we are satisfied the little boy ran out just in front of the horse, and that the injury to him was not due to want of ordinary care on the part of the driver. It is true that persons driving vehicles upon the street must keep a lookout and use ordinary care to avoid injury to those upon the street. It is also true that a child five years old is not chargeable with contributory negligence. But conceding all this, to warrant a recovery there must be evidence sufficient to show negligence on the part of the driver, bringing about the injury. This did not appear, and the court properly instructed the jury to find for the defendant, for the drivers of vehicles are not responsible for inevitable accidents.

Judgment affirmed.

R. B. PARK & CO. v. ORTH et al.

(Court of Appeals of Kentucky. April 22, 1903.)

STREET IMPROVEMENTS—PROPERTY SUBJECT TO ASSESSMENT—ANNEXATION OF PLATTED PROPERTY.

1. Where one laid out land as an addition to a city, subdividing it by streets, and recorded a plat thereof, and sold lots by deeds calling for the streets, and the lots are built on, and the streets are used as such, and thereafter the city annexed such territory, such streets thereby become principal streets of the city, within Ky. St. 1899, §§ 2833, 2834, limiting the territory which may be assessed for a street improvement.

Appeal from Circuit Court, Jefferson County, Chancery Division.

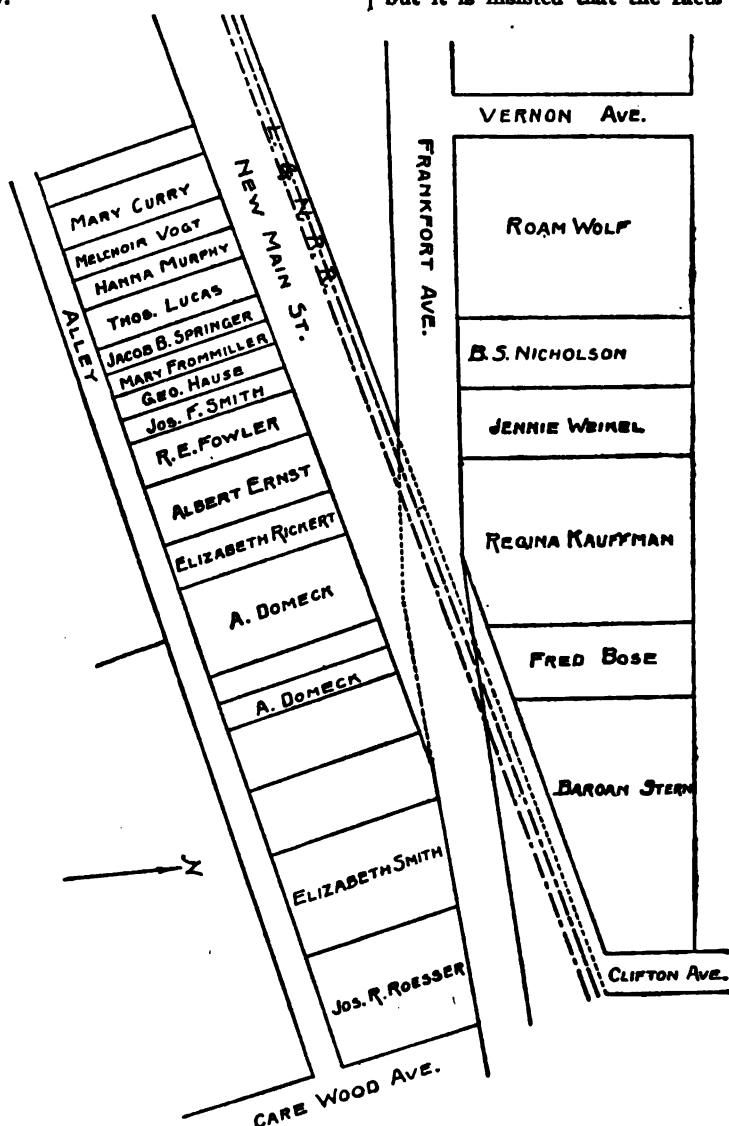
"Not to be officially reported."

Action by R. B. Park & Co. against Catherine Orth and others. From a judgment for certain defendants, plaintiffs appeal. Affirmed.

Barnett & Barnett, H. H. Herr, and Chas. F. Taylor, for appellants. Lane & Harrison, for appellees. H. L. Stone, for appellee city of Louisville. Helm, Bruce & Helm, for appellee Louisville & N. R. Co.

HOBSON, J. Appellants, R. B. Park & Co., on July 3, 1900, entered into a contract with the city of Louisville to improve the carriage-way of Frankfort avenue from the former city boundary line to Cavewood avenue extended, pursuant to an ordinance of the council theretofore passed, and, having completed the work and received apportionment warrants therefor, brought this action against the property owners abutting thereon and the city to recover the cost of the improvement. The court held that the apportionment had been made on the wrong basis, and directed a new apportionment to be made. He also held that no part of the property lying south

improvement. The petition was accordingly dismissed as to the defendants A. Domick, Elizabeth Rickert, Albert Ernst, R. F. Fowler, Joseph F. Smith, Mary Frommiller, Jacob Springer, Thomas Lucas, Hanna Murphy, Barbara Stern, and Fred Bose. The situation of this property is shown on the following map:



The ordinance directed the cost of the improvement to be assessed against the property fronting on Frankfort avenue, and extending back to a depth of 195 feet. The property of the defendants as to whom the petition was dismissed fronts on New Main street or Clifton avenue, but is taken in by a line running parallel with Frankfort avenue, and 195 feet from it. Other ground intervenes between this land and Frankfort avenue. In holding it not subject to the lien,

S. W. 474, where it was held that the council, in fixing the territory to be assessed for the cost of the street improvement, exceeded its authority in crossing a principal street, which intersected the street improved at an acute angle. The soundness of that opinion is not assailed by the counsel for appellants, but it is insisted that the facts of this case

do not bring it within the rule there laid down, because, as is urged, neither New Main street nor Clifton avenue is a principal street of the city.

Some 25 or 30 years ago, J. W. Bowles, who then owned this land, laid it out as an addition to the city of Louisville; subdividing it by New Main street, Clifton avenue, Vernon avenue, etc. A plat was made, which he had recorded in the county clerk's office. All the lots fronting on New Main street,

Clifton avenue, Young avenue, Vernon avenue, and the like, were sold and conveyed by deeds calling for such streets, which have been continuously used by the public as public ways under a claim of right for more than 20 years. Though it is not shown that the county authorities accepted these highways, or ever took control of them, or that the city has done so since the annexation of the territory to the city, it is shown that when the annexation was made the streets were in existence and used by the public. The lots bordering on them had been sold under the deeds calling for the street. The purchasers had settled on their lots, and were in use of their property, together with the street appurtenant thereto. To illustrate the condition to which New Main street was settled, it is only necessary to look at the map, and see how closely it was cut up into lots, all of which, but one or two, were built upon. When the property came into the city in this condition, these streets were recognized by the assessing officer in describing the property for assessment, but it is not shown that the city has in any other way accepted the dedication of the streets. The question to be decided is whether New Main street and Clifton avenue are, on these facts, principal streets of the city of Louisville, within the meaning of the statute. In Elliott on Roads & Streets, § 117, it is said: "Dedication may be established against the owner of the soil by showing that he has platted the ground, representing the streets and alleys on the plat, and has sold lots with reference to it, or by showing that he has adopted a map or plat made by public officers or other persons, or by showing that he has sold lots, describing them as bounded by a street or road. Merely laying out grounds, or merely platting and surveying them, without actually throwing them open to use, or actually selling lots with reference to the plat, will not, as a general rule, constitute a dedication; and even when lots were sold with reference to an unrecorded plat, showing a street, it was held that a finding that there was no dedication was justified, when it appeared that the owner maintained obstructions across the same, and told the purchaser that it was a private way. But ordinarily the sale of a single lot with reference to the plat will complete the dedication." Again, in section 153, it is said: "Where an amended charter is accepted, which adds to the municipal corporation territory previously laid off and platted, there is an implied acceptance of the streets and alleys designated on the plat." So, in 2 Smith on Municipal Corporations, § 1280, the rule is thus stated: "The user for a considerable period of property as a public highway creates a presumption of its being a public street. While there

is a distinction between a public road and a public street, yet, when property over which a road is located is annexed to a municipality, the road becomes a street; and, while the purposes and uses are the same, the regulation and control will be different." See, also, to same effect, 2 Dillon on Municipal Corporations (3d Ed.) § 632; Eastern Cemetery v. Louisville (Ky.) 15 S. W. 1117; Louisville v. Brewer's Adm'r (Ky.) 72 S. W. 8; South Covington, etc., Railroad Co. v. Turnpike Co. (Ky.) 66 S. W. 177, 57 L. R. A. 875, and cases cited. The act of the city in taking this territory into city was wholly voluntary on its part. In thus extending its limits it took the territory as it then was—laid off into streets, with lots used as residences fronting on these streets. The property covered by the street had been dedicated by the owner to this purpose in the most solemn way—by recording the plat and conveying the lots calling for the streets. The persons who bought the lots were entitled to the free use of these streets, and the public was using them and had used them as highways for a number of years. Some of the residences on New Main street have been built as much as 20 years. The city could not take this territory in with the streets in actual use without accepting the benefits with the burden. Its annexation by the city was an acceptance by it of the street. The dedication was made in anticipation of the annexation of the property to the city, and when the property was annexed no further act on the part of the city in accepting the streets was necessary.

We are therefore of opinion that the circuit court properly held New Main street and Clifton avenue to be principal streets of the city, and therefore properly adjudged that the land of the defendants above named, fronting on these streets, and not on Frankfort avenue, could not be subjected for the improvement of Frankfort avenue.

A number of other questions are discussed by counsel, but none of these can be considered, as the court has rendered no final judgment as to any of these matters. The court has not determined as to the liability of the city of Louisville or of the Louisville & Nashville Railroad Company, or as to whether a deviation was made from the contract. At least, no final judgment has been rendered on any of these matters, and none of them are therefore before us on the appeal. The only thing finally determined by the circuit court is that the property of the defendants above named is not subject to the lien; and, seeing no error in the judgment to this extent, we must affirm it, without any intimation as to the other matters not yet finally determined in the circuit court.

Judgment affirmed.

SHERIFF—SERVICE OF ATTACHMENT—FORTH-
COMING BOND—INSOLVENT SURETIES—LIA-
BILITY OF OFFICER—SUIT IN CHANCERY—
REVIEW OF EVIDENCE—DETERMINATION OF
ATTACHMENT—NECESSITY—AMENDMENT OF
RECORD.

1. On the appeal of a suit against a sheriff who served an attachment for having taken insolvent sureties on a forthcoming bond, the chancellor's findings will not be disturbed, unless palpably against the weight of evidence.

2. A sheriff serving an attachment is not, in the absence of statute, a guarantor of the solvency of a surety taken by him on a forthcoming bond.

3. Where, in a suit against a sheriff who served an attachment for taking insolvent sureties on a forthcoming bond, the only issue of fact is the sheriff's negligence, a judgment for the sheriff will create a presumption that the chancellor found that he used a reasonable care to ascertain the financial condition of the sureties.

4. The liability of a sheriff, serving an attachment, for taking insolvent sureties on a forthcoming bond, cannot exceed that of the sureties.

5. Evidence, in a suit against a sheriff who served an attachment for having taken insolvent sureties on a forthcoming bond, examined, and held to sustain a finding that the sheriff used reasonable care.

6. Civ. Code Prac. § 214, authorizing a forthcoming bond to be taken by a sheriff serving attachment, provides that it shall be conditioned that the defendant shall perform the judgment in the action, or that the property or its value shall be forthcoming. Sections 263, 264, provide for the making of issues on attachment by affidavits, and for their trial. Held that, to charge a sheriff with liability for having taken insolvent sureties on a forthcoming bond, it was necessary that a judgment be rendered sustaining the attachment itself, so as to charge the bond; and a mere personal judgment against the defendant is insufficient.

7. Where, in an action against a sheriff, serving an attachment, for having taken insolvent sureties on a forthcoming bond, an order sustaining the attachment was not introduced below, it cannot be added to the record on appeal.

8. The failure of a petition, in an action against a sheriff, serving an attachment, for having taken insolvent sureties on the forthcoming bond, to allege that the attachment was sustained, cannot be remedied by filing on appeal a copy of an order sustaining the attachment, even if such amendment of the record were permissible.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Suit by the Edwards-Barnard Company against John R. Pfanz. From a judgment for defendant, dismissing the petition, plaintiff appeals. Affirmed.

W. W. Thum and G. Garner Clark, for appellant. Kohn, Baird & Spindle, for appellee.

SETTLE, J. Appellant brought suit and obtained an attachment in the Jefferson circuit court, chancery division, against Jas. H. and Caleb E. Roberts, on a note of \$250 it held against them. The attachment was

Pfanz, then sheriff of Jefferson County, for service. On the attachment was this indorsement: "W. B. Tate & Co., Golden Rule Warehouse, Garnishee: The object of this action is to attach all money, property, choses in action, or other evidence of debt in your hands belonging to Jas. H. Roberts and Caleb E. Roberts, or in which they have any interest, and to restrain you from paying the same to them, or to any one for them, until the further order of this court. Phelps & Thum, Plff's Attys." The attachment was served by the sheriff on the defendants and the garnishee named therein. It does not appear from the record that the attachment was levied by the sheriff on any property of the defendants Roberts. It was simply executed by delivering copies thereof to each of them and to the garnishee. After the execution of the attachment, the defendants Jas. H. and Caleb E. Roberts, with Ray & Co. (Robert P. Hare and Samuel Ray) as sureties, executed a bond to obtain a stay of the attachment, which bond was taken by the sheriff in words and figures as follows: "Jefferson Circuit Court. Edwards-Barnard Co., Plff., v. J. H. Roberts, etc., Defts. Forthcoming Bond. We bind ourselves to the Edwards-Barnard Co., in the sum of \$550.00, that the defendants, Jas. H. Roberts and Caleb E. Roberts, shall perform the judgment of the court in this action, or that the property attached in this action, or its value, shall be forthcoming and subject to the order of the court. January 29th, 1897. Jas. H. Roberts. Caleb E. Roberts. Ray & Co., that is, Robert P. Hare and Samuel Ray, by John T. Bashaw, Atty. in Fact." Personal judgment was rendered in appellant's favor against Jas. H. and Caleb E. Roberts in the attachment suit for the amount of the note sued on, and execution was issued thereon, directed to the sheriff of Henry county, where the defendants then resided, but was returned, "No property found." Thereafter appellant brought suit in the Jefferson circuit court, common pleas division, against Robert P. Hare on the bond taken by the sheriff; Samuel Ray having in the meantime died intestate and insolvent. In that action judgment by default was rendered against Hare in appellant's favor for \$250, with interest and costs, upon which execution was issued directed to the sheriff of Jefferson county, by whom it was returned with the indorsement, "No property found," etc. Then the appellant instituted this action in the Jefferson circuit court, chancery division, against appellee, seeking to recover of him the amount of its debt and costs against Jas. H. and Caleb E. Roberts, upon the alleged ground that he had negligently, as sheriff, failed to require good security upon the bond taken by him in the matter of the attachment, and that the sureties therein, Samuel Ray and Robert P. Hare, were insolvent when they were accepted on the

bond, and that their insolvency was known, or by the exercise of ordinary care could have been known, to appellee at the time. After answer and other necessary pleadings had been filed, proof in the shape of depositions was taken by the parties upon the issues thus formed, and upon submission and trial of the case judgment was rendered by the lower court dismissing appellant's petition, and allowing appellee his costs. Of that judgment appellant complains. Hence this appeal.

We will not take time to consider all of the questions raised by the appeal, deeming it necessary to notice only such as in our opinion are decisive of the case. It will be observed that this action is purely an ordinary or common-law action, and it is a well-known rule in such cases that the judgment of the chancellor will be as favorably regarded as would be the verdict of a properly instructed jury. Hence, unless palpably against the evidence, it will not be disturbed. *Louisville, etc., Railway Co. v. Taylor*, 96 Ky. 241, 28 S. W. 666. The rule is, however, different in equitable actions; for in such action this court will, upon appeal, determine the weight of the evidence. *Scott v. Mitchell* (Ky.) 39 S. W. 507. The judgment of the chancellor in this case must therefore be tested by the rule first herein stated, and, unless it is found to be flagrantly against the evidence, it will not be disturbed.

The only issue of fact necessary to be determined by the chancellor was whether or not appellee, as sheriff, was guilty of negligence in taking the bond executed by the Robertses, with Ray and Hare as sureties. The sheriff is not the guarantor of the solvency of a surety whom he may take upon a bond. We have no statute in this state fixing the liability of the sheriff, or defining the degree of care required of him in the matter of taking bonds. The rule by which his official conduct in such cases is to be measured is thus stated in *Mechem on Public Officers*, § 762: "So, where it is the duty of the officer to take, for the protection of the plaintiff, bonds or other securities, it is the officer's duty, not only to obtain the bond, bail, or other security, but to use reasonable care and diligence to see that none but competent and reasonable securities are accepted, and that the securities themselves are in proper and sufficient form. He is not the insurer of the solvency of the sureties, unless the statute makes him so; nor is he liable, though deceived, where he exercises reasonable care. But if he discharges the goods or debtor without any bond at all, or one in which the sureties' names are forged, or if he accepts insufficient sureties, without making a reasonable effort to ascertain their solvency, he is liable. A fortiori, is he liable, where he accepts sureties who he knows are irresponsible." It must be presumed that the chancellor found from the evidence that ap-

pellee, in taking the bond in controversy, used reasonable care to ascertain the financial condition of the sureties, and to satisfy himself of their solvency. If he did, he cannot be held responsible for a mere mistake of judgment.

Of the witnesses whose depositions were taken by appellant, only one had had any business connection with the sureties, and none of them claimed to have any actual knowledge of their business or affairs. What they testified to was largely hearsay, and what they professed to know was based mainly upon suspicion and conjecture. Freese, of the Western Bank, whose deposition was taken by appellant, testified that the credit of the sureties was at the date of the bond fairly good with the bank. Hare, one of the sureties, and young Ray, who was in the employ of the firm, both say that at the time the bond was executed their assets exceeded their liabilities by a considerable amount; and, though they soon thereafter failed, it seemed in large measure to have been brought about by a destructive fire in their tobacco warehouse. Hare also testified that the firm of Ray & Hare, at the date of the execution of the bond, owned a house and lot in the village of Lewisport, Hancock county, which was unincumbered, and which was taken by them at the valuation of \$800, but was subsequently assessed at \$200. This lot was, after the execution of the bond, transferred to the bank by Ray & Hare, at a valuation of \$360, and was afterwards sold by the bank at \$75. But it is more than probable that the bank did not care to retain unremunerative real estate at any price, and hence sold it at a sacrifice. But, conceding that it was only worth that sum, or but little more, when the bond was executed, its value was practically equal to the amount for which appellee, if legally liable at all, could be made responsible in damages for neglect in taking the bond; for his liability could not exceed that of the sureties on the bond, and, if it be true, as testified by Hare, whose statements on that point are uncontradicted, that the proceeds of the sale of the tobacco in the hands of the garnishees afforded a surplus of only \$50 to \$75, after paying the factors' liens, it would seem to follow that the sureties in the bond would in no event have been liable for an amount greater than the surplus. In *Hayman v. Hallam*, 79 Ky. 389, it was held by this court that sureties in such bond as was taken by the sheriff in this case were liable only for the surplus of the property attached after the payment of existing liens antecedent in date to the attachment, and that the sureties could set up, by way of defense, to an action against them on the bond, the amount of such liens.

We do not suppose that the chancellor based his judgment alone upon the ground that, as the liability of the sureties on the bond does not appear to exceed the value of

property of their quinned or made them good as sureties on the bond; but that fact, with the further facts shown by the evidence, that the sureties were then in the tobacco business in Louisville, and operating a warehouse, with some tangible property in their possession of which they were the apparent, if not the real, owners, and that considerable sums were being received by them through their business, doubtless superinduced the conviction in the mind of the chancellor that the sheriff had good reason to believe, and as a prudent man did believe, that Ray & Hare were good and sufficient sureties on the bond, and that he is not to be charged with negligence because he accepted them in that capacity. At any rate, as the decision of the chancellor upon this issue is entitled to as much weight as would be the verdict of a jury, and as it cannot be said by this court to be flagrantly against the evidence, upon this ground alone the judgment might with propriety be affirmed.

It nowhere appears from the record that the attachment obtained by appellant has been sustained. It is certainly not averred, or admitted, in any of the pleadings, that it was sustained. The bond in this case was given under section 214, Civ. Code Prac. A bond may be given under section 221, the effect of which is to discharge the attachment; for it is to perform the judgment of the court, and can be given only by the defendant, and, when given, it substitutes the bond for the attached property, and shuts off all defense to the attachment, or right to contest the grounds thereof. Where the bond is given under section 221, it is not necessary for the court to sustain or discharge the attachment; for the right of recovery on the bond follows a personal judgment against the party executing it. But the giving of the bond provided for in section 214 is wholly different in purpose and effect. The latter bond may be given by any person in possession of the property attached. It is to be taken by the sheriff, and is conditioned that the defendant shall perform the judgment in the action, or that the property or its value shall be forthcoming and subject to the order of the court. This bond does not discharge the attachment, but constitutes an obligation that the property shall be produced and delivered when the court so orders. The lien created by the attachment, and the right of the court to subject it to the payment of the attachment debt, continues as fully after the giving of a forthcoming bond as if no such bond had been given, and the attachment itself continues until the case is finally determined by the judgment of the court on the attachment, as well as on the merits of the case. *Hobson v. Hall* (Ky.) 14 S. W. 958.

It would seem to follow, therefore, and such is our opinion, that there can be no liability on the bond in this case, which was

the basis for judgment sustaining the attachment. It is not enough that a personal judgment was rendered for the debt sued on. Some disposition of the attachment by judgment of the court was also necessary. The attachment was ancillary. The defendant may owe the debt, and be willing to allow personal judgment to go against him, and yet, if the grounds of attachment do not exist, the attachment may be successfully resisted, and the court adjudge its discharge, or the grounds of attachment may exist, yet the property attached may not be subject to attachment. The trial of the attachment is wholly distinct from the trial of the case on its merits, and sometimes precedes, sometimes follows, the main trial. *Kassel v. Snead* (Ky.) 52 S. W. 1058; *Francis v. Burnett*, 84 Ky. 24; sections 263, 264, Civ. Code Prac. If no liability rests upon the sureties in this bond, in the absence of a judgment sustaining the attachment, it necessarily follows that none rests upon the sheriff for taking insufficient sureties on the bond.

The appellant has offered to file in this court what purports to be a copy of the order of the lower court sustaining the attachment; but we do not think it should be now filed, as it was not filed, or made a part of the record, upon the trial in the lower court, and it is not proper to add to the record in this court something by way of evidence which was not used in or furnished the former court. But in any event the copy of the order now offered to show that the attachment was sustained, even if allowed to be filed, cannot cure or supply the entire omission from the petition of the necessary averment that the attachment was sustained.

Finding no error in the record prejudicial to appellant's rights, the judgment of the lower court is affirmed.

MUTUAL BEN. LIFE INS. CO. v. DAVIS. (Court of Appeals of Kentucky. April 29, 1903.)

LIFE INSURANCE—DIVIDENDS—LIMITATION—BORROWING AMOUNT OF PREMIUM—UNLAWFUL CONDITIONS.

1. An insurance company, in declaring a dividend out of surplus earnings, could not limit it to such policies as might be continued in force by the payment of the next premium.

2. An arrangement whereby an insured, who had borrowed the amount of a premium, was required not only to pay back the amount borrowed, with interest, but, by failing to pay such sum or the premium, he suffered not only the loss of the interest, but also a forfeiture of several years of extended insurance, was void, as an unlawful forfeiture or penalty for the use or forbearance of money.

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by Lizzie W. Davis against the Mutual Benefit Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

NUNN, J. Upon December 23, 1889, the appellant issued to the appellee's husband, Walter D. Davis, a policy of life insurance, by the terms of which it agreed to pay him at the end of 20 years from that date the sum of \$1,000. Should he die within the endowment period, this sum, after deducting therefrom all indebtedness to the company, was to be paid to Lizzie W. Davis; and the policy contained this clause, which is called "nonforfeiture provisions": "When after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the non-payment of any premium when due, its entire net reserve by the American Experience Mortality and Interest at four per cent., yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, * * *." And it was further provided in the policy that if the assured paid two full premiums, and then ceased to pay further, the net reserve should extend the policy for its full amount for 8 years and 347 days; and if he paid the third premium, and then ceased, the net reserve should extend the policy for the term of 15 years and 45 days. At the time the policy was issued, Walter D. Davis was 21 years old. The annual premium, as fixed in the policy, was \$47.46. The first premium was paid to the company when the policy was issued, and the second upon December 23, 1890, the date it became due. When the third annual premium became due, on December 23, 1891, the insured was unable to meet it with a cash payment, and borrowed the amount from the company, less a dividend declared by it of \$6.93; executing for the loan a note or loan certificate. He failed to pay the fourth annual premium, which became due December 23, 1892, at which time the company held another dividend due him, of \$7.30, which they failed to pay him or credit him with; claiming that the dividend was declared conditionally upon his paying of the premium. After this there was no action taken by either party until August 2, 1901, at which time the insured died; and on the 28th day of September, 1901, the appellee filed this action to recover under the nonforfeiture provisions of this policy. A trial was had, a jury waived, and the court adjudged that the appellee was entitled to recover the amount of the policy, less the \$40.53 note, with its interest.

The appellant asks a reversal of the case upon the ground that the extended insurance provided for in the policy had expired before the death of Walter D. Davis. Appellant claims that the net reserve to the credit of the insured was \$97.53, which would have,

from the 28th day of December, 1892, but that this sum should be reduced by the amount loaned, with its interest, \$42.96, leaving, as it claims, \$54.57, which was the true net reserve according to the policy; that this sum of \$54.57 continued the policy in force, counting his age at 24 years, 7 years and 154 days, making the policy expire May 26, 1900. Appellant also says that it should not account for the last dividend declared due the insured, amounting to \$7.30, but that, if it should be chargeable therewith, it would increase the net reserve to only \$61.87, which would only extend the insurance for 8 years and 216 days, making the policy expire July 27, 1901—six days before the death of the insured.

The appellant admits that it declared a premium of \$7.30 due the insured prior to December 23, 1892, and gave notice to the insured of that fact. But it claims that it declared provisionally upon his paying the premium due December 23, 1892. We are of the opinion that the case of *Aetna Life Ins. Co. v. Hartley*, 67 S. W. 19, 68 S. W. 1081, settles this matter against appellant's contention. The court said: "The company seeks to avoid the effect of this dividend, and the fact of it, too, so far as this policy is concerned, by a proviso in the resolutions declaring the dividend that it should go only to those policy holders that were continued in force thereafter. We are of the opinion that the board of directors had not authority to impose any such conditions upon their action in declaring the dividend. * * * The insurer could not add the condition that the insured should renew his policy by paying the next installment to become due, before it would allow him to participate in the surplus already earned by the class to which his policy belonged; nor could it have imposed a condition that this surplus would not be allowed unless the insured paid all the premiums that might accrue under the policy, and the insured outlived the tontine period. Therefore we conclude the insurance company owed the insured on the 10th day of March the sum of \$5.65." In that case this sum was the amount of the dividend, which sum extended the policy a few days beyond the death of the insured, and the court adjudged that the insurance company had the policy to pay.

We cannot exactly agree with the actuary's calculations. In the first place, he calculates the extended insurance as of the age of 24 years, when the insured was 21 years of age at the issuance of the policy; and we have been unable to find anything in the policy to authorize such a calculation. In the next place, the calculations are made on a basis of annual premiums of \$37 instead of \$47.46. But even admitting correctness of these assumptions and conditions on such a basis, it is ar-

sured. It is admitted that two years' premiums in cash were paid, and that it was stipulated in the policy that the net reserve thereon extended the policy 8 years and 347 days, or to December 6, 1900, and it is admitted that the insured is entitled to the first dividend, of \$6.93, and we have adjudged that he was entitled to the second dividend, of \$7.30. These two sums, amounting to \$14.23, evidently would further extend the life policy beyond the life of the insured. In the record there appears an insurance manual for 1901, and a pamphlet issued by appellant for 1879, introduced as evidence by appellant. According to this manual, the net reserve for two cash annual premiums, of \$37.16 each, is \$63.52. The pamphlet gives the amount of the single premium to be paid for a specified term of years for the different ages from 25 to 50 years, but it does not give it for the age of 21. Appellant's actuary has calculated and found that for a man 24 years of age a term of 9 years would cost \$61.36. We have calculated, and found that, for a man 21 years of age, \$63.52 would be more than is required for a 9-year term, or that \$63.52 would extend the life policy for more than 9 years, or until after December 23, 1901. Appellant, by its actuary, made the calculation, assuming that the net reserve was \$61.87, on a man 24 years of age, and ascertained that it would extend the life of the policy to within 6 days of the death of the insured, or to July 27, 1901. We have made the same calculation upon the same basis, except we calculated the age of the person at 21—the age of the insured when the policy was issued—and ascertained that it would extend the life much beyond the date of the death of the insured, to wit, August 2, 1901. According to the appellant's contention, the insured would have been in much better condition if he had never settled the third premium. If he had paid only two premiums, as shown by the evidence of appellant's actuary and the exhibits filed by him, the insured would have had a net reserve of \$63.52, which, added to his admitted dividend of \$6.93, amounts to the sum of \$70.45—admittedly sufficient to have carried the policy considerably beyond the date of his death, although calculated at the age of 24, instead of 21, years. But the appellant claims that the net reserve for three annual premiums amounted to \$97.53, which, added to the last dividend, of \$7.30, makes \$104.83, from which it claims that the amount borrowed from it by the insured, with 6 per cent. interest, amounting to \$42.96, should be deducted, leaving \$61.87 as the amount of the net reserve, which shows that by his borrowing from appellant he not only is required to pay the sum borrowed, together with 6 per cent. interest thereon, but by his failure to pay the sum borrowed, or the payment of his

to pay for forbearance, but suffered the loss, by forfeiture or penalty, of several years of extended insurance on his policy previously paid for by him. This amounted to a forfeiture or penalty for the use or forbearance of money, pure and simple, and is against the policy of the laws of the state, and such a contract ought not to be enforced.

There are other reasons offered by appellee why this judgment should be affirmed, but we deem it unnecessary to discuss them. Wherefore the judgment is affirmed.

McDOWELL et al. v. McDOWELL et al.
(Court of Appeals of Kentucky. April 28, 1903.)

CONTRACTS—MAINTENANCE OF PARENTS—RESCISSIION—GROUNDS—SUFFICIENCY—CANCELLATION OF DEED—ALLOWANCE FOR SUPPORT—APPEAL—FINDINGS OF FACT—CONCLUSIVENESS—EXCLUSION OF EVIDENCE—PREJUDICIAL ERROR.

1. On appeals in equity, the chancellor's conclusions of fact should not be disturbed in matters of doubt.

2. Plaintiff and her husband, being old and feeble, made a deed of their farm to the husband's son and wife in consideration of their furnishing them a home and taking care of them as long as they lived. After fulfilling the agreement for about 15 months, neither party being pleased therewith, it was mutually agreed that the son and wife would deed back the farm and plaintiff's husband pay them \$200 for board up to that time. The deed was not made because of the sickness of the son's wife. Plaintiff and her husband arranged to return home the following week, but just before the husband died, and plaintiff left a few days later. *Held*, that the facts disclosed sufficient grounds for rescinding the deed.

3. Defendant had been in possession of a farm for about 15 months, under a conveyance from his father, in consideration of his supporting his father and stepmother, when the parties agreed to rescind the contract, and defendant was to deed the farm back and receive \$200 for the board of his parents. A decree canceling the deed gave defendant the rents of the property during the time he held it, and the possession of a mule worth about \$100, and of a wheat drill. *Held*, that the decree allowed defendant sufficient compensation for his expense in boarding his parents.

4. The exclusion of a deposition was not prejudicial where there was nothing new in the testimony of the witness whose deposition was taken, and the admission thereof could not have affected the result.

Appeal from Circuit Court, Larue County.
"Not to be officially reported."

Suit for the cancellation of a deed by Tabitha McDowell and another against Alonzo McDowell and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Nat W. Halstead, for appellants. Twyman & Handley, for appellees.

HOBSON, J. Peter McDowell owned a farm in Larue county worth about \$4,000. He had two children, Alonzo McDowell and Sarah Sowers. He had been twice married.

the moribund habit, and by reason of his feebleness and her habits, in January, 1898, they made a deed to the farm to his son, Alonzo McDowell, and wife, in consideration that they would furnish them a home and take care of them as long as they lived. He put an addition to his house, and they moved over. In the following spring the old lady became somewhat dissatisfied, and there is some proof that later the old gentleman also complained. In April, 1900, neither party being pleased with the arrangement, it was agreed between them mutually that Alonzo McDowell and his wife would deed back the farm of his father, and the father would pay him \$200 for board up to that time. The deed would have been made, but Mrs. McDowell was sick and could not acknowledge it. On the following Monday the old people had arranged to return home, and on Sunday night Peter McDowell shot himself. Two weeks after this the widow left Alonzo's house, and a few days later she and Sarah Sowers and the latter's husband filed this suit to cancel the deed. On final hearing the circuit court canceled the deed, and Alonzo McDowell appeals.

Our rule is to give considerable weight to the chancellor's finding on questions of this sort, for the reason that the chancellor is on the ground, and his conclusions of fact in the exercise of his discretion should not be disturbed in matters of doubt. We attach no importance to the proof for appellees that the deed was obtained from Mrs. McDowell when she was under the influence of opium. On the contrary, we are satisfied, from all the circumstances, the contract was deliberately and fairly made. We are also satisfied that Alonzo McDowell in making the contract was prompted by the motive of advancing his father's happiness in his declining years, and that he was largely actuated by the same motive in agreeing to rescind the contract. We are also satisfied from the proof that he and his wife tried in good faith to carry out their contract. But still the fact remains that after 15 months' trial neither party to this contract was satisfied with it, and both were willing for it to terminate. From this fact, and all the circumstances shown by the evidence, we are constrained to the conclusion that the home at Alonzo McDowell's, by reason of the old lady's unfortunate habits, and some other facts not necessary to be mentioned, had become such as the contract did not contemplate, and both parties realized that their happiness depended on a rescission of it. The purpose of the arrangement was to give the old people a home. There can be no real home when the spirit of peace has departed and unkindness takes its place. The agreement of the parties to rescind the contract is conclusive confirmation of the proof for appellees as to the

arrangement. Such a state of feeling was sufficient reason for rescinding the conveyance.

The court left appellant in possession of the rents of the property during the time he held it. It also left him in possession of a mule worth about \$100, and the wheat drill. It seems to us that these were sufficient compensation for what he was out in the way of boarding the old people, and on the whole case we see no reason for disturbing the chancellor's judgment. Equality is equity; after the son is paid for the board furnished the father and his wife, substantial justice is done as between the son and daughter when the estate is equally divided between them after setting apart to the widow her share under the law. It is true the judgment complained of gives the widow less than she would have got under the deed, but this is of her own seeking, and of it she does not complain. We see nothing in the record to indicate that she is not competent to manage her own affairs and make an election for herself. In excluding the deposition of Mrs. Bell McDowell, the circuit court followed *Covington v. Geyler*, 93 Ky. 275, 19 S. W. 741, and this ruling was not prejudicial to appellant, for the reason that there was nothing new in her testimony, and the admission of her deposition could not have affected the result.

Judgment affirmed.

WARFORD et al. v. TEMPLE.

(Court of Appeals of Kentucky. April 28, 1903.)

SCHOOL DISTRICTS—NOTES—INDIVIDUAL LIABILITY OF TRUSTEES—CONSTRUCTION OF NOTE—DEFAULT JUDGMENT—DEMURRER.

1. While a demurrer to a petition remains undisposed of it is error to render a default judgment against the defendants.

2. Defendants executed to plaintiff their notes, as follows: " * * * We, or either of us, trustees of district No. 6, white, * * * promise to pay to the order of T. the sum of * * *, it being money borrowed of said T. to build schoolhouse in said district No. 6. T. W. W., L. F. G., Trustees." Held to conclusively show that defendants did not intend promise in their individual capacity.

3. In an action on the notes, it appeared from the averments of both petition and answer plaintiff knew the money was being borrowed to build a schoolhouse, and that it was for that purpose. The answer set up the words, "We, or either of us, promise to use on the notes, were inserted by the draftsman. Held to conclusively show this correction, that the obligation was the district, and not of the defendants individuals.

Appeal from Circuit Court, County.

"Not to be officially reported."

Action by Adam Temple &

¶ 2. See Bills and Notes, vol. 7,

Oliver & Oliver, for appellants. Moss & Moss, for appellee.

BURNAM, C. J. The appellee, Adam Temple, sought in this action to make the appellants, T. W. Warford and L. F. Green, personally responsible for the debts evidenced by the following obligations:

"February 26, 1896. Twelve months after date, we, or either of us, trustees of district No. 6, white, of McCracken county, Kentucky, promise to pay to the order of Adam Temple the sum of \$110.00 without interest until after maturity, it being money borrowed of said Temple to build schoolhouse in said district No. 6. T. W. Warford, L. F. Green, Trustees."

"February 21, 1896. Twenty-four months after date, we, or either of us, the trustees of white school district number 6, McCracken county, Kentucky, promise to pay to the order of Adam Temple the sum of \$120.00 for value received without interest until after maturity, it being money this day borrowed of said Temple to build schoolhouse in said district number 6. T. W. Warford, L. F. Green, Trustees."

He alleges in his petition that appellants were the trustees of common school district No. 6, and that it had been legally determined that a schoolhouse should be erected and furnished; that there was not enough money under the control of the defendants as trustees for this purpose, and that they borrowed and used the money for which the notes were executed for the purpose of erecting and furnishing a schoolhouse; that it was their duty as trustees to levy and have collected a tax sufficient to have paid or discharged these notes, but that they had failed and refused to do so—and charges that, in consequence of such dereliction on their part, they were personally bound to him for the money so borrowed, and asked a personal judgment therefor, and for all proper relief.

The defendants filed a general demurrer to plaintiff's petition, which was not acted upon, but it was adjudged that plaintiff's petition be taken for confessed; and personal judgments were rendered against each of the defendants on both of the obligations at the May term, 1901, of the McCracken circuit court. At the following September term of the court, the defendants moved the court to set aside the judgment on the ground that it was prematurely entered, under section 517 of the Civil Code of Practice. And at the same time they tendered and offered to file their answer, in which they allege, in substance, that they were the trustees of common school district No. 6, that the county superintendent had notified them that the schoolhouse had been condemned; and that the furniture therein was insufficient; that there were no funds in their hands available

which the notes sued on were executed was borrowed for the use and benefit of the district, pursuant to the authority conferred upon them by section 4440 of the Statutes; that, with full knowledge of the facts, plaintiff loaned to them the money as school trustees, and not in their individual capacity; that in the year 1896 they levied a capitation tax on each white male citizen in the district over 21 years of age of \$1, and an ad valorem tax of 25 cents on each \$100 worth of property for four years, and that, as long as they were trustees of the district, the tax so levied was collected and applied to the erection and equipping of the schoolhouse for the district; that their terms as trustees expired in the year 1897, and they were not trustees for the years 1898, 1899, or 1900, but that at the date on which their answer was filed they were again in office, and would make every effort to collect the money to pay the plaintiff's debt. They also charge that the words, "We, or either of us, promise to pay," were inserted in the note by mistake and oversight of the draftsman, and that it was never intended or understood, either by them or by the plaintiff, that they were in any event to be personally bound therefor, but that they were executed and accepted as the obligations of the common school district. The motion of defendants to vacate the judgment and file their answer were both overruled, and they have appealed.

The judgment of the lower court must be reversed for two reasons: First, it was erroneous for the trial court to have rendered a judgment by default against a defendant who had filed a demurrer to the petition, and which remained undisposed of. See Black on Judgments, vol. 1, § 86; En. Pl. & Pr. vol. 6, p. 80; and Grady v. Pruitt (Ky.) 63 S. W. 283. Besides, it seems to us that the language of the obligations sued on conclusively shows that the makers did not intend to promise in their individual capacity. They show that the money was to be expended in the erection of a schoolhouse for the district, and the promise, both in the body of the instruments and in their signature thereto, is in their official capacity. It is difficult to understand how they could have used more explicit language. But even if we are mistaken in this construction of the language employed, there can be no doubt that the answer tendered by the defendants set out a complete and valid defense thereto, and one that is not at all inconsistent with the rational interpretation of the note. We are supported in this conclusion by Yowell v. Dodd, 66 Ky. 581, 96 Am. Dec. 256, and the authorities there cited. In Pack, etc., v. White, 78 Ky. 243, White sued Pack, etc., upon an obligation which reads as follows: "Twelve months after date, we, the directors of the Big Eagle and Harrison County Turnpike Co., promise to pay to the order of Mrs.

...out defalcation or discount at the Branch Bank of the Farmers' Bank at Georgetown, with interest at the rate of eight per cent. from date until paid." The notes were signed by the defendants as individuals. In that case the defendants were held liable as individuals, the court saying: "There is nothing on the face of the paper showing that the money was to be applied for the benefit of the corporation, or to discharge a debt due by it. The corporate name embodied in a note may imply that the corporation was interested in some manner in the consideration, but, to make it liable on the obligation, it must be averred and proven that it was executed and received as the obligation of the company, and by mutual mistake the parties failed to use language creating the liability. This is the proper test in determining the liability of the parties upon the face of an instrument like this." The notes sued on show on their face that the money borrowed was to be used to build a schoolhouse for the benefit of the district, and it appears from the averments both of the petition and answer that the plaintiff knew the purpose for which the money was borrowed, and that it had been so applied. Under section 4440 of the Kentucky Statutes of 1890, appellants were not only authorized to borrow money to build or repair the district schoolhouse after its condemnation by the county superintendent, but were liable to be indicted and fined for failing to do so. But for the use of the words, "We or either of us," in the obligations sued on, the demurrer filed by the defendants should have been sustained, and in the answer tendered by them it is pleaded that these words were used by mistake of the draftsman. With this correction, we think that the pleadings conclusively show that it was understood by both parties that the obligation was that of the district, and not of the individual defendants.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

BAKER et al. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Court of Appeals of Kentucky. April 21, 1903.)

SHERIFFS—COLLECTION OF TAXES—DEFAULT—COUNTY LIEN—SUBROGATION OF SURETIES—HOMESTEAD EXEMPTION.

1. Under Ky. St. § 4134, providing that the sureties on all bonds executed by the sheriff shall be jointly and severally liable for his default during the term in which the bonds may be executed, whether such liability occurred before or after the execution of such bond or bonds, the sureties of a sheriff on his revenue bonds for the collection of taxes for two separate years were each liable for one-half of the sheriff's default in the payment of county claims, for which sufficient taxes had been collected by him.

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...have a lien, from the date the sheriff begins to act, on the sheriff's real estate therein secured or afterwards acquired, which shall not be discharged until the whole amount of money collected by the sheriff for taxes, or for which he may be liable to them, respectively, shall have been paid. *Held* that, where the sureties of a sheriff paid a defalcation by him for county taxes collected, they were subrogated to the county's lien on the sheriff's real estate therefor.

3. Ky. St. § 4130, provides that the sheriff shall give a revenue bond for the collection of taxes, and that in no case shall sureties be accepted who are not jointly worth, subject to execution, a sum equal to the aggregate amount of money which the sheriff will probably receive, and that the commonwealth, etc., shall have a lien on the sheriff's real estate, which shall not be discharged until the money for which he may be liable shall have been paid. *Held*, that the words "subject to execution" had no reference to the county's lien on the sheriff's real estate, and hence such lien was not subject to the sheriff's homestead exemption.

Appeal from Circuit Court, Hancock County.

"Not to be officially reported."

Action by the Fidelity & Deposit Company of Maryland against G. C. P. Baker and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Sweeney, Ellis & Sweeney, for appellants. Powers & Anderson, for appellee Fidelity & Deposit Co. Geo. W. Jolly and G. D. Chambers, for appellees Miller and others.

NUNN, J. In the month of December, 1892, the appellees J. H. Miller and about six others became the sureties of G. C. P. Baker, the sheriff of Hancock county, on his revenue bond for the collection of taxes for the year 1893. On the 28th day of December, 1893, the Fidelity & Deposit Company of Maryland became his surety on his revenue bond for the collection of taxes for the year 1894. It appears that the sheriff defaulted to the extent of about \$1,500 in the payment of county claims, although he collected the taxes with which to pay same. The Hancock Deposit Bank, being the owner of the unpaid claims by purchase and assignment from the creditors of the county, instituted suit against the sheriff and the sureties on both bonds. The case was litigated, and the bank recovered judgment against both sets of sureties for \$1,546.30. The sureties on each bond paid one-half. This was right, under section 4134 of the Kentucky Statutes. By this section the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which the bond may be executed, whether the liability accrued before or after the execution of such bond or bonds. Then the appellee Fidelity & Deposit Company of Maryland brought this action against the appellant, by which it sought to subject some real estate belonging to him; claiming that it, with the other set of sureties, who were made parties, was

Under section 4130 of the Kentucky Statutes, this language is used: "The commonwealth, the county and any taxing district, shall have a lien from the date the sheriff begins to act upon the real estate of the sheriff therein secured or afterwards acquired by him, which shall not be discharged until the whole amount of money collected by the sheriff or for which he may be liable to them respectively shall have been paid." In the case of Dawson v. Lee, 88 Ky. 51, and Lee v. Hill, Id., the court recognized the fact that, when sureties of a sheriff pay for him money collected as revenue, then the sureties should be substituted to the rights of the commonwealth to its lien upon the real estate of the sheriff. When this decision was rendered the statute only allowed a lien in favor of the commonwealth, but under the present statute (section 4130) the lien is given to the commonwealth, county, and taxing district; and we can see no reason why the sureties are not entitled to be substituted to the county's lien.

The appellant filed his answer, to which appellee demurred, and the court sustained the demurrer, and rendered judgment against the appellant, and subjected his real estate to the payment thereof. The appellant complains of the action of the court, and insists that the court erred to his prejudice, for two reasons:

The first is, he claims, that the petition is defective in not alleging that the county court made a levy on the property of the county, authorizing his collection of the taxes for which he defaulted. The petition alleges that the fiscal court, at the October term, 1893, a majority of the members thereof being present and concurring, duly made and entered an order levying, for county purposes, to pay off the existing current indebtedness (by a previous order they had shown this to be \$3,891.75) of said county, to defray the current and necessary expenses thereof, and to pay the claims out of the levy as aforesaid, a poll tax on each male person of the age of 21 years residing in the county, and an ad valorem tax of 20 cents (afterwards changed to 23 cents) on each \$100 worth of taxable property in said county subject to taxation for county purposes, and ordered and directed the appellant G. C. P. Baker, sheriff, to collect same. We are of the opinion that this was a proper levy, and especially is it sufficient when appellant admits having collected the tax thereunder.

The next cause of complaint by appellant of the action of the lower court is that the court refused to allow his plea claiming his real estate as a homestead. His plea was sufficient, if allowed to retain it as against the claim sued on. The appellant claims that the sections of the General Statutes and Kentucky Statutes on the subject of liens on behalf of the commonwealth, etc., for taxes

words "subject to execution" have been interpolated, and that these words do not appear in the General Statutes. This is right as to the General Statutes of 1873, but in 1886 this statute was changed. See section 4, tit. 9, c. 92, of the General Statutes of 1899. The words "subject to execution" do appear. These words have no reference to the lien on the sheriff's real estate for taxes collected. There has never been any change of the statutes for taxes collected by him, except that it put his real estate in lien for taxes for counties and taxing districts in addition to the lien on behalf of the commonwealth.

He also contends that by leaving the words "then owned" out of the Kentucky Statutes, in section 4130, and inserting the words "therein secured," appellant's homestead was exempt from liability on this claim. We do not so understand it. There has been no change in the meaning. "Therein secured" has reference to the lien, and means that the lien exists or is therein secured on the real estate of the sheriff at the moment of the execution of the bond, and the commencement of his duties as such officer under the bond.

We deem it unnecessary to refer to a number of cases which decide that a sheriff cannot claim a homestead, as against the commonwealth, for liabilities created by the collection of taxes due it; and by the statute which existed at the time of the execution of these bonds, and as it now exists, the same lien given to the commonwealth is given to the counties and taxing districts.

Wherefore the judgment of the lower court is affirmed.

STRONG v. SOUTH et al

(Court of Appeals of Kentucky. April 28, 1903.)

APPEAL—FINDINGS—CONFLICTING EVIDENCE.

1. The findings of the chancellor will not be disturbed where the proof is conflicting and leaves the mind in doubt as to the truth.

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by E. C. Strong against W. T. B. South and others. Judgment for defendants and plaintiff appeals. Affirmed.

J. B. Marcum and T. T. Cope, for appellant. White & Ray, D. B. Redwine, and W. W. Vaughn, for appellees.

HOBSON, J. A survey was made for George T. Cotton in the year 1812 for 23,189 acres of land, known as the "Pickett and Marshall tract." Both the parties to this case claim under Cotton. Appellant's title is derived in this way: On July 21, 1846, George T. Cotton and others united in a deed to George H. Ketchum for the land. On

debts. On September 21, 1850, Ulysses Turner, in consideration of \$500 in hand paid, sold appellant, E. C. Strong, all the right and title which he or Ketchum had in the unsold portion of this tract; but the land that had been previously sold was excepted out of this sale.

Appellees' title is derived in this way: Appellees are the heirs of J. W. South, who died in the year 1880. The land in controversy lies on Fish Trap Branch, above a large white oak, and runs with the top of the ridge around the head waters of Fish Trap back to a point opposite the white oak. This land was conveyed on November 26, 1850, by A. B. Patrick and wife to J. W. South and A. P. Williams, in consideration of \$1,400 in hand paid, and on January 14, 1873, Granville Smith and wife, in consideration of \$1,500 paid, conveyed to J. W. South their undivided half of the tract, this being the interest of A. P. Williams under the former deed, as we understand it. Patrick got the land from James Stidham, and Stidham from Alexander Strong on July 19, 1847. The proof for appellees shows that the Breathitt county courthouse was burned about the year 1872, and the deeds back of the two referred to are not, therefore, produced, although it is shown that they were duly recorded. Stidham testifies that after he bought out Alexander Strong, and paid him \$100 for his interest in the land, he finished paying George Cotton for the land, and received a deed, which was recorded. This testimony is confirmed by the fact that Ketchum witnessed the transfer from Alexander Strong to Stidham. It is also confirmed by evidence showing that Stidham worked for Ketchum on boats to pay for the land; that he settled on the land, built a house and planted an orchard, and lived there until he traded the land to Patrick for another tract, and made him a deed to it.

On final hearing, the court gave judgment in favor of appellees. We must give the finding of the chancellor some effect. Our rule is not to disturb it where the proof is conflicting and leaves the mind in doubt as to the truth. It will be seen from the above that Strong only acquired by his purchase from Ulysses Turner the unsold land in the survey, and the land which had been previously sold was excepted out of the sale to him. The evidence of James Stidham is to the effect that the land in controversy was sold long before September 21, 1850, when appellees' purchase of Turner was made. The written receipt from Alexander Strong to Stidham bears date in July, 1847, and Stidham's testimony is confirmed by a number of witnesses testifying that he lived on the land, claiming it as his own, from about the time of his purchase from Alexander Strong. Though he lived on the land for a

South and Williams, and at which South bought the undivided half from Smith and wife, would indicate that no doubt was entertained then of the sufficiency of this title; and this fact is entitled to some weight, as the records then of the title in the county clerk's office had not been destroyed. The proof is convincing also from Stidham's planting out an orchard on the land, and his manner of holding it, that he was not a tenant, as claimed by appellant. This proof is confirmed by a number of witnesses testifying to his working for Ketchum—building boats—to pay for the land. It is also confirmed by the possession of the land by Patrick, South, and South's heirs through tenants, from the time that Stidham left the land, or soon thereafter, until it was placed in the hands of the receiver. The conduct of appellant, Strong, taking all the proof into consideration, seems to us to support the claim of the South heirs, and on the whole record we see no reason to disturb the chancellor's conclusion.

Judgment affirmed.

ALLEN et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 24, 1903.)

BAIL BOND—DESCRIPTION OF OFFENSE—ABBREVIATIONS—SURETIES—VALIDITY.

1. Cr. Code Prac. § 82, provides that the undertaking of bail shall describe the offense with which the principal is charged. Section 85 provides that no bail bond shall be invalid by reason of any variance between its stipulations and the provisions of the Code, or by any other irregularity, if it appears accused was legally in custody charged with an offense, and that he was discharged by the bond. On a prosecution for violation of the local option law, the bail bond recited that defendant was in custody charged with the offense of V. L. O. L. Held, that though the sureties did not fully understand the offense which the letters purported to name, they knowing that defendant was indicted, and that they were pledging themselves that he would appear, the bond was not valid as to them because of the abbreviation

Appeal from Circuit Court, Trigg County
"Not to be officially reported."

Proceedings by the commonwealth against C. T. Allen and others, as sureties on bond. From a judgment for plaintiffs and defendants appeal. Affirmed.

R. A. Burnett and J. B. Garnett, for plaintiffs. C. J. Pratt and M. R. Todd for Commonwealth.

BURNAM, C. J. At the May of the Trigg circuit court, the reported three indictments against Davis for selling liquor in violation of the local option law numbered by the clerk respectively 432, 433, and 435, and upon the back appeared the following indorse-

Davis, indictment for V. L. O. L. A True Bill. L. D. Dunning Foreman. Bail \$100.00. Presented by the foreman of the Grand Jury to the Court in the presence of the entire Grand Jury, and received from the court by me and filed in open court this 27th May, 1901. A. C. Burnett, Clerk." Upon these indictments bench warrants were issued, directed to the sheriff, commanding him to forthwith arrest Ben F. Davis, and to bring him before the Trigg circuit court to answer an indictment in that court against him for "V. L. O. L." These bench warrants bore the same numbers as the indictments upon which they were issued, and upon the back of each there was this indorsement: "It is ordered by the court that the defendant may give bail in the sum of \$100.00, and if he desires to give such bail, it may be taken by the sheriff of the county in which he resides or by the sheriff of Trigg County. [Signed] A. C. Burnett, C. T. C. C." Each of the bench warrants was executed by arresting the defendant, Ben F. Davis, and whilst in the custody of the sheriff bonds were executed in the following form: "The defendant, B. F. Davis, being in the custody of the sheriff charged with the offense of V. L. O. L. and being admitted to give bail in the sum of \$100.00, not we B. F. Davis, etc., of Trigg County, Kentucky, hereby undertake that the above named F. B. Davis shall appear in the Trigg circuit court on the 1st day of its next September term to answer said charge, and will at all time render himself amenable to the order and process of said court in the prosecution of said charge, and if convicted will render himself in execution thereof, or if he shall fail to perform either of the conditions that we will pay to the Commonwealth the sum of \$100.00. Witness our hand this 28th day of August, 1901. Ben F. Davis, J. L. Frith, C. T. Allen, G. W. Vinson."

The defendant, Davis, failing to appear in the Trigg circuit court, his bonds were forfeited, and summons issued against the securities to appear and show cause, if any they could, why judgment should not be rendered against them. For response to this summons they say that the bonds signed by them were null and void for the reason that the letters "V. L. O. L." did not name or describe an offense, as required by section 82 of the Criminal Code of Practice. They do not controvert that the defendant, Davis, was in the custody of the sheriff upon a bench warrant issued upon an indictment against him, or that he was discharged therefrom by reason of their undertaking that he should appear in the Trigg circuit court on the 1st day of its next September term to answer the charge contained therein. Nor do they plead that they did not understand at the time they signed the bond what these letters stood for, or the offense which they purported to name, or that they were in any way deceived or misled in the execution of

abbreviation for words, for instance, the letters "U. S." are universally understood to stand for the United States; the letters "Ky." for Kentucky; and in the same way the letters "V. L. O. L." were simply used as an abbreviation to describe the offense charged against Davis by the indictment, which had been returned against him by the grand jury, and on which the bench warrant issued, and by virtue of which the sheriff had taken him into custody.

Section 85 of the Criminal Code provides: "No bail bond or bail recognizance shall be deemed to be invalid by reason of any variance between its stipulations and the provisions of this Code, nor by the failure of the magistrate or officer to transmit or deliver the same at the times herein provided, nor by any other irregularity, provided it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the bond or recognizance, and provided it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for the examination of the charge, or before the court for the trial thereof. If no day be fixed for such appearance, or an impossible day, or a day in vacation, the bond or recognizance, if for his appearance before a magistrate shall be considered as binding the defendant so as to appear and surrender himself into custody, for an examination of the charge within twenty days from the time the bond or recognizance was given; and if for his appearance in a court for trial, shall be considered as binding the defendant so to appear and surrender himself into custody, on the first day of the next term of the court, which shall commence more than ten days after the time when the bond or recognizance is given."

Even if the defendants had not fully understood the offense which the letters purported to name, they did know that the defendant was indicted for some offense, and that they were pledging themselves that he would appear in answer thereto on the first day of the next September term of the Trigg circuit court. We are of the opinion that the averments of the response are insufficient to support a defense, and that the trial court properly gave judgment for plaintiff.

Judgment affirmed.

SMITH v. SMITH.

S. KAHN'S SONS v. SAME.

(Court of Appeals of Kentucky. April 24, 1903.)

WILL—RESTRICTION ON ALIENATION—EFFECT AS TO CREDITORS.

1. Under Ky. St. § 1681, providing that land to which the defendant has a legal title in fee for life or for a term, whether in posses-

every kind held in trust subject to the debts of the person for whose benefit they are so held, just as they would be if those persons owned a like interest in the property itself, the title of a devisee may be subjected by his creditors, notwithstanding a provision of the will restricting alienation by him until he arrived at a certain age.

Appeals from Circuit Court, Trigg County.
"To be officially reported."

Actions by Dorcas Smith and S. Kahn's Sons against T. D. Smith. From a judgment setting aside attachments on defendant's land, plaintiffs appeal. Reversed.

J. B. Garnett, for appellant Dorcas Smith.
R. A. Burnett, for appellants S. Kahn's Sons.
Denny P. Smith, for appellee.

HOBSON, J. Appellants, as creditors of T. D. Smith, brought these actions against him in the Trigg circuit court to subject to their debts a tract of land owned by him. Attachments were taken out which were levied on the land. The attachments were sustained, but before a judgment was entered for the sale of the land it was held by this court in the case of Wallace v. Smith, 68 S. W. 131, that T. D. Smith, under the will of his father, from whom he got the land, could not pledge, mortgage, or sell it until he was 35 years old. After this decision was rendered, the circuit court set aside the order sustaining the attachments, and adjudged that the land could not be subjected to the debts.

The clause of the will referred to is in these words: "I give to my son Thomas D. Smith at the death of my wife the above eighty acres of land; but if my wife shall be living when my son Thomas D. Smith becomes twenty-one years old, he is to have fifty acres of the above eighty acres. At the death of my wife my son Thomas D. Smith shall have the remaining thirty acres of said eighty acres, but he shall not pledge, mortgage or sell the eighty acres of land hereby given to him, nor any part thereof, until he is thirty-five years old."

In the case of Wallace v. Smith, the devisee sold the land conditionally to Wallace, and an agreed case was submitted to test his power to convey. The court held that the restriction in the will that he should not pledge, mortgage, or sell the land was valid. But the question is in this case whether, notwithstanding this, his title may be subjected by the creditors to the payment of their debts. In Stewart v. Brady, 66 Ky. 623, this court, while upholding a similar restriction as to a voluntary alienation, said, "The interdiction constructively applies to any such sale, unless for payment of debts for which he might be legally bound." This exception as to debts for which the devisee was legally bound is again brought out by the court when the same will was before it in Stewart v. Barrow, 70 Ky. 368, for there

given were the debts of the husband. These cases are referred to and quoted from in Wallace v. Smith as the basis of that opinion. By section 1681, Ky. St., it is provided: "Land to which the defendant has a legal title in fee for life or for a term, whether in possession, reversion or remainder, may be taken and sold under execution." By section 1702 a homestead of \$1,000 is exempt. By section 1709 incumbered property may be sold. By section 2355 estates of every kind held in trust are made subject to the debts of the person for whose benefit they are so held, just as they would be if those persons owned a like interest in the property itself. The purpose of the statute is to make every interest which a debtor may own in land, not exempt as homestead, subject to the payment of his debts, and it has often been held that a deviser cannot vest in his devisee a beneficial interest in land which shall not be subject to the payment of his debts, although the will expressly so provides. Samuel & Johnson v. Ellis, 51 Ky. 483; Samuel v. Salter, 60 Ky. 259; Woolley v. Preston, 82 Ky. 415; Parsons v. Spencer, 83 Ky. 305; Bland's Adm'r v. Bland, 90 Ky. 400, 14 S. W. 423, 9 L. R. A. 599, 29 Am. St. Rep. 390. In the case last cited, the court said: "The law regards the substance rather than the form; and persons disposing of their property by will cannot be permitted to really make a debtor the beneficiary of their bounty, and by evasion defeat the statute for the protection of the creditor."

While a man may dispose of his property as he pleases, by will, the law will disregard any restrictions which he may place upon the property that are forbidden by law. It is the policy of our law that no man can hold as his own and enjoy property free from the claims of his creditors, but that all property not exempt from execution shall be subject to the payment of his debts. If a provision that the devisee should not pledge, mortgage, or sell the property until he reached a certain age would exempt it from the claims of his creditors until that time, the purpose of the statute might be easily defeated, and the beneficial interest in property might be secured to devisees, and placed beyond the reach of their creditors. cannot be allowed.

The question is not here presented whether, under a devise like this, if it was necessary to pay debts, the devisee might in good faith sell the property, or a creditor for this purpose himself, to avoid the proceedings. The right of a creditor to subject the property to the statute which overrides the will is in conflict with the policy. The disability of the devisee comes from the will under the testator, in disposing of the property, and annex any condition to his

law; and a reasonable restriction on the power of the devisee to alienate is upheld on this ground, as the testator may have a variety of reasons for such a provision. But while this is true of the devisee, it cannot affect a creditor whose rights are conferred by law.

Judgment reversed, and cause remanded for a judgment subjecting the land.

DOW-HAYDEN GROCERY CO. v. MUNCY
et al.

(Court of Appeals of Kentucky. April 24,
1903.)

**NOTE—CONSIDERATION—FORBEARANCE—
SURETY—SIGNATURE IN BLANK.**

1. Forbearance to sue on a past-due account, and an extension of time in which to pay, was sufficient consideration for a note, both as to the maker and the surety.

2. A surety who signed a note in blank was not relieved from liability because it was filled up, by the agent of the payee, in the presence and with the knowledge and consent of the maker, to exceed the amount agreed, which agreement was not disclosed to the payee.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action on a note by the Dow-Hayden Grocery Company against J. M. Muncy and another. From a judgment for defendants, plaintiff appeals. Reversed.

Wm. Lewis, Neville C. Fisher, and W. W. Rawlings, for appellant. B. B. Golden and J. R. Jeffries, for appellees.

BARKER, J. The appellee, J. M. Muncy, being indebted to the appellants, Dow-Hayden Grocery Company, in the sum of \$389.42, for goods sold and delivered to him by them, applied to appellee J. M. Baker to become his surety on a note with which he proposed to settle the indebtedness in question. Upon being asked by Baker as to the amount of his indebtedness to appellants, Muncy replied that it would not exceed \$185, whereupon Baker signed a blank note, and delivered it to Muncy, which was to be filled up in such manner as to pay off the indebtedness to appellants—the sum not to exceed \$185. With this blank note in his possession, J. M. Muncy had a settlement of his account with appellants, which was ascertained to be \$389.42, whereupon the blank note was filled up to read as follows: "\$389.42. Winchester, Ky., Jan. 10th, 1900. Ninety days after date, we promise to pay to the order of Dow-Hayden Grocery Co., three hundred and eighty-nine and $\frac{42}{100}$ dollars, value received, negotiable and payable at the Clark County National Bank of Winchester, Ky., with interest at the rate of six per cent. per annum from maturity until paid, due April 10th, 1900. J. M. Muncy. J. M. Baker."

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 205; Principal and Surety, vol. 40, Cent. Dig. § 68.

ment of the open account which was then due from J. M. Muncy to them. The note having become due, and not paid, the appellants instituted this action in the Leslie circuit court for judgment against the appellees. J. M. Muncy made no defense. J. M. Baker filed an answer, alleging, first, the agreement between him and Muncy when he signed the note in blank that it should be filled up for a sum not exceeding \$185; and, second, that the note was without consideration as to him. Upon the trial of the case, the facts appeared as above stated. At the close of all the testimony, both sides moved for peremptory instructions. That of appellants was overruled. That of appellee J. M. Baker was sustained. To reverse this judgment, appellants have brought the case to this court.

We think the motion of appellants for a peremptory instruction to the jury to find for them, as prayed for in their petition, should have been sustained. The forbearance to sue on the past-due account, and the extension of time for 90 days in which to pay, was sufficient consideration, as between Baker, the surety, and appellants, the payees of the note. The rule upon this subject is thus stated in Am. & Eng. Encycl. of Law, vol. 6, tit. "Consideration," p. 748: "Forbearance to sue upon any legal demand is a valid consideration for a promise either by the party liable or by a third party." The same rule is announced by this court in the case of Allen v. Pryor, 8 A. K. Marsh. 305; and in the case of Pullian v. Withers, 8 Dana, 98. 33 Am. Dec. 479, it is said: "Promise to give day or extend the time of payment has ever been a valid consideration, and such as will sustain a promise to pay at the expiration of the time. Nor does it matter whether the indulgence or time given is to the party assuming on his own debt, or to a third person on his debt, especially if the latter avails himself of the indulgence. In either case it is equally a disadvantage to the party giving the time, and disadvantage on the one side, as well as advantage on the other, has ever been held a good consideration."

Nor does the plea of the surety, Baker, that he signed the note in blank upon an agreement between him and Muncy that it was to be filled up for a sum not to exceed \$185, constitute a valid defense to the note. There was no pretense that appellants knew anything of the secret agreement between the surety and the principal. Nor does it make any difference that the blanks in the note were filled up by T. M. Hill, the agent of appellants. It was done in the presence of Muncy, and with his knowledge and consent. It cannot be material to the surety whose hand held the pen when the blanks were filled. The effect was the same to him whether the writing was done by his principal, into whose hands he had intrusted the blank note, or some one else at his instance.

raising money or paying on an indebtedness, the person so intrusted with the blank note becomes the agent of the person signing it, and binds him by any contract written therein not inconsistent with the nature of the instrument; and, where the paper passes into the hands of an innocent holder, the party thus signing becomes as absolutely bound as if he had signed it after its terms were written out. See *Daniels on Negotiable Instruments*, § 142; *Sowers v. Citizens' National Bank of Lancaster*, 12 Ky. Law Rep. 356; *Smith v. Lockridge*, 8 Bush, 423; *Keene's Adm'r v. Miller* (Ky.) 45 S. W. 1041.

As appellee's own testimony brought him within the pale of the principles herein announced, the judge of the trial court should have sustained appellant's motion for a peremptory instruction. Wherefore the judgment is reversed for proceedings consistent with this opinion.

SWINEBROAD v. BRIGHT.

(Court of Appeals of Kentucky. April 24, 1903.)

WITNESSES—DECLARATIONS OF DECEDENT— COMPETENCY OF EXECUTOR OR DEVISEES— ACTION BY WIFE—COMPETENCY OF HUSBAND.

1. In an action against an executor to recover a legacy which he refused to pay on the ground that it had been adeemed by a gift, the executor and his surety were not incompetent to testify as to declarations of the testator as to the purpose of the gift, under Civ. Code Prac. § 606, which provides that no person shall testify for himself concerning any verbal statement of a decedent.

2. Nor were the devisees incompetent to testify as to such declarations.

3. Where in an action by a wife she did not offer herself as a witness, her husband was competent to testify to any matters which she might have testified to.

Appeal from Circuit Court, Lincoln County.

"Not to be officially reported."

Action by Kate B. Swinebroad against George P. Bright. Judgment for defendant, and plaintiff appeals. Affirmed.

G. B. Swinebroad, R. H. Tomlinson, and R. P. Jacobs, for appellant. Hill & McRoberts, for appellee.

HOBSON, J. Appellant's father devised to her \$1,000. Appellee, as his executor, refused to pay her the amount, on the ground that the legacy had been adeemed.

The facts in this case are stated in the former opinion. See *Swinebroad v. Bright*, 62 S. W. 484. On that appeal there had been a judgment for defendant, which was reversed on the ground that under the statute the burden of proof was on the executor to show that the \$1,000 paid appellant after the date of the will was intended by the testator in satisfaction of the bequest to her. On the return of the case the defendant amended

verdict was returned in favor of the defendant, on which judgment was again entered, and the plaintiff appeals.

The only ground of complaint necessary to be noticed relates to the admission of evidence, as no objection is taken to the instructions of the court, and the amended answer was sufficient; for the allegation that the payment was intended by the testator in satisfaction of the legacy is necessarily an allegation that it was so intended by him at the time the gift was made, and the court in its instructions thus submitted the issue to the jury. The verdict of the jury, therefore, supplied this averment in the answer, and cured the omission, if material.

The executor himself and his sureties in his bond were introduced as witnesses to prove the declarations of the testator as to the purpose of the gift of \$1,000. It is insisted for the appellant that, being as defendants in the action, they were testifying for themselves as to a verbal statement of the decedent, and that their testimony was incompetent under section 606 of the Civil Code of Practice. We do not so understand the rule. The question before the court was whether the estate of the testator owed the plaintiff \$1,000. The testimony of the executor and his sureties was to the effect that the estate did not owe the money. It was the duty of the executor to protect the estate, and we know of no rule of law making him an incompetent witness for the estate as to a transaction of his own decedent with him. If the \$1,000 was not going to the plaintiff, it belonged to the residuary devisee. The executor had no interest in the fund. The judgment in the case did not affect his liability in any way, as in either case he had to pay the money over to somebody. He was not, therefore, interested in the result at all, and was not testifying for himself. Neither was the surety, J. B. Owsley. The Code of Practice was aimed to widen, not narrow, the admissibility of witnesses, and one of the purposes of the section was to protect the estate of decedents. To hold the executor incompetent in a case like this would be to defeat the purpose of the statute. For this is really a controversy between devisees under the will as to which of them is entitled to the part of the estate in question, and the executor is only, in effect, stakeholder between them. The cost of the action, if decided against the executor, would be paid out of the estate, and he has no interest in the controversy except in the direction of the court in the execution of his trusts.

The court also allowed one residuary devisee to testify as to the intention of the testator to him. It is objected to on the ground of the residuary devisees, not entitled to the fund in controversy.

not have been admitted, under section 606 of the Code. It is true he was testifying for himself, but it has been held by this court that in a contest over a will all the devisees are competent witnesses as to transactions with the deceased. *Flood v. Pragoff*, 79 Ky. 607; *Williams' Ex'r v. Williams*, 90 Ky. 28, 13 S. W. 250. The same principle has been applied in other controversies between devisees or other persons claiming under the decedent, whose declarations are sought to be proved by one of them. *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188; *Murphy's Ex'r v. Murphy* (Ky.) 65 S. W. 165.

Under these authorities, we conclude that all of the devisees were competent to prove the declarations of the testator to them. The plaintiff did not offer herself as a witness, and her husband was introduced, and certain declarations of the testator to him were offered to be proved by him. It has heretofore been held that the husband in such case may testify to any matters which the wife might testify to. *Bright's Ex'rs v. Swinebroad* (Ky.) 51 S. W. 578. The husband should therefore have been allowed to testify to the entire conversation between him and the testator, as the wife might have testified to it had the conversation occurred with her. But the court did allow the substance of the testator's statements to go to the jury, and in view of all the evidence in the case we are unable to see that the admission of what was rejected could have affected the result. The part that was rejected simply amplified what was admitted, and the weight of the evidence and the facts established thereby are so clearly with the defendant that we are of opinion that the rejection of this evidence was not prejudicial to the substantial rights of the appellant on the whole case.

The declarations of the testator, whether made before or after the notes were placed in the hands of the attorney, were properly admitted, as they were so interwoven and so closely connected. They were all made before the money was collected and the transaction closed up.

The judgment complained of is therefore affirmed.

HARRODSBURG WATER CO. v. CITY OF HARRODSBURG.

CITY OF HARRODSBURG v. HARRODSBURG WATER CO.

(Court of Appeals of Kentucky. April 21, 1903.)

MUNICIPAL CORPORATIONS—WATER SUPPLY—CONTRACT WITH PRIVATE COMPANY—BREACH—RIGHTS OF PARTIES.

1. A contract between a city and a water company provided that the latter should furnish pure water for drinking and domestic purposes from a standpipe of sufficient height to throw a stream of certain force and dimensions for

sum which the city agreed to pay quarterly for the use of the water and to maintain the plant, and by the city to cancel the contract on the ground that the water company had not complied with its conditions, it appeared that for from three to six months of the year the water which was furnished was impure, unfit for drinking or other domestic purposes, and, when used for sprinkling streets and lawns, gave off a noxious odor, but that the city had derived much benefit during other seasons of the year, and that, though the standpipe was not of sufficient height to afford the protection against fire contemplated, a considerable degree of protection was furnished. *Held*, that the contract should not be declared void for failure to furnish pure water and to maintain a standpipe of the height required, nor should the city be compelled to pay full compensation, but that it should pay a reasonable price for the water furnished, and if, within a reasonable time, the water company should fail to furnish water in accordance with its contract, the city should be absolved therefrom.

Appeals from Circuit Court, Mercer County.

"Not to be officially reported."

Action by the Harrodsburg Water Company against the city of Harrodsburg. From the judgment, both parties appeal. Reversed.

Galther & Vanarsdall and Breckinridge & Shelby, for Harrodsburg Water Co. Robt. Harding, E. M. Hardin, and W. C. Bell, for city of Harrodsburg.

NUNN, J. The water company filed its action in the Mercer circuit court on the 26th day of January, 1900, against the city of Harrodsburg, to recover the sum of \$1,055, claimed to be due the company on contract for water rent for the quarter ending November 30, 1899. The city answered in three paragraphs. The water company demurred to each and all of the paragraphs. The lower court sustained the demurrer to the first and second paragraphs, and overruled it as to the third. On the trial of the case the court rendered a judgment against the city for the amount claimed, and the city appealed to this court, and the case was reversed. See 64 S. W. 658. On the return of the case the pleadings were amended as indicated by the opinion of this court. Afterwards another petition was filed by the same plaintiff against the same defendant, claiming a like sum for the next quarter's rent, and afterwards another petition was filed by the same party against the city for the balance of the rent, \$6,330, up to August 30, 1901; the pleadings in the last two cases being similar to the first. These sums were claimed by the water company under an alleged contract dated the 31st day of July, 1891, and upon allegations that the water company had fully performed and complied with the terms and requirements of the contract on its part. The city answered, denying the allegations of the several pleadings of the water company, and averred that the contract was void for three reasons, viz.: (1)

the city council. (2) Before the contract could be made binding upon the city, the proposition to tax it for such purposes must have first been ratified by the voters of the city at an election held for that purpose, as required by law, and it was denied that such an election had been held. (3) That, if it was a legal contract, by it the water company bound itself to furnish engines and pumps and an elevated tank of the best modern character; the elevated tank to hold not less than 30,000 gallons; to be erected on brick, stone, or iron foundation; to be constructed of iron; to be of such thickness as to withstand all pressure required of it; and to be elevated sufficiently to give, when full, four streams of water, 75 feet in height, at the courthouse, through 50 feet of 2½-inch hose, with ring nozzle 1 inch in diameter. That its waterworks should, in case of necessity, furnish at any time 10 to 15 sufficient streams of water for the purpose of extinguishing fires; the water to be supplied to be pure and wholesome, and protected from all sources of impurity and contamination, and constantly maintained during the life of this contract to that standard of purity usually required for supplies of water for municipal and domestic purposes. It should be sufficient in quantity to supply 10,000 people with 50 gallons each per day; the same to be increased, if necessary, to meet the future requirements of the city. And it also agreed to furnish, free of cost, water for the public schools of the city. The city alleged that the company failed in each and all of these particulars; that the water furnished, instead of being pure and wholesome, was foul, stagnant, impure, filthy, unfit for drinking purposes, bathing purposes, and unfit even for sprinkling the streets or yards, and, when so used in sprinkling, gave forth foul and offensive odors. The water company denied each and all these allegations, and alleged that the water supply was from Salt river, and that it was known at the time the contract was entered into that the supply was to come from that source; that the city had accepted the contract with that knowledge, and was therefore estopped from complaining of the quality of the water so furnished. The issues were completed by additional pleadings filed.

As to the first contention of the city, it appears to us that the former opinion referred to settles it by the use of this language: "We do not think that it is material whether the contract was made with the trustees of Harrodsburg or the city council, if in fact the name of the city authorities had been changed by law. In such a case the officers of the city, exercising the power theretofore vested in the trustees, did in fact enter into the contract after the same had been ratified by the voters."

As to the next proposition—as to whether

evidence introduced at the election was in substantial compliance with the law with reference to the elections upon such questions. In the same opinion the court said: "Nor do we think that the mere fact that the vote was taken at the hotel and courthouse invalidates the election, provided there was in effect any law authorizing an election to be held at those places at that time, and provided the election was in fact held there, upon due notice, and the voters of the city generally participated therein."

The next and last question is more serious. There are copied into this record the depositions of about 100 witnesses, all stating, without material contradiction, that from three to six months in each year the water furnished by the water company under its contract with the city was foul, stagnant, impure, unfit for drinking and bathing purposes, and when the streets or yards were sprinkled with it they gave forth foul and offensive odors; that none of the citizens drank it during these times, nor used it for cooking purposes; few bathed in it; some washed their dishes and cooking utensils with it, but used cistern or well water for rinsing; and some sprinkled their yards and the streets with it. Many stated that it was unhealthful, and all agreed that it was very offensive and noxious to the smell. The proof also showed that the standpipe was not sufficiently elevated, or that it was not kept full of water, so as to create the pressure as required by the contract to extinguish fire, and that probably 20 or more houses in the city, by reason of their elevation, are not furnished any or complete fire protection. The witnesses also stated that the cause of the water not being wholesome was because the water did not run in Salt river during the dry season of the year, and stood in pools, and the water company erected a dam across the river to accumulate water sufficient for its purposes, which caused the pools to extend several miles up the stream, in which stock of all kinds entered and stood, and the carcasses of dead animals accumulated, and the filth from the farms and buildings above was washed into it, and the mud and slime accumulated in it. On the other hand, the water company showed that it furnished the city a good and substantial waterworks plant, at a cost of seven or a hundred thousand dollars; that the trouble is the impurity of the water; part of the year, the lack of filtration; the water is muddy, and the defective pressure from the standpipe; the being insufficient to protect a few buildings from fire. The proof of the system had been very effective purpose of putting out fires from it until the trial of the case of great benefit to the city. We do not understand that

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE.

1. Plaintiff, 72 years old and somewhat infirm, took passage on defendant's train, being placed in charge of the conductor. When a transfer point was reached, the conductor saw her safely seated in the other train, and enjoined her to remain seated until it stopped at her destination. Plaintiff testified that, on nearing the depot, some one came to the door of the coach and cried, "All hands get out here;" that she could not hear very well; that her head was all bundled up; that she rose from her seat, and was thrown down by a movement of the train, and injured. There was no evidence of any unusual jerk or suddenness in the stopping of the train. *Held*, defendant was not liable.

Appeal from Circuit Court, Larue County.

"Not to be officially reported."

Action by Martha Boles against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. Marriott, I. W. Twyman, Pirtle & Trabue, and J. M. Dickenson, for appellant. Gore & Williams and G. A. Taylor, for appellee.

BARKER, J. This action was instituted by the appellee, Martha Boles, to recover of the appellant, the Illinois Central Railroad Company, damages for injuries alleged to have been received by her while a passenger upon one of its trains, caused, as she alleged, by its gross negligence, by which she was thrown down in the car and severely hurt. The answer of appellant put in issue the allegations of negligence in the management of its train, and by a second paragraph charged contributory negligence of the appellee. The reply properly put in issue the allegation of contributory negligence. The trial of the case resulted in a verdict and judgment for the appellee in the sum of \$600, from which appellant has appealed.

The first question necessary to be decided is whether or not the lower court erred in overruling appellant's motion for a peremptory instruction at the close of appellee's testimony. The facts are these: The appellee, who is 72 years of age, took passage on the train of appellant at Hodgenville, Ky., for the purpose of going to Louisville. She seems to have been placed by a member of her family in charge of the conductor of the train at Hodgenville. When the train arrived at Cecilia, where it was necessary to change cars, the conductor saw her safely seated on the train bound for Louisville, and enjoined her to remain seated until the train stopped at the depot in Louisville. It appears by appellee's own statement that, when she was placed on the car at Cecilia by Conductor Ludwick, he told her to remain seated until the train stopped still. Had she done this, no harm would have come to her; and, when she disobeyed his injunction, she was guilty of negligence. It is true that she says

that the city was to pay the water company the sum of \$1,055 quarterly for the sole purpose of affording it fire protection, but it was to be paid for all the benefits which might or could be derived from such a plant; and the citizens, when they voted the tax upon themselves for that purpose, contemplated getting pure and wholesome water for domestic purposes, even though they had to pay individually for water for such use; and all these benefits and conveniences were contemplated in the making of the contract by the city council for the benefit of the citizens. From all the facts and circumstances shown by the record, we are of the opinion that the water company has not complied, in substance and effect, with its contract, and that it would be inequitable and unjust to compel the city to pay the full contract price for the water furnished it by the water company. But on the other hand, we are of the opinion that the water furnished by the water company has been of considerable benefit to the city, and that the water company has not intentionally failed to comply with its contract, but it has been slow in using its means to obtain the character of water it contracted to furnish, and, until it does substantially comply with its contract in these respects, it should only be allowed to recover a reasonable price for such water as it has furnished and does furnish—not, in any event, to exceed the contract price. Under all the circumstances, it would be unjust and inequitable to declare this contract null. By doing so, it would cause almost the entire sacrifice of its investment. The city should pay the water company a reasonable price for the water furnished, to enable it to furnish water as it contracted to do. Then if, within a reasonable time, the company fails to furnish water in accordance with its contract, the city should be absolved from the contract.

It is our opinion that the ordinance passed by the city council, declaring the contract void and at an end, and the written notice given by the water company to the council to the same effect, did not have the effect to annul the contract.

The principles upon which we have held that the controversy between these parties should be settled are in line with the cases of *Escott & Son v. White*, etc., 10 Bush, 170; *Morford v. Ambrose and Mastin*, 3 J. J. Marsh. 688; and *Same v. Mastin*, 6 T. B. Mon. 609, 17 Am. Dec. 168.

The parties, upon the return of this cause, should be allowed to amend their pleading as herein indicated, and, upon their failing to do so, the actions should be dismissed. Wherefore the judgment of the water company against the city for \$8,440 is reversed, and also the judgment in favor of the city, annulling the contract, is reversed, and the actions are remanded to the lower court for further proceedings consistent herewith.

out here," and this was repeated in a loud voice two or three times; but she did not know or say who this was, or whether he was an officer or employé of appellant. She further says that she could not hear well, and that her head was all bundled up. Evidently she misunderstood what was said on this occasion.

There is nothing in the record which shows that appellant fell short of the full discharge of any duty it owed to appellee as its passenger. Its conductor saw her safely and comfortably seated in the car at Cecilia, where the change of cars was made, and there enjoined strictly upon her to remain in her seat until the car stopped still. There is no evidence in the case tending to show any unusual jerk or suddenness in the stopping of the train. Common experience teaches that there is always some sway in the cars when the train is stopped. Appellee, being old, somewhat deaf, and timid, had been placed in the especial care of the conductor, and it was her duty, having been so placed, to obey the injunctions given for her safety. When the train neared Louisville, and the passengers commenced to get up and stand in the aisle to put on their wraps and overcoats, as is usual on such occasions with the traveling public, appellee, forgetting or disregarding the injunction to keep her seat until the train stopped still, also got up, and when the train stopped she, being somewhat infirm, was thrown against the arm of the seat, and her side injured.

A careful examination of this record convinces us that the injuries which appellee received were wholly caused by her own negligence, and the jury should have been peremptorily instructed to find for the appellant. Wherefore the judgment is reversed for proceedings consistent with this opinion.

CRAIG v. WELCH-HACKLEY COAL & OIL CO.

(Court of Appeals of Kentucky. April 22, 1903.)

DESCENT AND DISTRIBUTION—HEIRSHIP—RESULTING TRUST—ESTABLISHMENT—PETITION.

1. Where, in an action to establish plaintiff's heirship, and to enforce an alleged resulting trust of certain conveyances of land made by other alleged heirs of decedent, the petition did not allege facts from which plaintiff's alleged heirship was derived, and did not allege that decedent ever owned the land conveyed, or any interest therein, or that he died intestate, the petition was demurrable.

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Action by Sarah F. Craig against the Welch-Hackley Coal & Oil Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

for appellee.

BARKER, J. The appellant, Sarah F. Craig, by a petition filed in the Knox circuit court, states that she is a resident of Charleston, in the state of West Virginia; that Eliza S. Goodwin, Levi Welch, Cornelia H. Welch, Miriam W. Donley, Lalla V. Welch, Charles Hedrick, Catherine C. Hedrick, Mary V. Hedrick, James Fry, Henry Fry, and John Fry, each and all claiming to be heirs at law of one James Welch, deceased, late of Greenbrier, formerly in the state of Virginia, but now West Virginia, filed a suit in equity in the United States Court for the District of Kentucky, at Frankfort, Ky., on the 26th day of September, 1896, against certain persons then residing in Knox county, Ky., for the purpose of quieting the title to certain lands in that county which were claimed by Eliza S. Goodwin and her coplaintiffs as heirs at law of James Welch. This action, which was styled "Eliza S. Goodwin and others, Plaintiffs, against William Gilbert and others, Defendants," in the United States Court for the District of Kentucky, did not come to trial, but was compromised by the plaintiffs, as the heirs at law of James Welch, with the defendants, who were the occupying claimants of the lands involved in the action. By this compromise the occupying claimants granted and relinquished to the plaintiffs all of their right, title, and interest in the coal and mineral rights in the land in question, and the plaintiffs relinquished to the occupying claimants all of their interest in the surface thereof, and the action in the United States District Court was dismissed. Proper deeds of conveyance between the parties to the action were made, and duly put to record in the Knox county court. Afterwards the plaintiffs in the action before mentioned, as heirs at law of James Welch, conveyed all of their right and title in and to the mineral rights in the lands so acquired to the Welch Hackley Coal & Oil Company, a corporation created under the laws of the state of New Jersey, with power to contract and be contracted with, to sue and be sued, and, among other powers granted to it, it was empowered to mine coal and bore for oil; that none of these before-mentioned plaintiffs in the action in the United States Court for the District of Kentucky were heirs at law of James Welch, nor did they have any right, title, or interest in or to the lands in question; that appellant is an heir at law of James Welch, but was not a party in the suit in question in the United States Court for the District of Kentucky, and was not a party to the compromise made therein, nor was she a party to any deed or deeds of conveyance made in pursuance of the compromise before mentioned. Appellant further states that Alexander Montgomery, Guy Montgomery, and

James Welch, except herself, or whom she has any knowledge, and that she will take such steps as are necessary to bring them before the court; that Eliza S. Goodwin and her co-plaintiffs effected the compromise in question, and obtained the conveyance of the mineral rights before mentioned, by reason of the fact that they pretended to be heirs at law of James Welch; that the mineral rights obtained by reason of the compromise in question have great value, and that appellee, who purchased the same, has given out the statement that it paid \$500,000 for them; that appellant does not desire to attack or assail the agreements of compromise and deeds of conveyance made thereunder to Eliza S. Goodwin and others, but, on the contrary, she ratifies the agreements of compromise, and accepts the deeds of conveyance, and prays that she be adjudged to be an heir at law of James Welch, and that appellee be adjudged to hold the conveyances made to it in trust for her and the other heirs at law of James Welch; and she prays for her costs and all other proper relief. A general demurrer having been filed by the appellee to the foregoing petition, it was sustained by the court, whereupon appellant filed an amended petition, in which she sets forth the names of the various occupying claimants who were defendants in the action of Eliza S. Goodwin against William Gilbert and others, and gave in detail the various agreements of compromise with reference to the land in question and sale of the mineral rights to appellee. By a second amendment she states that the compromise between the occupying claimants and Eliza S. Goodwin and her coplaintiffs was made under the belief that Eliza S. Goodwin and her coplaintiffs were the true heirs at law of James Welch, and that the compromise in question was made for the sole use, benefit, and profit of the real heirs at law of James Welch, and was so intended; that the agreements of compromise in question were all made without the knowledge or consent of appellant, but that she adopts and ratifies them. A general demurrer having been filed to the petition as amended, it was sustained by the court, and, appellant declining to plead further, her petition was dismissed; from which judgment she has appealed.

The petition, as amended, does not raise the question which appellant evidently desired to have this court adjudicate. Without reference to the merits of the question involved, the petition is clearly bad on demurrer, because it is not alleged that James Welch ever owned the land mentioned in the pleadings, or that he had any interest therein; nor is it alleged that he died intestate, or shown how appellant is his heir. The allegation that she is his heir at law is a mere legal conclusion, as was decided by this court in the case of Larue v. Hays, 7 Bush, 50. On this subject the court says: "But

she have failed to manifest their right to any recovery by any sufficient evidence of title, but that the petition is fatally defective, so far, at least, as it purports to allege the derivation of title by Phoebe Larue by inheritance from Isaac Larue, the averment that she was one of his heirs being but a conclusion of law, as this court has repeatedly decided in effect in passing upon the competency of evidence adduced to prove heirship. *Banks v. Johnson*, 4 J. J. Marsh. 649; *Currie, etc., v. Fowler*, 5 J. J. Marsh. 145."

Appellant's petition was fatally defective for these reasons, and the circuit court did not err in dismissing it on demurrer; wherefore the judgment is affirmed.

HUFF et al. v. MINIARD et al.

(Court of Appeals of Kentucky. April 28, 1903.)

PUBLIC LANDS — PATENT — PATENTEE — PRESUMPTIONS — EVIDENCE — LACHES — CONSTRUCTION OF DEED.

1. The incompetency of a son to testify as to the declarations of his deceased father that he intended certain land for the son, and had a survey made and a patent issued in his name, is not affected by an assignment by the son of his alleged interest in the land to plaintiffs, who sue to recover the value of timber cut by defendants, in possession of the land under a deed from the father.

2. Defendants claimed as heirs at law of their ancestor, who acquired title to land through mesne conveyances from W. T., who surveyed the land and obtained a patent therefor. W. T., Jr., the son of the patentee, acquiesced for over 30 years in the possession of those claiming under his father's deed, and then, after the father's death, claiming that his father made the survey and obtained the grant in his name and for him, conveyed his alleged interest in the land, which had valuable timber on it, to plaintiffs for \$30 by a deed reciting a consideration of \$450. The surveyor who made the survey testified that it was made by the father, and there was nothing in the record of the survey or patent to indicate that it was made in the son's name. The only proof offered by plaintiff was some alleged declarations of the father, proved by the son and another witness, that the father intended the land for the son, and had the survey made and the patent issued in the latter's name. *Held* insufficient to overcome the presumption that the W. T. named in the patent was the W. T. who had the survey made and obtained the patent.

3. A question was made as to whether the deed from W. T., which purported to convey all his land in that locality, included the land in controversy. *Held* that, by his acquiescence for over 30 years in the possession of those claiming under the deed, the son gave a practical construction to it, which could not be disregarded.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by John B. Minlard and another against John Huff and another. Judgment for plaintiffs, and defendants appeal. Reversed.

¶ 2. See Deeds, vol. 16, Cent. Dig. § 312.

HOBSON, J. On December 4, 1844, William Turner, of Harlan county, made a survey of 100 acres of land, which was carried into grant on July 2, 1845. The survey describes the land as lying in Harlan county, on Turner's Creek of Greasy Fork. On March 3, 1857, William Turner and John S. Turner, by deed, conveyed to Robert Turner "a certain farm composed of various tracts of land situated in the county and state aforesaid, consisting of about seven hundred acres, * * * beginning on a sycamore standing on the south bank of the Greasy river; thence running so as to include all the various tracts of land owned by the said William Turner and John S. Turner on both sides of said Greasy river." Eli Huff, the ancestor of appellants, got the land from Robert Turner, or his heirs, who made him a deed for it. Eli Huff lived on the farm for a number of years, and, finding that the 100-acre survey above referred to did not adjoin the other land, took out a patent for the intervening land, so as to get all his land in one boundary. After this he died, in the year 1893, leaving appellants in possession as his heirs at law. William Turner had a son named William Turner, who in 1844 was some 5 or 10 years old; and this son, on September 14, 1895, for an alleged consideration of \$450, conveyed the 100 acres above referred to to appellee John B. Miniard. The real consideration of the deed was \$30, and it was not recorded until March 25, 1899. On March 20, 1899, Miniard and John M. Bailey, to whom he had conveyed an interest in the land, instituted this action to recover for 136 poplar logs cut by appellants from the land, alleged to be of value \$408. On the trial of the case the court fixed the value of the logs at \$222.41, and entered a judgment to the effect that the plaintiffs had shown themselves to have the better right to the land from which the timber in controversy was cut, and it was therefore adjudged that the plaintiffs recover of the defendants the value of the timber, \$222.41, and their costs.

It is insisted for appellees that, as there was no demand made on the court for a separation of the conclusions of law from the findings of fact, the judgment of the court on all questions raised by the pleadings must be treated as the verdict of a properly instructed jury. This is true, but the judgment of the court is, in substance, a finding of fact in favor of the plaintiffs' title, and it is insisted for appellants that this finding is palpably against the evidence. The only ground upon which William Turner, Jr., who made the deed to Miniard in March, 1895, claimed title to the land, was that his father, William Turner, Sr., made the survey and obtained the grant in his name, and for

as to his age; or some 5 years younger, if we fix his age by that of another man, who, he says, was older than he. The surveyor who made the survey says that it was made by William Turner, the father. There is nothing in the record of the survey or patent to indicate that it was made in the name of William Turner, Jr. The presumption is that the William Turner therein named is the William Turner who had the survey made, and obtained the patent. This legal presumption after the lapse of half a century and the death of all the parties cannot be overthrown but by the clearest evidence. The only proof to sustain the conclusion of the circuit court is some alleged declarations of William Turner, proved by William Turner, Jr., and the father of plaintiff Miniard, to the effect that he intended the land for William Turner, Jr., and had the survey made and the patent issued in his name; but this evidence, so far as testified to by William Turner, Jr., is incompetent, as he cannot testify for himself as to the declarations of his father, and by the provisions of the Code his competency in this respect is not affected by his assignment of his interest in the land to another; and, waiving this, we are clearly of the opinion that such evidence cannot overturn the record after the death of all the parties, under the circumstances shown in the case. William Turner, Jr., asserted no right to the land in the lifetime of his father, or Robert Turner, his vendee, or Eli Huff, who bought the land when it was sold to settle the estate of Robert Turner. In fact, so far as appears, for something over 30 years he acquiesced in the claim of Huff and Robert Turner to this land, and in 1895 he conveyed away to Miniard the tract for \$30, putting in the deed an alleged consideration of \$450. The land has valuable timber upon it, and his sale of it for \$30 is, in keeping with his previous conduct, showing that he had no title to it. If the title to land could be destroyed by such proof, no confidence could be placed in record titles.

A question is also made as to whether the deed from William Turner to Robert Turner covered this 100-acre survey. The purpose of the deed, on its face, was to convey all the land of William Turner on Greasy Fork. Neither William Turner, nor any of his children, have set up any claim to the land. The claim of William Turner, Jr., is not made as the heir of his father, but on the idea that he was the patentee. If this body of land had not at the time been understood to be included in the deed which William Turner made, it is incredible that none of the parties in interest should have set up claim to it or looked after it. The acquiescence in Huff's claim of the land for so many years, and until after his death, as well as

not now be disregarded.

On the admitted facts, the judgment of the circuit court is not sustained by sufficient evidence, and it is therefore reversed, and the cause remanded, with directions to grant appellant a new trial.

**BEDFORD-BOWLING GREEN STONE
CO. et al. v. OMAN et al.**

(Court of Appeals of Kentucky. April 28, 1903.)

**LEASE-CONSTRUCTION-RIGHT TO TAKE OUT
CUTTING STONE-EXPIRATION OF LEASE-TITLE
TO RAILROAD SWITCH-RAILROADS-
DUTY TO RECEIVE FREIGHT.**

1. A lease of the right to work and use all the fine cutting stone contained on two certain tracts of land obligated the lessees to build or cause to be built a railroad from the quarry over the land of a third party to the line of a certain railroad company. There was no covenant in the lease for the conveyance of the railroad to the lessors at its expiration. *Held* that, in the absence of a stipulation governing the matter, the railroad, being part of the realty, became the property of the owners of the soil to which it was affixed, and a grantee of one of the lessors had no interest therein.

2. A commissioner's deed, stipulating that "that which is conveyed is the interest of F. in the cutting stone on the land aforesaid, being one-third interest," conveys only an interest in the cutting stone, and no interest in a railroad switch connecting the quarry with the line of a railroad company.

3. A railroad corporation which had the control and management of a switch running from its line to appellant's quarry could not lawfully refuse to receive and transport freight belonging to appellees, owners of a near-by quarry, to and from such reasonable points along the line at which they could lawfully ship or receive it.

4. The right to take cutting stone from a tract of land necessarily carries with it such reasonable use of the surface over the stone as is necessary to make the right available.

Appeal from Circuit Court, Warren County.
"To be officially reported."

Bill by John Oman and others against the Bedford-Bowling Green Stone Company and the Louisville & Nashville Railroad Company. Decree for plaintiffs, and both defendants appeal. Affirmed on appeal of railroad company. Reversed on appeal of stone company.

Bodley, Baskin & Morancy and John E. Du Bose, for appellant Bedford-Bowling Green Stone Co. Jas. E. Mitchell, Mitchell & Du Bose, E. W. Hines, B. D. Warfield, and Thos. B. Harrison, Jr., for appellant Louisville & N. R. Co. L. McQuown, for appellees.

BARKER, J. This action involves the rights of appellees to the use of a railroad switch which runs from the Memphis Junction of the Louisville & Nashville Railroad Company's line in Warren county, Ky., about 8½ miles, to the quarry of the appellant Bedford-Bowling Green Stone Company. It is

with any minute particularity. It is sufficient to say that the Bedford-Bowling Green Stone Company claims to be the exclusive owner of the switch in question; and, on the other hand, the appellees claim a part ownership, with the right to its use, and, if that be not so, that it is a part of the railroad system of the appellant Louisville & Nashville Railroad Company, and, as such, they have the right of shipment over it, and that the Louisville & Nashville Railroad Company has no legal right, as a common carrier, to refuse to transport freight along its line, and that the pleadings properly present these issues for adjudication. Upon the trial below, the learned chancellor held that the appellees were part owners of the switch in question, and enjoined the Bedford-Bowling Green Stone Company from interfering with their rights to its use, and required, by a mandatory injunction, the appellant Louisville & Nashville Railroad Company to transport appellees' freight over it to their quarry, at or near the end of the line. From this judgment an appeal has been prosecuted to this court.

In 1870 Hugh F. Smith and his wife, Lydia A. Smith, were the owners in fee simple of a tract of land in Warren county, Ky., known as the "Howarth Tract"; and they and one B. C. Sanders, together, owned the perpetual right to quarry the fine cutting stone in an adjoining tract, known as the "Loving Land." Smith and wife owned an undivided two-thirds interest, and B. C. Sanders an undivided one-third interest. Sanders had no interest in the Howarth land. On the 22d day of January, 1870, Smith and wife and B. C. Sanders entered into a written lease with Owen McDonald & Co., whereby they leased to them for a term of 30 years the right to work and to use all the fine cutting stone contained on the two tracts of land. In consideration of this lease, Owen McDonald & Co. bound themselves to build, or cause to be built, within three years from the date of the lease, a railroad from the quarry on the land to the Memphis Branch of the Louisville & Nashville Railroad Company, and to commence operations in the quarry within three years from the date of the lease; and it was stipulated that unless this was done the lease was to be null and void. Owen McDonald & Co. were also to pay to the lessors, as a royalty, \$1 for each 100 feet of all stone suitable for cutting or dressing quarried by the lessees during the term of the lease, and covenanted to keep their books open to the inspection of the lessors, so that they might settle between themselves as to their rights in the royalty. At the expiration of the term of the lease, it was stipulated that the lessees could remove all the tools and machinery, unless the lessors paid a fair price for them. Afterwards Owen McDonald & Co. conveyed their interest in the lease to the White Stone

from the stone quarry to the junction of the Louisville & Nashville Railroad Company, and built thereon the railroad switch involved in this litigation, since which time the interests originally acquired by Owen McDonald & Co. have passed in regular succession from the White Stone Quarry Company to the Belknap & Dumesnil Stone Company, and from it to the Bowling Green Stone Company, and from it to the Columbia Finance & Trust Company, which conveyed it to the Bedford-Bowling Green Stone Company. In 1888 the Belknap & Dumesnil Stone Company purchased all the interests of the Smiths in both the Howarth and the Loving tracts, and thus became the owner in fee simple of the first, and the owner of a two-thirds interest in the cutting stone in the latter, tract. In 1878 B. C. Sanders, being indebted to Milton Feland and McElwain, conveyed to them his interest in the cutting stone in the Loving tract. Feland having died, in a suit to settle his estate his interest in the cutting stone was sold, and bought by appellee John Oman. McElwain in 1885 sold his interest in the cutting stone to Sallie M. Smith, and she sold it to the Belknap & Dumesnil Stone Company in 1888, so that at the expiration of the lease, in 1900, John Oman was the owner of a one-third interest in the cutting stone in the Loving tract, and the Bedford-Bowling Green Stone Company was the owner in fee simple of the Howarth tract, and of an undivided two-thirds interest in the cutting stone in the Loving tract. Between them, and in the proportions mentioned, they were the owners of all the property demised by the lease of 1870. After the expiration of the lease the Columbia Finance & Trust Company, appellants' vendor, and the appellee John Oman, in an action that was pending in the Warren circuit court between John Oman and the Bowling Green Stone Company, etc., entered into an agreement by which that case was settled, and a division made between the parties at interest as to their rights in the cutting stone in the Loving tract. In pursuance of this agreement, commissioners were appointed to divide the interests of the parties in the cutting stone, which having been made, the commissioner of the court conveyed to each party to the settlement their respective portions. This deed having been put to record, there is now no dispute as to the rights of the parties to this litigation on this question.

John Oman, having opened a quarry on the Loving tract, set apart to him, very near the quarry operated by the Bedford-Bowling Green Stone Company, is naturally very anxious to use the switch in transporting his machinery to his quarry, and in transporting his stone to the main line of the Louisville & Nashville Railroad; it being impracticable to haul such heavy freight for so long a distance in any other way. We do not think, however, he has any interest in the switch in question. It was built by the White

Stone Quarry Company, and the instrument contains no covenant for its conveyance to the lessors at its expiration; at which time, being a part of the realty, in the absence of any stipulation governing the matter, it became the property of the owners of the soil to which it was affixed. In order for appellee Oman to prove himself entitled to an interest in the railroad switch involved in this litigation, it was incumbent upon him to exhibit some muniment of title by which he acquired an interest in it. This he has wholly failed to do. Even should it be held that his remote vendor, B. C. Sanders, acquired an interest by the terms of the lease of 1870, it would still be necessary for him to show some transmission of that right to him. He purchased the interest he holds at a judicial sale in the settlement of Milton Feland's estate, and the deed of the commissioner of the court in that case to him, after describing the land containing the cutting stone to be conveyed, contains this stipulation: "That which is conveyed is the interest of M. C. Feland in the cutting stone on the land aforesaid, being one-third interest." So that all he purchased was an interest in the cutting stone, and not an interest in the railroad switch.

The railroad switch involved in this litigation was built by the White Stone Quarry Company, and in so doing they entered into a contract with the Louisville & Nashville Railroad Company, by which it leased or hired all of the material which went into it, from the railroad company, upon a stipulated rent, to be equal to 6 per cent. per annum on the value of the material furnished; the quarry company to keep the roadway in good condition, either by doing the work itself, or paying the railroad company for what it might do in this regard. Afterwards, on the 23d day of May, 1893, the property having passed into the ownership of the Bowling Green Stone Company, a new contract was made between it and the railroad company, in which all of the terms and conditions of the original contract concerning material furnished by the railroad company, and the rental therefor due from the quarry company, were recited, and further that, "whereas, said Bowling Green Stone Company wishes to increase its business and has represented to said Louisville & Nashville Railroad Company that if it should be relieved from the payment of said rent and for said repairs, it could largely increase its business, which would result in an increase of traffic for said Louisville & Nashville Railroad Company: Now therefore, in consideration of the premises, the said Louisville & Nashville Railroad Company, from and after this date, releases the said Bowling Green Stone Company from the payment of rent on said material, and also agrees to keep said track in repair during the continuation of this contract without cost to said Bowling Green Stone Company,

on 60 days' notice in writing to said Bowling Green Stone Company whenever and at any time in the opinion of the management of said Louisville & Nashville Railroad Company the shipments from said quarries to points on and reached via said Louisville & Nashville Railroad Company's lines are not sufficient to justify the maintenance of the track by said Louisville & Nashville Railroad Company." This contract, and other evidence in the record bearing upon the question, show that the Louisville & Nashville Railroad Company, during the continuance of this last contract, has the control and management of the railroad switch. It owns, controls, and operates the engines and other rolling stock which pass over the line. It keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows, it exercises the same control and dominion over this line that it does over any other part of its system; and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, becomes a part of the general system of the Louisville & Nashville Railroad Company. This being so, it cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it. This is clearly settled by the opinion of this court in the case of the Louisville & Nashville Railroad Company v. Pittsburg & Kanawha Coal Company, 64 S. W. 969, 55 L. R. A. 601, in which it is said: "Railroad companies are quasi public corporations, created for the purpose of exercising the functions and performing the duties of common carriers. These duties are defined by law, and in accepting their charters they necessarily take with them all the duties and liabilities annexed; and they are required to supply, to the extent of their resources, adequate facilities for the transaction of all business offered, and to deal fairly and impartially with their patrons. *McCoy v. C., I., St. L. & C. R. R. Co.* (C. C.) 13 Fed. 5; *Munn v. Illinois*, 94 U. S. 126, 24 L. Ed. 77. And they have no right to contract with a corporation or individual to give exclusive rights to transfer any commodity over any part of their line. * * * The contention is made for the railroad company that appellee is not entitled to a mandatory injunction requiring them to fulfill their corporate obligations to furnish impartial service, because they have adequate relief in a court of law by suit to recover damages for the wrong

law provides. By accepting its charter the railroad company assumed obligations to the public, and the duty of enforcing these obligations, in the absence of some statute providing a different remedy, necessarily devolves upon courts of equity. Their jurisdiction to grant relief of this sort has been well established and defined. *Hays v. Pennsylvania Co.* (C. C.) 12 Fed. 309; also the *Express Case*, decided by Justice Miller and Judge McCreary (C. C.) 10 Fed. 869, and the case of the *State v. The Hartford & New Haven Railroad Co.*, 29 Conn. 546. It is plainly laid down in these and other cases that a railway company may be compelled by a mandatory injunction to carry out the object for which they were created, and to impartially and without discrimination serve the public."

While it is the duty of the railroad company thus to receive and transfer freight for appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive or ship it. He has no right to trespass upon the private property of appellants in order to reach the road. We think, under his right to the cutting stone, as now fixed by contract, appellee is entitled to ship and receive freight at any reasonable point along the road, as now constructed, which lies upon any part of the Loving tract, which was set apart and conveyed to him in the settlement had between him and the Columbia Finance & Trust Company. Although the part of the Loving tract upon which the railroad switch lies (being No. 4 on the plat) is now owned in fee by appellants Bedford-Bowling Green Stone Company, the right to take the cutting stone which belongs to appellee necessarily carries with it such reasonable use of the surface over the stone as is necessary to make appellees' interest in the land available. If it should be found impracticable, from the topography of the land, to reach the railroad on tract No. 4, then appellees may acquire the right of way by contract with appellants, or condemnation under section 815 of the Kentucky Statutes, to any practicable point on the line which will not unnecessarily interfere with appellants' quarry as now operated.

For the reasons herein given, this case is affirmed as to the Louisville & Nashville Railroad Company, and reversed as to the Bedford-Bowling Green Stone Company, for proceedings consistent with this opinion.

SETTLE, J., not sitting.

STATE v. O'CONNOR.

(Supreme Court of Texas. May 4, 1903.)

ACTION BY STATE—TITLE TO LAND—VALIDATING STATUTE—CONSTRUCTION.

1. Act Feb. 11, 1860 (Gen. Laws 1860, p. 109, c. 78), gave certain district courts power to investigate any claim for land against the state having its origin prior to December 19, 1836, and to confirm such claims, and provided that the act should continue in force for three years. Act April 4, 1881 (Gen. Laws 1881, p. 105, c. 92), provided that whereas suits to confirm titles to land under the act of 1860 had been properly brought, but not finally adjudicated until after three years, and inasmuch as the Commissioner of the Land Office had refused to issue patents for titles not confirmed within the three years, the Commissioner was required to issue patents to lands when suit was commenced within three years from the passage of the statute, and when the "proper district court" had finally confirmed such titles. Suits were instituted by the same plaintiff, under the act of 1860, for confirmation of title to two tracts, and there was a judgment in favor of plaintiff in 1862 in one suit, and in 1872, on petition of plaintiff, the former decree was set aside, and confirmation had as to both tracts. All of such proceedings were had in the district court for the county of W., which by the act of 1860 was given jurisdiction, but Act Aug. 15, 1870 (Gen. Laws 1870, p. 201, c. 83), amended the statute of 1860 so as to confer jurisdiction on the district court of T. county. *Held*, that the judgment of 1872 was not validated by the statute of 1881, since the suit in which the judgment in 1872 was entered was an independent proceeding commenced after the time limited by the statute of 1860, and there had been a valid judgment within the time prescribed by the act of 1860, and exclusive jurisdiction had been conferred on the district court of T. county before such judgment was rendered.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by the state of Texas against Thomas O'Connor. From a judgment of the Court of Civil Appeals (71 S. W. 409) reversing a judgment for plaintiff, plaintiff appeals. Reversed.

C. K. Bell, Atty. Gen., for the State. H. G. Dickinson, for defendant in error.

BROWN, J. On the 5th day of February, 1901, the Attorney General of the state of Texas instituted this suit against O'Connor in the district court of the Twenty-Sixth District, in Travis county, to recover from him 19,410 acres of land, described in the plaintiff's petition, and situated in Webb county. The facts of the case are stated by the Court of Civil Appeals as follows:

"The evidence established the fact that, under the law of 1860 (Gen. Laws 1860, p. 109, c. 78) Daniel Ruggles instituted two suits in the district court of Webb county for the confirmation of the title to two large tracts of land, one of which was designated as the 'Palafox Tract,' and the other as the 'Balconitas Tract.' The suit for the confirmation of the Palafox tract came to trial on the 8th day of January, 1862, and resulted in a judgment in favor of Ruggles for the confirmation of the title to a large tract of

land, the southwestern boundary of which was six leagues of 5,000 varas each from the western bank of the Rio Grande river and parallel with it. In 1869 a motion was filed by Ruggles, seeking a construction and modification of the decree of the 8th of January, 1862; but it was overruled. In 1871 the other suit, the one for the Balconitas tract, was dismissed by the court for want of jurisdiction. In 1871, Ruggles made a motion to redocket the two cases, which was granted; and at the same time he filed a petition in which he sought to have the decree of 1862 set aside, and have a confirmation of the title to both the Palafox and Balconitas tracts; but on the 8th day of March, 1872, these motions were refused. On March 12, 1872, Ruggles filed in the same court another petition, seeking to set aside the decree of the 8th of January, 1862. The court set aside the decree, and consolidated the motions. On the 13th of March, 1872, Ruggles filed an amended petition, in which he sought a confirmation of the title to both tracts, and upon which judgment was rendered in favor of Ruggles on the 13th of March, 1872. The land which was covered by the decree of confirmation of 1862 was patented to Ruggles, and the state has not in any way questioned the validity of that judgment, or of the title of those claiming under Ruggles to the land. The land sued for in this case is located entirely on that portion of the land which the court in its decree of 1862 declined to confirm in favor of Ruggles, but it is included within that which purports to have been confirmed to him by the decree of March 13, 1872."

Upon a hearing before the court, judgment was given in favor of the state of Texas for the recovery of the land, which judgment was by the Court of Civil Appeals reversed, and judgment there rendered in favor of O'Connor, from which last judgment this writ of error was granted.

The validity of the judgment entered by the district court of Webb county on the 13th day of March, 1872, in the case of Ruggles v. The State, under which defendant in error claims, has heretofore been twice before this court. In the case of Kenedy v. Jarvis (Tex.) 1 S. W. 191, the Commission of Appeals reported to the Supreme Court an opinion in which that judgment was held to be valid, but the Supreme Court expressly declined to approve of that opinion, and subsequently, in the case of Texas Mexican Railway Company v. Jarvis, 80 Tex. 456, 15 S. W. 1089, the question was decided by the Supreme Court, holding that judgment to be void. In the latter case the court, speaking by Chief Justice Stayton, said: "In the case of Kenedy v. Jarvis (Tex.) 1 S. W. 191, on the judgment now in question, a contrary rule was announced by the Commission of Appeals; but this court declined to express any opinion upon the question, and affirmed the judgment of the court below upon some ground

not stated." The unapproved opinions of the Commission of Appeals are not authoritative expressions of the court. It is claimed that a determination of the question was not necessary to the decision of the *Railway Company v. Jarvis*, and that the opinion in that case is not authority upon the issue as now presented. It is true that the case then before the court might have been disposed of without passing upon the validity of the judgment, but the issue arose upon the facts, and was presented to and decided by the court. It is frequently the case that a court discusses and decides questions presented which might be omitted in a final determination of the case, but that does not affect the weight of the opinion as authority. We follow the case of *Railway Company v. Jarvis*, because of its authoritative character, and because we unqualifiedly approve of the conclusion reached by the court upon this question.

In *Railway Company v. Jarvis*, above cited, Chief Justice Stayton announced principles which controlled in the determination of the question then, and are equally applicable now. That opinion rests upon the following propositions of law: (1) It was a special proceeding authorized by the statutes to be instituted against the state, and the district court had no authority except to proceed in the manner prescribed by the act of 1860. (2) The law of 1860, which alone authorized the proceeding, expired by its own limitations in 1865, and at the date of the judgment relied upon by defendant in error there was no law in existence which authorized the proceeding to be had in that court. (3) The district court under the act of 1860 had no equity power conferred upon it by which it could, after the expiration of the term, set aside its judgment of February 8, 1862. There can be no doubt that the judgment of the district court of Webb county of March 13, 1872, was void, nor that the judgment rendered by that court in the former case on the 8th day of January, 1862, was a valid and subsisting judgment; but counsel for O'Connor claims that the judgment of March 13, 1872, was validated by the following section of the act of 1881:

"Section 1. Be it enacted by the Legislature of the state of Texas, that, whereas, many suits to confirm land titles for land between the Nueces and Rio Grande rivers were brought within three years from and after the passage of the act of February 11, 1860, and in compliance with the terms thereof, but, owing to the war and other causes, were not finally adjudicated until after such three years had expired; and, whereas, the Commissioner of the General Land Office has refused to issue patents for titles not confirmed within such three years; and, whereas, it is just and equitable that parties who, in good faith and diligence, have attempted to comply with the terms of said act, should receive the full benefit thereof, therefore the

Commissioner of the General Land Office is hereby authorized and required to issue patents to all lands between said rivers, when suits to establish same under said act have been commenced within three years from the passage of the same, and when the proper district court has finally confirmed such titles." Gen. Laws 1881, p. 105, c. 92.

This is a remedial statute, and, if the judgment of 1872 is embraced in the spirit of that act, we must sustain the judgment of the Court of Civil Appeals. The spirit of the law is "the intent, the real meaning" of the Legislature, to be ascertained from the language used. From the language of the law it is manifest that the Legislature did not intend to validate all judgments that might have been entered by any district court confirming titles of the character now in question. We must therefore look to the terms of the statute to see if the judgment of 1872 is embraced within the purpose and meaning of the Legislature as expressed in that law, which prescribed that the judgment to be validated must have been entered in a suit that was begun in the district court of the county where the land was situated, within three years from the 11th day of February, 1860. The suit in which the judgment in question was entered was an independent proceeding commenced in the year 1872, many years after the time limited by the law of 1860 for the commencement of such actions. *Goss v. McClaren*, 17 Tex. 107, 67 Am. Dec. 646. The law also prescribed that the judgment to be validated must have been entered after the expiration of the three years in a suit wherein the matter had not been finally adjudicated within the time prescribed. The judgment under which O'Connor claims title was entered after the expiration of the three years, but in the original suit, commenced within the time prescribed by the act of 1860, final judgment was entered in 1862. At the date of the last judgment the law of 1860 had expired by its own terms, and another law was enacted by the Legislature in 1870 (Gen. Laws 1870, p. 201, c. 83) conferring exclusive jurisdiction in such cases upon the district court of Travis county; hence the judgment set up in this case was not entered in a proper district court as required by the act of 1881. That judgment did not set aside the judgment of 1862.

The judgment of 1872 is not embraced in the terms of the validating law, but is excluded by the specific designation of the judgments which the Legislature intended to make valid. It could not be validated by the act of 1881, unless that law had the effect to set aside and annul the judgment rendered in 1862; otherwise there would be two antagonistic judgments operating at the same time upon the same subject. There is no language in the act which would justify such a conclusion.

We conclude that the judgment entered by

the rights of Ruggles in the land in controversy; that the subsequent judgment entered by the said court was void in every particular, in so far as it affects the land sued for, being without power or authority of law; and that the Court of Civil Appeals erred in reversing the judgment of the district court, and in entering judgment for defendant in error. It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court be in all things affirmed, and that the state of Texas recover the costs of the Court of Civil Appeals and of this court against the defendant in error, Thomas O'Connor.

**WESTERN UNION TELEGRAPH CO. v.
ARNOLD et al.**

(Supreme Court of Texas. May 4, 1903.)

**TELEGRAM—FAILURE TO DELIVER—MENTAL
SUFFERING.**

1. The widow and children of deceased sent a telegram to a clergyman to attend the funeral. He was a friend of the family, which was known to the telegraph company. Through the negligence of the company the message was not delivered, and it was necessary to secure another clergyman. *Held*, that there could be no recovery for mental anguish.

Certified questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by Mary C. Arnold and others against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appealed to the Court of Civil Appeals. Questions certified.

Norman G. Kittrell and Geo. H. Fearons, for appellant. Monta J. Moore and Hefley, McBride & Watson, for appellees.

BROWN, J. Certified questions from the Court of Civil Appeals for the Third Supreme Judicial District as follows:

"This is a damage suit against a telegraph company. The trial court overruled a general demurrer and special exceptions to the plaintiffs' petition, and upon trial a verdict and judgment were rendered for the plaintiffs for \$1,235, and the defendant has appealed, and has assigned as error the ruling of the trial court on the demurrers and other rulings, which assignments make it the duty of the Court of Civil Appeals to decide the following material questions, which said court deems proper to certify to the Supreme Court for decision, which is accordingly hereby done:

"If the facts alleged in the plaintiffs' petition are true, were the plaintiffs entitled to recover compensation for mental distress and anguish? In other words, were such injuries to be contemplated as a breach of the contract?

"Omitting certain formal portions, the

the plaintiff Mary C. Arnold, and the father of the other plaintiffs, departed this life on, to wit, April 22, 1890, and his remains were interred in the city cemetery at Cameron, Tex., on the following day, to wit, April 23, 1890. That owing to the fact that W. K. Homan, a minister of the gospel, and who resides at Dallas, Tex., a lifelong friend to the said B. I. Arnold and his family, the plaintiffs, and obeying the oft-repeated requests of the said B. I. Arnold, made just prior to his death, plaintiffs desired to have the said Homan present, and to have him officiate and to perform the funeral services at the burial of their said husband and father; and, with this object in view, plaintiffs procured James B. Moore, of Cameron, Tex., to deliver to the defendant's agent at Cameron, Tex., for prompt transmission and delivery to said Homan, at Dallas, Tex., a message, in substance as follows, to wit: "Cameron, Texas, Apr. 22nd, 1890. To W. K. Homan, care Christian Courier, Dallas, Texas. Captain Arnold will be buried to-morrow evening four o'clock. Family wish you to officiate. Reply. James B. Moore." At the time of receiving said message, defendant corporation was a public telegraph company, engaged in the business of transmitting telegraph messages for the public between Cameron and Dallas, Tex., and as such received the message aforesaid, receiving from the plaintiffs, through the said James B. Moore, the sum of twenty-five cents as the charge for promptly transmitting said message by telegraph and delivering the same with reasonable dispatch to said W. K. Homan, at Dallas, Tex., and defendant contracted, and it was its duty, so to do, and, if it had done so, said Homan would have come to Cameron, and would have been present and officiated at the burial of said B. I. Arnold, as defendant company well knew Defendant company, not being ignorant of the premises, but well knowing same, and having full knowledge of the facts as herein alleged, and well knowing that said message was being sent for the benefit of these plaintiffs, and knowing the relationship between plaintiffs and the said B. I. Arnold, and the latter was dead, and well knowing the failure to promptly transmit and said message as agreed would occasion plaintiffs great mental anguish and resulting from the failure of said plaintiffs to be so present and officiate as aforesaid negligently and without cause, refuse to promptly and with reasonable dispatch transmit and deliver said said Homan as aforesaid, and of this negligence said Homan, and the death of the said B. I. Arnold, and the wish of the plaintiffs to have Homan officiate at the funeral, and and was not present at

other and a different minister to officiate, who was an entire stranger to plaintiffs and their said deceased husband and father, and, as a consequence, plaintiffs suffered great disappointment and anguish and distress of mind, to their actual damage in the sum of nineteen hundred and ninety dollars, and they are also entitled to damages in the sum of twenty-five cents, the amount paid defendants for sending said message. Wherefore plaintiffs ask that defendant be cited, and that they have judgment for damages in the aforesaid sums, and they also pray for costs, and for all such general and special relief, legal and equitable, to which they may appear entitled.'

"The Court of Civil Appeals desires to amend the statement and question certified in this cause by adding that the plaintiffs filed a trial amendment in which they alleged that, at the time the message was sent, the defendant company had actual notice of the relations existing between them and the deceased, and between them and said Homan, and of the fact that a failure to promptly transmit and deliver the message would cause the plaintiffs to suffer mental anguish. All these averments, except the latter, were sustained by proof.

"We desire that the Supreme Court, in deciding the question certified, shall consider the above averments as part of the plaintiffs' pleading; and we desire and request that court to decide:

"(1) Whether or not the averments in the original and amended petition state a cause of action for damages for mental anguish.

"(2) If they do, is the averment that the defendant had actual notice that mental anguish would result to plaintiffs from the failure to promptly transmit and deliver the message essential to show such cause of action; and would a failure to prove that averment be fatal to a recovery for mental suffering?"

As a general rule, the law denies a recovery of damages for mental anguish caused by breach of contract, and appellees' action cannot be sustained unless it comes within some established exception. We know of no case decided by this court which is a precedent for this action. On the contrary, it has been held that a recovery cannot be had for the failure of a friend or relative to attend the sender of such message, in case of death or serious illness, through the negligence of the telegraph company. *W. U. T. Co. v. Luck*, 91 Tex. 181, 41 S. W. 469, 66 Am. St. Rep. 869; *W. U. T. Co. v. Steinbergen* (Ky.) 54 S. W. 829.

In the case of *Telegraph Company v. Luck*, above cited, the facts were, briefly, that Luck was seriously sick, and his wife, Mena Luck, by telegraphic message, summoned her daughter, the stepdaughter of the sick man, to come to the family in San Antonio. The telegraph company negligently failed to de-

by the daughter was prevented from arriving before the death of her stepfather. The mother, who sent the telegram, suffered mental distress on account of her daughter's absence, and brought suit against the telegraph company to recover damages, but this court held that the facts did not constitute a cause of action against the telegraph company, because the mental anguish was not a natural consequence of the failure to deliver the message.

The appellees cite the cause of the *Western Union Telegraph Company v. Robinson* (from the Supreme Court of Tennessee) 37 S. W. 545, 34 L. R. A. 431. The facts of that case make it more analogous to the class of cases in which a physician is summoned by a telegraphic message to attend a sick person, and, upon failure caused by the negligence of the telegraph company, our court has allowed a recovery for mental anguish. We are not, however, inclined to approve the case of *Telegraph Company v. Robinson*, cited, even if it were in point.

We answer that the facts alleged in the plaintiffs' petition do not constitute a cause of action against the telegraph company.

CARLETON et al. v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW — APPEAL — AFFIRMANCE OF CONVICTION — ARREST OF DEFENDANT — FORFEITURE OF RECOGNIZANCE — PROPRIETY.

1. Code Cr. Proc. art. 910, provides that in cases of misdemeanor, where the judgment has been affirmed, no proceedings need be had after filing the mandate, except to forfeit defendant's recognizance, or issue a *capias* for him, or an execution against his property, to enforce the court's judgment in the same manner as if no appeal had been taken. *Held*, that the arrest of defendant on a *capias* pro fine satisfied the condition of his recognizance, and it could not be forfeited.

Error from McLennan County Court; G. B. Gerald, Judge.

Suit on a recognizance by the state of Texas, against John Carleton and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. B. Scarborough and T. A. Blair, for plaintiffs in error. Howard Martin, Asst. Atty. Gen., and J. T. Sluder, Asst. Co. Atty., for the State.

DAVIDSON, P. J. This writ of error is prosecuted from a judgment final on forfeited recognizance. The history of the case shows that appellant Carleton was convicted in the county court of McLennan county of a misdemeanor, and prosecuted his appeal to this court, where the judgment was affirmed. Hill and Grant, appellants, were sureties on his recognizance on appeal to this court. The judgment being affirmed by this court in May, 1899 (51 S. W. 213), mandate issued in June

month of July, capias pro fine issued from the county court of McLennan county, under which appellant Carleton was arrested, and placed in the county jail. After being detained in said jail for some time, he was released by the sheriff. This is a sufficient statement of the record to meet the main question presented for revision.

Article 910, Code Cr. Proc., provides: "In cases of misdemeanor, where the judgment has been affirmed, no proceedings need be had after filing the mandate, except to forfeit the recognizance of the defendant, or to issue a capias for the defendant, or an execution against his property to enforce the judgment of the court ordering the fine or imprisonment or both, in the same manner as if no appeal had been taken." It will be seen that, where a judgment on appeal has been affirmed, and the mandate has been received in the trial court notifying that court of such judgment, nothing further is to be done except to forfeit the recognizance of the appealing party, or issue a capias pro fine for him, or issue execution against his property to enforce the pecuniary fine, if any such should be included in the judgment. It will be observed that directly after receiving the mandate a capias was issued for the principal, Carleton, upon service of which he was incarcerated in jail. The issuance of the capias and his arrest and incarceration were proper, and it relieved the sureties from any further obligation to present him before the trial court to answer the judgment of affirmance or order of the appellate court. The state could not at the same time legally take from the custody of the sureties the body of defendant and forfeit the recognizance or appearance bond, to which they had signed their names, and on which they were otherwise responsible. So, when the state seized the body of Carleton, and placed him in jail after the reception of the mandate of affirmance in the county court of McLennan county, the sureties were relieved of further responsibility for his appearance before the trial court.

There are other questions suggested for revision, but, as this proposition disposes of the case, it is not necessary to discuss them.

The judgment is reversed, and the cause remanded.

THOMAS v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—EMBEZZLEMENT—PRINCIPALS AND ACCESSORIES—ACCOMPLICES—INSTRUCTIONS—INADVERTENT ERRORS.

1. In a prosecution for embezzlement the court's inadvertent statement, in one portion of the charge, that defendant was on trial for burglary, was not reversible error.

2. Where, in a prosecution for embezzlement, it was proved that the prosecutor delivered the money to F. as his agent, and that defendant

conducted, aided and encouraged prosecutor to so intrust his money to F., who embezzled the same, defendant, in thus aiding and encouraging the embezzlement, became the principal, and the court was therefore not bound to instruct as to accessories.

3. Where the court submitted to the jury whether a witness in a prosecution for embezzlement was an accomplice, it was error to omit to define an accomplice.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Dave Thomas was convicted of embezzlement, and he appeals. Reversed.

Richardson & Seay, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of embezzlement, and his punishment assessed at imprisonment in the penitentiary for a term of seven years; hence this appeal.

The only assignments relate to the charge of the court. It appears that the court told the jury that defendant was on trial for the offense of "burglary," whereas the indictment only charged, in the first two counts, theft, and embezzlement in the third count; there being no burglary in the case. This was evidently a mistake on the part of the trial judge, as nothing further is said in the charge in regard to burglary, but the charge relates entirely to embezzlement—the trial being on the third count of the indictment. While this mistake should not have occurred, still it does not appear to us that it was of a character calculated to injuriously affect appellant.

Nor do we believe the court was required to give a charge on the subject of accessories. True, some of the proof against appellant showed that appellant received or was paid money by the agent of the prosecutor the next morning after the money had been intrusted to such agent; yet this is but one of a number of circumstances tending to show appellant's guilt of the offense of embezzlement. It is not pretended that appellant was the agent of prosecutor, as he was not intrusted with the \$90, or any part thereof, by prosecutor, Williams; the proof showing that the money was delivered by Williams to Ben Feinstein. But the proof shows appellant was present at the time, and his acts and conduct show that he was aiding and encouraging prosecutor to intrust his money with said Feinstein as his agent. Although the law makes the act of embezzlement dependent on the question of agency, yet one who is not an agent can become a principal in the act of embezzlement by aiding and encouraging the agent to commit the embezzlement. As stated, we think appellant's acts and conduct show that he rendered such aid.

Appellant complains that Lonnie Henderson, who was a witness against him, was unquestionably an accomplice, and that the court should have instructed the jury to that effect; but, instead of doing so, the court submitted to the jury in its charge the question

was an accomplice, utterly failing to define to the jury what constituted an accomplice. In this we think the court erred. Said Henderson was an important witness against appellant, and, when the court submitted to the jury to determine whether or not said witness was an accomplice, he should have also instructed them what an accomplice was.

The judgment is accordingly reversed, and the cause remanded.

SHAW v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

ASSAULT — INSTRUCTIONS — PROVOKING ASSAULT—INSULTING LANGUAGE —SELF-DEFENSE.

1. In a prosecution for aggravated assault, being a misdemeanor case, a failure to charge that insulting language does not justify an assault is not available error, conceding that such is the law, in the absence of a special requested charge by defendant.

2. Where one by cursing and abuse provokes another so that the latter attacks him, and the former injures the attacking party, the defense of self-defense is not available.

Appeal from Montague County Court; W. W. Cook, Judge.

T. E. Shaw was convicted of an aggravated assault, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25.

The first ground of the motion for new trial contends that the verdict of the jury is contrary to the weight of the evidence. In our opinion, the evidence supports the verdict.

The second ground is "because the court failed to charge insulting and abusive language does not justify an assault." This being a misdemeanor case, in the absence of a special requested charge by appellant, even conceding this is a correct proposition of law applicable to the facts of this case, it will not be reversed because of the failure of the court to so charge.

The third ground of the motion is "because the court failed to give special charge No. 1 asked by defendant, wherein the jury was in substance instructed that, if prosecuting witness and defendant had a previous difficulty, and such witness had retreated out of danger, and afterwards returned and made an unlawful attack on defendant with a knife or otherwise, then defendant would be authorized to defend himself against such attack; and if, under such circumstances, he cut said witness with a knife, he would be justified, if it was done in his proper self-defense; and this, too, although the jury might believe that, after such first difficulty had ceased, defendant cursed said witness, or used opprobrious

¶ 2. See Assault and Battery, vol. 4, Cent. Dig. § 96.

not a correct proposition of law, and the court did not err in refusing to give the same to the jury. If appellant provoked the difficulty by cursing and abusing the injured party, he could not justify on the ground of self-defense.

There is no error in this record, and the judgment is affirmed.

CRAYTON v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—FORGERY—CONVICT BOND—INDICTMENT—DESCRIPTION OF INSTRUMENT—VARIANCE.

1. Where the purport clause of an indictment for forgery described the false instrument as the act of B. H., whereas the instrument as set out showed that it was the act of defendant and others, the indictment was void.

2. An exception that an indictment for forgery charged no offense against the laws of the state was sufficient to present an objection to the indictment for variance between the purport and the tenor clause thereof.

3. Since the statute authorizes the giving of a convict bond for the whole or a part of the judgment, a bond to the county judge, reciting that the principal had been hired as a convict at a certain rate, etc., until a certain fine had been paid, and binding the principal and sureties for the payment of such sum, and that the convict should be humanely treated during his employment, and furnished sufficient food and clothing, etc., created both a common-law and statutory obligation, and could, therefore, be the subject of forgery.

4. Where an indictment for forging a convict bond charged the forgery to be an undertaking to pay the remainder of a judgment, and the instrument forged was an undertaking to pay the judgment, such variance was not fatal.

5. An indictment for forging a convict bond, which failed to allege that the bond was approved by the county judge, was insufficient.

Appeal from District Court, Williamson County; R. L. Penn, Judge.

Lon Crayton was convicted of forgery, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of five years.

The charging part of the indictment is as follows:

"Lon Crayton, alias Ike Crayton, * * * on or about the 28th day of March, 1902, * * * then and there, without lawful authority, and with intent to injure and defraud, did willfully and fraudulently make a false and forged instrument in writing purporting to be the act of Brack Hall, which said false and forged instrument in writing is substantially to the tenor as follows:

"The State of Texas, County of Williamson.

"Know all men by these presents: That we, Isaac Crayton, as principal, and the other

¶ 1. See Forgery, vol. 22, Cent. Dig. § 72.

subscribers hereto as sureties, are held and firmly bound unto Chas. A. Wilcox, county judge of Williamson county, and his successors in office, in the penal sum of twenty three and no/100 dollars, well and truly to be paid, to which we bind ourselves, our heirs and assigns, jointly and severally.

"The condition of this obligation is such that, whereas, the above bounden principal has this day hired from the said Chas. A. Wilcox, county judge, one Lon Crayton, a convict of said county, at the rate of fifteen dollars per month, until he shall have discharged the sum of twenty three dollars, the same being the amount of fine and costs adjudged against him in the county court of said county, at its Dec. Term, 1902, the same being due and payable as follows:

15.00 on April 28th, 1902.

8.00 " May 15th, 1902.

"Now, should the said principal well, faithfully and promptly pay to the said Chas. A. Wilcox, county judge, as aforesaid, or his successors in office, all such sums of money as may become due under and according to the tenor of this bond, and treat said convict humanely while in his employment, furnishing him with a sufficient quantity of good and wholesome food and comfortable clothing, and medicines when sick, and not require the convict to work at unreasonable hours, or for a longer time during any one day than other laborers doing the same kind of labor are accustomed to work, then this obligation shall be null and void, otherwise to remain in full force and effect.

"Witness our hands, this 28th day of March, 1902.

"Isaac Crayton. April 5.

"Brack Hall. April 5.

"Peary Robson. April 5.

"Bird Roley. April 5.

"Approved: _____,

"County Judge, _____ Co., Texas."

"That the said Lon Crayton, alias Ike Crayton, did then and there owe to the county of Williamson, in the state aforesaid, a balance of twenty-three dollars, upon a judgment for fine and costs, rendered in cause No. 4563 on the criminal docket of the county court of Williamson county, Texas, which said judgment was rendered at the December term, A. D. 1902, of said county court—against the peace and dignity of the state."

It will be seen from an inspection of the indictment that in the purport clause the false instrument is alleged "to be the act of Brack Hall," whereas the instrument as set out shows the same to be the act of "Isaac Crayton, Brack Hall, Peary Robson, Bird Roley." Under a long line of authorities, this is fatal. Where the purport clause alleged that the forged instrument purported to be the act of the accused, another party, and one M. W. Leonard, and the tenor clause described the instrument as one executed by

accused, another party, and one W. W. Leonard, it was held a fatal variance, for which the prosecution should be dismissed. *Williams v. State*, 35 Tex. Cr. R. 183, 32 S. W. 893. Where the purport clause of an indictment for forgery alleged the instrument to be the act of G., and the tenor clause showed it to be the act of S. & G., held, the variance in the indictment was fatal. *Stephens v. State*, 36 Tex. Cr. R. 386, 37 S. W. 425. And see, also, *Gibbons v. State*, 36 Tex. Cr. R. 469, 37 S. W. 861; *Fite v. State* (Tex. Cr. App.) 34 S. W. 922. However, this exact question is not raised in the motion, except by the general statement "that the indictment charges no offense against the laws of the state." But in considering the validity of an indictment this exception covers every objection that could be legally urged.

The second ground of his motion to quash is that the instrument declared upon in the indictment as the alleged forged instrument, if true and genuine, would be void, there being no consideration for the same; and there being no allegations in the indictment making it clear that, if genuine, it would create, increase, diminish, discharge, or defeat any pecuniary obligation as required by law. We do not think this objection is tenable. The law authorizes the giving of a convict bond, either for the whole or part of a judgment theretofore rendered against the party giving the bond. The terms of the bond under consideration create a common-law as well as a statutory obligation, and, in contemplation of the forgery statute, could be made the subject of forgery.

Appellant's third insistence is that there is a fatal variance between the allegations in said indictment and the allegations in the alleged forged instrument set out in this: That the indictment states the alleged forgery is an undertaking, if true, to pay the remainder of a judgment, while the alleged forged instrument, if true, is an undertaking to pay a judgment; and that there is no allegation explaining said variance. However, we do not think it would invalidate the indictment.

It is also insisted the indictment is defective because the alleged instrument is not set out in *hæc verba*. We are not certain as to the ground of this objection. The only language making it apparent that it is not set out in *hæc verba* is the failure of the allegations in the indictment to state that the bond was approved by the county judge. This would vitiate the indictment, and would constitute a variance. We would suggest that in each instance the forged instrument should be literally copied in the indictment, inasmuch as it often becomes a nice question as to whether certain omitted parts thereof are a part and parcel of the instrument itself.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

CRIMINAL LAW—INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—CONTINUANCE—CUMULATIVE EVIDENCE—APPLICATION—REQUISITES—LOCAL OPTION DISTRICTS—ESTABLISHMENT—PROOF—INJUNCTION—DEFENSES—JURY COMMISSIONERS—JURORS—QUALIFICATIONS.

1. Where an application for a continuance alleged that defendant could prove certain facts by four absent witnesses, and two of the witnesses appeared and testified, the denial of the application was not error, since it thereby appeared that the testimony of the other witnesses was cumulative.

2. Where, in an application for a continuance in a prosecution for the violation of a local option law, defendant alleged that absent witnesses would testify that he was sick in bed on the days on which the illegal sales of liquor were alleged to have been made, but the application failed to state that such witnesses were in defendant's place of business continuously during such time, so as to qualify them to testify of their own knowledge, the application was insufficient.

3. Where an information for violating a local option law charged that the sale was made in Justice Precinct No. 4 of M. county, and that local option was in effect in all the precincts of that county, and described Precinct No. 4 by metes and bounds, it was not error, in the court's discretion, to permit the state to introduce in evidence the orders of commissioners' court of such county, containing the field notes of the justice's precincts therein, though such allegation in the information was unnecessary.

4. Where, in a prosecution for violating a local option law, defendant introduced an injunction restraining further publication of the order declaring the result of the local option election in the precinct in which the alleged unlawful sale was made, a motion and judgment dissolving such injunction were admissible in rebuttal.

5. In proceedings for the establishment of local option in a county, an injunction was granted, restraining the further publication of the order declaring the result of the election, and putting local option in effect. During the pendency of the injunction the final publication of the notice was made, and thereafter the injunction was dissolved, as improvidently granted without jurisdiction; the court taking no notice of the violation thereof. *Held*, that such violation was not available in a subsequent collateral proceeding as a defense to an alleged violation of the local option law.

6. In a prosecution for the violation of a local option law, the fact that the jury commissioners, as well as the jurors selected to try defendant, were all prohibitionists, was no ground for a reversal of the conviction.

Appeal from Montague County Court; W. W. Cook, Judge.

F. R. Lively was convicted of violating the local option law, and he appeals. **Affirmed.**

Jas. A. Graham, for appellant. Mann Trice, and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 30 days' confinement in the county jail.

Appellant made a motion for continuance,

*Rehearing denied May 6, 1903.

ance was predicated on the absence of the witnesses C. B. Downs, B. Kelly, F. M. Taylor, and Joe Cowan. Two of said witnesses, to wit, Downs and Kelly, were present and testified. So the question of continuance, as to them, is eliminated. If it be conceded that diligence was used for the other two witnesses, which is exceedingly doubtful, then the testimony of said witnesses was of a cumulative character, because appellant alleges he can prove the same facts, in effect, by all of said witnesses. As stated, two of the witnesses were present and testified. In addition to this, it does not appear that the statement with regard to said witnesses as to the facts they would testify is sufficient. Appellant stated he expected to prove by Taylor that he (appellant) was sick in bed during September 4th, 5th, and 6th, and that he was not at his place of business, and did not sell intoxicating liquor to B. H. Jackson. The application does not state where said witness was, so as to put him in a situation to be able to testify as to the whereabouts of appellant during said time. This seems to be a conclusion of the witness, and, for aught that appears, the testimony of the witness might have been hearsay. However, the application as to Joe Cowan is more certain on this point, as it shows he was in or about the place of business of defendant during said time. If he was in the place of business during all of said time, he might be able to state that appellant was not there; but, if he was about said place, it is not so certain he could so testify, as the word "about," in this connection, is indefinite. We do not think the court erred in overruling the application.

During the trial the state offered in evidence the orders of the commissioners' court of Montague county, which it was claimed contained the field notes of Justices' Precincts Nos. 1, 2, 3, 4, 5, 6, 7, and 8. Appellant objected to said orders on the ground that there were no pleadings to warrant such testimony, and because the same were irrelevant and unnecessarily incumbered the record. The information charged that the sale of the liquor was made in Justice Precinct No. 4 of Montague county, and further alleged that at said time local option was in effect in all of the justice precincts of said county, and then proceeds to describe by metes and bounds Justice Precinct No. 4, the locus in quo of the sale of said liquor. It was not necessary to have made this allegation, nor to have described Justice Precinct No. 4 by metes and bounds; but, having done so, it was perhaps proper to offer proof of this. While it may not have been necessary, having alleged local option had been adopted in all of said precincts, it was proper to show the orders in response to the allegation in the information. In the discretion of the court, it was not necessary to consume the time of the court in reading said field notes to the jury. It is not claimed that there was

notes offered and the allegations in the information.

Appellee offered in evidence the motion and judgment of July 25, 1902, dissolving an injunction which had been granted to restrain the fourth publication of the order putting local option in effect in said precincts in Montague county. This was objected to on the ground that it was wholly irrelevant and immaterial, and that it unnecessarily incumbered the record, and, further, that it was calculated to mislead and misdirect the minds of the jury, and because there was no pleading to authorize the introduction of the same. It appears from the record that, after said local option election had been held, three consecutive publications of the order declaring the result and putting local option into effect had been made. At this stage an injunction had been brought, restraining the further publication of said order. This was granted on the 9th or 10th of July. Notwithstanding this, publication was made of the order in the issue of the newspaper on the 12th, which made the fourth publication. The judgment of dissolution was rendered on the 25th of July following. Appellant had introduced said writ of injunction in evidence, and the judgment was evidently introduced in response to the same. We are of opinion that the introduction of said judgment was admissible to show the disposition of the case. If the injunction had been perpetuated, and the contest sustained, then the invalidity of the election, as well as the writ of injunction, would have been established, and this would have related to all the prior proceedings. In that event, the fourth publication might have been rendered entirely nugatory. The judgment itself recites the fact that the injunction restraining the fourth publication was improvidently issued, that there were no constitutional or statutory grounds for the issuance of the same, and that the court was without jurisdiction in the premises, and dissolved and held for naught the proceedings thereto. The effect of this, in our opinion, was to declare that there was no basis for the issuance of the original writ, and that it was void, and no one was obliged to respect it. Ency. of Plead. & Prac. vol. 10, p. 1106, subd. "b."

Appellant contends that because the fourth publication was made after the issuance of the writ of injunction, and while it was still undissolved, said fourth publication was null and void, and did not put local option into effect in said justice precinct. If this contention is correct, then the conviction in this case cannot be sustained, because no other publication was made, as appears from this record. It does not distinctly appear in the statement of facts how said fourth publication came to be made—whether by some employé or some person connected with the office of the newspaper, who had not been served with the writ of injunction, is not made manifest. However, it was published in due course, and

the order declaring the result, and putting local option into effect. The violation of writs of injunction is punished by courts in two ways—by contempt proceedings, or by annulling or destroying what has been done. One or both of these methods may be adopted. It is competent for the court, in some cases where the writ has been violated, to reinstate a party in his rights; that is, to restore the former status as far as practicable. See *Beach on Injunc.* vol. 1, § 281; *High on Injunc.* vol. 2, § 1461; *Ency. of Plead. & Prac.* vol. 10, p. 1114, subd. "h." But as was said above, the court dissolved the writ, and not only failed to treat the party as in contempt for an alleged violation thereof, but failed to make any finding with reference to the alleged unauthorized publication; holding it nugatory and void. On the contrary, the judgment of the court was that it was without jurisdiction to grant the writ. Under this state of case, it occurs to us that the doctrine announced by the Supreme Court of Alabama is applicable here. See *Callan v. McDaniel*, 72 Ala. 96. That is, where a court granting a writ of injunction has failed to take any steps in regard to a violation thereof, such violation, or the alleged effect thereof, cannot be set up in a collateral proceeding. We quote from the decision, as follows: "If the plaintiffs submitted to the violation, suffering the suit in equity to continue in progress and ripen into a final decree, other courts cannot inquire into it collaterally, and visit it with a forfeiture of rights the court of equity may not have been willing to impose. In that court there are many equitable considerations involved in an application to punish a party for a violation of an injunction while the cause is in fieri. The motives of the party obtaining the injunction, the good or bad faith, and the conduct of the party charged with its violation, are all considered. If other courts should intervene, and determine collaterally that there has been the violation of an injunction, the consequences which are to result could not be adjusted as a court of equity would adjust them; and, if the parties aggrieved do not apply to that court, they cannot ask other courts to assume its jurisdiction. If the suit in equity has passed into a final decree, and the injunction been perpetuated, the court adjudging the defendant was without right to clear the lands in controversy, the decree would be admissible evidence and conclusive." We are presented here with a similar condition. The district court dissolved the injunction, and held it was without jurisdiction and that the issuance of the writ was void; and, that court having jurisdiction to pass upon the question, we cannot give the writ in this collateral proceeding an effect which that court refused to give it. We accordingly hold that the fourth publication was properly made, and that local option was in effect in said precinct at the time of the alleged sale of the intoxicating liquor.

jury, in that the judge selected three jury commissioners who were all prohibitionists, and all or a great majority of the jurors selected were prohibitionists. This charge is supported by affidavits. The affidavits affirm the contention that the commissioners were prohibitionists, and that all 12 of the jurors selected for the week appellant's case was tried were prohibitionists. It is further shown that there are some five or six thousand voters in said county, and that in the prohibition election it was carried for local option by between two and three hundred votes. The controverting affidavits show that there was no design in this, and that all of said jurors stated they had no bias or prejudice in favor of or against appellant, and could give him a fair and impartial trial. While the jury commissioners, as well as the jurors selected, appear to have been prohibitionists, still this would afford no ground for reversal of the judgment.

Appellant raises a question as to the misconduct of the juror John Garvin. The court heard evidence upon this question, and decided against appellant's contention. In our opinion, the evidence supports the finding of the court on this point.

We have examined the record carefully, and believe the facts are sufficient to authorize the conviction. No error appearing, the judgment is affirmed.

Ex parte RODRIQUEZ.

(Court of Criminal Appeals of Texas. April 22, 1903.)

HABEAS CORPUS—COUNTY PRISONER—NON-PAYMENT OF FINE—AFFIDAVIT OF INABILITY TO PAY.

1. Code Cr. Proc. art. 856, provides that if one who has been convicted of a misdemeanor and fined makes oath that he is unable to pay the fine and costs he may be hired out or imprisoned in the county jail for a sufficient time to discharge the same, rating the punishment at \$3 a day. Article 980 provides that one who has been convicted in a justice court and fined can be discharged on habeas corpus by showing that he is too poor to pay the fine and costs, that he has not been afforded the opportunity of discharging the same as provided by law, and that he has remained in jail a sufficient time to satisfy the same at the rate of \$3 for each day; but in no case shall he be discharged until he has been imprisoned at least 10 days. *Held*, that one who had been fined, and imprisoned for failure to pay the same, was not entitled to release on habeas corpus, though he had been in jail 10 days, no affidavit having been filed by him showing his inability to pay the fine and costs, as required by article 856.

Appeal from Sutton County Court; R. C. Dawson, Judge.

Habeas corpus by Gregorio Rodriguez for release from custody. From a judgment denying the writ, relator appeals. Affirmed.

Taylor & Cornell, for appellant. Howard Martin, Asst. Atty. Gen., for the state.

county judge of Sutton county, in vacation, to be released from a fine imposed in the justice court. He states in his application: "I do further swear that I was committed to jail by virtue of the process annexed hereto on the date therein named, to wit, on January 31, 1903; that I am, and have been ever since the same was imposed on me, too poor to pay said fine and costs; that I have not been afforded an opportunity by the commissioners' court of the county of discharging the fine and costs adjudged against me, as provided in the law relating to county convicts; that I have remained in jail a sufficient length of time to satisfy said fine and costs at the rate of three dollars for each day; that I have been confined for more than ten days." The evidence adduced on the hearing is substantially as follows: Appellant had been in jail 14 days; that he had not been put to work at the county workhouse upon the county convict farm, nor upon the public roads, bridges, or other improvements of the county, but that he had, on three different occasions since his imprisonment swept out the county courthouse; that he had not been hired out under the law relating to county convicts. It was shown by the testimony of Albert Owens that he was constable of precinct No. 1, Sutton county; that he arrested appellant; that when he put appellant in jail, and told him he could give a convict bond, or could make an affidavit showing his inability to pay the fine and costs adjudged against him, in which case he would be entitled to a credit of \$3 for each day he remained in jail, he was not certain appellant understood him, although he had a Mexican interpreter. It was agreed in open court by counsel for state and defendant that appellant was then, and ever since his imprisonment had been, too poor to pay the fine and costs adjudged against him, and that appellant had not, as suggested in article 856. Code Cr. Proc., made an affidavit showing his inability to pay the fine and costs adjudged against him.

Appellant insists that he was entitled to his discharge because the evidence shows that he had been placed in jail on account of the failure to pay the fine and costs against him in the justice court, and, having shown further, first that he was too poor to pay said fine and costs; second, that he had not been afforded an opportunity by the commissioners' court of the county of discharging the fine and costs adjudged against him, as provided in the law relating to county convicts; and, third, that he had remained in jail a sufficient length of time to satisfy said fine and costs at the rate of \$3 for each day, and that he had remained in jail at least 10 days—this contention involves a construction of articles 856 and 980, Code Cr. Proc. The latter article was passed in 1858 and the former some time after that. If there is an apparent conflict, said statutes must be recon-

ciled, if a proper judicial construction of the same will enable us to do so. We hold article 980, Code Cr. Proc., in any event, does not authorize the release of relator unless he has been imprisoned for ten days; and he must also have complied with the provisions of article 856, in relation to filing his affidavit authorizing a credit upon his fine of \$3 per day. The mere fact that relator had been confined over 10 days, in the absence of such affidavit, would not per se authorize his release. Clearly, article 980 contemplates that the same must be considered in pari materia with article 856, and, when so done, the conclusion here stated is irresistible; that is, that relator, if convicted in the justice court, and immediately makes an affidavit of his inability to pay the fine and costs, as required by article 856, and is not afforded an opportunity by the commissioners' court of the county to discharge said fine and costs, as provided by law relating to county convicts, then he is entitled to be discharged, either on habeas corpus or by proper showing before justice of the peace, unless it is further made to appear that he has not been in jail 10 days. In other words, when one is convicted in the justice court, he cannot, in any event, be discharged until he has remained 10 days in jail, and not then unless he has filed the proper affidavit as required by article 856. It follows, therefore, that the judgment of the lower court remanding relator to the custody of the officer must be affirmed, and it is so ordered.

Affirmed.

LAZENBY v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—WELL-POISONING—EVIDENCE—SUFFICIENCY—NEW TRIAL—INCOMPETENCY OF JUROR.

1. On motion for a new trial, an affidavit in behalf of defendant was presented, to the effect that a juror had stated that he expected to have been asked some questions before he went into the jury box; that, if he had been, he would have told them that he had heard too much about the case, but, as they asked no questions, he decided to go into the jury box and serve as a juror, and say nothing about the case until he heard what the balance of the jury had to say. The district attorney presented an affidavit of another juror swearing that there was no discussion of the case among the jurors, except as to the evidence introduced; that the juror in question was one who contended for the lowest punishment, and one of the last to agree to find defendant guilty. It did not appear that such juror was examined on his voir dire concerning the matters alleged to have been stated by him, or that he answered falsely concerning any of such matters. *Held* not error to overrule the motion.

2. On a prosecution for poisoning a well, evidence that paris green was placed in the well, and that paris green is a deadly poison, was sufficient to support a conviction, though a doctor introduced by defendant testified that, from a bare inspection of paris green, one could

not tell whether it was paris green, or some other green compound.

Appeal from District Court, Tyler County; W. P. Nicks, Judge.

Henry Lazenby was convicted of willfully poisoning a well, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the offense denounced in article 647, Pen. Code, of willfully poisoning a well, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appended to appellant's motion for new trial is the affidavit of John T. Crumpler to the effect that he heard Barlow, one of the jurors who tried the case, make this statement: "I expected to have been asked some questions before I went into the jury box. That if I had been, I would have told them that I had heard too much about the case, but, as they asked no questions, I decided to go into the jury box and serve as a juror, and say nothing about the case until I heard what the balance of the jury had to say." The district attorney controverts this ground of the motion, and says that the juror Barlow's affidavit cannot be obtained, on account of the great distance which Barlow lives from the courthouse. And then follows an affidavit from Henry Keith, one of the jurors, swearing, in substance, there was no discussion of said cause among the jurors who tried the same, except as to the evidence adduced before the jury on the trial; that the juror Barlow was one who contended for the lowest punishment—two years—while other jurors contended for the highest penalty; and, further, that Barlow was one of the last of the jurors to agree to find defendant guilty. It does not appear that said juror was examined on his voir dire concerning the matters alleged to have been stated by him, or that he answered falsely concerning any of said matters. *Miller v. State*, 32 Tex. Cr. R. 319, 20 S. W. 1103. Furthermore, this issue was submitted to the court, and decided against appellant. We see no error in the ruling of the court. *Johnson v. State* (Tex. Cr. App.) 40 S. W. 982.

Appellant also contends that the verdict of the jury is not supported by the evidence. We think the evidence is sufficient. The state witnesses swear positively that paris green was placed in the well of prosecutor by defendant, and the testimony shows that paris green is a deadly poison. It is true, the defendant introduced a doctor who testified that, from a bare inspection of paris green, one could not tell whether it was paris green, or some other green compound. However, this is a question to be passed upon by the jury, and they have settled it against appellant, and there is sufficient evidence to support their finding.

The judgment is affirmed.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—EMBEZZLEMENT—DECLARATIONS OF THIRD PERSONS—FAILURE TO CHARGE—NECESSITY OF REQUESTS.

1. Where, in a prosecution for embezzlement of money claimed to have been left in the hands of defendant, a saloon keeper, the evidence as to the person from whom the money was received by defendant was conflicting, defendant's contention being that he received it from T., and that he was not aware at the time of its receipt that it belonged to prosecutor, and there was no evidence that defendant was connected with a conspiracy between others, with whom prosecutor came to the saloon, to deprive him of such money, the acts, conduct, and statements of such others in defendant's absence while on their way to the saloon were inadmissible.

2. Statements made by third persons, occurring one or two days after an alleged embezzlement, in defendant's absence, are inadmissible.

3. In a prosecution for embezzlement error cannot be predicated on the court's failure to charge on defendant's theory, in the absence of a request therefor.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Ben Feinstein was convicted of embezzlement, and he appeals. Reversed.

Robt. B. Seay, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of embezzlement, and his punishment assessed at confinement in the county jail for 12 months and a fine of \$500. He reserved a bill of exceptions to the admission of the acts, conduct, and statements of Dave Thomas, Henry Williams, and Lonnie Henderson, occurring before the alleged embezzlement, in the absence of appellant. On the night of the alleged embezzlement, Williams, the injured party, and Lonnie Henderson, accompanied by Dave Thomas, started from the "Big Four Settlement," in the south part of Dallas, to the "Crooked Shack," four or five blocks distant. En route Dave Thomas put his hand in Williams' pocket on the pretense of trying to prevent Williams from falling, Williams being intoxicated. Williams told him to take his hand out of his pocket, and leave him alone. Lonnie Henderson also warned him to keep his hands out of Williams' pocket. Appellant was not with the parties at the time, and, so far as the record is concerned, knew nothing about any of these matters. Upon reaching the "Crooked Shack," appellant was behind the bar, in the capacity of bartender, and waited on the customers when they called for the drinks. The drink obtained by Williams at this place affected him very strangely; in fact, he fell upon the floor shortly afterwards, and was carried by the crowd into a rear room, where

time he took the drink—just before or just after—Williams' money was turned over to appellant for safe-keeping. The state's testimony shows that Williams handed him the money. There is some testimony going to show that Henderson took the money from Williams, and handed it to appellant. Appellant's evidence goes to show that he received the money from Dave Thomas, who received it from Williams before entering appellant's saloon. It seems to be conceded that all those present knew the fact that Williams' money had passed into the hands of appellant. The conflict seems to have arisen on the fact as to which one of the parties handed the money to him. Appellant's contention is that he received it from Thomas, and that he was not aware, at the time he received it, that it belonged to Williams; and leaves the further impression that Thomas received the money from Williams before entering appellant's saloon. Under the state of case made, we are of opinion that the acts occurring between the parties before reaching appellant's saloon were not admissible against him. He was not present, knew nothing of the transaction; and it is no way connected, as we understand the record, as to make it appear appellant was in the conspiracy with the parties, so as to admit the acts and declarations of co-conspirator in his absence.

Objection was also urged to the admission of the conduct, acts, and statements of one of the policeman and Joe Aronoff, occurring one or two days subsequent to the alleged embezzlement, in the absence of appellant. This was inadmissible.

There were some special charges asked and refused, which, under the facts, appellant contends should have been given. We are of opinion that these charges, as written, were properly refused. If appellant received the money from Williams, or from Henderson, or from Thomas, knowing it to be Williams' money, and subsequently appropriated it to his own use, either alone or in conjunction with Thomas and others, he would be guilty of embezzlement. This was the state's case. If appellant received the money from Thomas, who had stolen it, or gotten it in any way from Williams, before reaching the saloon, and was not cognizant of the fact that it was Williams' money, but received it as Thomas' money, not knowing it to belong to Williams, he would not be guilty of embezzlement. The court sufficiently charged the state's side of the case, and the other was not requested by appellant, error not being assigned for the failure of the court to so charge.

For the errors discussed in the admission of testimony, the judgment is reversed, and the cause remanded.

(Court of Criminal Appeals of Texas. April 15, 1903.)

CRIMINAL LAW—APPEAL—DEFECTIVE RECOGNIZANCE.

1. A recognizance on appeal from a conviction of peddling stoves without a license, which recited the offense with which defendant was charged as "pursuing occupation without license," was fatally defective, under Code Cr. Proc. 1895, art. 887, prescribing the form of appeal recognizances, which includes a statement that "defendant has been convicted of a misdemeanor."

2. Under Code Cr. Proc. 1895, art. 887, prescribing the form of appeal recognizances in cases of misdemeanor, which includes a statement of the punishment assessed, a recognizance which did not state the fine imposed was fatally defective.

Appeal from Gonzales County Court; W. W. Glass, Judge.

J. W. Hannon was convicted of peddling stoves without a license, and appeals. On motion to dismiss. Appeal dismissed.

Harwood & Walsh, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of a misdemeanor, and appeals. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that the recognizance fails to allege that appellant was convicted of a misdemeanor, and also fails to state the amount of the fine assessed against appellant. We have examined the recognizance, and it is defective in both the respects pointed out. Instead of following the form prescribed in article 887, Code Cr. Proc. 1895, stating appellant was convicted of a misdemeanor, it attempts to recite the particular offense for which appellant was prosecuted, and in doing so the recognizance alleges that appellant was charged with the offense of "pursuing occupation without license." This is not the offense named in the information and prescribed by statute. The information charges appellant did unlawfully engage in, follow, and pursue the occupation of a peddler, peddling cooking stoves and ranges, an occupation then and there made taxable by law, etc., without having first obtained a license to pursue said occupation, etc. The occupation tax is assessed in General Laws, Twenty-Sixth Leg. p. 201, c. 116; and the prosecution was under article 112, Pen. Code 1895. If the recognizance had sufficiently charged the offense under the statute, instead of using the simpler form prescribed by statute—that appellant had been convicted of a misdemeanor—it would have been sufficient. *Kees v. State* (Cr. App.) 72 S. W. 855. The recognizance is also fatally defective because it does not state the amount of the fine imposed. *May v. State*, 40 Tex. Cr. R. 196, 49 S. W. 402.

The appeal is accordingly dismissed.

*Rehearing denied May 6, 1903.

(Court of Criminal Appeals of Texas. April 22, 1903.)

THEFT—POSSESSION OF PROPERTY—EVIDENCE—INSTRUCTIONS.

1. Evidence that certain wagon wheels belonging to prosecutor were missed in November, 1901, and that defendant was found openly using the same in November, 1902, but claimed to have exchanged scrap iron therefor with a peddler, was insufficient to sustain a conviction for the theft of the wheels.

2. It was error for the court to refuse defendant's requested instructions to acquit if the jury believed that defendant's possession of the stolen wheels was not recent.

Appeal from McLennan County Court; G. B. Gerald, Judge.

General Porter was convicted of theft, and he appeals. Reversed.

Richd. J. Munroe and S. A. Hogan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of two wagon wheels, and his punishment assessed at confinement in the county jail for 10 days; hence this appeal.

The only question necessary to be considered is the sufficiency of the evidence to sustain the conviction. The testimony shows that prosecutor, Coates, owned an old pair of wagon wheels, and some time in November, 1901, the wheels were missed from the premises of Coates. Some time in the following November, 1902, defendant, who lived some two or three miles from the prosecutor, was found in possession of the wheels. He was using them openly on a cart. When notified that the wheels belonged to prosecutor, he stated that he traded scrap iron for them with a peddler who was in the neighborhood buying scrap iron. This is substantially all the testimony of an inculpatory character; that is, the case depends solely on the possession of the stolen property, without other circumstances tending to show appellant stole the property. We hold the possession here shown was not of such a recent character that, in the absence of other circumstances of a criminative nature, it would afford plenary proof of guilt. Besides, appellant gave an account of how he came by the property which was reasonable, and this was not disproved by the state. We hold the evidence was not sufficient. *Bragg v. State*, 17 Tex. App. 219; *Lehman v. State*, 18 Tex. App. 174, 51 Am. Dec. 298; *Loving v. State*, 18 Tex. App. 459; *Romero v. State*, 25 Tex. App. 394, 8 S. W. 641. Besides, the court should have given appellant's requested instructions on the question of recent possession; that is, to acquit if they believed the possession was not recent, etc. See *Boyd*

¶ 1. See *Larceny*, vol. 32, Cent. Dig. §§ 170, 172, 175.

v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908.

The evidence being insufficient to support the conviction, the judgment is reversed, and the cause remanded.

LOCKLAND v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

ASSAULT—AGGRAVATED ASSAULT—POSSESSION OF PROPERTY—DEADLY WEAPON—PRESUMPTIONS—EVIDENCE—SUFFICIENCY OF VERDICT.

1. Defendant allowed an agent to take peaceable possession of a sewing machine and load it on his wagon, and then assaulted such agent, evidence as to the terms of the contract in reference to the possession of such machine was immaterial.

2. Under White's Ann. Pen. Code 1895, art. 680, one who has parted with the possession of personal property may not regain it by such means as result in homicide or assault.

3. Defendant allowed a machine agent to take peaceable possession of a sewing machine and load it on his wagon, and then assaulted him. Defendant and his wife testified that the only condition in the contract of sale was that the wife might return the machine if not satisfied with it. The agent had come at defendant's request several times, worked on the machine, and showed the wife how to operate it. *Held*, that evidence offered by the state that the machine was in good condition and not defective was relevant.

4. In a prosecution for aggravated assault it was admissible for the state to prove by two of the jurors what defendant and his wife had testified to, on the trial of a civil suit, as to the circumstances attending the assault, and that neither of them testified that the prosecutor called defendant a liar, or started at defendant with a drawn knife, before the latter drew a pistol on prosecutor.

5. Where what occurred between defendant and prosecutor some half hour after the alleged assault and at another place was proved by defendant and not controverted by the state, further testimony thereon was properly excluded.

6. In a prosecution for an aggravated assault, where a pistol was not used or attempted to be used by defendant as a bludgeon, it will be presumed, in the absence of evidence to the contrary, that such pistol was loaded, and so was a deadly weapon.

7. Where defendant was charged with an aggravated assault, and only this feature of the case was submitted to the jury, a verdict finding defendant guilty as charged in the indictment was sufficient.

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

S. L. Lockland was convicted of an aggravated assault, and appeals. Affirmed.

Nunn & Neal, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25; hence this appeal.

Appellant made a motion for continuance, based on the absence of David Beaver and his wife. If diligence be conceded as to these witnesses, it does not occur to us that their testimony was material. The evidence

proposed to be proved by said witnesses was to the effect that they were present at the house of appellant about a month before the alleged difficulty, and heard the conversation between appellant and Lamb, in which said Lamb told defendant if at any time his wife became dissatisfied with the sewing machine he had sold defendant he (Lamb) would take back the machine and pay defendant \$15 which he had originally paid on it. We do not consider said testimony material under the peculiar facts of this case, because, as we understand the testimony, prosecutor Lamb was permitted by defendant and his wife to take possession of the same, remove it from the house to the gate, some 30 or 40 yards distant, and load it on his machine wagon; that is, he was in complete possession of the machine, and appellant had no right to then retake possession from him by force or violence. If it was a condition precedent to the taking said machine by Lamb, as testified by appellant and his wife, that he should repay said \$15 to appellant, and appellant had insisted on the payment thereof before prosecutor took possession of the machine and removed it from the house and placed it on his wagon, then prosecutor would have had no right to have used force to get possession of the machine, and appellant could have retained possession thereof until said condition was complied with. This is in accord with the doctrine announced in *Culver v. State* (Tex. Cr. App.) 62 S. W. 922. And see *Singer Sewing Machine Co. v. Rios*, 71 S. W. 275, 6 Tex. Ct. Rep. 293. The law accords one in possession of property the right to protect such possession; but the possession must be actual, and not merely constructive; and when one has parted with the possession of personal property he may not regain it by such means as result in homicide or assault. White's Ann. Pen. Code 1895, art. 680, and authorities there cited. So that, under the facts, it becomes immaterial what the stipulations between the parties were as to the right of prosecutor to take possession of said sewing machine. Although it may have been understood that the \$15 should be paid by prosecutor before he took possession of the machine, appellant should have asserted his right while the machine was in his possession and in his house. This he did not do. And, notwithstanding he may have expected the prosecutor to pay him the \$15 before he drove off with the machine, and was disappointed when he did not do so, yet, having lost possession, he was not authorized to draw his pistol and make an assault on prosecutor in order to regain possession. As stated, it was immaterial what the terms of the contract were in reference to possession, or what the two absent witnesses may have understood in regard to it.

Appellant objected to testimony with reference to the condition of said machine; that is, the state was permitted to show by witness Lamb and another that the machine

to any defect. This was objected to on the ground that this had nothing to do with the contract by which appellant agreed to return the machine, appellant and his wife's testimony showing that the only condition was that if his wife was not satisfied with it she could return it. The court explained the bill by showing that prosecutor had been sent for several times, and had come, at the instance of appellant, and worked on the machine, and showed his wife how to operate it, and that there was really no ground for dissatisfaction. It occurs to us that this testimony was relevant.

We think it was admissible for the state to prove by two of the jurors what appellant and his wife had testified, in the trial of the civil suit, as to the circumstances attending the assault; particularly to show that neither of said witnesses testified that Lamb, prosecutor, called appellant a liar, or started at him with a drawn knife, before he drew his pistol on prosecutor.

We do not believe the court erred in refusing further testimony as to what occurred between prosecutor and appellant some half hour after the alleged assault and at another place. What occurred on that occasion was proved by appellant in his cross-examination of prosecutor, and this was not controverted by the state. Aside from this, we fail to see what light it shed upon the assault alleged against appellant.

Appellant complains because the court refused to give a charge to the jury predicated on the idea that said pistol was not a deadly weapon. The pistol was not used or attempted to be used as a bludgeon, and in the absence of proof to the contrary it will be presumed that at the time it was presented on prosecutor by appellant it was loaded, and so was a deadly weapon.

Nor was it necessary for the court to charge upon simple assault, even had such a charge been presented by appellant and asked to be given, because the facts do not authorize such a charge. The verdict of the jury finding appellant guilty as charged in the indictment was sufficient. He was only charged with an aggravated assault, and only this feature of the case was submitted to the jury. *Fred Wilson v. State* (decided at the present term) 73 S. W. —.

No error appearing in the record, the judgment is affirmed.

ALMENDARIS v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

SODOMY—PENETRATION—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

1. In a prosecution for sodomy, carnal knowledge such as is essential to the crime of rape must be proved, though the jury may infer penetration from the circumstances, without direct proof.

proven, but the act of penetration was proven only by circumstantial evidence, it was error for the court to refuse to charge on the law of circumstantial evidence.

Appeal from District Court, Hays County; L. W. Moore, Judge.

Felix Almandaris was convicted of sodomy, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of sodomy, and his punishment assessed at confinement in the penitentiary for a term of five years.

The only question we see fit to review is the failure of the court to charge on the law of circumstantial evidence. After a careful review of this record, we think the court should have charged upon said issue. Under a charge of sodomy, carnal knowledge, such as is essential to the crime of rape, must be proved, though the jury may infer penetration from the circumstances, without direct proof. *Cross v. State*, 17 Tex. App. 476. The juxtaposition of appellant to the jennet is proven, but the act of penetration is only established by circumstantial evidence. This is the gist of the offense. We are not to be understood as holding that the evidence is insufficient to circumstantially establish the fact that there was penetration; but, if established, it is done so by circumstantial evidence, and not by positive. This being true, it becomes a case of purely circumstantial evidence, and it is incumbent on the court to so charge.

For the error discussed, the judgment is reversed and the cause remanded.

JACKSON v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CRIMINAL LAW—APPEAL—DISMISSAL—DEFECTIVE RECOGNIZANCE.

1. Under Code Cr. Proc. 1895, art. 887, where recognizance on conviction of misdemeanor fails to state the amount of punishment assessed, the appeal will be dismissed.

Appeal from Gonzales County Court; W. W. Glass, Judge.

George Jackson was convicted of a misdemeanor, and appeals. On motion to dismiss. Appeal dismissed.

Walter & Van Struve, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed a motion to dismiss the appeal because the recognizance is defective, in that it fails to state the amount of the punishment assessed against appellant as required by article 887, Code Cr. Proc. 1895. See May

v. State, 40 Tex. Cr. App. 196, 49 S. W. 402. The motion is well taken.

The appeal is dismissed.

STEPHENS v. STATE.

(Court of Criminal Appeals of Texas. April 22, 1903.)

CONSTITUTIONAL LAW—STATUTES—LOCAL OPTION LAW—PROHIBITION AGAINST PRESCRIPTIONS—CRIMINAL PROSECUTION—INFORMATION—ALLEGATION OF SALE.

1. Pen. Code, art. 405, prescribing a punishment for all persons giving prescriptions for intoxicants in local option territory, except physicians, and against them if they should give prescriptions to any one not actually sick, and without a personal examination of the applicant, exceeds the authority given to the Legislature by Const. art. 16, § 20, providing that the Legislature shall, at its first session, enact a law whereby the qualified voters of any county, etc., may, by majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

2. To constitute a violation of the local option law, there must be a sale alleged and proved.

Brooks, J., dissenting.

Appeal from Wise County Court; S. G. Tankersley, Judge.

J. M. Stephens was convicted of giving a prescription in violation of the local option law, and appeals. Reversed.

Bullock & Basham, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted for giving a prescription in violation of article 405, Pen. Code—in violation of the local option law.

Motion was made to quash the information, (1) because it charges no offense; and (2) because the law is unconstitutional, wherein it seeks to prescribe a penalty against physicians for giving prescriptions. Article 405, in substance, prescribes the punishment against all parties who undertake to give prescriptions in local option territory, except regular, practicing physicians, and against them if they should give prescriptions without a personal examination of the applicant, which personal examination must disclose the fact that applicant is sick. Article 16, § 20, of the Constitution, requires the Legislature to pass what is termed the "Local Option Law," and, by the terms of the Constitution, these laws are restricted to prohibition of the sale of intoxicants. In *Holley v. State*, 14 Tex. App. 505, the question was at issue whether the Legislature could pass a statute prohibiting the giving of intoxicants under the authority of the Constitution. The case was very thoroughly discussed by the court, and it was held that the Constitution was restrictive, and that the law authorizing the punishment for the gift of intoxicants in local option territory was invalid and unconstitutional. "A rule of construction is that, when the Constitution defines the cir-

cumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases." *Cooley's Const. Lim.* (4th Ed.) p. 78. This rule is decisive of the controversy. The Constitution defines the circumstances under which the people may prohibit the sale of intoxicating liquors under legislative enactment, and the Legislature have attempted to extend the prohibition to a gift, and have imposed a penalty for giving away intoxicating liquors. This they had no authority to do. On the contrary, the Constitution having specified the bounds within which they were to act, it was a direct assumption and usurpation of unwarranted power to go beyond these bounds." If authority is given expressly, though by affirmative words, upon a definite condition, the expression of that condition excludes the doing of the act authorized under other circumstances. *City of New Haven v. Whitney*, 36 Conn. 373; 1 Kent, Com. 467, and note; *District Tp. of City of Dubuque v. City of Dubuque*, 7 Clarke, 262. This same principle is recognized in *Ex parte Brown*, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743, and is authority for the statement that the constitutional provision (article 16, § 20) giving the Legislature authority to enact laws with regard to the adoption of local option by the people is exclusive of any other method to be pursued by the Legislature for dealing with the question, at least so far as the same territory is concerned where local option has been adopted. The purpose and effect of the constitutional provisions was and is restrictive, and limited the legislative authority to the powers expressly granted. Hence the legislative act not within the legitimate scope in this express grant, such as the cold storage act, is unconstitutional and void. These authorities set forth the recognized rules of construction, and have been strictly followed. The Legislature has no authority to punish a party for giving a prescription to himself. *Hawk v. State* (decided at the present term) 72 S. W. 842. No more could he be punished for giving a prescription to a third party. The Legislature has not been authorized by our Constitution to prohibit the giving of prescriptions. This is not a sale, nor can it be tortured into a sale. It may be admitted that it contemplates the purchase of the intoxicant, but it is not a purchase or a sale; and if *Holley v. State*, supra, and *Ex parte Brown*, supra, set forth the law, then any attempt by the Legislature to punish parties for giving a prescription would be futile. The information in this case does not charge a sale. It simply charges the giving of a prescription for the purpose of obtaining intoxicants. That a physician may be guilty of violating the local option law by means of giving a prescription may be conceded, though it would not be for giving a prescription, but for bringing about the illegal sale. Cases can be well imagined

and readily conceived where a physician, for the purpose of assisting the seller in making the sale, would become particeps criminis in the sale. Or if the physician, without connivance or complicity of the seller, should, by means of a prescription, or any other means, use the seller as an innocent instrument in violating the local option law in the sale, then he (the giver of the prescription) would be guilty, under our statute. In such instances he would, were the case a felony, bear the relation of an accomplice to the crime; but, being a misdemeanor, he would be a principal. *Houston v. State*, 13 Tex. App. 595. But there must be a sale alleged and proved in order to make a violation of the local option law. We are not discussing what it would take to constitute a sale, but only hold that a party cannot be convicted of violating the local option law until he has been instrumental criminally in bringing about a sale of the intoxicants within the prohibited territory. This must be alleged.

Because the information does not charge an offense, the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., dissents.

McCOY v. STATE.*

(Court of Criminal Appeals of Texas. March 18, 1903.)

PERJURY — CONTINUANCE — EVIDENCE — MATERIALITY — ADMISSIBILITY — CIRCUMSTANTIAL EVIDENCE — INSTRUCTIONS — IMPROPER CONDUCT — OBJECTIONS — BILL OF EXCEPTIONS.

1. Where the testimony of an absent witness could have been true, without impairing the state's case or aiding defendant's, and other witnesses testified to the same facts, in substance, and their testimony was not controverted by the state, defendant could not complain of the court's refusal to grant a continuance.

2. Defendant, who was prosecuted for perjury in testifying on the trial of one accused of assault with intent to murder that the accused was at his own residence, 2½ miles distant from the place of the assault, from 6 to 9 o'clock on the evening of the assault, which was alleged to have taken place between 8 and 9 o'clock, asked for a continuance on account of an absent witness, who was present at the house when the assault occurred, and would testify that she did not know what time the assault occurred, but that, in her opinion, it might have been as late as 10 o'clock. The evidence adduced at the trial showed that the assault occurred between the hours claimed. *Held*, that this absent testimony was too indefinite and unimportant to entitle defendant to a new trial on account of the court's refusal to grant the continuance.

3. Defendant based his motion for continuance on the further ground that another absent witness would testify that at 4 o'clock in the morning of the day of the assault defendant drove off in the direction of the home of the one accused, 40 miles distant, returning to the starting place in the morning of the following

day. *Held* that, as the fact of defendant's starting for the residence of the accused could hardly tend to show that he went there, this testimony was not of sufficient importance to require a continuance.

4. It was not necessary to prove that the assault occurred between 8 and 9 o'clock, but the jury would be authorized to convict defendant if it was shown that the testimony that the accused was at his home between 6 and 9 o'clock was false, and not made through inadvertence or by agitation or mistake.

5. Where the bill of exceptions failed to state that a remark by the district attorney was not justified, and did not negative the fact that the evidence justified it, the objection to the remark cannot be considered on appeal.

6. In a prosecution for perjury committed by defendant in testifying in favor of one on trial for assault, the latter's attorneys were permitted to testify that they used defendant to prove an alibi for their client, and that before putting defendant on the stand they had talked with him as to what his testimony would be. *Held*, that this testimony was properly admitted.

7. Testimony was also admitted as to statements and acts of the one accused of assault on the day after his trial. *Held*, that this testimony was properly admitted for the purpose of showing the guilt of the one accused of the assault.

8. The victim of the assault was permitted to testify that machine oil had been poured on her dresses, and that the one accused of assaulting her was at the house the day before the oil was discovered. *Held* that, though this circumstance was remote, it was not reversible error to admit testimony thereof—the evidence of the assault being circumstantial—as it was one of the circumstances tending to show guilt.

9. A charge on circumstantial evidence, in a prosecution for perjury, that "the facts and circumstances proved, if any, should not only be consistent with the falsity of said alleged false statement, but inconsistent with any other reasonable hypothesis or conclusion than that of its falsity," states the legal requisites of such evidence the same as though it required the evidence to exclude "every reasonable hypothesis consistent with the innocence of defendant."

Appeal from District Court, Erath County; W. J. Oxford, Judge.

O. R. McCoy was convicted of perjury, and appeals. *Affirmed*.

Nugent & Pannill, Emory C. Smith, and Moroney, Love & Simpson, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years.

When the case was called for trial, appellant presented an application for continuance on account of the absence of several witnesses, by whom he expected to prove that in the early part of March, 1900, he purchased a cow and calf, and carried them into an adjoining county, and at the same time and place executed a note to Dock Baines for \$50, borrowed money. This fact, if it had any material bearing on the case, was a fact tending to place him at the residence of Dock Baines at the time he claimed to have executed the note. His purchase of the cow and

*Rehearing denied May 6, 1903.

by the state, and proved by several witnesses who testified in appellant's behalf. However, we do not believe it had any material bearing on the case. Every fact and incident connected with the transaction could have been true, without impairing the state's case, or in any material manner aiding defendant's side of the case. It was also shown by appellant that the note was executed, and not contradicted by any testimony for the state. The note itself was not introduced in evidence, so far as the record discloses, though indirectly the note was presented before the jury, as appellant introduced evidence showing the payment of the note.

Continuance was further sought on account of the absence of Mrs. J. O. Freeman and Asst. Freeman. By Mrs. Freeman it was expected to prove that she and her daughter Minnie, who was shot by Dock Baines on the night of the 9th of August, 1900, were at the home of Mrs. J. O. Freeman, where the shooting occurred, and that none of those present "looked at the timepiece, and did not know what time the assault occurred, and that, in her opinion, it might have been as late as 10 o'clock when the alleged assault on Minnie Freeman occurred." Mrs. J. O. Freeman was the mother-in-law of Dock Baines, the party who was alleged to have assaulted his sister-in-law, Minnie Freeman. Time of the shooting was an element in the case, by reason of the fact that it was necessary to show the guilt of Dock Baines of this assault, to convict appellant of perjury, as the perjury is alleged to have been committed on the trial of Dock Baines for said assault. The shooting of Minnie Freeman is said to have occurred between the hours of 8 and 9 o'clock. The perjury is assigned on the statement of appellant on the trial of Dock Baines that Dock Baines was at his (Dock Baines') residence from 6 until 9 o'clock p. m. on the evening of the shooting, and this was about 2½ miles distant from the scene of the assault. The evidence of Mrs. Freeman, as stated in the application for continuance, is so uncertain and indefinite that it was practically worthless. If she in fact testified she did not know the time the assault occurred, and that it was only her opinion it might have been as late as 10 o'clock, in the face of the testimony, in our judgment, it was immaterial. The evidence shows that the shooting did occur between the hours of 8 and 9 o'clock p. m. This absent testimony was too uncertain and unimportant to have required the trial court to grant defendant a new trial.

By the witness E. J. Smith he expected to prove that he, in company with said Smith, left Mineral Wells, in Palo Pinto county, on the evening of August 8th, and started in the direction of Dock Baines' residence, in Hood county, and traveled as far as the Brazos river, near where the Mineral Wells road crosses that river, and remained together and fish-

defendant started in the direction of said Baines' house, driving said Smith's horses and buggy; that defendant returned to where said Smith was waiting for him, and fished on the Brazos river for some time on the morning of the 10th of August, 1900; that they ate breakfast together, and then started to Mineral Wells, where they arrived on August 10th in time for the convening of the justice court on said day. We do not believe this testimony was of sufficient importance to have required the court to grant the continuance in the first instance, or the new trial subsequently. The justice of the peace testified that there was a suit pending between appellant and West in the justice court at Mineral Wells, which was settled in the absence of defendant, and that appellant was in Mineral Wells on the 10th. The only facts to which Smith could have testified were that appellant and himself went to the Brazos river on the evening of the 8th, and fished until 4 o'clock in the morning of the 9th, and that appellant left him at that point, driving his horse and buggy in the direction of Baines' residence, which seems to have been distant some 35 or 40 miles. It is not pretended that Smith knew anything further in regard to the matter. These facts could have been absolutely true without in any way impinging the state's case. The fact that he started in the direction of Baines' residence was not a fact of sufficient importance to show that he went to Baines' residence, nor do we believe it a fact which even tended to show that he went to Baines' residence. It does not even allege, except in the most general manner, that he announced his purpose to Smith of going to Baines' residence. What he expected to prove by J. C. Smith is not shown, unless it be the fact that the two Smiths had built a boat, and were fishing on the Brazos river about the time mentioned. The testimony set out is so vague, uncertain, and indefinite that, if true, it was not material. There was no attempt on the part of appellant to cover any of the time or distance from the point of fishing on the Brazos river to Baines' residence, which it was claimed it took him a day and night to travel and return.

Motion was made to quash the indictment, in which we think there is no merit. On the former appeal (68 S. W. 686) the indictment was held vicious for the reasons stated in that opinion, and this indictment seems to have complied with the requirements of that opinion.

There are several exceptions to the charge of the court, none of which, in our judgment, are of sufficient importance to require serious consideration. Among other exceptions to the charge was that it failed to instruct the jury that, unless the evidence satisfied them that the shooting occurred between the hours of 8 and 9 o'clock p. m. of August 9, 1900, it

ing said time, and a special charge was requested, embodying this idea. The charge sufficiently covered this question.

The assignment of perjury is based upon the statement of appellant on the trial of Baines that said Baines was at his (Baines') residence all the time between the hours from 6 until 9 o'clock p. m. of August 9, 1900. The court charged the jury that, before they could convict defendant of perjury, this evidence must be shown to be false. He further charged the jury in this connection that, if there was a reasonable doubt as to whether this statement was false, they should acquit, or if it was made through inadvertence or by agitation or by mistake, or if there was a reasonable doubt as to whether the statement was made under any of these circumstances, appellant should not be convicted. We believe this sufficiently presented the issues. Appellant did not swear, nor is perjury assigned upon the fact, that the shooting occurred between 8 and 9 o'clock on said night, but that Baines, the alleged assaulting party, was at his (Baines') residence between the hours of 6 and 9 o'clock p. m. on the evening of the shooting. The evidence shows Baines' residence to have been at least $2\frac{1}{2}$ miles distant from the scene of the shooting. It was necessary, as a predicate for this conviction, for the state to disprove the fact that Baines was present at his residence during that time. The fact that he shot the girl at Freeman's, $2\frac{1}{2}$ miles distant, between the hours of 8 and 9 o'clock, was a strong fact going to prove the falsity of appellant's statement; but appellant had not sworn directly that the shooting did not occur between 8 and 9 o'clock, nor is perjury assigned upon such testimony.

Another bill of exceptions was reserved to the following remarks of the district attorney: "That McCoy failed to appear and testify on the first trial of Dock Baines, although he was the only man who knew facts which would clear Dock Baines." The bill of exceptions is in the following language: "Defendant excepted to the said remarks of the district attorney, and then and there presented to the court a special charge, No. 4, as follows: 'You are instructed, gentlemen of the jury, that you will disregard the following remarks of state's counsel: "That McCoy failed to appear and testify on the first trial of Dock Baines, although he was the only man who knew facts which would clear Dock Baines."'" This bill fails to show by its statements that error was committed. It does not show that the remarks were not justified, nor does it recite the fact that there was no testimony justifying said statement. If there was any evidence which justified it, either directly or circumstantially, there could be no error, for it would have been a proper deduction or statement. The bill fails to negative the fact that the evidence justified the comment.

The witnesses Keith and Daniel were permitted to testify that, as attorneys for Baines

prove an alibi, and the fact that they talked with him before placing him on the stand as to what he would testify, and after so consulting with him they used him as a witness. This evidence was admissible. This question was decided in the recent case of *Freeman v. State* (Tex. Cr. App.) 72 S. W. 1001.

Certain statements and acts of Dock Baines on the day succeeding the shooting of Minnie Freeman were introduced. These tended to show the criminality of Baines, and were introduced for that purpose, and were admissible.

There is also a bill of exceptions to the testimony of Deputy Sheriff Keith as to some statements made to him by Baines a day or two after the shooting. It is not necessary to discuss their admissibility, as they were withdrawn from the consideration of the jury.

Minnie Freeman testified that, a short time prior to the assault upon her, she found machine oil poured on her dresses; that Baines was about the house the day before she discovered this oil on her clothes; that she did not know who did the act. The court qualifies this bill by stating that he had no recollection of this evidence being argued. This was a remote circumstance, and, if it be conceded it was inadmissible, we do not believe it was of that injurious character which would require a reversal. As before stated, it was one of the necessary steps to this conviction to show the guilt of Baines of the assault. An inspection of the statement of facts shows that this was in line with his conduct towards his sister-in-law Minnie Freeman; that he had several times made indecent advances towards her, and was outraged at her refusal and rejection of his advances. There are quite a number of these matters shown in the record, tending to establish motive and reason why Baines was the party who did the shooting. The case against Baines was one of circumstantial evidence, and this was one of the circumstances introduced on the part of the state connecting him with the shooting of the girl.

The charge on circumstantial evidence is criticised because "it did not require that the facts relied on to prove defendant's guilt must exclude every reasonable hypothesis consistent with the innocence of defendant, as required by law." That portion of the charge is as follows: "And the facts and circumstances proved, if any, should not only be consistent with the falsity of said alleged false statement, but inconsistent with any other reasonable hypothesis or conclusion than that of its falsity," etc. There is no set form of words or expressions by which the charge on circumstantial evidence must be given. If the charge sets out the legal requisites of circumstantial evidence, it is sufficient; and, in our opinion, this charge does so.

Finding no reversible error in the record, the judgment is affirmed.

HENDERSON, J., absent.

(Court of Civil Appeals of Texas. April 22, 1903.)

DEATH—PRESUMPTIONS FROM ABSENCE—PARTITION—PARTIES DEFENDANT—STAY OF PROCEEDINGS.

1. Rev. St. arts. 1821, 3372, provide, in effect, that any person absenting himself beyond seas or elsewhere for seven years successively shall be presumed to be dead, unless proof be made that he was alive within that time. *Held*, that the statute must be construed to mean that the person referred to must absent himself from his home, and proof of change of his residence from one state to another, and that he has not been heard of in the former state for a period of seven years, does not make a case within the statute.

2. Where, in a partition suit, it was shown that a third party had an interest in the property, it was the duty of the court, of its own motion, to stay the proceedings, and require him to be made a party defendant.

Appeal from District Court, Collin County; J. E. Dillard, Judge.

Action by John Tombs against M. L. Latham and others. Judgment for plaintiff, and defendants appeal. Reversed.

Abernathy & Mangum, for appellants. Clifton & Doggett and J. M. Pearson, for appellee.

KEY, J. This is an action of trespass to try title and for partition, and judgment was rendered awarding a portion of the land to the plaintiff, and appointing commissioners to make partition.

The first assignment of error complains of the action of the court in refusing to dismiss the plaintiff's case, and instruct a verdict for the defendant, upon the ground that the testimony developed the fact that Luther Pitts and Daniel Pitts were necessary parties to the suit. Counsel for appellee urge objections to this assignment, and contend that it is not borne out by the record, and should not be sustained. They concede, however, that, if Luther Pitts were living, he should have been made a party to the suit, because he would own an interest in the land, and, if he died after 1898, his father, Dave Pitts, would own an interest, and be a necessary party. However, their contention is that the testimony warranted the trial court in finding that Luther Pitts was dead, and that he died prior to 1898. All the testimony on that subject was given by Nancy Bailey, and is stated in appellee's brief as follows: "I am a half-sister of Mary Tombs, who was the daughter of Sallie Latham by a former husband, William Hickman. Sallie Latham was the stepmother of witness Nancy Bailey. The maiden name of Mary Tombs was Mary Hickman. The maiden name of Sallie Latham, the mother of Mary Tombs, was Sallie Thurman. The maiden name of Sallie Hickman, the mother of witness Nancy Bailey, was Sallie Boatwright. William Hickman first married Sallie Boatwright, who became Sallie Hickman, and by whom William Hick-

man, the witness, William Hickman, and Josephine Hickman. Both Josephine and William Hickman, the half-brother and half-sister of witness Nancy Bailey, died in 1877. William Hickman died without heirs. Josephine Hickman married a man named Dave Pitts, by whom she had a son named Luther Pitts. And witness did not know whether Dave Pitts or Luther Pitts were living or dead. The last time witness knew anything about Dave or Luther Pitts was when they left Tennessee. At this point the plaintiff offered to prove, and did prove, over defendants' objection, by the witness Nancy Bailey, that the father of Luther Pitts carried Luther in 1877 to Alabama; that witness resided in the immediate neighborhood of where the mother of Luther Pitts resided at the time of her death, and from which Luther Pitts was carried to Alabama, for three years immediately afterwards, and that witness resided in the state of Tennessee for twenty-two years after Luther Pitts was carried to Alabama, and that witness frequently received letters and heard from the neighborhood from which the child was taken all during the time she was in the state of Tennessee; and that during all this twenty-two years she was in the state of Tennessee she never heard a word from Dave Pitts or his son Luther Pitts; that witness came to Texas in 1898; that the child (Luther Pitts) was sick when it left Tennessee. Witness further testified that she and father of Luther Pitts were not upon good terms, and that it was not likely that she would hear from him."

Considering this evidence, in connection with the statutory provisions (Rev. St. 1895, arts. 1821, 3372) to the effect that any person absenting himself beyond seas or elsewhere for seven years, successively, shall be presumed to be dead, unless proof be made that he was alive within that time, the contention of appellee is that the court was justified in finding that Luther Pitts was dead, and that he died before 1898. We cannot sanction this contention. While the statute does not expressly so read, we think it must be construed to mean that the person referred to must absent himself from his home; and proof of change of residence from one state to another, and the party not having been heard of in the former state for a period of seven years, does not make a case within the purview of the statute. In order to bring the case at bar within the statute, it should have been shown that Luther Pitts absented himself for seven years, successively, from his home in Alabama. The testimony shows that he was carried to Alabama and left with his grandmother, and indicates that Alabama became his home. No evidence was offered tending to show that he ever abandoned that home, and no evidence tending to show his death, except the fact that he was a sickly child when he left Tennessee, and the further

borderhood from which the child was taken in Tennessee, and never heard from either the child or its father. She does not state that she received letters or any other character of information from Alabama, the home of the child and its father, or that she made any inquiries there or anywhere else to ascertain anything concerning their existence. We think the evidence was insufficient to support the contention urged. The form of the assignment is immaterial. The error is fundamental in its nature. When the facts referred to concerning the existence of Luther Pitts and his interest in the property sought to be partitioned were developed, it was the duty of the court, of its own motion, to stay the proceedings and require him to be made a party defendant. *De La Vega v. League*, 64 Tex. 205.

The other questions presented in appellants' brief have been duly considered, and on all of them we rule against the appellants.

For the error indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

LUNA v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. April 22, 1903.)

RAILROADS—INJURIES TO PERSONS ON TRACK —NEGLIGENCE—BURDEN OF PROOF —APPEAL AND ERROR.

1. Where there is no statement of facts in the record, the appellate court will not pass on the correctness of charges given or refused, unless it appears that such charges, taken in connection with the pleadings and verdict, are so plainly erroneous as to leave no doubt that the verdict must have been controlled by the improper instructions.

2. Where plaintiff, while intoxicated, went on defendant's railroad track, fell down, and was run over by a train, the burden was on him of proving his discovery by defendant's employes in time to have avoided the injury.

Error from District Court, Hunt County; H. C. Connor, Judge.

Action by J. N. Luna against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. F. Spearman, for plaintiff in error. Perkins, Craddock & Wall, for defendant in error.

FLY, J. This is a suit in which plaintiff sought to recover damages from defendant on account of personal injuries inflicted upon him by a locomotive belonging to defendant. The jury returned a verdict for defendant.

The assignments of error complain of certain charges given by the court, and, there being no statement of facts in the record, this court will not pass upon the correctness of charges given or refused, unless it should appear that the charges, taken in connection

doubt that the finding of the jury must have been controlled by the improper instructions. *Railway v. McAllister*, 59 Tex. 349.

The pleadings of plaintiff and defendant, considered together, make out a case of a drunken man going upon a railroad track, and falling or lying down and being run over by a train. The allegations of plaintiff make him a trespasser, and damages are claimed on the ground that the employes of defendant discovered the peril of plaintiff in time to have prevented his injury by the exercise of care and diligence. Plaintiff having admitted that he had gone on the railroad track and fallen down, the court properly assumed that he had done so; and if he had not so alleged, in the absence of a statement of facts, it would be presumed that he did so.

The charge properly placed the burden upon plaintiff of establishing the fact that the employes of defendant discovered him in time to have prevented his injury, and that charge, and the one that informed the jury that they were the judges of the credibility of the witnesses and the weight to be given to their testimony, did not in any manner intimate the opinion of the judge on the facts.

The judgment is affirmed.

BOREN et al. v. JACK.

(Court of Civil Appeals of Texas. April 25, 1903.)

APPEALABLE ORDER.

1. An order sustaining a demurrer, which does not show that the petition was dismissed upon the demurrer being sustained, and does not recite that the plaintiffs take nothing by their suit, or that the defendant "go hence without day," and recover his costs, is not final, and hence not appealable.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Lizzie Boren and others against T. H. Jack. From an order sustaining demurrer to the petition, plaintiffs app. Dismissed.

Ballew & Wheeler, for appellants.

BOOKHOUT, J. This is an appeal from an order sustaining a demurrer to the plaintiffs' petition. The order appealed from does not show that the petition was upon the demurrer being sustained not recite that the plaintiffs take their suit, or that the defendant without day, and recover his judgment is not final. The same is mature, and must be dismissed. *Lewis*, 34 Tex. 475; *Bradshir*, Tex. 345; *Warren v. Shum*, State v. Trilling (Tex. Civ. 311.

¶ 1. See Appeal and Error, *vs* 465, 688.

LOWERY v. BRIGGS.

(Court of Civil Appeals of Texas. April 25, 1903.)

ELECTIONS—CONTEST—GROUNDS—CONSTRUCTION OF STATUTE—SUFFICIENCY OF PETITION.

1. Rev. St. 1895, art. 3397, provides that, after the result of an election under the liquor law has been declared, the election may be contested, and, if it appear that it was illegally or fraudulently conducted, another election shall be ordered. *Held*, that the term "election" means the act of casting and receiving the ballots from voters, counting such ballots, and making returns thereof, and a petition in a proceeding to contest a local option election, in which the grounds alleged are not based on any irregularity in holding the election, fails to state a cause of action.

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by J. E. Lowery against M. B. Briggs. Judgment for defendant, and plaintiff appeals. Affirmed.

C. W. Kerns and J. R. Warren, for appellant. J. P. Hart, M. P. Mell, and E. L. Barnwell, for appellee.

TEMPLETON, J. Appellant instituted this proceeding to contest a local option election held in Justice's Precinct No. 7 of Upshur county. He was defeated on a trial, and has appealed. It was held by our Supreme Court in *Norman v. Thompson*, 72 S. W. 62, that the term "election," as used in article 3397, Rev. St. 1895, which provides for contesting local option elections, means "the act of casting and receiving the ballots from the voters, counting the ballots, and making returns thereof." The grounds upon which appellant seeks to have the present election declared void are not based upon any irregularity in holding the election, and it must be held that his petition wholly fails to state a cause of action. The judgment entered against him will therefore be affirmed.

Affirmed.

ROYALS et al. v. LACEY.

(Court of Civil Appeals of Texas. April 22, 1903.)

DEED OF MARRIED WOMAN—EXECUTION—ACKNOWLEDGMENT—EVIDENCE—SUFFICIENCY—AGREEMENT TO ARBITRATE—ADMISSIBILITY.

1. Evidence examined, and *held* to support a finding that a married woman had executed and acknowledged a deed according to law, though she testified that she had never signed it, and that the certificate of acknowledgment was false.

2. Proof that a controversy about a deed was by agreement submitted to arbitration, and that the arbitrators found that the deed should be returned to the grantors, and the money and notes received by them returned to the grantee, was properly excluded, it not appearing that the alleged arbitration occurred before the grantee had resold the land, nor that the grantors had offered to return the money and notes which they had received.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Trespass to try title by Minnie Royals and others against A. Lacey. From a judgment for defendant, plaintiffs appeal. Affirmed.

Evans & Elder and John G. Nix, for appellants. J. G. Matthews, for appellee.

KEY, J. From a judgment in favor of the defendant in an action of trespass to try title the plaintiffs have appealed. The only issue of fact in the court below was whether or not the plaintiff Minnie Royals, who was a married woman, had executed a deed in the manner required by law. The deed referred to was in the usual form, was signed by Minnie Royals and her husband, C. H. Royals, and the certificate of acknowledgment was in compliance with the requirements of the statute. The land was homestead at the time that the deed was made. The notary public who made the certificate of acknowledgment was dead at the time of the trial. Mrs. Royals testified as follows: "I did not sign the deed, nor authorize any other person to sign it for me. I did not appear before J. F. Puckett, the notary before whom the same purports to have been acknowledged, for the purpose of acknowledging the deed. The deed was never read over or explained to me by said notary, or by any other person; and I did not acknowledge that I had signed the conveyance, and did not in any manner acknowledge the same to be my act and deed. I can neither read nor write. My husband, C. H. Royals, had sold the place, and wanted me to join him in the conveyance, and I refused to do so. On the morning of the 3d day of March, 1898, I went with my husband in a buggy to Celeste, to get some medicine for my sick boy, and when we drove up in front of McWilliams' drug store I saw Mr. Puckett standing in front of the house, and he motioned for me to come to him, and Mr. Royals said to me that there was Mr. Puckett, who perhaps wanted to see me. I went into the store. I followed Mr. Puckett to a little off in the rear of the house. When we got in there, there was a man in there, who was a stranger to me, but whom I have since learned was Dr. White. Mr. Puckett laid a paper on the table and said, 'Put your name down here.' I answered 'I can't write.' Puckett said to the man standing in the door: 'You put her name down. I am so nervous I can't write.' The man sat down preparatory to writing the name, and remarked to me, 'What are your initials?' Mr. Puckett replied 'Put it down 'Mrs. Minnie Royals.'" That was all that was said and done. Mr. Puckett said, 'That is all,' and I got up, and walked out. I never saw any deed. I did not know what the paper was. I never saw it before nor since. Mr. Puckett never told me what the paper was,

it to Clymer, in my presence. Mr. Royals kept his papers in a desk, and if I got any papers for him I did not know what they were. I did not tell any one that morning that I was going down to sign a deed to my home. We lived on the place until December following. I told Mrs. Hudson in McWilliams' drug store that I did not intend to sign my rights away to my home. We moved to South Texas in December, 1898. We bought a place there, built a house on it, and made two crops. Sold out the place. I signed the deed, and we moved back." Re-examination: "I did not leave my home voluntarily. My boy was bad sick, and my husband said he was going to carry him any way, and I went because he was going to carry my boy. He bought the place down there and improved it over my protest. I told him that if he was going to move there, that we wanted to rent until we could come back to our home. If the deed was delivered to Clymer in my presence at my house, I did not know what they were doing. I knew that Mr. Royals wanted to sell, and wanted me to sell, and as soon as I found out that Clymer was claiming the place, and had paid Mr. Royals some money and notes, I insisted that they all be returned to Mr. Clymer. Mr. Royals went to see him two or three times, and sent for him. They had an arbitration over the matter, and I thought it was all settled, until I moved to South Texas." Dr. C. E. White testified that the notary public and Mrs. Royals came into his office, and one of them requested him to sign Mrs. Royals' name to a paper, which he did, and left the office immediately. E. T. Clymer, the grantee in the deed, and under whom the defendant Lacey holds, testified that he purchased the land in controversy; that when he went to Mr. Royals' house to close up the transaction Mr. Royals told his wife to give him the deed and notes, which she did, bringing them out of an adjoining room, whereupon Clymer signed the notes, and paid Royals \$150. Mrs. Royals' acknowledgment to the deed was dated March 3, 1898, and a witness named Beulah Stallings testified that on that particular day she saw Mrs. Royals and her husband passing by her place and going to the town of Celeste, where the deed was acknowledged; that she had a conversation with Mrs. Royals, and the latter told her that she was going that morning to sign her land away. Mrs. Emma C. Hudson testified that about the 1st of March, 1898, she saw Mrs. Royals in a drug store in Celeste, and asked her what she was doing there, and she said she had come to make the deed to her land. Mrs. Lucy Clymer testified that she was present when the deed was delivered to her stepson, E. T. Clymer, and that Mrs. Royals went to the desk and got it, and either she or her husband delivered it to E. T.

show that the certificate of acknowledgment was false, and, considering the certificate itself, which was an official act of the deceased officer, as evidence, and the testimony submitted by the defendant, which tended to support the certificate and overthrow the testimony given by Mrs. Royals, we hold that the judgment is amply supported by testimony.

The only other question presented relates to the action of the court in refusing to permit plaintiffs to prove "that the controversy about the deed was, by agreement, submitted to arbitration, and that the arbitrators found that the deed was to be returned to the plaintiffs, and that the money and notes were to be returned to Clymer." It is not shown that the alleged arbitration occurred before Clymer sold the land to the defendant; nor did the plaintiffs offer to prove such facts as would make the arbitration binding upon the defendant. Furthermore, if it was a statutory arbitration, it should have been reported to the court, and the award entered as a judgment of the court. But, whether a statutory or common-law arbitration, before the plaintiffs could claim any benefit under it it was necessary for them to show compliance on their part, and the bill of exceptions does not state that they showed or offered to show that they had offered to return the purchase money notes and refund the purchase money paid. Hence no error was committed in excluding the testimony referred to.

No reversible error has been shown, and the judgment is affirmed. Affirmed.

BAUGHN et al. v. ALLEN.

(Court of Civil Appeals of Texas. April 17 1903.)

CHattel Mortgages—Foreclosure—App
CATION OF PROPERTY—ORDER OF SALE—
EMPT PROPERTY—SALE BY CONSTABLE—
BILITY OF SURETIES—COSTS.

1. The sureties of a constable were not for his act in selling exempt property which acted under a chattel mortgage containing power of sale, and not in his official capacity.

2. Where a chattel mortgage covered mules, one of which was exempt from taxation, the mortgagor was entitled to nonexempt mules first sold and the applied to the debt.

3. Such proceeds being sufficient the debt, the constable making the other proceeding to sell the exempt property, he was personally liable for the debt.

4. In an action against a constable for sale of exempt property under a mortgage, it was error for the court against such constable incurred other parties being made defendant.

Appeal from Fannin County
Evans, Judge.

Action by Sam Allen
Baughn and others. From

versed in part.

Gross & Gross, El. C. Armstrong, and Taylor & McGrady, for appellants. Geo. W. Wells and Richard B. Semple, for appellee.

RAINEY, C. J. The court erred in rendering judgment against the bondsmen of appellant Baughn, constable, as the evidence conclusively shows that Baughn, in selling the exempt mule, was not acting in his official capacity, but was acting under a mortgage covering said mule, and executed by appellee with power of sale.

Appellee Allen was entitled to have the proceeds of the sale of the two nonexempt mules, also covered by the mortgage, first applied to the extinguishment of the mortgage debt, and, said proceeds being sufficient therefor, and Allen having demanded that it be so applied, and having forbid the sale of said exempt mule, Baughn is liable individually for the value thereof.

The trial court further erred in taxing the costs against Baughn incurred by reason of other parties being defendants.

The judgment will be reversed and rendered as to the bondsmen, and as to Baughn it will be reformed in the manner indicated as to costs, and in all other respects affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS
v. BRANOM.

(Court of Civil Appeals of Texas. April 18, 1903.)

RAILROADS — INJURIES AT CROSSING — CONTRIBUTORY NEGLIGENCE — EVIDENCE
— QUESTION FOR JURY.

1. Plaintiff was struck by a train while crossing the track in the early morning. He testified that he had previously worked on the section, was familiar with the crossing, and knew that two trains were about due to pass when he endeavored to cross, and that he did not stop, look, or listen before going on the track; that the train did not whistle for the crossing, but carried an electric headlight, which would throw a reflection for a quarter of a mile. *Held*, that plaintiff was guilty of contributory negligence, as a matter of law.

2. Where plaintiff's evidence in an action for injuries at a railroad crossing showed that he was guilty of contributory negligence, as a matter of law, and there were no circumstances surrounding the accident to relieve him from such negligence, the court was not required to submit the issue of contributory negligence to the jury.

Appeal from District Court, Hopkins County; H. C. Connor, Judge.

Action by J. H. Branom against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. B. Perkins and Perkins & Craddock, for appellant. Leach & Sheppard, for appellee.

RAINEY, C. J. Appellee sued to recover damages for personal injuries sustained by his 19 year old son, J. M. Branom, and also

property belonging to said minor. The injuries resulted from a collision with one of appellant's passenger trains at a public road crossing. A trial resulted in a judgment for plaintiff, from which this appeal is prosecuted.

Two assignments of error are presented, only one of which has merit, and that complains of the court for overruling defendant's motion for a new trial; the ground being that the verdict of the jury is contrary to, and not supported by, the evidence, in that it was shown that the direct and proximate cause of the accident was the want of ordinary care on the part of J. M. Branom in approaching and going upon the crossing. The facts are, in substance, that about 2:15 in the morning of April 30, 1902, J. M. Branom was riding in a buggy along a public road which runs north and south at Ruff, a small village, where the railroad track of appellant crosses said dirt road. A train going west on appellant's track collided with said Branom, injuring him and his horse and buggy. The railroad runs east and west, and, going east, is straight for about one mile. Just east of the crossing is a cut, and an embankment thrown up, which obstructs the view in approaching the crossing from the south. There is also a blacksmith shop about 118½ feet south of the crossing, that obstructs the view east. From said shop to the crossing, riding in a buggy along said road, a man standing on the track east of the crossing 80 yards, the top of his head can be seen. The engine, in approaching the crossing, did not give the signal at the whistling post, nor ring the bell, as required by the statute. Just before striking young Branom, the alarm signal was sounded, but then he did not have time to avoid the collision. As to the care used by young Branom in approaching the crossing, he shows that he was traveling north, going home from a party he had attended that night. He testified: "My buggy was making some noise. Where the top fits on the bed, needs washers. There was just a light breeze blowing—a pleasant morning. It was a starlight night. Coming up to the road to the place where you turn to go north, I kept on in a trot right up to the railroad. I never looked in the direction the train was coming. I was not studying about a train. I could not have seen it if it had been any distance off. I was not studying about a train, and was not paying any attention to a train. It was right on top of me before I knew anything about it. I could not hear any. My hearing is good. I did not stop and listen for one. I had crossed there lots of times before. I knew there was a passenger train due about that time every morning. I was driving along there alone, not studying about a train coming." "You was not looking out?" "I was looking the way I was travelling." "You did not look down the direction from which the train comes?" "No, sir; I don't think I did." "You did not particularly listen for it?" "No, sir." "Was not thinking

"No, sir." "Wasn't thinking about the fact of approaching a railroad track?" "I knew I was approaching the track." "You was not thinking about that fact?" "No, sir." "In other words, you drove up there without thinking or looking for a train. Is that a fact?" "No, sir; I was not thinking about it, or looking or listening for it. I knew * * * these trains were using electric headlights. The track from where the road crossed it at Ruff is straight for at least a mile, but it is not level. It goes up and down some pretty good sized hills and hollows. I knew the particular time of this train. It was the regular west-bound passenger train. I knew how the hedge ran. I knew the blacksmith shop was there. I knew the railroad went into a cut there. I knew about this dump. I had worked on the section. Was entirely familiar with it. I knew it was about time for that train, if I had thought about it. I was not thinking about it. There was a train due from both ways at about the same time, * * * and I was coming up that way without looking or listening for a train, and without stopping. I did not hear any whistle until the alarm whistle was blown. I heard that and saw the engine about the same time. The engine was then practically right at me—within ten to twenty-five feet of me. I have seen engines that use electric lights. * * * They would make everything plain. Usually they would throw a reflection for a quarter of a mile or more. The track was straight at that place for a mile east from where the accident happened." There was testimony by the employes that young Branom told them just after the accident that he was asleep. He testified on the stand that he was not asleep, and that he was stunned by the collision, and does not remember making the statement. While the effect of the jury's finding is that he was not asleep, it is difficult to understand why he would have driven on the crossing as he did if he were not asleep.

There was a sharp conflict in the evidence as to the blowing of the whistle 80 rods from the crossing. The verdict of the jury settles this against the defendant, and in deference thereto it will be held that the employes failed to blow the whistle as required by statute, which constitutes negligence on the part of the defendant; and, unless plaintiff was guilty of contributory negligence, the judgment must be affirmed.

It is the duty of a party who attempts to cross a railroad track to use due care to avoid danger. If he fails to do so, and his own negligence is the proximate cause of injury from a passing train, he cannot recover, though the statutory signal is not given. *Railway Co. v. Graves*, 59 Tex. 330. The evidence shows an utter absence of care on the part of young Branom in attempting to cross. There is nothing whatever shown to excuse

that the train was due about that time, and that the view east was obstructed to some extent, and yet he never even listened for the whistle of an approaching train. Had he done this, and relied on the trainmen giving the signal at the 80-rod post, he would be entitled to recover, but he did not even do this. According to his own testimony, the headlight of an engine equipped as this one was would cast its reflection a quarter of a mile or more. It being at night, it is inconceivable why he did not see the reflection before going upon the track. This, it seems to us, he would have discovered in time to have escaped, had he used any care whatever. Viewing the evidence in the most favorable light for appellee, we cannot escape the conviction that young Branom was guilty of contributory negligence. *Railway Co. v. Graves*, 59 Tex. 330; *Railway Co. v. Bracken*, 59 Tex. 71; *Railway Co. v. Fuller*, 5 Tex. Civ. App. 667, 24 S. W. 1090; *Railway Co. v. Willson* (Tex. Civ. App.) 59 S. W. 590.

It is insisted that contributory negligence was a question for the jury, and, as it was submitted to and passed upon by the jury, its verdict should not be disturbed. This is the correct practice where there is a conflict in the evidence, or where there is any evidence showing the absence of contributory negligence. But here young Branom's own testimony shows an absolute want of care in going upon the crossing, and that he was negligent in doing so. There being no circumstance or surrounding to relieve him from his negligent act, it becomes a question of law, and, the facts showing contributory negligence, a verdict should have been instructed for defendant.

The judgment is reversed, and the cause remanded.

WAGLEY v. WESTERN UNION LAND CO.

(Court of Civil Appeals of Texas. Apr. 1903.)

VENDOR'S LIEN—FORECLOSURE—PLEA DESCRIPTION OF LAND—VARIANCE

1. A petition for the foreclosure of a lien, and the published citation by vendors were served, described the property situated in the county of D.; "being tract No. 96, cert. 1/108, grantee F. containing 640 acres of land." statement of facts, approved by the recited that plaintiff introduced the D. county, "to show the sale on section No. 69, cert. No. 1/104, 'tee B. S. & F. Blk. K7," to def. that there was a fatal variance.

Error from District Court County; H. H. Wallace, Judge
Action by the Western Union company against S. L. Wagley
Judgment for plaintiff and
Wagley brings error. Re

CONNER, C. J. Plaintiff in error insists that the evidence in this case falls to support the judgment against him. As instituted, the suit was upon four promissory notes alleged to have been executed by plaintiff in error and one M. P. Wagley as part of the consideration for a tract of land described in the petition as follows: "Situated in the county of Deaf Smith, in the state of Texas; being all of abstract No. 96, cert. 1/108, grantee B. S. & F., containing 640 acres of land. That said lot or parcel of land was heretofore, to wit, on the 21st day of October, 1890, conveyed by said plaintiff [defendant in error] to defendants by deed of writing of that date, in consideration, among other things, of the notes herein described; and that in said deed of conveyance a lien was reserved therein to secure the payment of said notes." The residence of S. L. and M. P. Wagley was alleged to be unknown, and they were cited by publication; the citation describing the land substantially as it was described in the petition. An attorney was appointed to represent the defendants cited by publication, who entered a general denial. The trial resulted in a judgment against the Wagleys for the aggregate sum of \$1,171.46, with interest and costs, and foreclosing the lien as prayed for upon the land described as in the petition. A statement of facts was agreed to by the attorneys and approved by the trial judge. Omitting formal parts, the statement is as follows: "Plaintiff introduced the deed records of Deaf Smith county, Texas, to show the sale and transfer of section No. 69, cert. No. 1/104, original grantee B. S. & F., Blk. K7, Deaf Smith county, Texas, to defendants, showing liens reserved as set out in plaintiff's petition; also 3 promissory vendor's lien notes, for \$384 each, dated October 21, 1890, bearing 8% int., and corresponding in every particular with the allegations in plaintiff's petition." We think the contention of plaintiff in error must be sustained. It seems quite clear to us that the proof is materially variant from the allegations of the petition, as well, also, as from the description of the land as given in the citation and in the judgment.

In view of the well-recognized distinction between the "facts" of the case, and the "evidence" by which the facts are established, it may also be well doubted whether the "statement of facts" hereinbefore quoted by us is a sufficient compliance with our most recent statute on the subject (Rev. St. 1895, art. 1346), requiring in suits by publication "a statement of the evidence" to be approved by the trial judge and filed with the papers of the case, but we find it unnecessary to determine this question.

Because the judgment is not supported by the evidence, it is reversed, and the cause remanded.

GIDDINGS V. WINFREE.
(Court of Civil Appeals of Texas. April 1, 1903.)

PUBLIC LANDS—SURVEYS—PAROL EVIDENCE TO CONTRADICT FIELD NOTES—BOUNDARIES—DEED—STATUTE OF LIMITATION.

1. Where the field notes of a survey are clear and unambiguous, do not call for any marked line, and the boundaries thereby designated are not in conflict with any portion of a prior survey, parol evidence is inadmissible to show that the subsequent survey, as actually located on the ground, included a portion of the land lying in the prior survey.

2. Where it appeared that the portion of plaintiff's land of which defendant had been in possession was not included in the boundaries of defendant's deed, the latter acquired no title thereto under the three or five years' statutes of limitation.

Appeal from District Court, Chambers County; L. B. Hightower, Judge.

Action by George H. Giddings against E. H. Winfree. Judgment for defendant, and plaintiff appeals. Reversed.

H. E. Marshall and E. B. Pickett, Jr., for appellant. Jackson & Hightower, for appellee.

PLEASANTS, J. This is an action of trespass to try title, brought by appellant against appellee for a tract of 70 acres of land, a part of the William D. Smith one-fourth survey in Chambers county. The defendant disclaimed as to a portion of the land sued for, and as to the remainder pleaded not guilty and the statutes of limitation of three and five years. The trial in the court below without a jury resulted in a judgment in favor of the plaintiff for that portion of the land to which the defendant disclaimed, and in favor of defendant for the portion claimed by him under his pleas of limitation. The facts are undisputed, and are succinctly stated as follows: Plaintiff has a regular chain of title from the sovereignty of the soil to the 70 acres of land sued for. This land is a part of the William D. Smith one-fourth league survey. The Smith survey was located in 1835, and its boundaries are known and established. The defendant is the owner of the Thomas M. Blake survey, which was surveyed and patented in 1879. The field notes in the patent describe the Blake survey as follows: "Beginning at the S. E. corner of the Wm. D. Smith survey on the north line of Wm. Bloodgood league, stake in prairie; thence N., 79½ E., on N. line of Bloodgood 525 varas to corner of Henry Griffith league, cedar stake; thence N., 31 W., with W. line of Griffith, 1,493 vrs., to intersection of the E. line of said W. D. Smith survey with the W. line of the Griffith; thence S., 10½ E., with E. line of W. D. Smith, 1,400 vrs., to the beginning. Surveyed May 21, 1879." All of the deeds under which appellee holds title to the Blake survey copy the description of the land contain-

*Rehearing denied, and application for writ of error dismissed by Supreme Court for want of jurisdiction.

whom he claims, or any portion of the 70 acres of land claimed by him. The Blake survey, as actually located upon the ground, included a portion of the land claimed by plaintiff, and also a portion of the Smith survey lying west of and adjoining plaintiff's land. Defendant, in the spring of 1892, put improvements upon that portion of the Blake survey as the same was actually located which is on the Smith survey outside of but adjoining the 70 acres claimed by plaintiff, and had occupied and resided upon same continuously up to the time of the filing of this suit on the 1st day of March, 1901. The fence inclosing the premises thus occupied by defendant extended over the line of the 70-acre tract owned by plaintiff for a distance of about 15 feet, and included a portion of plaintiff's land variously estimated by the witnesses at from one-fourth of an acre to two acres.

Under these facts judgment should have been rendered by the court below in favor of plaintiff for the entire 70-acre tract. The field notes of the Blake survey do not call for any marked line and the boundaries thereby designated are not in conflict with any portion of the William D. Smith survey, and parol evidence was not admissible to show that a different survey was in fact made. These field notes are clear and unambiguous, and the land thereby described is east of the east line of the Smith survey. The location of the Smith survey is not questioned, and the undisputed evidence shows that plaintiff's 70 acres of land is a part of that survey. From these facts it appears beyond dispute that the portion of plaintiff's land of which defendant is shown to have been in possession is not included in the boundaries of defendant's deed, and defendant acquired no title thereto under the three or five years' statutes of limitation. *Anderson v. Stamps*, 19 Tex. 460; *Converse v. Langshaw*, 81 Tex. 278, 16 S. W. 1031.

The judgment of the court below will be reversed, and judgment here rendered in favor of the appellant for the whole of the 70-acre tract of land described in his petition, and it is so ordered. Reversed and rendered.

GALVESTON, H. & S. A. RY. CO. v. PERKINS.*

(Court of Civil Appeals of Texas. April 15, 1903.)

APPEAL—STATEMENT OF FACTS—FAILURE TO SECURE APPROVAL—CERTIORARI—STATUTES —FAILURE TO USE DILIGENCE—CONSIDERA- TION OF EVIDENCE.

1. Where the statement of facts, although agreed to by counsel, is not approved by the district judge, it cannot be considered on appeal.

*Rehearing denied May 6, 1903, and application for writ of error denied by Supreme Court.

¶ 1. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 2531, 2532, 2564.

or approved *nunc pro tunc*.

3. Rev. St. 1895, art. 1382, provides that whenever a statement of facts shall have been filed after the time prescribed, and the party tendering the same shall show that he has used due diligence to obtain the approval of the judge and to file the same within the time, and that failure to obtain the approval of the judge was owing to causes beyond his control, the Court of Civil Appeals shall permit the statement to remain as a part of the record. *Held*, that where, on appeal, it is claimed that the failure to secure the approval of the statement of facts was caused by sickness of one of the counsel, and business on the part of the other, but it is not claimed that diligence was used to obtain the approval, or that it was through the fault of the trial judge that it was not obtained, the statement cannot be considered.

4. In the absence of a statement of facts on appeal, assignments of error based on the existence of facts proved in the trial court cannot be considered, except where an instruction is obviously erroneous when considered in the light of the pleadings and verdict.

Appeal from District Court, Medina County; I. L. Martin, Judge.

Action by R. L. Perkins against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Ed De Montel, John R. Storms, H. C. Carter, and Perry J. Lewis, for appellee.

FLY, J. This is a suit for damages arising from personal injuries inflicted through the negligence of appellant. A trial by jury resulted in a verdict and judgment for appellee in the sum of \$7,000.

The statement of facts, although agreed to by counsel for both parties, was not approved by the district judge, and cannot be considered by this court. *Johnson v. Blount*, 48 Tex. 38; *Railway v. McAllister*, 59 Tex. 349. In the case of *Johnson v. Blount*, above cited, it was agreed by counsel that the statement of facts should be filed as a part of the record, and should be so treated and considered by the Supreme Court, without the approval of the judge who tried the cause and it was held: "Such an agreement cannot supersede the necessity of the approval of the presiding judge, so as to entitle agreed statement to be treated and considered by this court as a statement of fact in this case, as required by the statute. It has been uniformly held by this court the signature of the presiding judge, way as to indicate his approval of statement of facts, was absolutely required. The approval of the presiding judge is peratively demanded by the statute. St. 1895, art. 1379.

It is claimed by appellant to secure the approval of the facts was caused by the sickness of its counsel, and a press of other part of the other, and that

that the trial judge is willing and ready to approve the statement of facts at this time if permitted to do so. A writ of certiorari is prayed for, "to have the statement of facts in this case, as agreed upon by counsel for the appellant and for the appellee, to be signed and approved nunc pro tunc by the trial judge, and that the clerk of the district court of Medina county be permitted to correct the transcript so as to show such approval by the district judge." The office of a writ of certiorari from this court is to correct the record filed here, which is imperfect by reason of a failure to send up a correct copy of the papers on file in the trial court. It cannot be used to create a record that does not exist, and which, under the plain terms of the law, cannot be created. It is not claimed that due diligence was used to obtain the approval and signature of the trial judge to the statement of facts, and that it was through his fault that the approval was not obtained in time, and it is only in cases where such facts are shown that an appellate court is permitted to consider a statement of facts not having such approval. *Id.* art. 1382. All the cases cited by appellant in support of its motion are merely authorities to the effect that appellate courts can and should grant writs of certiorari to correct records improperly prepared by the clerks of trial courts. None of them is authority for the issuance of the writ to create a record.

The assignments of error are based upon the existence of facts proved in the trial court, and, in the absence of a statement of facts, cannot be considered by this court. "It is universally held that, without a statement of facts or bill of exceptions, this court will not consider the action of the court below in receiving or rejecting evidence, nor will it pass upon the correctness of the charges given or refused." *Railway v. McAllister*, 59 Tex. 349, and cases cited. An exception to the above rule is where the charge is obviously erroneous when considered in the light of the pleadings and the verdict. The exception does not arise in this case.

The judgment is affirmed.

HALSTED v. ALLEN et al.*

(Court of Civil Appeals of Texas. April 4, 1903.)

BOUNTY LANDS — GRANTS — CONSIDERATION — RESOLUTIONS — CONSTRUCTION.

1. A joint resolution of the first congress of the republic of Texas enacted November 24, 1836, provided that the pay of volunteers from the United States and elsewhere shall commence from their embodying and leaving home: provided that such time shall not exceed sixty days prior to their being mustered into service of the republic of Texas, at which time their

limited to money, but included as well land granted to a soldier for a term of three months service which included the time between his embodying and leaving home and the date of his being mustered into service.

2. A bounty land certificate providing that the soldier to whom it was granted having faithfully served in the army of the republic of Texas and been honorably discharged, is entitled to 960 additional acres of bounty land for which the certificate is given, etc., is not a mere gratuity, but a grant based on the consideration of the soldier's service.

Appeal from District Court, Haskell County; P. D. Sanders, Judge.

Action by George Bruce Halsted against C. H. Allen and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

S. W. Scott, A. C. Foster, and P. H. Swearingen, for appellant. H. G. McConnell and Walton & Walton, for appellees.

CONNER, C. J. Appellant was the plaintiff below, and, in the right of his wife, is entitled to recover all the interest ever had or held by George Whitfield Brooks, who died in Washington county, Tex., in 1882, in the 960 acres of land situated in Haskell county which is the subject-matter of this suit. Appellees are entitled to whatever interest, if any, in said land, that was ever had or held by one George Washington Brooks, of De Witt county, Tex., who died in 1885; the vital issue in the case being one of identity. There was evidence tending to show that George Whitfield Brooks was born May 25, 1824, and was enrolled or "embodied" in Capt. Jack Shackelford's company of Fannin's command December 12, 1835, and with said company arrived in the republic, and formally enlisted in the volunteer army on January 19, 1836; that he was a soldier in the advance guard of Gen. Fannin's army under the immediate command of Col. Albert Horton, and, being so in advance, escaped the capture of Gen. Fannin; and that he continued in service as a soldier in the army of the republic until the 15th day of March, 1836, when he was honorably discharged. There was also evidence tending to show that George Washington Brooks was the head of a family, and therewith immigrated to the republic in May, 1830; that he enlisted and served as a soldier throughout the war of independence, his term beginning in 1835, and ending after the battle of San Jacinto on April 21, 1836; that he served as a member of Capt. John Austin's company and in Capt. John Bird's company. But, so far as appears in the proof, George Washington Brooks never belonged to Fannin's command, or served under either Capt. Shackelford or Col. Horton. It further appears that George Whitfield Brooks, as early as the year 1872, asserted ownership of the land in controversy, he at that time having executed conveyance of the same to P. H. Swearingen,

*Rehearing denied May 2, 1903.

ownership of the land, having possession by tenant part of the time, and paying all taxes assessed and due thereon all the time. There is no proof of claim on the part of George Washington Brooks, or of any one claiming through him, or on the part of his heirs, who are the appellees in this case, until a short time before the institution of this suit, when appellees gained possession. There was also evidence, which we need not set out, tending to show that both the patent which was issued to George W. Brooks in April, 1861, and the certificate by virtue of which the land in controversy was located, had been procured in behalf of George Whitfield Brooks. The certificate was as follows:

"No. 3102.

960 acres.

"Republic of Texas.

"Know all men to whom these presents shall come.

"That George W. Brooks having served faithfully and honorably for the term of Three months from the twelfth day of December, 1835, until the tenth day of March 1836 and having been honorably discharged is entitled to nine hundred and sixty additional acres Bounty Land for which this is his certificate.

"And the said Geo. W. Brooks is entitled to hold said Land or sell, alienate, convey and donate the same and to exercise all rights of ownership over it.

"In testimony where of I have hereunto set my hand at Houston this First day of May 1838.

"Barnard E. Bee, Secretary of War."

During the trial, which, under the charge of the court, resulted in a verdict for appellees, and after the cause had been submitted to the jury, the jury returned, and propounded to the court the following question: "Did the republic of Texas have a law allowing soldiers pay from the date of enlisting or from the date of entering into actual service?" to which the court answered: "Gentlemen of the jury, in answer to the foregoing question asked by you, you are instructed the laws of the republic of Texas granted pay in money to volunteer soldiers in the army of Texas in the war with Mexico from the time they left home in the United States or elsewhere, provided said time should not exceed 60 days prior to the time of their being mustered into service. But there was no law granting land to soldiers for any time prior to their being mustered into service." Error is assigned to this charge, and we think it must be sustained. On November 24, 1836, by a joint resolution of the first congress of the republic, it was enacted "that the pay of volunteers from the United States and elsewhere shall commence from the time of their embodying and leaving home: provided, said time shall not exceed

time then term of service with compensation. In view of the fact that George Whitfield Brooks was not actually mustered into the military service of the republic until January 19, 1836, the jury may have, and probably did, conclude that the certificate by virtue of which the land in controversy was located was not issued to nor intended for George Whitfield Brooks. As before stated, while not actually mustered in the service until January 19, 1836, he enlisted or was embodied and left home for the republic December 12, 1835, and therefore was clearly within the purview of the benefits granted by the resolution quoted, unless, as was evidently the view of the trial court, the word "pay," used in said resolution, is to be restricted to "pay in money" alone. We do not think the resolution should receive any such restricted construction. It is not so limited in the resolution itself, and we have been cited to no other law or decisions so requiring. The consideration for the issuance of the certificate, as shown on its face, was the fact that the George W. Brooks to whom it was issued had served faithfully and honorably for the term of three months from the 12th day of December, 1835, until the 10th day of March, 1836, the exact term of service by George Whitfield Brooks that was shown in this case; and, while the grant by the republic may have been but a bounty in a sense, yet it was, in substance, a recompense or payment for duties performed in the military service of the republic in a more adequate sense and form than the money payment provided by the then law. We know of no case where certificates of the character here in question have been held to be mere gratuities. The construction of our Supreme Court is, as we think, to the contrary *Nixon v. Land Co.*, 84 Tex. 408, 19 S. W. 560; *Goldsmith v. Herndon*, 33 Tex. 706; *Rogers v. Kennard*, 54 Tex. 30. The charge of the court, therefore, was affirmatively erroneous, and requires a reversal.

We do not deem it necessary to discuss determine questions presented under other signments, but for the error of the court the charge quoted the judgment is reversed and cause remanded.

HAMILTON v. SAUNDERS

(Court of Civil Appeals of Texas,
1903.)

BOUNDARIES—EVIDENCE—FIELD ESTABLISHMENT OF LINE

1. Where, in an action to establish, plaintiff introduced the original of the survey in evidence, defendant contended was the true such line corresponded with on calls of such original field not

*Rehearing denied May 6, 1903

at the instance of either party.

Appeal from District Court, Coleman County; John W. Goodwin, Judge.

Action by P. J. Saunders against J. T. Hamilton. From a judgment in favor of plaintiff, defendant appeals. Reversed.

F. L. Snodgrass, for appellant. J. C. Randolph, for appellee.

KEY, J. This is a boundary suit, the lines in controversy being the south and east lines of the J. P. McLean survey No. 701. The plaintiff recovered part of the land claimed by him, and the defendant has appealed.

The plaintiff put in evidence a certified copy from the General Land Office of the original field notes of the survey referred to, reading as follows: "Beginning at the S. E. corner of survey No. 700, a stone mound, from which a live oak 12 in. dia. brs. S., 86¾ W. 65, and a do. 11 in. dia. brs. S., 71¾ W., 35 vrs.; thence west, crossing the N. P. Hord's creek, 1,344 varas, S. W. corner of No. 700, a stake post oak 7 in. dia. brs. S., 34 E., 12 vrs., and a do. 8 in. dia. brs. north 3 vrs.; thence south 1,344, a stake; thence east 1,344 vrs. to a stake on west line of No. 687; thence north 295 vrs. N. P. Hord's creek, passing the S. W. corner of No. 697, and with its west line, in all 1,344 vrs., to the place of beginning." The plaintiff also put in evidence the patent, which gave the same description of the land, except the call for Hord's creek on the east line. After reaching the southeast corner, the description in the patent reads thus: "Thence north 295 vrs., passing the S. W. corner of No. 697, in all 1,344 vrs., to the place of beginning." After the plaintiff had submitted the testimony of two surveyors, tending to establish the lines according to his theory, the defendant submitted the testimony of one Gordan, a surveyor, which tended to fix the lines in accordance with the defendant's contention. And the defendant offered to prove by Gordan that, running north from the point fixed by him as the southeast corner of the McLean survey No. 701, on the variation and course ran by him as the east line of said survey, he found and crossed a prong of Hord's creek at about 295 varas. On objection of the plaintiff, the court excluded that testimony, because there was no such descriptive call in the patent. This ruling is assigned as error, and the assignment must be sustained. After the plaintiff put the original field notes in evidence, it seems quite clear to us that the defendant had the right to show that the line contended for by him corresponded with any one or more of the calls in the original field notes. But, aside from the fact that the original field notes were put in evidence by the plaintiff, we are of the opinion that they

and, when placed in evidence, it would have been permissible to show that any call given therein corresponded with any line contended for by either party. In *Ayres v. Harris*, 77 Tex. 108, 13 S. W. 768, it was held that the field book of the surveyor who made the survey, which book was an archive of the land office, was admissible in evidence on the question of boundary, though it differed in some respects from the field notes carried forward in the grant. And of course, if the surveyor's field book would be admissible, then the original field notes returned by him to the land office, and upon which the patent issued, would in like manner be admissible in evidence. And when such documents are put in evidence it is then permissible to follow them up with testimony tending to show that objects called for therein have been found by the witnesses upon the ground.

In reference to the complaints urged against the charge of the court, we think it sufficient to say that no error has been pointed out of which the defendant can complain. As the evidence stood, there were but two theories by which the lines in dispute could be ascertained, and the court submitted those theories to the jury. Upon another trial, when the excluded testimony is admitted, another theory may be presented; and, if it is, no doubt the charge of the court will be changed to conform thereto.

For the error pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

ROLLER v. ZUNDELOWITZ.*

(Court of Civil Appeals of Texas. April 4, 1903.)

LANDLORD AND TENANT—LEASES—HOLDING OVER—IMPLIED CONTRACT—ACTION FOR RENT—LIMITATIONS—PETITION—DEMURRER.

1. Where a lease for three years provided that at the end of the term the lessee should have the refusal of an extension at the current market rates at that time, and at the expiration of the lease the lessee held over for another term of three years on the same terms, a subsequent holding over on the termination of the second period was not under the written contract, but by virtue of an implied contract, and hence an action for rent accrued thereunder was subject to the two-year statute of limitations.

2. Where, in an action for rent, plaintiff's entire claim, except an amount insufficient to confer jurisdiction on the district court, was barred by limitations, the petition was properly dismissed on an exception pleading such statute.

Error from District Court, Wichita County: A. H. Carrigan, Judge.

Action by J. E. Roller against A. Zundelwitz. From a judgment sustaining a special exception to the petition, plaintiff brings error. Affirmed.

* See *Boundaries*, vol. 8, Cent. Dig. § 172.

*Rehearing denied May 2, 1903.

SPEER, J. There is but one assignment of error in this case, and that complains of the judgment of the district court in sustaining defendant in error's third special exception, and in dismissing plaintiff in error's petition. The exception which the court sustained is as follows, to wit: "(3) For a third special exception to plaintiff's first amended original petition, this defendant says that it affirmatively appears that the liability of this defendant for any rent of the building described in plaintiff's said petition after the 1st day of April, 1899, is barred by the two-year statute of limitation, which this defendant here pleads in bar of any liability arising before the 1st day of April, 1899; and of this exception this defendant prays the judgment of the court." The allegations of the petition, so far as germane to the issue thus presented, are as follows: "And the plaintiff, complaining of the defendant, avers that heretofore, to wit, on the 14th day of November, 1889, said plaintiff, by instrument in writing duly signed and executed by both plaintiff and defendant, leased to the defendant for the period of three years, to wit, from the 1st day of December, 1889, to and ending on the 30th day of November, 1892, the certain premises belonging to plaintiff, namely, the single-story brick store on Seventh street in the city of Wichita Falls, Texas, on lots known and described as 25 feet by 100 feet off of lots 8 and 9 in block 152 of said city; that, in consideration of the use and occupancy of said property for said period of three years, the defendant, by said instrument in writing, bound and obligated himself to pay to the plaintiff the sum of \$1,260, to be paid in installments of \$35 at the end of each and every month of said lease; that, among other stipulations in said instrument of writing, it was agreed 'that said Zundelowitz' should at the end of said lease have the refusal of the extension of said lease at the current market rates at that time. Plaintiff says that the defendant duly entered into the occupancy of said premises under and by virtue of said lease, and held and used the same for and during the period of three years, to wit, until November 30, 1892. Plaintiff avers and charges the fact to be that after said last-mentioned date, and after the expiration of the said three-year lease, the defendant, Zundelowitz, with the consent of the plaintiff, held over and continued to use and occupy said premises under and by virtue of the terms and conditions of said lease in writing, providing and stipulating for an extension of the same for another period of three years from the said 30th day of November, 1892, until the 30th November, 1895, and upon the terms and conditions and for the price for use and occupancy of the same set out in the instrument in

and term of three years, to wit, November 30, 1895, the defendant held over and continued to occupy said premises, with the consent of plaintiff, under and by virtue of said written lease, and at the price and upon the terms therein set out, to wit, —, defendant continued to use and occupy said premises for the three years ending November 30, 1898; that after the expiration of said last-mentioned term of three years, to wit, after the 30th of November, 1898, defendant, with consent of plaintiff, held over and continued the occupancy and use of said premises under the terms and conditions and for the price for said use and occupancy, and by virtue of said instrument in writing, to wit, said written lease hereinbefore described, until, to wit, April 1, 1899, when he surrendered and plaintiff accepted the possession of said premises; that the current market rates of rental on said building from November 30, 1892, to April 1, 1899, was at least \$35 per month. Plaintiff says, premises considered, the defendant held, occupied, and used said premises for the six years and four months succeeding said 30th day of November, 1892, to wit, until April 1, 1899, holding same under and by virtue of said lease in writing, whereby the defendant, A. Zundelowitz, became indebted and by said instrument in writing bound himself to pay to plaintiff the sum of \$2,600, which is at the rate of \$35 per month, which said sum of \$35 per month is and was the real market value of said property. Plaintiff says that of said sum the defendant has at various times, and in divers sums, paid the plaintiff the sum of \$1,910, leaving due this plaintiff the sum of \$750, which said sum of \$750 the defendant, though often requested, has wholly failed to pay, and still refuses to pay, or to pay any part thereof, to plaintiff's damage \$1,000."

If plaintiff in error's petition discloses action "for debt where the indebtedness is evidenced by a contract in writing," then ruling of the court is right; otherwise wrong. Sayles' Ann. Civ. St. 1897, art. 16. In *City of San Antonio v. French*, 80 Tex. 16 S. W. 440, 26 Am. St. Rep. 763, Supreme Court quotes with approval from *Boyer v. Text-writers and Decisions* to the effect that when a tenant holds over after expiration of his term the law will agree him to hold for a year upon the prior lease, and its own contract that the tenant who holds over with the consent of his landlord is deemed to be upon the terms of his prior lease on the ground that the parties are presumed to have tacitly renewed the former agreement. The same principle is announced in *Bro. v. Maddox*, 86 Tex. 54 and *Racke v. Brewing Assn.*, 167, 42 S. W. 774. Upon these cases, appellant contr

and, said, and within years constituted successive renewals of the original written lease for the full period thereof, and that appellee's holding was at all times by virtue and according to the terms of the said instrument, and his suit, therefore, "evidenced by or founded upon" a contract in writing, and subject only to the four-year statute of limitations. Sayles' Ann. Civ. St. 1897, art. 3356. We do not so interpret these decisions, nor do we understand the law to be as stated. In cases where the original lease contains no provisions for renewal, a holding over with the consent of the landlord creates the relation of landlord and tenant upon the terms of the expired lease. From the conduct of the parties, the law implies the contract. And in these cases, whether the original lease be in writing or not, the renewal is not a written lease. In those cases where the original lease, which is in writing, provides for the renewal of the same, and the tenant, by holding over, or by other compliance with the provisions stipulating for the extension, renews the contract, the second term is as much a part of the written lease as the first. The holding in such case is by virtue of the express written contract. No new assent upon the part of the lessor is required. *McClelland v. Rush* (Pa.) 24 Atl. 354. But after the expiration of the renewal term provided for by the terms of the original lease, any holding over would only create a renewal by virtue of the implied contract. This implied contract, notwithstanding it may and will be upon the same terms of the prior written lease, is not itself evidenced by written contract, and is therefore, under our statute, subject to the bar of limitations after two years. Such we understand to be the status of appellant's case. If we treat the original lease as providing for a renewal, which is not at all certain, yet that instrument could not embrace more than six years from December 1, 1889, and after that time the liability of appellee arising from his holding over with the consent of appellant would be predicated upon the implied contract. Such further term is in no way contemplated by the lease, nor does appellee's liability have its inception there. We conclude, therefore, that appellant's cause of action as set forth in his petition was subject to the exception of appellee interposing the bar of limitations of two years.

It is true, as suggested by appellant, that appellee's exception does not embrace the rents from March 9, 1899, to April 1, 1899, a period of 23 days—suit having been filed March 9, 1901—but the amount in controversy having been reduced, by sustaining such exception, to an amount not within the jurisdiction of the district court, the petition was properly dismissed. *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093; *Hammond v. Lamar County* (Tex. Civ. App.) 44 S. W. 179; *Doherty v. Galveston* (Tex. Civ. App.) 48 S. W. 806; *McFadin v. San Antonio* (Tex. Civ. App.) 54 S. W. 49; *Hill v. Strauss* (Tex. Civ. App.) 56 S. W.

35, 3 Tex. Ct. Rep. 295.
The judgment is affirmed.

FLANARY et al. v. WOOD.

(Court of Civil Appeals of Texas. April 18 1903.)

EXEMPLARY DAMAGES—ACTUAL DAMAGES—EXCESSIVE DAMAGES.

1. Exemplary damages can be recovered only where actual damages are sustained, and must bear a reasonable proportion to such actual damages.

2. In an action to recover damages for an assault and battery on plaintiff's wife, and for the value of certain household goods carried away by defendants, a judgment for \$2,344 exemplary damages was excessive, where the actual damages were assessed at \$56, which the evidence showed to be the value of the furniture taken.

Appeal from District Court, Bosque County; W. Poindexter, Judge.

Action by Tom Wood against W. J. Flanary and others. Judgment for plaintiff, and defendants appeal. Reversed, unless plaintiff file remittitur of all exemplary damages recovered in excess of \$500.

J. P. Word and Dewey Langford, for appellants. N. J. Wade, for appellee.

SPEER, J. Tom Wood sued the appellants in the district court of Bosque county to recover \$10,500 actual, and \$10,500 exemplary, damages, for an assault and battery inflicted upon him and his wife, and for the value of certain household goods carried away by appellants; and, from a judgment in his favor for \$56 actual, and \$2,344 exemplary, damages, this appeal is prosecuted.

The evidence is ample to sustain the verdict for actual damages in the amount recovered, but we are of opinion the assignment complaining of the excessiveness of the verdict for exemplary damages should be sustained. The authorities in this state all agree that there can be no recovery for exemplary damages except where actual damages are sustained. *Flanagan v. Womack*, 54 Tex. 45; *Trawick v. Martin-Brown Co.*, 79 Tex. 400, 14 S. W. 584; *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823; *Giraud v. Moore* (Tex. Sup.) 26 S. W. 945. And it is further held that the exemplary damages should bear a reasonable proportion to the actual damages sustained. *Willis v. McNeill*, 57 Tex. 480; *I. & G. N. Ry. Co. v. Tel. Co.*, 69 Tex. 282, 5 S. W. 517, 5 Am. St. Rep. 45; *Tynberg v. Cohen*, 76 Tex. 416, 13 S. W. 315. What would be a reasonable or proper ratio in all cases cannot, of course, be declared. It will depend upon the circumstances of each individual case, and, necessarily, much is left to the discretion of the jury. If it be conceded, which it must be, that the rule forbidding exemplary damages except in those cases where actual damages are shown is a sound one, it

determine the amount to be awarded as exemplary damages. With us, exemplary or punitive damages are considered in the nature of a punishment or smart money. *Smith v. Sherwood*, 2 Tex. 463; *Graham v. Roder*, 5 Tex. 149; *Gordon v. Jones*, 27 Tex. 622; *Hays v. H. & G. N. Ry. Co.*, 46 Tex. 280; *Flanagan v. Womack*, 54 Tex. 50. And, while they should be large enough to command respect for the law and to deter others from similar infractions, they should not be excessive or oppressive.

In this case the extent of the injuries inflicted upon appellee amounted, according to the finding of the jury, of which no complaint is made, to \$56, a sum but little more than nominal. Under the pleadings and the charge the jury was authorized to consider, as a part of this actual damage, the physical and mental pain suffered by appellee, as well as the value of the household property taken. In view of the fact that the testimony for appellee showed the value of the furniture to be just \$56, we are inclined to interpret the verdict of the jury for that amount as a finding against the appellee upon the other elements of actual damage. But, whether this be true or not, the verdict for actual damage being so small, it amounts practically to the same thing. This being true, we think the verdict for \$2,344 exemplary damages is excessive. It is out of all proportion to the actual damages sustained. We are not to be understood as holding that the amount of the actual damages, to the exclusion of every other consideration, is of controlling importance in estimating the exemplary damages, but that, after considering the evil motive which must be present in every case to authorize a recovery for vindictive damages, the jury will also take into consideration the extent of the real injuries inflicted in assessing such exemplary damages, and maintain a reasonable proportion between the two, having due regard to the circumstances which authorize the recovery of exemplary damages in the first place. We do not think the circumstances surrounding this case, interpreted in the light of the verdict for actual damage, are such as to call for the imposition of so harsh a penalty as has been inflicted upon appellants. In view of the rule in this state (taking, as we do, the verdict as the measure of actual damage), we would not be willing to affirm the judgment for more than \$500 exemplary damages.

We overrule all other assignments, but, for the error of the court in refusing to set aside the verdict and to grant appellant a new trial, the judgment is reversed, and the cause remanded for a new trial, unless appellee shall, within 20 days from this date, file in this court a remittitur of all exemplary damages recovered in excess of \$500, upon the filing of which remittitur, however, the judgment will be reformed and affirmed.

73 S.W.—68

(Court of Civil Appeals of Texas, April 8, 1903.)

NEGLIGENCE—INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. Where, in an action for injuries, the evidence shows that plaintiff's conduct necessarily proximately contributed to his injuries, an instruction that, if plaintiff was guilty of negligence that contributed to his injury, the jury should find for defendant, was not erroneous on the ground that plaintiff's negligence, in order to preclude recovery, must have "proximately contributed" to the injury.

2. In an action for injuries the charge prepared by plaintiff's counsel and which the court gave treated the issue of contributory negligence in general terms, and instructed that plaintiff could not recover if guilty of "contributory negligence," and the court also on its own motion instructed that, if plaintiff was guilty of "contributory negligence," the jury should find for defendant. *Held*, that the instruction given by the court on its own motion was not erroneous because it did not state that plaintiff's negligence must have "proximately contributed" to the injury, since the submission of such instruction was induced by the form of the charge requested by plaintiff.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Firmin Baca against the San Antonio & Aransas Pass Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Nat B. Jones, Saml. Belden, Jr., and M. W. Davis, for appellant. Houston Bros. and R. J. Boyle, for appellee.

JAMES, C. J. The errors assigned affect only the charge of the court on the question of contributory negligence. We conclude, as matter of fact, from the manner in which the testimony shows plaintiff's injury occurred, his acts, if they or any of them contributed to his injury, necessarily proximately contributed thereto. This being the case, the following charge on contributory negligence: "Or if you believe from the evidence that the plaintiff was guilty of negligence, under the circumstances, that contributed to his injury, if any, you will find for defendant," was not erroneous for the reason assigned, viz., that such negligence, to preclude recovery, must have been the proximate cause, or have proximately contributed the injury, and that the charge ignored excluded this idea. *Ry. v. Rowland*, 90 Tex. 38 S. W. 756; *Culpepper v. Railwa*, 90 Tex. 627, 40 S. W. 386; *Ry. v. Mc*, Tex. 284, 38 S. W. 36. In addition plaintiff's counsel prepared the charge the court gave in toto, except that added to a paragraph covering it of assumed risk the clause above which appellant's complaint is of charge, as prepared and tendered and as given, treated the contributory negligence in general

*Rehearing denied May 6, 1903
denied by Supreme Court.

was guilty of contributory negligence. The addition made by the court to the charge in another place said practically the same thing, using the expression "negligence that contributed to his injury," instead of "contributory negligence." We cannot escape the conclusion that the submission of the issue in this form, and in no other, was induced or contributed to by the requests of plaintiff.

Affirmed.

GALVESTON, H & N. RY. CO. v. BLAU.*
(Court of Civil Appeals of Texas. March 19, 1903.)

RAILROADS—ANIMALS KILLED ON TRACK—EVIDENCE.

1. Evidence held insufficient to prove that plaintiff's jack was killed by a train of defendant railroad company.

Appeal from Harris County Court; E. H. Vasmer, Judge.

Action by A. Blau against the Galveston, Houston & Northern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Thos. H. Botts, for appellant. J. H. Davenport, for appellee.

GARRETT, C. J. This suit was brought by the appellee against the railway company in a justice's court in Harris county for the recovery of \$200, the value of a jack alleged to have been killed by a train or locomotive on appellant's railway near Edgewater, in Galveston county. There was a judgment in the justice's court in favor of the appellee for the sum of \$125. On appeal to the county court judgment again was in favor of the appellee, and the company has appealed to this court.

There was no evidence that the jack was killed by a train or locomotive of the appellant. The animal was found dead at a distance from the track of from 50 to 300 yards, as estimated by the witnesses, and near a dirt road crossing. The carcass was still warm when found, and bore no bruise, or mark of violence or injury, as the cause of the death of the animal. There was no sign at the crossing of its having been struck there, nor was there any sign of its having been dragged to the place where it lay. There was some evidence of struggle, and it appeared that the animal lay where it had fallen. Appellant's track was fenced, and the crossing, though not of a public road, was made for a road used by the public generally, and was put in for the convenience of the people of the neighborhood. The appellee seeks to sustain the verdict of the jury on the ground that the road had not been laid out as a public road, and, as testified by two witnesses,

*Rehearing denied.

road. It is needless to say that such evidence was not sufficient to support the verdict. The animal might have died of some disease, or even of old age, so far as the evidence discloses the cause of its death. The judgment of the court below will be reversed, and judgment will be rendered here in favor of the appellant.

Reversed and rendered.

GALVESTON, H. & S. A. RY. CO. v. KEEN.*

(Court of Civil Appeals of Texas. April 15, 1903.)

INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—INSTRUCTIONS—APPEAL—STATEMENT OF FACTS.

1. In an action against a railroad company for injuries sustained by a cook for a bridge gang, injured while being transported from one point of the road to another, an instruction that one who enters the employment of a railroad company does not assume the risk of defendant's negligence unless he knew of it, or in the discharge of his duties would have known of it, is not erroneous, as making the railroad liable in all cases in the absence of actual knowledge, since, in view of the nature of the cook's employment, the instruction could not have been prejudicial to defendant.

2. Inasmuch as Rev. St. 1895, art. 1379, requires that a statement of facts for use on appeal shall be approved by the trial judge, such approval cannot be waived by the parties.

Appeal from District Court, Medina County; I. L. Martin, Judge.

Action by J. T. Keen against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Ed De Montel, Chas. H. Bertrand, John A. O'Conner, and Perry J. Lewis, for appellee.

FLY, J. This is a suit to recover damages from the railway company arising from personal injuries inflicted through negligence of appellant. Appellee was alleged to be a cook in the employ of appellant. He recovered damages in the sum of \$14,000.

The fifth paragraph of the court's charge was as follows:

"One who enters the employment of a railroad company assumes the risk ordinarily incident to his employment, but he does not assume the risk of the negligence of the company, unless he knew of it, or, in the discharge of his duties, would have known of it."

It is the contention of appellant that the charge makes the railroad liable in all cases, in the absence of actual knowledge on the part of appellee of defects that caused his

*Rehearing denied May 6, 1903.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 332.

injuries. While not as full and clear as it might be, the charge, in substance, embodies the law as stated by the Supreme Court. Says the Supreme Court in *Bonnet v. Railway*, 89 Tex. 72, 33 S. W. 384: "The servant owes no duty of inspection. He assumes the risks of a danger of which he has actual knowledge, and of such hazards as he would have learned by the exercise of ordinary circumspection, which a prudent man would use in the particular case. Since, in the absence of knowledge to the contrary, he may rely upon the assumption that the master will do his duty, he is under no obligation to look out for the master's negligence; but he cannot shut his eyes to dangers that are obvious to an ordinary man, or to an experienced man, if he be experienced." In the case of *Railway v. Hannig*, 91 Tex. 347, 43 S. W. 508, it was said: "He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge." The pleadings in this case state that appellee was employed as a cook for a bridge gang, and was being transported from one point on the road to another, when the train parted by reason of a defective coupler, and then the parts came into collision. In the very nature of things, a cook for a bridge gang would not necessarily acquire knowledge of the state of the couplers on a train conveying him from one point to another. Governed as this court must be by the allegations in the pleadings as the only test, in the absence of a statement of facts as to whether the charge could have been injurious if erroneous, we must conclude that it could not possibly have injured appellant.

The other assignments of error are dependent upon the facts established at the trial, and have no basis, for the reason that what purports to be a statement of facts has not been approved by the district judge. The approval of the judge is required by statute (Rev. St. 1895, art. 1379), and cannot be waived by the parties. *Witten v. Poindexter*, 25 Tex. Supp. 378; *Wampler v. Walker*, 28 Tex. 598; *Frost v. Frost*, 45 Tex. 324; *Johnson v. Blount*, 48 Tex. 38.

The judgment is affirmed.

LANDERS v. BOLIVER.

(Court of Civil Appeals of Texas. April 18, 1903.)

SCHOOL LANDS—ACTION TO RECOVER—ADVERSE CLAIMANTS—SUFFICIENCY OF EVIDENCE.

1. In a suit to recover school lands, where the pleadings do not specifically set forth the award by the commissioners of the land office to defendant, and the subsequent rejection of plaintiff's applications, though the evidence discloses these facts, plaintiff must also show, in order to recover, that the commissioners did not have the power to award the land to defendant.

Appeal from District Court, Hale County; Jo A. P. Dickson, Judge.

Action by J. W. Boliver against J. T. Landers. Judgment for plaintiff, and defendant appeals. Reversed.

H. C. Randolph and W. C. Mathes, for appellant. Geo. L. Mayfield and L. S. Kinder, for appellee.

SPEER, J. J. W. Boliver sued J. T. Landers in the district court of Hale county in the ordinary form of trespass to try title to recover two sections of school land. The answer was a general demurrer, general denial, and plea of not guilty. Upon the trial Boliver introduced evidence to prove (1) classification and appraisalment of the land in due form, of date December 22, 1897; (2) proper applications to purchase, filed in the general land office December 27, 1901, and marked "Rejected" by the commissioner; (3) tender of first payment of purchase money to the State Treasurer; (4) a sufficient settlement on the home section; (5) that he owned no other lands, no collusion, and that the additional section was within a radius of five miles from the home section, etc. Landers then proved the award of both sections to him by the land commissioner on January 20, 1900, and both parties closed. The verdict and judgment were for Boliver, and Landers appeals.

We sustain the assignment complaining of the insufficiency of the evidence to support the verdict. In *Reeves v. Smith*, 58 S. W. 185, Mr. Justice Stephens, for this court, said: "Where the petition of one suing to recover school land shows that his application to purchase has been rejected because of a previous sale to another, it must go further, and allege facts showing, not only that the commissioner of the land office did not have the power to award the land upon the prior application, but also that he did wrong in rejecting the subsequent application; that is, where the pleader undertakes, as in this instance, to allege his title specially. He must, in such case, show facts entitling him to have the award of the commissioner disregarded, otherwise the land is no longer subject to sale." So, in this case, while the pleadings do not specially set forth the award to appellant, and the subsequent rejection of appellee's applications, the evidence does disclose these facts, and the rule is as stated in the quotation above; i. e., the proof for appellee must go further, and show that the commissioner of the land office did not have the power to award the land upon appellant's applications, for otherwise the land was not subject to sale at the time appellee's applications to purchase were filed, and appellee's proof fails in a material part of his case. See *Davis v. McCauley*, 4 Tex. Ct. Rep. 341, 66 S. W. 1124; *McBane v. Angle*, 5 Tex. Ct. Rep. 534, 69 S. W. 435; *Bell v. Williams*, 4 Tex. Ct. Rep. 342, 66 S. W.

The judgment is reversed, and the cause remanded.

**DALLAS CONSOL. ELECTRIC ST. RY. CO.
v. ILLO.**

(Court of Civil Appeals of Texas. April 22, 1903.)

STREET RAILWAYS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—APPEAL—PREJUDICIAL ERROR.

1. Plaintiff's wife was struck by one of defendant's cars while driving across its tracks. The car was running on a downgrade, and was some 250 feet distant when plaintiff's wife started to cross the track. The motorman allowed the car to run of its own momentum, and did not have it under control, although he knew the street was crowded, and saw plaintiff's wife; and he made no effort to stop the car until it struck her carriage, which was hindered from crossing by a team passing immediately in front of it. *Held*, that the facts showed negligence on the part of defendant.

2. The facts failed to show negligence on the part of plaintiff's wife proximately contributory to her injury.

3. In an action against a street railway company for injuries from a collision, error, if it was such, in admitting in evidence a city ordinance requiring motormen to keep vigilant watch for vehicles and persons on foot, and in giving a charge in the language of the ordinance, when such ordinance was not pleaded, was not prejudicial where the undisputed evidence showed that the motorman exercised the diligence required by the ordinance, and still failed to prevent the injury.

Appeal from District Court, Dallas County; Thos. F. Nash, Judge.

Action by F. S. Illo against Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Finley & Knight, for appellant. Harry P. Lawther, for appellee.

NEILL, J. This suit was brought by the appellee against appellant to recover damages for personal injuries to his wife, alleged to have been inflicted by the company's negligence. The defendant pleaded not guilty and contributory negligence. The judgment appealed from, which was entered on a verdict, is for \$3,500.

These are the facts: In August, 1901, at about 6:30 o'clock in the evening, appellee's wife, in company with a female companion, was driving in a buggy across Elm street, in the city of Dallas, at a point between Stone and Akard streets. The appellant operated an electric street railway along said street, maintaining a double track thereon, over which its cars, running in opposite directions—east and west—were continuously passing. When appellee's wife started to drive across, one of appellant's cars running west turned into Elm street, 250 feet distant from her; and, the track being downgrade, the motorman in charge of and operating the car turned off the current of electricity by which it

brake chain slack and brake not set, to roll of its own momentum rapidly down the track towards where she was driving across the street. The motorman, according to his testimony, did not have the car under control, though he knew the street, all along in front of him, was crowded with people, buggies, wagons, and bicycles, and saw appellee's wife and companion in the buggy from the time they started across the street until he ran them down with his car. Appellee's wife and her companion saw the car coming in their direction when they started to drive across the street, and, it being something over a block from them, judged that they had ample time to cross in safety before the car reached the part of the track where they intended to pass over it. While in the act of crossing, and before the hind wheels of the buggy cleared the track, another vehicle, going east on Elm street, was driven directly in front of and between their horse's head and side of the street to which they were crossing, blocking their way, and stopping their buggy on the track directly in front of the approaching street car. Though the motorman saw the wagon pass along, from the rear, beside his car, and get in front of and stop the buggy, and realized the perilous situation of the ladies in it, he made no effort to check or stop his car until it struck, overturned the buggy, and threw the ladies with great violence upon the asphalt-paved street. That these acts constitute negligence, there cannot be a particle of doubt. By reason of such negligence appellee's wife, without any fault on her part proximately contributing to her injury, was seriously and permanently injured, to appellee's damage in the amount found by the jury.

Conclusions of Law.

The introduction in evidence by appellee, over the objection of appellant that it was not pleaded of an ordinance of the city of Dallas requiring "the conductor of each car to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and, on the first appearance of danger to such persons or vehicles, to stop the car in the shortest possible time," when the undisputed facts in this case are considered in connection with the well-settled principles of law applicable to them, furnishes no ground for a reversal of the judgment; nor does that part of the charge which is substantially in the language of the ordinance. It is shown from the testimony of the motorman himself that he did keep the vigilant watch, and that he saw the ladies in the buggy from the time his car turned into Elm street until the collision occurred; and that he also saw the wagon pass his car, get in the way of and stop the buggy on the street car track. If the negligence charged had been the failure of the motorman to use ordinary care in discovering per-

sons on or near the track, and the evidence had made it a controverted issue of fact, it might, with some degree of plausibility, be contended that the admission of the ordinance, and giving substantially its language in charge to the jury, were prejudicial errors. But, as no such issue was made, and the undisputed evidence shows the motorman exercised the diligence of discovery required by the ordinance, the admission of the testimony and giving the charge could not, if error, have possibly prejudiced the appellant.

The grounds upon which appellant's liability rests are the negligence of the motorman in permitting his car to run of its own momentum down a street thronged with people and vehicles without having it under his control, and his failure to exercise any diligence at all to stop or check the speed of the car when he discovered the imminent peril of the ladies. These grounds of negligence are so clearly and conclusively established and shown by the evidence to be the proximate cause of the injury that we can hardly conceive of an error that would justify us in reversing the judgment.

There is no question about the fact that the motorman discovered the peril of appellee's wife in time to have avoided the collision had he exercised the degree of care required under the circumstances. In view of this fact, the paragraphs of the court's charges complained of in the third and fourth assignments of error, if subject to the objections urged against them, could not have been prejudicial to the appellant. But it seems to us the charge correctly announces the law applicable to the case made by the pleadings and evidence. *San Antonio Traction Co. v. Upson*, 71 S. W. 565, 6 Tex. Ct. Rep. 447, and authorities cited.

If there were any error in the admission of the testimony complained of by the fifth and sixth assignments of error, it was cured by the court's instructing the jury "that in determining the question whether or not defendant's motorman was guilty of negligence in this case you are not to consider for any purpose any of the evidence detailed before you which relates to other accidents with which he was connected, but you will look alone to the facts and circumstances detailed that were connected with the occasion of the accident." *Railway v. Duellin*, 86 Tex. 450, 25 S. W. 406.

There is no error requiring a reversal of the judgment, and it is affirmed.

COUCH & GILLILAND v. HOME PROTECTION FIRE INS. CO.*

(Court of Civil Appeals of Texas. March 28, 1903.)

INSURANCE-WARRANTY-ATTACHED STIPULATIONS-FORFEITURE-WAIVER.

1. Where a slip attached to an insurance policy contained a description of the property, a

stipulation that the insurance was subject to the "following conditions" as warranties, then a three-fourths loss clause, an iron-safe clause, and a statement that it was made a part of the policy, and the policy contained the provision that it was subject to the provisions, agreements, or conditions "added" thereto, and, in referring to a mortgagee's interest, provided that the conditions of the policy should apply to such interest as should be "appended" to it, the iron-safe clause was made a part of the policy, and was a binding warranty on the insured.

2. Where, in an action to recover on an insurance policy, it was shown that, though the company's adjuster and local agents were informed by plaintiffs that they had not complied with an iron-safe clause, neither of them declared a forfeiture of the policy; that the adjuster afterwards required one of plaintiffs to make a statement of the loss under oath, and stated that the company would settle for the loss; and that plaintiffs had no notice of any limitation on the adjuster's authority—it was a question for the jury whether defendant had waived the forfeiture of the policy.

Appeal from Grayson County Court; J. D. Woods, Judge.

Action by Couch & Gilliland against the Home Protection Fire Insurance Company. Judgment for defendant, and plaintiffs appeal. Reversed.

F. B. Dillard, for appellants. A. L. Beaty, for appellee.

BOOKHOUT, J. This suit was instituted by the firm of Couch & Gilliland against the appellee, as defendant, to recover the amount of an insurance policy. A trial was had, and a verdict returned for defendant by instruction of the court. Plaintiffs appealed.

1. The first assignment complains of the ruling of the court on the exception of the plaintiffs to that part of the answer setting up the iron-safe clause of the policy. It is insisted that the iron-safe clause, which was on a slip of paper attached to said policy, is not a warranty by plaintiffs, but is only a representation by them; and there is no plea that said representation was fraudulent, or made to deceive, or that defendant was misled, deceived, or injured thereby. The original policy, by order of the court, is sent up for our inspection. There is attached to the face of the policy, at the top of the space intended for description of the property insured, a slip of paper headed, "Mercantile Building and Stock Form." Then follows a description of the property insured. This description is followed by a statement reading: "This insurance is effective subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract." Then follows the three-fourths loss clause, after which follows the iron-safe clause. At the end of the slip the following appears: "Attached to and made a part of Policy No. 1,244 of the Home Protection Fire Insurance Company of San Antonio, Texas. R. M. McBride, Secretary." The policy is numbered 1,244. Near the end of the policy, and in the last clause thereof, appears

*Rehearing denied April 25, 1903.

lations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto." In referring to any interest which may exist in favor of a mortgagee, it is provided that the conditions of the policy shall apply "to such interest as shall be written upon, attached, or appended hereto." It is clear that the slip or piece of paper containing the description of the property insured, the three-fourths loss clause, and iron-safe clause were added to the policy, and, by its express terms, became a part thereof. The reference was sufficient to make said iron-safe clause a part of the policy, and the same was a promissory warranty. The court did not err in overruling plaintiffs' exception to that part of the answer setting up said clause as a warranty.

2. It is contended that the court erred in instructing a verdict for the defendant, his action being grounded upon the fact that the assured had breached the iron-safe clause of the policy. It is insisted that there is evidence tending to show that a forfeiture of the policy by reason of the assured not having complied with the iron-safe clause had been waived by the company. Leftwich & Rutherford were the local agents of the defendant at Tloga. When the fire which destroyed appellants' property occurred, they wired the fact to the company. The company then sent them blanks on which to take proof of loss and return it. These agents were, at the time the proof of loss was taken, informed by Gilliland that they had not complied with the iron-safe clause, and that their books and invoices were destroyed by the fire. The sworn proof of loss was then taken, and sent to the company, and was not returned or objected to. No forfeiture was claimed. After this, on January 2, 1902, the company wrote Leftwich & Rutherford as follows: "On the 16th inst., immediately after receiving notice of the fire, we enclosed you a blank proof sheet to have insured make a proof of loss on and return to us. We have failed to receive the proof of loss up to this date and suppose that he misunderstood the matter. We herewith enclose another proof sheet. Please explain to him the necessity of making proof of loss on same, and return to us at once. Our adjuster met with a painful accident some few days since, was thrown from his buggy and badly crippled up. It will be some days yet before he will be able to travel; however, we will try and arrange to have the loss adjusted within the next few days. Please tell Mr. Dillard that the matter will be adjusted as early as possible and settled in its regular order." On receipt of this letter and the blank, the local agents again required appellants to come to their office to make proof of loss, and were again informed that the iron-safe clause had not been complied with; that their books and invoices

were required by defendant's agents to make a second proof of loss, which was sworn to, and mailed to the company. No forfeiture was claimed at this time. Couch & Gilliland had no notice of any limitation on the authority of Leftwich & Rutherford. Windsor was the adjuster of defendant, and was sent to Tloga to adjust this loss. Couch & Gilliland had no notice of any limitation on his authority. When he reached Tloga, he sent for Gilliland to come to his hotel, and was there informed by Gilliland that his books and invoices were burned. He then took Gilliland to the home of a notary public at night, and was informed in the presence of the officer that the iron-safe clause had not been complied with, but he required Gilliland to submit to examination under oath, as provided by the policy. The adjuster did not declare the policy forfeited, and did not refuse to settle it, but stated that he could not arrive at the amount, as the books were burned, but that the company would settle it. While at Tloga this adjuster, in conversation with the local agent of defendant, Mr. Leftwich, based his refusal to pay the policy on the ground that it had been transferred to wholesale merchants. It may be stated generally, that if, in any negotiation or transaction with the assured after knowledge of the forfeiture, the company recognizes the continued validity of the policy, or does acts based thereon, or requires the assured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived. *Georgia Home Ins. Co. v. Moriarty* (Tex. Civ. App.) 37 S. W. 628. See, also, *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.* (Tex. Civ. App.) 48 S. W. 559. This court held that a forfeiture for failure to comply with the iron-safe clause was waived if the company, with knowledge of the breach of the condition, required the insured to be examined under oath with reference to the loss pursuant to the terms of the policy. *Georgia Home Ins. Co. v. O'Neal*, 38 S. W. 62. If the adjuster, with knowledge of a forfeiture of the policy by reason of Couch & Gilliland having failed to comply with the iron-safe clause, did not rely thereon, but, with knowledge of the breach of such clause, induced the assured, or either of them, to go before a notary public, and make oath as to the amount of goods they had on hand at the time of the fire, and did not claim a forfeiture, but stated the company would settle the loss, then the jury would be justified in finding a waiver of such forfeiture. The company was bound by the acts of its adjuster. *Sisk v. Ins. Co.* (Mo. App.) 69 S. W. 687. The evidence was sufficient to raise the issue, and the trial court erred in instructing a verdict for defendant.

The judgment is reversed, and the cause remanded.

(Court of Civil Appeals of Texas. April 6, 1903.)

RECEIVER—PROPRIETY OF APPOINTMENT—OIL FIELD—REGULATIONS TO PREVENT FIRE—SUIT TO ENFORCE—RECEIVERSHIP TO COLLECT OIL.

1. In a suit to compel by injunction the enforcement of regulations to prevent fire agreed on by owners of a petroleum field, one of which required owners of land abutting on drains for waste oil to keep them open, the court cannot, on petition of intervening owners, appoint a receiver to collect oil which may be wasted, and sell it for the benefit of those interested, or to improve the field and lessen danger from fire; the purposes of the receivership not being germane to those of the principal suit.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Suit by George W. Carroll against the J. M. Guffey Petroleum Company and others, in which J. M. Abbott and others intervene, praying a receivership. From an order appointing a receiver, G. W. Hardy and others appeal. Reversed.

W. L. Douglass and Hardy & Hardy, for appellants. Jackson, Hightower & Lipcomb, for appellees.

GARRETT, C. J. This is an appeal from an interlocutory order of the judge of the Fifty-Eighth Judicial District appointing a receiver. On September 28, 1901, George W. Carroll filed a petition in the district court for the Fifty-Eighth Judicial District against the J. M. Guffey Petroleum Company and many others, resident citizens of Jefferson county, "engaged in the business of producing petroleum in said county," showing that there was situated in Jefferson county, on Spindle Top Heights, a parcel of about 200 acres of land, underlying which, at about the depth of 1,000 feet, there was a great volume of inflammable oil and gas, easily ignited when exposed by the dropping of a match or lighted cigarette or cigar, or ashes from a pipe, or coming in contact with steam pipes, or cook stoves, boiler furnaces, or fire of any kind; that, in drilling for the oil, both oil and gas escape in great quantities, the gas filling the air at times for many thousand cubic yards around, and the oil, by force of natural pressure exerted upon it, rises through the opening made by the drilling of wells in great quantity, to the height of from 75 to 200 feet above the surface of the earth, pouring upon the ground a flood of inflammable matter at the rate of from 30,000 to 80,000 barrels a day. The land is in part flat, and badly drained. Many wells had already been drilled, and the ground upon which the defendants were operating and that owned by plaintiff was saturated with oil, and covered with numerous pools of oil, rendering danger by fire imminent. It was averred that a committee of 15, the names of whom were set out, had been appointed by the 100 or more owners of said land, and that at a meeting of said owners said committee had

force rules for the protection of said oil field against fire; that said committee had appointed and employed George A. Hill as inspector to act peaceably in the enforcement of such rules by protest against their infraction. The petition then set out a number of rules which had been made by said committee, which plaintiff averred were reasonable, and such as were suggested by practical oilmen operating in the field, who were themselves willingly governed by them. One of said rules requires that "all landowners whose property abuts on the ditches cut for drainage of waste oil shall take the utmost precaution to keep the same open and unobstructed." Plaintiff set out the description of the land owned by him, and averred that it would be destroyed as an oil field in the event of a general conflagration in said field. It was alleged that the defendants were severally owners or lessees of the field so far as developed, and had drilled and completed producing wells, and were about to drill such wells in said field, and near the land owned by plaintiff, and that said defendants had at divers times violated and were violating the rules formed for the protection of the field, and plaintiff feared they would further disregard them. It was averred that the danger from fire was absolutely beyond estimate, and that it threatened both plaintiff and the public, and the damage therefrom would be irreparable in its nature. A writ of injunction was asked for, restraining the defendants, their agents and employes, from violating said rules, and requesting the appointment of the inspector as a special bailiff for the enforcement of such order, and to report infractions thereof to the court. A writ of injunction was granted as prayed for, conditioned on the execution by the plaintiff of a bond in the sum of \$500. The writ was issued, and service thereof was accepted by a number of the defendants. George A. Hill, chairman of the safety committee, was appointed inspector. First and second amendments of the petition were afterwards filed, and modifications of the injunction were made by the court, and the cause was retained on the docket for the purpose of enforcing the observance of the rules adopted by the owners of wells in the oil field as above set out, and various orders of the court were made for that purpose until January 17, 1903, when the plaintiff filed a motion in the cause, stating that he did not desire to prosecute the suit any longer, and asked the court to discontinue the same and dismiss it at his cost. On January 27, 1903, before any action was taken by the court on said motion, one Marion A. Fell filed a plea of intervention in the cause, adopting the allegations of the plaintiff's petitions, and making other amendments to show the necessity thereof, and prayed that the injunction be continued in force, and that the streets in the oil field be opened and repaired, and for general and special relief. This petition of intervention purported to be by the Empire, etc., Com-

to, except by the said Fell. On January 28, 1903, the court entered an order in which the intervention of "certain parties" (not naming them) was recognized, and dismissed the cause as to the said George W. Carroll, without prejudice to "the rights of the several interveners to prosecute the same in their own behalf." No bond was executed by the said Fell, nor is there any recognition of the intervention, except in the order permitting Carroll to take a nonsuit, as above set out. On the 27th day of January, 1903, the court ordered George A. Hill to make a report of the sales of the waste oil taken from Spindle Top by virtue of his position as chairman of the safety committee, and thereafter the court removed the said Hill from the office of chairman and inspector, as he was called, and appointed J. Malley Eastham in his stead; the following recitals being contained in the order: "What is known as 'Spindle Top Oil Field' is hereby placed under his control, in so far as the protection of said oil field is concerned, from fire, waste, or any character of loss or destruction, and the said Eastham will proceed forthwith to collect the waste oil in said field, by establishing and maintaining ditches, drains, and reservoirs, with pools and tanks to store said oil, and all persons are enjoined from taking the waste oil from said field, and the said Eastham is empowered to store said oil, and sell same under order of this court; proceeds of sale to be expended, under the direction of the court, for the purpose of defraying expenses incurred in the protection of said oil field." On February 7, 1903, the appellees J. M. Abbott and Ben Andrews, who previously had not been parties to the suit, filed in said cause a petition complaining of the appellants, and alleging that the oil wasted from the wells, pipe lines, and tanks in this oil field had become very valuable; that they were the owners of oil on said field, and had an interest in said waste oil; that the waste oil of the various well owners on the field became commingled—and prayed for and obtained an order restraining the owners from allowing waste oil to accumulate on their premises, and placing all the waste oil on said Spindle Top Field in the hands of a receiver, and appointing J. Malley Eastham as such receiver, authorizing him to collect and hold all of the waste oil on said field. A motion had been made by John Woolridge for leave to be permitted to take oil from a certain part of said oil field, and this had been granted by the court. After granting said order last named, the court had entered a rule to show cause why same should not be vacated, and this rule was pending and still undisposed of when the order appointing a receiver herein was made; the last being the order complained of by appellants, which placed all of the waste oil on the entire field in the custody of a receiver

wells, except to the petition of intervention, and to the appointment of a receiver, because the original suit did not involve the title to the waste oil, or any kind of property, and new parties and new issues could not be injected in the case by the interveners.

The suit was brought, plainly, as a suit for the abatement of a nuisance, and it is very questionable whether the court had any jurisdiction to extend the relief prayed for; but, conceding that it had, the appellees, as the owners of waste oil in the field, intervened for the purpose of recovering a share of the oil that would become waste oil, and asked that a receiver be appointed, not for the purpose of taking charge of oil that had already escaped from the wells of the owners, but to take charge of such as might thereafter accumulate. It is true that the appellees alleged that the waste oil lying in the field amounted to probably 3,000 barrels, of the value of \$1,500; but the purpose of the intervention was to appoint a receiver to collect the oil that might thereafter escape, for the purpose of sale and distribution among those interested therein as their interest might thereafter be made to appear, "or disposed of, by the consent of all parties, in improving the condition of said roads and driveways, and in lessening the dangers from fire to property in said oil field." The obvious purpose of the intervention was to open up and maintain a receivership, to last for an indefinite time, in aid of a suit that does not seek or pray for any final relief. It is not shown by the petition that the owners of the wells cannot, in obedience to the injunction, so ditch their premises, and drain from the field the oil escaping from them, as to make it unnecessary to maintain a receivership for that purpose. If the jurisdiction of the district court is doubtful in the suit to maintain a set of police rules by injunction, it would seem of much more doubtful jurisdiction for it to reach out its arm, and, with a receivership, grasp property to defray the expenses of enforcing such rules, although the property seized might be denominated waste and derelict property. No proper ground for intervention is shown. The question of title and ownership of waste oil cannot be brought into the suit. The law furnishes an adequate remedy to the appellees to determine their right of ownership. *Stan-sell v. Fleming*, 81 Tex. 297, 16 S. W. 1033; *Whitman v. Willis*, 51 Tex. 424; *Burditt v. Glasscock*, 25 Tex. Supp. 48; *Paschal v. Dangerfield*, 37 Tex. 275, 299; *Townes on Pleadings*, 208-9. If the court has improperly taken into custody any property, it should rather release its grasp on it, than adopt the extreme measure of appointing a receiver. We think the court erred in such action, and its order is reversed and set aside.

Reversed and set aside.

RAILROADS—LICENSEE AT DEPOT—ASSAULT BY RAILROAD POLICEMAN—LIABILITY OF COMPANY.

1. Evidence in an action by a licensee at a railroad depot for an assault by a railroad policeman examined, and held to sustain findings that the policeman was acting as agent of the company, and not in his capacity as a public officer, nor as a party to a private brawl.

2. In an action by a licensee at a railroad depot for an assault committed by a railway policeman, it was stipulated that the policeman had been appointed by the city, at the company's request, to be stationed at the depot, and was "acting under said appointment" at the time of the assault, and that the company, and not the city, paid for the policeman's services. The policeman testified that he was not acting as policeman in making the assault, which was the chief issue of fact on the trial. Held, that the stipulation was merely intended to avoid the necessity of proving the policeman's commission, and that it was still in force, and did not constitute proof on the above issue of fact.

3. The fact that a railroad employé assaulting a licensee at a depot lost his temper, and used an unreasonable amount of force, though without provocation from the person assaulted, would not acquit the company of liability.

Appeal from District Court, Jefferson County; J. D. Martin, Judge.

Action by Frank C. Taylor against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Watts, Chester & Ellison, for appellant. Greer & Minor and Oswald S. Parker, for appellee.

GILL, J. By this suit the appellee sought to recover of appellant damages for personal injuries alleged to have been sustained by him by reason of an assault upon his person committed by one of the employés of appellant in the line of his duties as such employé. A trial by the court without a jury resulted in a judgment for appellee for \$1,000, from which the railway company prosecutes this appeal.

The pleadings present the issues hereinafter discussed, and it is unnecessary to state them at length. On the occasion in question, Frank C. Taylor, the plaintiff, went to the passenger depot of appellant, at Beaumont, Tex., to aid his friend Williams in putting the latter's aged father as a passenger upon the train of appellant. When they arrived at the depot, one Sisk, the state convict agent, was in the waiting room with a lot of convicts, and refused Taylor admittance. Appeal was made to Reed Tevis, upon whose order he was admitted to the waiting room. In a few minutes Taylor and his friends came out, and were standing upon the platform, when Tevis ordered plaintiff and Williams to get off the platform, saying, "You

stumbled on the head with his club. Plaintiff stumbled and fell, and, as a result of the stroke and the fall, he sustained injuries in the amount of the verdict. About nine months prior to the injury, the city authorities of Beaumont had, at the special instance and request of appellant, commissioned Tevis as a policeman, and stationed him at appellant's depot. Appellant paid the salary of Tevis, and the city paid him nothing. He was in the employ of appellant, and was subject to the orders of appellant's local agent, Putman, from whom he received orders, and to whom he reported. He had been ordered by Putman to keep idlers and persons without tickets away from the depot. Tevis himself testified that he was not acting as policeman in what he did to plaintiff, as the latter had done nothing for which to be arrested. He (Tevis) had strict orders to keep everybody away from there who did not have tickets. Tevis, in his account of the occurrence, uses this language: "It was not so much on account of my orders that I hit him, as that he sassed me. He had said to me, 'I do not give a God damn for any white man.'" As to whether the plaintiff and his friend Williams were rude and noisy, and used profane language, as stated by Tevis, the evidence is conflicting, but is ample to sustain the finding of the trial court that plaintiff did nothing calculated to provoke Tevis to commit the assault.

Appellant, by the first assignment, insists that the judgment should be reversed because Tevis was a policeman, and appellant could not, therefore, be liable for his acts as such. The proposition, as a whole, may be conceded to be sound, but its application here depends upon the presence of a fact which in the assignment is assumed to exist, but which was an issue of fact at the trial, and decided against appellant by the trial judge. We speak of the issue as to whether Tevis was acting as policeman in doing the acts complained of. Tevis admits that he was trying to arrest plaintiff, and his strong statement in behalf of appellant is that he did not strike plaintiff so much on account of Putman's orders, as because plaintiff "sassed" him. The fact that Tevis was a policeman of the city of Beaumont inconsistent with his employment by appellant, and the undisputed facts show he was acting in both capacities. His position as a peace officer empowered him to arrest for offenses committed in the city, but the duty which more frequently was to obey the orders of Putman in behalf of the company. The question which the trial court determined this court must determine, and which was assigned, was whether the assault was committed while acting in his capacity as policeman or as a peace officer. Plaintiff insists that he was acting as a policeman.

*Rehearing denied, and writ of error denied by Supreme Court.

Appeal from District Court, Leon County; J. M. Smither, Judge.

Action by Oscar Keeton against Houston Davison, in which Mary Davison intervenes. Judgment for plaintiff, and the intervener appeals. Affirmed.

S. W. Dean, for appellee.

PLEASANTS, J. This is an action of trespass to try title to a tract of 108 acres of land in Leon county, brought by appellee against Houston Davison. Appellant, who is the wife of Houston Davison, intervened in the suit, and claimed the land as her homestead. The trial in the court below resulted in a judgment in favor of plaintiff against the defendant and intervener for the title and possession of the land. From this judgment the intervener perfected an appeal to this court, but has filed no brief. Appellee has filed briefs, and asks an affirmance of the judgment. The failure of appellant to file briefs must be treated as an abandonment of her appeal, and it would be dismissed but for the fact that appellee asks an affirmance. The subject-matter of the suit was within the jurisdiction of the court, and the judgment is in response to plaintiff's petition. In the absence of a brief by appellant pointing out the errors relied upon for a reversal, we could only refuse to affirm the judgment because of fundamental error, and, there being no such error apparent upon the record, the judgment of the court below will be affirmed.

Affirmed.

HAHN v. P. J. WILLIS & BRO. et al.*

(Court of Civil Appeals of Texas. March 19, 1903.)

EQUITY—INJUNCTION—LEGAL REMEDY—RESTRAINING SALE OF LAND—TRESPASS TO TRY TITLE.

1. Injunction will not lie to restrain the sale of land where there is an adequate legal remedy to protect the title.

2. An injunction, in favor of an administrator, to restrain the sale on execution of the interest of certain heirs in land belonging to an estate in course of administration, on the ground that such sale would cast a cloud on the title to such land, and prevent its selling for its value at an administrator's sale, will not lie, as a purchaser at the execution sale would take title subject to administration, and trespass to try title would be an adequate legal remedy for the purchaser at the administrator's sale.

Appeal from District Court, Colorado County; Munford Kennon, Judge.

Suit by P. Hahn, administrator, etc., against P. J. Willis & Bro., and another. Judgment for defendants, and plaintiff appeals. Affirmed.

*Rehearing denied, and writ of error denied by Supreme Court.

¶ 1. See Execution, vol. 21, Cent. Dig. §§ 498, 508, 512.

GARRETT, O. J. The appellant brought this suit in the district court of Colorado county against the appellees, P. J. Willis & Bro. and the sheriff of the county, to enjoin the sheriff from selling on execution against them the interest of C. Hahn and P. Hahn as heirs in a tract of land belonging to the estate of Elizabeth Hahn, deceased, of which the appellant was administrator. It was alleged that appellant claimed and held the land as a part of the assets of said estate, administration of which was pending in the county court of Colorado county; that the estate was probably insolvent; and that a sale of the land under the execution would cast a cloud upon the title, and prevent its selling for its value at administrator's sale. Appellees demurred to the petition, and also excepted to the jurisdiction of the court that the county court of Colorado county alone had jurisdiction to enjoin the sale. The trial court sustained the demurrers, dismissed the petition, and rendered judgment in favor of the appellees.

The rule is too well established in this state to require discussion that injunction will not lie to restrain the sale of land when there is an adequate legal remedy to protect the title. *Purinton v. Davis*, 66 Tex. 456, 1 S. W. 343; *Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123; *Chamberlain v. Baker*, 67 S. W. 532, 4 Tex. Ct. Rep. 339. The title of the land, while it descended and vested in the heirs of Elizabeth Hahn at her death, did so subject to administration for the payment of the debts of the deceased. Only the interest of C. Hahn and P. Hahn as heirs was levied on, and a purchaser at the sale would take the title subject to administration. He would take no better title than would a purchaser from them at private sale whose title is clearly subject to be defeated by sale by the administrator. Trespass to try title would be a full and adequate legal remedy. The judgment is affirmed.

Affirmed.

CITY OF HOUSTON v. ALBERS.

(Court of Civil Appeals of Texas. April 9, 1903.)

MUNICIPAL CORPORATIONS—POLICEMEN—TERM OF OFFICE—EXPIRATION—SUBSEQUENT SERVICE—LIABILITY OF CITY—SUSPENSION.

1. Houston City Charter, § 26, Sp. Laws 1897, p. 61, c. 7, provides that the terms of service of all employes of the police department of the city shall continue during efficient service and good behavior, and Const. art. 16, § 80, declares that the term of all officers, not fixed thereby, shall not exceed two years. *Held*, that on the expiration of two years from the date of a policeman's appointment, in the absence of reappointment, he ceased to be an officer de jure, after which the city was only liable for services actually rendered by him and accepted.

2. Where a policeman was suspended from the performance of his duties after his term of office had expired by limitation, whether such suspension was in accordance with the city charter was immaterial.

Appeal from Harris County Court; E. H. Vasmer, Judge.

Action by Gus Albers against the city of Houston. From a judgment in favor of plaintiff, defendant appeals. Reversed.

T. H. Stone, City Atty., for appellant.

PLEASANTS, J. Appellee brought this suit against the city of Houston to recover salary alleged to be due him, as a policeman of said city, from the 3d day of February, 1892, up to the date of the filing of the suit, at the rate of \$85 per month, and also the value of 15 days' service rendered said city as policeman during the year 1901; the aggregate amount sued for being \$663.87.

The defendant's answer contained a general demurrer and general denial, and also various special exceptions and pleas, the nature of which it is unnecessary to disclose, further than to say that the issues herein-after discussed were properly presented by said answer.

The facts disclosed by the record are briefly stated as follows: On the 21st day of May, 1898, plaintiff was appointed by the mayor of the city of Houston to the office of policeman of said city, which appointment was confirmed by the city council of said city on May 23, 1898. At the time of his appointment as aforesaid, plaintiff executed and delivered to the mayor a bond in the sum of \$500, conditioned that he would faithfully perform the duties of his office. This bond was signed by two sureties, as required by the ordinance of said city, and was duly approved by the mayor. Plaintiff also took the oath of office prescribed by the ordinance of said city, and at once entered upon the discharge of the duties of his office, and continued in the discharge of same until the 3d day of February, 1902, when John G. Blackburn, who was then chief of police of said city, acting under the direction of John D. Woolford, the then mayor, notified plaintiff that he was discharged from the service of the city, and refused to further permit him to discharge the duties of policeman. Plaintiff appealed from this order of discharge to the police, fire, and health board. This board did not decide the question presented by the appeal, but referred same to the city council. At a meeting of the city council held on February 24, 1902, it was determined, by a vote of 10 to 2, that plaintiff had been wrongfully discharged from the service of the city, and it was recommended that he be reinstated in his former position, and be paid in full for the time lost by him. Since said action of the city council, plaintiff has from time to time applied to the chief of police to be put to work as a policeman, and has been at all times ready and willing to perform

the duties required of him as such officer but said chief of police has refused to allow him to perform such duties, and has struck his name from the roll of policemen. The regular salary of a policeman of the city of Houston is fixed by ordinance at \$75 per month, but when such policeman serves as a mounted officer his salary is \$85 per month. Plaintiff was a mounted policeman during the time he served as a policeman. Plaintiff was never reappointed as a policeman of the city of Houston after his appointment in May, 1898, but in November, 1901, he was notified by the chief of police that a new bond was required of him as such policeman. In obedience to this notification, plaintiff, on March 21, 1901, executed and delivered to the mayor, John D. Woolford, a new bond, similar in all respects to the one formerly executed by him. This bond was accepted and approved by the mayor. During the year 1901, plaintiff was suspended by order of the chief of police from the performance of his duties as policeman for 15 days, and his salary for said time was not paid him by the city. Upon these facts, the trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$615.70, from which judgment the defendant prosecutes this appeal.

Section 26 of the charter of city of Houston, Sp. Laws 1897, p. 61, c. 7, provides that the terms of service of all employes of the police department of said city shall continue during efficient service and good behavior. This provision of said charter was construed by this court in the cases of Proctor v. Blackburn (Tex. Civ. App.) 67 S. W. 548, and Cawthon v. City of Houston (Tex. Civ. App.) 71 S. W. 329, and held, in the light of the constitutional provision fixing the term of office of all officers whose term is not otherwise fixed by the Constitution at two years, to mean that the duration of the term of service of policemen of said city is, during efficient service and good behavior, for two years, as limited by the Constitution. As alleged in his petition and shown by the undisputed evidence, appellee was appointed a policeman of the city of Houston on May 23, 1898, and qualified, as such on the same day. Under the provision of the Constitution above mentioned, his term of office expired on the 22d day of May, 1900. There is neither allegation nor proof that he was ever reappointed to such office. There is no provision in the charter of the city of Houston giving the right to a policeman to hold his office until his successor has qualified; in fact, under the charter and ordinances of said city there can, strictly speaking, be no succession in the office of policeman. The number of policemen for said city is not fixed by the charter or by any ordinance of the city. The individual policeman does not hold any fixed or permanent office created by law which is required to be kept filled, but is merely a member of an official body the

cies of the city may demand, subject only to the limitation that when once appointed no policeman can be deprived of his office before the expiration of his term, except upon the ground and in the manner prescribed by the charter. The mayor appoints such number of policemen as may be necessary to enforce the laws of the city, and, when the term for which an individual policeman has been appointed expires, it is discretionary with the mayor and chief of police whether the number of men on the force shall be decreased by dispensing with the services of such policeman. It follows that an appointment upon the police force of the city only gives the appointee a right to the office for a term of two years, and when that term expires, unless he is reappointed, he ceases to be a de jure officer, and the liability of the city for his salary as such officer ceases. Should he remain in the service of the city, and continue to act and be recognized by the city in his official capacity, he would become a de facto officer, and as such would be entitled to compensation for the services rendered the city in such capacity and accepted by it. When, however, the city ceased to recognize him as a de facto officer, and refused to permit him to discharge the duties of policeman, it incurred no liability for any salary that he might have earned had he been allowed to continue in the discharge of the duties of his office.

The evidence fails to show that appellee performed any services as a de facto policeman for which he has not been paid. The alleged 15 days' service for which appellee claims compensation is shown by the undisputed evidence to have not been performed. During the time alleged, appellee was suspended from the performance of the duties of policeman, and, not being at that time a de jure officer, it is immaterial whether such suspension was in accordance with the provisions of the charter, since the city owed him no duty to permit him to discharge the duties of policeman after his term of office had expired.

There being no evidence to sustain any judgment against the city, the judgment of the court below is reversed, and judgment here rendered in favor of the appellant. Reversed and rendered.

STONE v. BYARS et al.*

(Court of Civil Appeals of Texas. April 3, 1903.)

JURISDICTION — JURY TRIAL — CHANGE OF VENUE—APPEAL FROM COUNTY COURT TO DISTRICT COURT—VACATING ORDER FOR CHANGE OF VENUE—RESUMPTION OF JURISDICTION.

1. The court which first acquires jurisdiction over a controversy should maintain it un-

*Rehearing denied, and writ of error denied by Supreme Court.

¶ 1. See Courts, vol. 13, Cent. Dig. § 1229.

2. Under 1 Stats. Rev. St. art. 1880, no jury trial is allowed in the county court in probate matters except when expressly provided by law, but after a matter has been transferred to the district court by appeal or otherwise the parties become entitled to a trial by jury.

3. Where a cause has been appealed from the county court to the district court, it stands on the docket of the latter court in all respects as any other cause, and the parties have a right to a change of venue.

4. The district court of one county cannot resume jurisdiction of a cause by setting aside an order granting a change of venue, after such order has been executed, and the jurisdiction of the district court of another county has attached.

Appeal from District Court, Colorado County; Munford Kennon, Judge.

In the matter of the estate of William Dunovant, deceased. From a judgment of the district court of Colorado county appointing M. R. Byars and Joseph A. Robertson administrators of said estate, E. L. Stone, a creditor of the estate, appeals. Affirmed.

Whit Boyd, for appellant. Maco & Minor, Stewart, Adkins & Green, McCormick & Brown, and Grobe & Ayars, for appellees.

GARRETT, C. J. This is an appeal by E. L. Stone, a creditor of the estate of Wm. Dunovant, deceased, from a judgment of the district court of Colorado county appointing the appellees, H. R. Byars and Joseph A. Robertson, administrators of said estate. Wm. Dunovant died intestate August 11, 1902, in Harris county, Tex. His principal estate was situated in Colorado county. Application was made by the appellee Joseph A. Robertson for letters of administration upon the estate of said William Dunovant in the county court of Harris county October 23, 1902. Paul T. Gordon and J. A. Harbert and A. M. Waugh, administrator, etc., creditors of said estate, contested said application on the ground that the said William Dunovant was not a resident of Harris county at the time of his death, but that he had his domicile in, and was a resident of, Colorado county, where his principal estate was situated. Upon a hearing of the application and contest on January 7, 1903, the county judge of Harris county granted the application of the said Robertson, and appointed him as administrator of said estate. Both Gordon and the said Harbert and Waugh excepted, and gave notice of appeal to the district court of Harris county. Two appeals from said order were perfected and prosecuted, and were filed in the district court of the Eleventh Judicial District, and docketed as follows: "No. 32,914. Estate of William Dunovant, Deceased. Appeal of Paul T. Gordon." "No. 32,916. Estate of William Dunovant, Deceased. Appeal of J. A. Harbert and A. M. Waugh, Adm'r." On December 30, 1902, the appellee H. R. Byars filed an application in the county court of Colorado county for letters of administra-

ground that William Dunovant resided and had his domicile in the county of Harris, and that the contestant had been appointed by the county judge of Harris county temporary administrator of said estate, and that he had theretofore filed an application in the county court of said county for appointment as permanent administrator. Upon the hearing of said application the county court of Colorado county appointed the appellee Byars administrator of said estate, to which the appellee Robertson excepted, and gave notice of appeal to the district court of Colorado county. The appeal was perfected, and the cause was filed in said district court, and was docketed as No. 7,023. The said Joseph A. Robertson and the said H. R. Byars, the appellees here, being the parties to the causes of contest of application for administration pending in the district courts of Colorado and Harris counties, entered into a written agreement, which was filed in the causes Nos. 32,914 and 32,916 pending in the district court of Harris county for the Eleventh Judicial District, to change the venue of said causes to the district court of Colorado county, and moved the court so to order, and in accordance with said agreement and motion the said district court of Harris county, on February 11, 1903, made an order in each of said causes changing the venue thereof to the district court of Colorado county. The papers in said causes and transcripts of the orders therein were duly transmitted to the clerk of the district court of Colorado county, and were filed in said court February 16, 1903, and entered upon the docket thereof the said cause No. 32,916 as No. 7,011 and the said cause No. 32,914 as No. 7,012. The three causes then pending on the docket of the district court of Colorado county in the matters of the applications of H. R. Byars and Joseph A. Robertson for letters of administration upon the estate of William Dunovant, deceased, and the contest thereof, numbered 7,011, 7,012, and 7,023 on the docket of said court, were, on motion of the parties, consolidated by order of the court, and proceeded with as No. 7,011 on the docket. The appellant, E. L. Stone, intervened in the consolidated cause, and showed that he was a creditor of said estate, and excepted to the jurisdiction of the district court of Colorado county of the said causes transferred from Harris county, and asked that they be remanded to the district court of the Fifty-Fifth Judicial District of that county.

It appeared from the pleadings and exhibits that after the orders changing the venue had been made by the district court of Harris county for the Eleventh District, a motion was made in that court by R. G. Ashe, who had been appointed by the county judge of Harris county as temporary administrator of said estate after removal by him of said

said court made an order February 24, 1903, transferring the causes to the district court of Harris county for the Fifty-Fifth Judicial District, and that on February 26, 1903, the said district court for the Fifty-Fifth District made an order by which it undertook to vacate the former orders of the district court for the Eleventh Judicial District changing the venue in said causes, and ordered the clerk of the district court of Colorado county to return the papers thereof to the said district court of Harris county for the Fifty-Fifth Judicial District. This order was not obeyed, the judge of the district court of Colorado county having directed the clerk of his court to retain possession of the papers. Hon. Blake Dupree, county judge of Harris county, and the said R. G. Ashe, intervened in the consolidated cause in the court below, also setting up the matters above stated, and asked that the causes be remanded to the district court of Harris county for the Fifty-Fifth Judicial District. Exceptions were sustained to their plea of intervention, and it was stricken out, whereupon the said Ashe and Dupree excepted, and gave notice of appeal. The plea of the said E. L. Stone was also overruled, to which action of the court said Stone excepted, and gave notice of appeal. The cause then came on to be heard, and the court found that the said William Dunovant, at the time of his death, resided in the county of Colorado, and that the county court of said county had jurisdiction of the administration of his estate, and, a number of the creditors and the next of kin of the deceased having so requested, the said Joseph A. Robertson and H. R. Byars were appointed joint administrators of said estate. The said E. L. Stone has perfected an appeal from said judgment, and has assigned as the question the validity of the order of the district court of Harris county changing the venue to Colorado county, as well as the fact finding as to the domicile of the said William Dunovant at the time of his death.

No statement of facts appears in the record, but the trial judge, in reaching his conclusion that the domicile of William Dunovant was in Colorado county, has stated facts which sustain his conclusion with conclusive effect. It is an undisputed fact that the principal part of the estate of the said William Dunovant was situated in Colorado county. It is clear that the county court of Colorado county has jurisdiction of the administration of said estate, unless jurisdiction has been properly assumed by the district court. The proceedings show that jurisdiction between the county courts of Harris and Colorado counties is a question of fact that may be determined differently in the future by the supporting the jurisdiction. There is a rule of law, however,

the court which the request should maintain it undisturbed by the interference of any other court of co-ordinate jurisdiction. *Tex. Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 778. The question of a collateral inquiry by the Colorado county court into the jurisdiction of the Harris county court was taken out of the case, however, if the venue of the Harris county contests were properly transferred to Colorado county and remained there. The court may, upon the written consent of the parties thereto, filed with the papers of the cause, by an order entered on the minutes transfer the same for trial to the court of any other county having jurisdiction of the subject-matter of such suit. *Rev. St. 1895*, art. 1270. Appeals from a county court to the district court are entered upon the civil docket of the district court, to be called and disposed of in regular order. When reached, they are tried anew, as if originally brought in such court, and the judgment of the district is certified to the county court for observance. *Rev. St. 1895*, arts. 2261-2263; *Phelps v. Ashton*, 30 Tex. 345; *Elwell v. Universalist General Convention*, 76 Tex. 518, 13 S. W. 552; *Kelly v. Settegast*, 68 Tex. 16, 2 S. W. 870; *McLane v. Paschal*, 62 Tex. 104; *Hawes v. Foote*, 64 Tex. 34. In the county court in probate matters no jury trial is allowed except when expressly provided by law. 1 *Batts' Rev. St.* art. 1855. But after a matter has been transferred to the district court by appeal or otherwise, the parties become entitled to a trial by jury. *Cockrill v. Cox*, 65 Tex. 669. So the causes stood on the docket of the district court of Harris county in all respects as any other cause, and subject to trial by jury. The reasons for a change of venue apply with the same force to such a cause as to any other upon the docket of the court. While the precise question does not appear to have been passed on by our Supreme Court, there can be no doubt about how it should be decided. Under a statute similar to ours, the Supreme Court of Maine held that the parties had the right to a change of venue. *Backus v. Cheney*, 80 Me. 17, 12 Atl. 636. The order changing the venue vested jurisdiction in the district court of Colorado county. The jurisdiction of the district court of Harris county could not be resumed by setting the order aside after it had been executed and the jurisdiction of the district court of Colorado county had attached. *Dimmitt v. Robbins*, 74 Tex. 445, 12 S. W. 94; *Henderson v. Henderson*, 55 Mo. 544; *Wolcott v. Wolcott*, 32 Wis. 69; *Servatius v. Pickel*, 30 Wis. 507. This view of the effect of the order changing the venue after its execution renders it unnecessary for us to say more with respect to the order of the district court for the Fifty-Fifth Judicial District than that that court did not acquire jurisdiction to make its order recalling the cases, even if it otherwise

ment of the court below, and it will be affirmed.

Affirmed.

TEXAS & P. RY. CO. v. SCOTTISH UNION NAT. INS. CO.

(Court of Civil Appeals of Texas. April 15, 1903.)

FIRE—RAILROADS—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—SETTING OF OTHER FIRES.

1. In an action against a railroad company for the destruction of cotton by sparks from defendant's locomotive, the court charged that, if the cotton was burned through sparks from the locomotive, plaintiff had made a *prima facie* case, and could recover, unless the engine was properly equipped and managed, or unless the jury found in favor of defendant on the issue of contributory negligence. The evidence raised the issue of contributory negligence on the part of plaintiff, and such issue was properly submitted. *Held*, that the instruction was not erroneous on the theory that, because the issue of contributory negligence was raised, it was error to charge that the setting of the fire made a *prima facie* case.

2. The court refused to charge that, when the cotton was placed on the platform near the tracks, the owners assumed all risk of fire which might arise from a properly equipped and properly operated locomotive. The jury were expressly told in the charge to find for defendant if the locomotive was properly equipped and operated. *Held* not error.

3. In an action against a railroad company for the destruction of cotton, while on a compress platform, by sparks from defendant's locomotive, it was proper to admit testimony that on the day of the fire, and in the neighborhood thereof, witnesses saw the engine that passed the platform when the cotton appeared to have been ignited throwing sparks and setting fire to grass along the right of way.

Appeal from District Court, Red River County; J. G. McGrady, Judge.

Action by the Scottish Union National Insurance Company against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Head & Dillard and T. J. Freeman, for appellant. E. S. Chambers and A. L. Beatty, for appellee.

JAMES, C. J. On January 3, 1896, there was a cotton platform in Clarksville, partly on appellant's right of way and partly on adjoining land. W. A. Mauldin and Robt. Holt had each eight bales of cotton on the platform, all of which was burned on that day. Plaintiff alleged that the fire was communicated from one of defendant's engines. The insurance company insured the cotton, paid the loss, and claimed the rights of Mauldin and Holt through subrogation stipulations in the policy and by assignment, and brought this action.

By the first assignment of error it is alleged, in substance, that, as the evidence made the issue of contributory negligence on the part of the owners in not, under existing circum-

charge the jury that the setting fire to the cotton by the engine would be prima facie evidence of negligence. The charge which furnishes the material for this assignment is as follows: "Now, if you believe from the evidence that said cotton was burned through fire communicated by sparks or fire escaping from the defendant's locomotive engine, then the plaintiff has made a prima facie case, and would be entitled to recover, unless you should find in favor of defendant upon the ground that it had exercised ordinary care to have its engine equipped with the best approved appliances in use for the prevention of escape of fire and sparks therefrom, and that it had exercised ordinary care to have same in good repair, and was operated with ordinary care, under other instructions given you, or unless you find in favor of defendant upon the ground of contributory negligence, under other instructions given you." This is said to be erroneous, because "the evidence in this case raised the issue of contributory negligence upon the part of plaintiff, and, when the evidence does so raise the issue of contributory negligence, it is error to charge that the setting out of the fire makes a prima facie case of negligence in behalf of plaintiff." What this charge stated was that, if the cotton was burned from sparks escaping from the engine, this prima facie entitled plaintiff to recover, unless, among other things, the jury found that the owners had been guilty of contributory negligence. If they had not been guilty of contributory negligence (an issue fully submitted, and which the jury were required to pass on, and their finding on this plea must have been against defendant), then, in such event, the jury would not have been properly instructed if the court had not told them that the ignition of the cotton by sparks made a prima facie case of negligence against defendant. The fault with this assignment is in assuming that it is error to charge on this presumption a case where the issue of contributory negligence is raised by evidence. If the verdict should be in favor of the plea, it would be the end of the case. So the jury were instructed in a separate paragraph. If otherwise, the case should be considered just as if that issue were eliminated; and the jury would have to determine the case from the presumption of negligence and the rebutting evidence. The assignment is not well taken.

The second assignment complains of the refusal of this charge: "When the cotton was placed on the platform, the owners assumed all risks of fire which might arise from an engine equipped with the best approved appliances for preventing the escape of fire and sparks, if the same was then and there in good condition, and if said engine was there and then operated with ordinary care and prudence; and if you believe, from the evidence, the cotton was destroyed because of

that in placing the cotton where they did the owners assumed "the risk of fire which should emanate from one of defendant's engines properly equipped and properly operated." The jury were expressly told to find for defendant if the engine was properly equipped and properly operated. Such instruction would not have been improved any by telling the jury that, if the engine was properly equipped and operated, the owners assumed all risk of fire by placing the cotton where they did, and therefore to find for defendant.

Under the third, fourth, fifth, and sixth assignments question is made as to the admissibility of certain testimony of four witnesses. The proposition is the same under all of them, and we copy it: "The witness not knowing how the fire originated, it was error to permit him to testify as to its existence, and from such existence to presume that it originated from the engine, and from this presumption to draw the further presumption that the engine set fire to the cotton, and that this was negligently done." The testimony of these four witnesses, which is complained of, is of similar kind, and it is sufficient to indicate its nature that we copy that of three of them: L. A. Rains testified: "That he was at his home about three miles west of Clarksville when he saw smoke from a fire at Clarksville during the afternoon of January 3, 1896. That about half or three-quarters of an hour before he first noticed fire at Clarksville he saw a freight train on the T. & P. Ry. going east. That he could not see any fire, but that cinders were escaping from the locomotive very freely." Then plaintiff further offered to prove by this witness as follows: "I know of another fire that started on defendant's right of way on same day of the cotton platform fire about three and one-half miles west of Clarksville, and about the middle of the afternoon. This fire originated from the freight train before mentioned, which passed going east. I was about 75 or 100 yards from the fire when it started, and the engine was about 200 or 300 yards past the fire when I saw it. The fire burned off about a half an acre of grass—all there was there. The grass was also set on fire about the same time about 150 yards west of my house, and about 40 feet from the track, and burned off a small plat of bermuda grass. About 300 yards east of my house the grass was also set on fire about the same time. This was about sixty feet from the track." H. A. Green testified: "That about a half hour before he noticed the smoke of the fire from the compress platform at Clarksville a freight train passed him, going east. That it threw out cinders, and set the grass on fire." Plaintiff then further offered to prove by him the following: "That I went down the railroad towards home, and the grass was afire in two other places that I saw. These fires were about the same distance from the track as the other fires I saw. These fires

acre. I did not see any of these fires start, except the one first above mentioned." Lee Cooper testified: "That he was going toward Clarksville on the day of the fire. That he saw the freight train passing him, going east, between three and four o'clock, and about the time the fire was burning on the compress platform." Plaintiff then offered the following evidence from the witness: "I drove in a trot, and in about a quarter of a mile from where I first saw the train I saw grass burning on the south side, and near the railroad track. I saw this immediately after I saw the train. I had only ridden about one-fourth of a mile since I saw the train, and was riding in a trot. I do not know how this fire originated. I did not see it start. This and the platform was burning at the same time." This proof was circumstantial evidence tending to prove certain main facts in issue, viz., that the engine in question was not properly equipped, or not properly operated. It was the same engine that passed the depot platform when the cotton appears to have been ignited, and what was testified to occurred on the same occasion, and in close proximity to the fire in question. Unquestionably, it was competent, in view of evidence that this engine had the best spark appliances, and was skillfully and properly operated, to show the contrary by direct or circumstantial evidence. It is difficult to conceive of more appropriate testimony, or testimony more accessible to plaintiff to negative such evidence, than that the same engine, on the same occasion, under the same management, and in the same neighborhood, freely threw sparks, or left fires promiscuously as it passed. The matter is not one of establishing an inference or presumption that these other fires occurred through negligence of defendant, and from such inference to infer that the fire in question was so caused. The evidence under consideration bore directly on facts in issue—the character of the appliances on this engine, and the management of the engine—and was admissible for this reason, if for no other.

The question presented under the seventh assignment need not be discussed. This court fully considered and passed on it in *McAdams v. Ry.*, 45 S. W. 936.

Affirmed.

JONES v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. April 22, 1903.)

SERVANTS' INJURIES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. In an action against a railroad company for death of plaintiff's son, evidence showed that deceased, who was working for defendant as a section hand, was shot by some one on an excursion train which passed where deceased

that such a deed would be committed. *Reed*, that no negligence on the part of defendant was shown.

Error from District Court, Marion County: J. M. Talbot, Judge.

Action by Joseph Jones against the Missouri, Kansas & Texas Railway Company of Texas. There was judgment for defendant, and plaintiff brings error. Affirmed.

Geo. T. Todd, for plaintiff in error. L. S. Schluter, for defendant in error.

NEILL, J. Joseph Jones, for himself and his wife, Mary, brought this suit against the defendant in error to recover \$2,000 damages for the death of their son, Urias, alleged to have been caused by the negligence of the Sherman, Shreveport & Southern Railway Company, for the consequence of which it is alleged defendant in error, by reason of its purchase of and consolidation with said railway company, became liable. It is alleged as the grounds of negligence that on the 20th day of December, 1900, a passenger train of the Sherman, Shreveport & Southern Railway Company was filled with armed, lawless, and bolsterous men, who wantonly and recklessly discharged loaded arms on its trip from Granville to Jefferson, Tex.; that the railroad failed to discharge its duty to preserve peace and order and to protect the lives of its employes who were on its right of way near the track of the company, and prevent wanton and reckless firing of deadly weapons from its trains; that when said train reached a point opposite where plaintiff's son, Urias, was at work with a section gang, some person thereon, either a passenger or employe, aimed and fired a gun or revolver at the section crew, and thereby instantly killed Urias. The defendant, after filing general and special exceptions to the petition, answered by a plea of not guilty, and pleaded specially that, if deceased was shot by a passenger on its train, it was done so suddenly, and without notice or warning to defendant, that it could not have prevented the shooting; that none of its employes was present at the time the shot was fired; and it could not know the same would be fired, and therefore is not liable for the injury. Upon hearing the evidence, the court peremptorily instructed a verdict for the defendant. It is from a judgment rendered in favor of defendant upon the verdict returned in obedience to such instruction this appeal is prosecuted.

The undisputed evidence shows that Urias Jones, plaintiff's son, was in defendant's employment, working as a section hand on the line of its road between Jefferson, in Marion county, and Waskom, in Harrison county, on the 20th of December, 1900; that at said date defendant was running an excursion train for passengers over its road, upon which were many people going to the old states on a holiday excursion; and that as the train passed

along where Urias was at work some one fired a pistol shot from the train, which struck and killed him. As soon as the conductor in charge of the train heard of it, he made inquiry, and did all he could to ascertain who fired the shot; and, being unable to do so, he stopped the train at Waskom—the first station it reached afterwards—and had officers of the law to investigate the matter and endeavor to find out and apprehend the guilty party, but without avail. He had the same kind of search made on the train at Shreveport, with like result. There was evidence that a shot was fired from or near the train close to Pittsburg, Tex. Immediately after it was heard, the conductor made investigation and inquiry in regard to it, but failed to find that it was fired by any one on the train. The evidence shows that there were a great many people on board the train, all laughing and talking and hilarious, but nothing disorderly. There was nothing in the manner or conduct of any one on the train that would give defendant's servants in charge reason to apprehend such a deed of violence as caused the death of plaintiff's son.

Under the undisputed facts, the trial court could not, in the discharge of its duty, have done otherwise than instruct the jury to return a verdict for the defendant. Therefore, the judgment is affirmed.

HAMILTON v. VOTAW et al.*

(Court of Civil Appeals of Texas. March 24, 1903.)

PUBLIC LANDS—SCHOOL LANDS—DETACHED LANDS.

1. An adverse claimant cannot assail the title of a purchaser of school lands on the ground that in making his purchase he acted in collusion with some other person, but the question can only be raised by the state.

2. While Rev. St. 1895, art. 4218j, does not require that the obligation for the payment of the price of school land shall describe the land, if an applicant undertakes to describe the land in the obligation filed by him it is void if it describes a different tract from that described in the application.

3. Where an obligation filed by a purchaser undertook to describe the land, a variance caused by a misstatement of the name of the grantee of the certificate was immaterial.

4. Where, at the time certain lands were sold by the state, all the adjoining lands had been sold, save one section, application for which had been made, and which was afterwards sold, the first lands were "detached" lands at the time, so as to be subject to sale.

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by Charles Earnest against O. M. Votaw and others. From a judgment in favor of defendant Votaw, defendant H. Hamilton appeals. Affirmed.

El T. Branch and E. B. Pickett, for appellant. Dan H. Triplett and J. N. Votaw, for appellees.

*Rehearing denied, and writ of error denied by Supreme Court.

PLEASANTS, J. This is an action of trespass to try title, brought by Charles Earnest, against O. M. Votaw. Appellant, Hamilton, is the vendor of said Earnest, and, as such, was made a party defendant by Earnest, and judgment sought against him on his warranty in event plaintiff failed to recover the land sued for. The defendant Votaw answered by plea of not guilty. Hamilton answered, admitting that he had conveyed the land to plaintiff by warranty deed, and averred his willingness to defend the title to same against the claim of the defendant Votaw, who, he alleged, had no title to said land, and against whose title he pleaded "Not guilty." He further averred that the land in controversy had been conveyed to him by W. W. Dies by warranty deed, and prayed that said Dies be made a party defendant, and that, in event plaintiff should recover against him, that he have judgment against said Dies on his warranty. Dies answered by general denial and plea of not guilty. The case was tried by the court below without a jury, and judgment was rendered in favor of Votaw for the land in controversy, against Hamilton in favor of Earnest for the purchase money and interest paid Hamilton for the land, and in favor of Hamilton against Dies for the amount paid Dies by Hamilton for said land, and the interest thereon. From this judgment, only Hamilton has appealed.

The land in controversy was state school land, and is the south half of section No. 2, certificate No. 1,796, issued to B. S. & F., and situated in Liberty county. The findings of fact by the trial court are as follows:

"(1) That on the 18th day of September, 1900, M. E. Groos filed his application in the General Land Office of the state of Texas, with the Land Commissioner, for the purchase of the land in controversy, in which application the land applied for was described as section 2, certificate 1,796, grantee B. S. & F., 640 acres, price per acre \$1.50, in Liberty county, Texas, about 14 miles S., 70 E., from county site. Sworn to by the applicant on the same day, and upon the same day, and as a part of the same transaction, and upon the same piece of paper, the said applicant executed and filed at the same time his obligation in writing to pay to the state of Texas the sum of \$936, with interest thereon annually at 8 per cent., together with one-fortieth of the original principal, on the 1st day of each November thereafter, until the whole purchase money is paid, etc., as the balance of the purchase money due upon the land described in the application. In said obligation the land is described the same as to state, county, section number, and number of survey, but the grantee of certificate No. 1,796 in this obligation is given as 'H. & T. C. Ry. Co.,' but I find that it was intended to be, and should have been, B. S. & F.

"(2) That on the 18th day of September, 1900, and prior to the filing of said application, the said land applied for was a detached

\$1.50 per acre, and that said application was the first application to purchase said land after the same was placed upon the market, and that the first payment for said land was deposited with the treasurer as required by law.

"(3) That said application and obligation so filed by M. E. Groos was in full compliance with the existing law, and entitled the applicant to an award of the land applied for.

"(4) That the land so applied for was on the said 18th day of September, 1900, the only section No. 2, certificate No. 1,796, school section, in Liberty county, Texas, and that there was not and is not now in Liberty county, Texas, any other section of land numbered 2, with certificate No. 1,796, and that the said application of the said Groos was for the purchase of school land.

"(5) That said land so applied for was properly awarded to the said M. E. Groos by the Commissioner of the General Land Office of the state of Texas December 18, 1901.

"(6) And that the defendant C. M. Votaw, by a deed duly executed by the said M. E. Groos, holds all interest, right, and title of the said Groos to said land, and that the said Votaw placed said deed upon record in the county clerk's office of Liberty county, Texas, and thereafter filed the same in the General Land Office of the state, together with his obligation in writing to pay to the state of Texas the balance due upon said land so awarded to the said Groos, in full compliance with the law of this state.

"(7) That W. W. Dies, one of the defendants in this suit, filed his application and obligation in writing to purchase the same land involved in this suit with said Land Commissioner, in due form of law, on the 16th day of January, 1901.

"(8) That on the 10th day of January, 1902, the Commissioner of the General Land Office wrongfully canceled the award of M. E. Groos, and on the same day awarded said land to the said W. W. Dies, for the reason that the grantee in the obligation is stated as being H. & T. C. Ry. Co.

"(9) That on the 20th day of February, 1901, W. W. Dies, by his general warranty deed of that date, sold and transferred the land in controversy to defendant H. Hamilton for the sum of \$664.

"(10) That on the 20th day of April, 1901, defendant H. Hamilton, by his general warranty deed of that date, sold said land in controversy in this suit to the plaintiff, Charles Earnest, for the sum of \$1,600."

Under the first and second assignments of error, the appellant contends that the trial court erred in not finding that there was collusion between Groos and Votaw in the purchase of the land in controversy, and in not rendering judgment for the plaintiff upon that ground. An adverse claimant cannot assail the title of a purchaser of school lands on the ground that in making his purchase he

This question can only be raised by the state. Logan v. Curry (Tex. Sup.) 69 S. W. 129; Thompson v. Hubbard (Tex. Civ. App.) 69 S. W. 649.

The third assignment of error complains of the ruling of the trial court in admitting in evidence the application of Groos to purchase the land, over the objection of plaintiff that there was a fatal variance between the application and the accompanying obligation for the payment of the purchase money. The fourth assignment complains of the ruling of the court in permitting Groos to testify that said variance was not intended by him, but was a mistake. Under the fifth assignment it is urged that the trial court should have rendered judgment in favor of plaintiff because of the variance above mentioned. Without discussing these assignments in detail, it is sufficient to say that none of them present any error. The statute does not require that the obligation for the payment of the purchase money shall describe the land. Article 4218j, Rev. St. 1895. An applicant having undertaken, however, to describe the land in the obligation filed by him, such obligation would be void if it described a different tract of land from that described in his application. But we think the obligation filed by Groos sufficiently identifies the land therein described as the same land described in his application, and the variance caused by the misstatement of the name of the grantee of the certificate is immaterial. The application and obligation, being a part of the same transaction, and being written upon the same piece of paper, must be construed together; and, when so construed, it is plain that the obligation is intended as a promise to pay the purchase money of the land described in the application.

Under the remaining assignments the appellant contends that the land in controversy could not have been awarded to Groos, because at the time his application was made it was not "detached" land, and subject to sale as such. It would seem that under the principles announced in Logan v. Curry, supra, this issue could not be made by appellant: the state having, by its proper officer, sold the land as "detached" land. But be this as it may, the evidence shows that the survey was in fact detached land at the time it was sold to Groos. All of the state lands adjoining the survey in question had been sold by the state prior to the 18th of September, 1900, when Groos' application was filed, except section No. 2, certificate No. 1,834, L. Priest survey, being section No. 1, certificate No. 1,835, which adjoins the land in controversy on the east. On the 17th of September, 1900, F. M. Wells filed application to purchase the north 30 acres of L. Priest survey, certificate No. 1,834. This application was suspended by the Land Commissioner until the Land Office could be informed as to which of the L. Priest surveys was intended, and the sale was not made.

2, L. Priest survey. From this statement of the evidence, it appears that, at the time Groos filed his application to purchase the land in controversy, all of the adjoining lands owned by the state had been sold, except the north 80 acres of section No. 2, certificate No. 1,834, L. Priest survey, and that a valid application to purchase this 80 acres had been filed by Wells, and upon this application said land was awarded to Wells on December 12, 1900. We think these facts show that the land in controversy was detached land at the time the application of Groos was filed. The application filed by Wells for the 80 acres of the L. Priest survey was valid application, and entitled him to an award of the land which he afterwards received. The sale to Wells took effect from the date of his application, and from that date the land in controversy became detached land.

We think the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

HUGHEY v. WALKER.

(Supreme Court of Arkansas. April 18, 1903.)

EJECTMENT—LAND OCCUPIED BY TRAM RAILWAY.

1. An owner was entitled to recover land occupied by a tram railway which had been laid without her consent and without power to exercise the right of eminent domain.

Appeal from Circuit Court, Bradley County; Zachariah T. Wood, Judge.

Ejectment by Mrs. N. C. Hughey against J. E. Walker. From a judgment for defendant, plaintiff appeals. Reversed.

This is an appeal from the judgment of the court, in favor of appellee, in an action of ejectment brought by the appellant for the recovery of that part of the southwest quarter of section 18, township 13 S., range 9 W., which was occupied by the appellee for the use of a tram railway, by him built, and laid over said land.

The causes assigned in the motion for reversal of the judgment are: (1) The verdict is contrary to law. (2) The verdict is contrary to the evidence. (3) The court erred in admitting the testimony of witness Frazier. (4) The court erred in giving instruction No. 5 of its own motion. (5) The court erred in giving the first and third instructions on the part of appellee.

The ownership of the land by the appellant, Mrs. Hughey, is admitted.

Wells & Williamson, for appellant.

HUGHES, J. (after stating the facts). It does not appear that Walker, the appellee, had any corporate right or power to exercise the right of eminent domain, or that he possessed any right by contract to build or maintain the tram railway over the land of

get her permission, and offered \$500 for the right to cross the land with his tram railway, but the appellant refused absolutely to grant the privilege, except upon condition that the appellee, Walker, would pay her what he owed her for timber he had cut on her land, and would also pay her, for the privilege of crossing her land with the tramway, as much as he paid others for a like privilege. It does not appear that he complied with this condition at all.

There is not a scintilla of evidence showing that the permission to run the tramway over the land was ever given. There is an utter failure of the evidence to support the judgment, which is reversed, and, inasmuch as damages are waived here by appellant, judgment will be rendered below for appellant for recovery of the land and costs.

BATTLE, J., did not participate.

McCLINTOCK v. THWEATT.

(Supreme Court of Arkansas. April 18, 1903.)

STATEMENT OF ACCOUNT—EQUITY—JURISDICTION—CONTRACT TO DIVIDE PROFITS FROM SALES OF LANDS—STATUTE OF FRAUDS.

1. Equity has jurisdiction to order a statement of an account extending through eight years, the debit of which consist of various sums received for the purchase of lands, and the credits of moneys paid for lands, taxes, and other purposes, where plaintiff alleges that he has not sufficient information to enable him to state the account, and that he is ignorant of the amount due him.

2. A contract to divide the profits derived from sales of lands, fully executed except as to a division of the profits, is not within Sand. & H. Dig. § 3469, providing that no action shall be brought on a contract for the sale of land unless the same is in writing.

Appeal from Prairie Chancery Court; John M. Elliott, Chancellor.

Action by J. M. McClintock against J. G. Thweatt. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Eugene Lankford, for appellant. Gatewood & Gatewood, for appellee.

BATTLE, J. The plaintiff, J. M. McClintock, instituted this suit against the defendant, J. G. Thweatt, and alleged in his complaint as follows:

"That in the year 1888 he and the defendant entered into a partnership agreement for the purpose of buying and selling certain lands hereinafter described. That the defendant had a land deal on hand, in which he offered said lands for \$1,000 in cash. That he thought said lands to be worth much more, and was looking about to get some one to furnish him the money. That he spoke to the defendant about the good deal, and stated to him that if he had the \$1,000 cash he could make some money. That the de-

defendant told him he would furnish the money if he would let him in on the deal. Plaintiff could have gotten the money from other parties, but, being brother lawyer at the bar, he had confidence in him, let him in on the deal, and got the land finally for less than \$1,000. That defendant would have not got the land without plaintiff's efforts in the matter, nor would he have ever known of the deal. That said agreement was not placed in writing because of said confidence. He believed he would carry out his agreement, which he had always agreed and promised to do till the bringing of this suit. [Then follows a description of the land referred to, and which it is immaterial to state.] That under their agreement they were to share equally in the profits of said business, and the plaintiff looked after the purchase of said lands, and he and the defendant both looked after the sale of the same. That it was agreed and understood that deeds to all of the lands should be taken in the name of the defendant, Thweatt, which was done, and he was to make deeds to all purchasers, and did make deeds to parties he sold to, and also to lands sold by plaintiff. The said lands were purchased under said agreement, and were sold at various dates; the first being made on the 16th day of February, 1889, and the last was made on the 23d day of May, 1896. That during the whole time there has been no settlement of partnership business, notwithstanding the fact that plaintiff has repeatedly asked defendant to settle said partnership business with him. He always agreed to, but plaintiff never could get him to, settle. The defendant has paid out and expended in furthering said business and land deals, in purchase money and taxes, about the sum of \$3,000; the exact amount, plaintiff is unable to say. This amount is as nearly correct as he is able now to state. The defendant has received from said business and land deals the sum of \$3,000, according to the deeds made by him, and the best information of plaintiff, but plaintiff cannot say positively that this is all that defendant has received from said land business. That the plaintiff herein received the sum of \$240 from said land deal, from land deeded by plaintiff and partnership business, and this is all he has received. That said money was turned over to him as part of his share of the profits under said contract. That according to the records and the best information he is now able to receive, the sum of \$1,021 is now due him from the partnership business. That if plaintiff had not taken him into the deal, the said defendant would not have made anything out of it. The plaintiff would have made as much as he is now asking in this complaint."

And he concluded by asking that the defendant be required to account to plaintiff, and that a master be appointed, if necessary, to state an account, for judgment for the

amount found to be due him, and for other relief.

The defendant demurred to the complaint because there is no equity in it, and it does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer, and the plaintiff appealed.

A statement of an account is the equitable relief invoked in this case. The account extends through eight years—from the year 1888 to the year 1896—the debits of which consist of various sums received for the purchase of lands; and the credits, of moneys paid for lands, taxes, and other purposes. Appellant alleged in his complaint that he has not information or means sufficient to enable him to state such account, and that he is ignorant of the amount due him. In such cases, courts of equity have jurisdiction to grant relief. *Trapnall v. Hill*, 31 Ark. 345, 352, 355; *Dennis v. Tomlinson*, 49 Ark. 575, 576, 6 S. W. 11; 1 Story's Eq. Jur. (13th Ed.) § 459.

Is appellant entitled to the relief? This is denied, in part, upon the ground that the contract relied upon relates to an interest in lands, and is not in writing, as provided by the statute of frauds. The statute relied on provides: "No action shall be brought * * * to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them. * * * unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Sand. & H. Dig. § 3469. This action is not brought to charge appellee upon any contract for the sale of lands, or any interest in or concerning them. Appellant seeks to enforce a contract to divide the profits derived from the sales of land. The lands purchased by him and appellee were to be conveyed to appellee, and were by him to be conveyed to the persons to whom they sold the same, which has been done. The profits were to be divided equally between them. So much of the contract as comes within the statute of frauds has been performed. The remainder of the contract—the agreement to divide profits—does not, and will support an action. *Trowbridge v. Wetherbee*, 11 Allen, 361; *Bunnel v. Taintor's Adm'r*, 4 Conn. 568; *Howell v. Kelly*, 149 Pa. 473, 24 Atl. 224; *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592; *Hess v. Fox*, 10 Wend. 436; *Benjamin v. Zell*, 100 Pa. 36; *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Gwaltney v. Wheeler*, 26 Ind. 415; *Browne on Statute of Frauds* (5th Ed.) § 261g.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to the court to overrule the demurrer.

ST. LOUIS, I. M. & S. RY. CO. v. NORTON.
(Supreme Court of Arkansas. April 11, 1903.)

RAILROADS—CATTLE ON TRACK—INJURY—
NEGLECT—BURDEN OF PROOF—SUFFI-
CIENCY OF EVIDENCE—LOOKOUT—OBJECTION
TO INSTRUCTION—BAILEE—RIGHT OF RE-
COVERY.

1. The burden is on a railroad company to show that it used due care to avoid killing stock on its track.

2. Evidence, in an action against a railroad company for the value of stock killed on its track, examined, and held to support a verdict for plaintiff, based on the negligence of the company's employees in the management of the train.

3. In an action for the value of stock killed on a railroad track, the court instructed that it was the duty of "all persons running trains" to keep a constant lookout, and, if any property was injured "by the negligence of any employee of any railroad to keep such lookout," the company was liable. Held, that the criticism that the instruction required all members of the train crew to keep a lookout, being as to a matter of form, must be taken advantage of by a specific objection, or a requested instruction negating that idea, and could not be raised by a general objection.

4. Under Sand. & H. Dig. § 6352, providing that one who has a special ownership in stock injured by a railroad train may sue the company and recover such damages as the court or jury may assess, a bailee, having charge of a mule for the purpose of sale, may recover the full value of the animal from a railroad company whose train negligently killed it, and is not restricted to the amount he has expended in feeding and caring for it.

Appeal from Circuit Court, Jefferson County; Antonio B. Grau, Judge.

Action by Isaac S. Norton against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dodge & Johnson, for appellant. C. H. Harding and J. W. Crawford, for appellee.

BATTLE, J. Isaac S. Norton sued the St. Louis, Iron Mountain & Southern Railway Company for the damages occasioned by the negligent killing of one mule and two horses, of the property of the plaintiff, by the defendant's railway train. The plaintiff recovered judgment, and the defendant appealed.

The appellant insists that the verdict of the jury, upon which the judgment was based, was contrary to the evidence.

P. Molter testified that he, on or about the 16th of February, 1900, was engineer of a freight train of appellant, which consisted of 39 cars and a caboose. The train was running about 12 miles an hour, and was equipped with a headlight, air brakes, sand, and sand lever. While moving at the speed stated, he saw stock 100 feet ahead of him. "They were huddled together in the middle of the track," and did not move until the train struck them. As soon as he saw them he sounded the whistle. He "could not see very far on account of it being a bad night." "It was between a sleet and a snow at the

time this took place, and was about 3 o'clock in the morning." His statement was confirmed by that of his fireman.

Other witnesses testified that there were tracks of the horses and mule on track of the railroad, which indicated that they were running on the track about 600 yards to the place where they were struck and killed by the train, and that there were no tracks to indicate that they returned from that place. Witnesses differed as to the state of the weather at the time the stock was killed, and leave the distance the stock could have been seen by means of a headlight, in advance of the train, in doubt. The burden was on the appellant to show that it used due care to avoid killing the stock. It devolved upon the jury to determine whether it had done so. They decided that it had not, and there is sufficient evidence to sustain their verdict.

Appellant contends that the court erred in instructing the jury as follows:

"(1) The jury are instructed that it is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of said railroad, and if any person or property shall be killed or injured by the negligence of any employee of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable to the person injured for all damages resulting from such neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed."

In this connection the court instructed the jury, at the request of appellant, as follows:

"(1) A railroad company owes no duty to the owner of stock which strays upon its track, except to keep a constant and careful lookout upon the track, and to use reasonable and ordinary care at the time to avoid striking it. So, if you believe from the evidence in this case that the engineer in charge of the train was keeping such a lookout, and did use such care to avoid striking the animals in controversy as an ordinarily prudent man would have used under the circumstances, but, on account of the close proximity of the animals to the moving train when the engineer discovered them on the track, he was unable to stop the train in time to avoid striking them, then the company was not guilty of such negligence as will entitle the plaintiff to recover, and your verdict will be for the defendant."

In St. Louis, Iron Mountain & Southern Railway Company v. Pritchett, 66 Ark. 46, 48 S. W. 809, this court, in commenting on an instruction similar to the one objected to, said: "Counsel for appellant contend that this instruction, in effect, declared it to be the duty of each and every member of the train crew to keep a lookout. We do not believe that the language used necessarily con-

crew should see that a lookout was kept, and this, doubtless, is the meaning which the presiding judge intended to convey. If there was ambiguity calculated to mislead the jury, counsel for appellant should have made a specific objection to the instruction on that account, or should have asked an instruction stating that it was not required that every employé upon the train should be constantly on the lookout. * * * The defect was one of form only, and a general objection is not sufficient to raise a question of that kind."

We adopt these remarks in this case. The general objection of the appellant to the giving of this instruction was not sufficient. It should have followed the course indicated by the remarks quoted.

Counsel for appellant contends that appellee's interest in the mule amounted to \$8, and seems to think he ought to have recovered only \$8, instead of \$35, the value of the mule. Norton, the appellee, testified that he had the mule in charge to sell for another, and had expended \$8 in feeding and caring for it. This he was to have out of the proceeds of sale, and the remainder was to go to the owner. This showed that he had a special ownership in the mule, and was entitled to recover its full value. Sand. & H. Dig. § 6352; Railroad v. Biggs, 50 Ark. 169, 6 S. W. 724.

Judgment affirmed.

FORDYCE et al. v. McPHETRIGE & JOHN-SON.

(Supreme Court of Arkansas. April 18, 1903.)
JUDGMENT—ASSIGNMENT—PLEADING—COMPLAINT.

1. Laws 1899, p. 154, provides that, if any cause of action be sold after suit and before judgment, it shall be evidenced by a written transfer and the clerk shall make a minute thereof on the docket, and that, when the transfer is acknowledged, filed, and noted, the same shall be binding upon all persons subsequently dealing with reference to the cause of action or judgment. A complaint in an action on a judgment showed that the cause of action had been assigned to plaintiff before the judgment was rendered, but did not show an assignment, etc., under the statute. *Held*, that the complaint was demurrable.

Appeal from Circuit Court, Polk County; Will P. Feazel, Judge.

Action by McPhetrige & Johnson against S. W. Fordyce and another, receivers. From a judgment overruling a demurrer to the complaint, defendants appeal. Reversed.

Lathrop & Morrow, Fox & Moore, and Read & McDonough, for appellants.

HUGHES, J. This is an appeal from a judgment given for \$75 for an attorney's fee under the act of April 4, 1899 (Laws 1899, p. 154). The act is as follows:

of action upon which suit has been brought.

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. The sale of a judgment, or any part thereof, of any court of record within this state, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer, which, when acknowledged in the form and manner required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed by the clerk it shall be his duty to make a minute of said transfer on the margin of the record of the court where such judgment of said court is recorded, or if judgment be not rendered when said transfer is filed, the clerk shall make a minute of such transfer on the docket of the court where suit is entered, giving briefly the substance thereof, for which service he shall be entitled to a fee of twenty five cents, to be paid by the party applying therefor; and this act shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not.

"Sec. 2. That this act shall take effect and be in force from and after its passage."

The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action, and it was also contended that the act under which this suit was brought had not been properly passed; that it was not introduced by bill, as required by the Constitution; also that it embraced more than one subject; also that the act was amended on its passage through the House, so as to change its original purpose, contrary to the constitution of the state of Arkansas, etc. But, passing over any of these objections without discussion, we find that the appellants demurred to the complaint, and asked the jury of the trial to find for the defendants, which the court refused to do, to which the defendants excepted. The complaint does not allege that the appellees took an assignment of their interest in the cause of action in accordance with the terms of the act of April 4, 1899, *supra*. No judgment had been rendered. A complaint had been filed. According to the terms of this act, they should have taken a transfer of an interest in the action in writing, and filed it with the papers in the case, and have caused a note of such transfer, or the substance thereof, to be made upon the docket of the case by the clerk of the court. When said transfer is duly acknowledged, filed, and noted as aforesaid, the same shall be full

cause of action or judgment, whether they have actual knowledge of such transfer or note. The complaint failed to state that the plaintiffs had complied with this requirement of the act, and there is no evidence that it was complied with.

There was no cause of action stated or shown, for which failure the judgment is reversed, and the cause is remanded for a new trial.

CITY OF SPRINGFIELD v. JACOBS.

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

MUNICIPAL CORPORATIONS—LICENSE TAXES—VALIDITY.

1. An ordinance imposing a license tax of \$50 per day on the business of conducting "a transient, or traveling, clothing, dry goods, jewelry or other kind of store," and defining such stores as stores commonly designated as fire-sale or bankrupt-sale stores, etc., operates unreasonably and oppressively, and is void.

Appeal from Criminal Court, Greene County; J. J. Gideon, Judge.

Information by the city of Springfield, charging B. F. Jacobs with the violation of a city ordinance. From a conviction before the police magistrate, defendant appealed to the criminal court, which sustained a motion to quash, and the city appeals. Affirmed.

W. R. Self and T. J. Delaney for appellant. Perry T. Allen and Wright Bros., for respondent.

REYBURN, J. This is an action originating before the city recorder of the city of Springfield upon an information charging defendant with violation of an ordinance of the city of Springfield. From a conviction before the police magistrate, the defendant appealed to the criminal court of Greene county, where a motion to quash was sustained, and the city of Springfield has appealed to this court.

The terms of the sections of article 1, c. 15, of the Revised Ordinances of Springfield, or so much as is here material, epitomized, are: Section 482 declares it shall be unlawful to pursue various avocations—among them, the keeping or conducting of a traveling or auction store without first obtaining a license therefor from the proper officers of the city, and making payment of the license fixed by ordinance. Section 483 provides that a license tax is thereby levied and fixed upon the various objects, subjects, persons, trades, and occupations within the city of Springfield, Missouri, thereafter mentioned, and that the same shall be licensed, taxed, and regulated as thereafter provided. Section 528 is as follows: "That hereafter

carry on or engage in the business of conducting in the city of Springfield, a transient, or traveling, clothing, dry goods, jewelry or other kind of store, without first having obtained therefor a license from said city, and the charge for such license shall be as follows: For each and every day such store or business is conducted the sum of fifty dollars. By the words 'transient or traveling clothing, dry goods, jewelry or other kind of stores' as used in this ordinance, is meant such stores as are commonly denominated 'fire sale' and 'bankrupt sale' stores, and are a transient and temporary character, and also such stores of a transient or temporary character conducted on the lottery plan."

Among the powers specifically delegated to a city of the third class is authority to levy and collect a license tax on traveling and auction stores. It is worthy of remark, however, the measure of control over such callings is expressly restricted to the imposition and collection of a license tax, and is not extended to the broader prerogatives of regulation and suppression conferred and possessed, respecting the numerous callings enumerated in the succeeding paragraph of the statute, by which the authority of regulation or suppression may be exercised, additional to licensing and taxing. The bounds within which a municipal corporation can lawfully enforce such delegated powers, as well as the limits within which the courts will interfere with such civic legislation, and refuse to enforce such enactments, are now well defined; and, while courts will not disturb the legitimate exercise of the legislative power accorded a municipality, they will avert its abuse. A city ordinance is to be deemed prima facie valid, but the discretion of a city council is not absolute, and its authority must be properly exercised. While the subject of the enactment may be within the statutory powers, courts will refuse to enforce it, and will declare it void, where it is unjust, oppressive, or unreasonable; but, whether the ground upon which the assault is made be that the ordinance impugned would operate unreasonably or oppressively, a clear case must be presented to warrant a court in annulling its effect. Among the many authorities, text-writers, and decisions in this state, as well as in other states, supporting the foregoing propositions, may be cited *Smith, Modern Law of Mun. Cor.* § 526; 1 *Beach, Public Cor.* §§ 90, 512 (9); *Tugman v. City of Chicago*, 78 Ill. 405; *Caldwell v. City of Alton*, 33 Ill. 416, 75 Am. Dec. 282; *Morse v. City of West Port*, 110 Mo. 502, 19 S. W. 831; *Gratiot v. Railway Co.*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Kelly v. Meeks*, 87 Mo. 396; *Corrigan v. Gage*, 68 Mo. 541; *City of St. Louis v. Weber*, 44 Mo. 547; *City of Lamar v. Weidman*, 57 Mo. App. 507; *Han-*

¶ 1. See *Licenses*, vol. 32, Cent. Dig. § 15.

the ordinance before us have been considered by the courts of other states. In *City of Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522, a license fee of \$10 per day imposed on itinerant merchants was adjudged invalid, as unnecessarily burdensome, in general restraint of trade, and prohibitory of business. In *City of Peoria v. Gugenheim*, 61 Ill. App. 374, an ordinance fixing a license fee of \$200 per month upon itinerant or transient merchants was held extortionate and unreasonable. In *City of Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447, an ordinance requiring of transient merchants a license fee of \$250 per month, or \$25 per day if the license was issued for a short period, was held void, as unreasonable. In this state, also, in *City of Cape Girardeau v. Riley*, 72 Mo. 220, a provision of a municipal ordinance permitting an attorney's fee to be taxed as costs in collection of an ad valorem tax on merchants was deemed unreasonable and oppressive.

It is manifest that adopting the most liberal consideration, both as a means of producing revenue, as well as a method and exercise of police control, the length to which the ordinance here presented extends cannot be approved. The purpose aimed at in its enactment was not to require the amount of the license as a fair share of the public burdens to be borne by those engaged in the callings named, but the actual object of this piece of civic legislation was evidently the absolute prohibition from and annihilation within the limits of Springfield of all such transient or traveling establishments or means of livelihood, by requiring as a prerequisite to their lawful existence the payment of an extravagant and exorbitant per diem under the pretext of a license tax. Such arbitrary exercise and abuse of the authority delegated cannot be countenanced, and the judgment of the lower court is affirmed.

BLAND, P. J., and GOODE, J., concur.

CALKINS v. FARMERS' & MECHANICS' BANK.

(Court of Appeals at Kansas City, Mo. April 27, 1903.)

BANKRUPTCY—PREFERENCE—ADJUDICATION—MOTION FOR SECURITY OF COSTS—ATTORNEY'S PRESENCE AT BANKRUPTCY PROCEEDINGS—ADMISSIBILITY—INSTRUCTIONS—ASSUMPTION OF INSOLVENCY—VERDICT—FAILURE TO COMPUTE INTEREST.

1. In a suit by a trustee in bankruptcy to avoid a preference, the adjudication is admissible.

2. As an adjudication of bankruptcy introduced in a trustee's suit to avoid a preference conclusively establishes the bankrupt's insolvency, and that he intended a preference, an instruction assuming those facts is proper.

plaintiff's motion to require security for costs is not ground for reversal.

4. In a bankruptcy trustee's action to avoid a preference it is proper to show that defendant's attorney was present when the bankruptcy proceedings were had, as showing notice thereof.

5. A verdict "for the plaintiff in the sum of one thousand dollars, with interest at the rate of six per cent. per annum from" a given date, will not authorize a judgment for an amount compounded of the principal sum and interest, as it is the business of the jury, and not the clerk, to compute the interest.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by R. R. Calkins, trustee in bankruptcy of the estate of Squire E. Davis, against the Farmers' & Mechanics' Bank. Judgment for plaintiff, and defendant appeals. Conditionally affirmed.

Aleshire & Benson and Hamilton & Dudley, for appellant. Karnes, New & Krauthoff, W. C. Gillihan, and Geo. W. Groves, for respondent.

ELLISON, J. This action is by a trustee in bankruptcy to recover back from defendant \$1,000 paid to it by Squire E. Davis, who had been duly adjudged a bankrupt by the federal court. The trial court rendered judgment for plaintiff.

It appears that Davis owed defendant a note for \$1,000, given June 30, 1900, and due December 30th of that year; that on Christmas Day—a short time previous to the maturity of the note—Davis and the defendant's officers (cashier and president), together with their respective attorneys, had a meeting and conference with reference to this note, and to devise means for its payment. Davis told defendant's officers that he could not pay the note, and that he "could not pull through." The cashier did not know of any property Davis owned except his stock of goods, estimated at \$2,500, a small lot of household furniture, and his wearing apparel. He suggested to him to pay the note by selling his stock. That afternoon Davis sold the stock for \$1,250, receiving in payment the purchaser's check for that amount, and indorsing it over to defendant. The defendant canceled his note, and paid him the balance of \$250 in currency.

The evidence in the cause is so nearly conclusive against defendant that it was perhaps only out of abundance of caution that the trial court refused the peremptory instruction offered by plaintiff. The foregoing statement does not contain all that was shown by direct statement of fact, and by reasonable inference that would lead to the inevitable conclusion that defendant's action in reference to the note was clearly within the terms of the bankruptcy law forbidding preferences.

The objections presented here relate principally to the admission of evidence. It is contended that there was error in permitting

the fact of the adjudication of bankruptcy to be shown to the jury. It was proper to show this. That adjudication conclusively established that Davis was insolvent, and intended a preference in paying the note held by defendant. *Landis v. McDonald*, 88 Mo. App. 335. It was, therefore, not improper for the court to assume in instruction No. 2 that Davis was insolvent, and intended a preference. Leaving the question of whether defendant's officers had reasonable cause to believe a preference was intended, and this was properly submitted.

Another point made for reversal is that the court permitted the introduction of defendant's motion to require plaintiff to give security for costs. This objection is practically disposed of by what we have already said. The evidence was, perhaps, unimportant, but certainly it was harmless.

It was shown that defendant was present by attorney when the bankruptcy proceedings were had. Without saying that it was necessary to show specific notice of these proceedings, it is enough to say that it was not harmful in this case to show the fact. And, if it was a matter necessary to prove, the showing made was proper and sufficient for that purpose.

It seems that the jury found a verdict for plaintiff without calculating the amount of the interest. It was in the following words: "We, the jury, find for the plaintiff in the sum of one thousand dollars (\$1,000), with interest at the rate of six per cent. (6 per cent.) per annum from the 15th day of March, 1901. E. West, Foreman." Judgment was entered on this verdict for \$1,066.16. The verdict did not authorize such judgment. The clerk, in entering the judgment, had no authority to calculate the interest. The jury should have done that. *Poulson v. Collier*, 18 Mo. App. 604; *Dyer v. Combs*, 65 Mo. App. 148. For this reason the judgment must be reversed, and the cause remanded, unless the plaintiff will within 15 days enter a remittitur for \$66.16, so as to leave the judgment as though originally entered for \$1,000. If this is done, the judgment will be affirmed, with costs of appeal against plaintiff. All concur.

POSTON v. WILLIAMS.

(Court of Appeals at Kansas City, Mo. April 27, 1903.)

AGENCY—INFANTS—VOID APPOINTMENT—APPEAL—WAIVER—CONCLUSIVE-NESS OF RECORD.

1. Under Rev. St. 1899, § 4072, providing that an appeal allowed by a justice shall not be dismissed for a defective affidavit or recognizance, where appellant, or some person for him, files the required affidavit before determination of the motion to dismiss, the insufficiency of the affidavit is waived, if no motion to dismiss the appeal is made.

2. Where the record on appeal states that a motion to set aside the court's action in granting a new trial and an affidavit of appeal were

filed, this recital of the record is conclusive on all parties to the suit.

3. The action of an infant in appointing another as his agent is void.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by William H. Poston, by his next friend, against Park Williams. From an order setting aside a verdict for plaintiff, he appeals. Affirmed.

H. A. Kerr, for appellant. Henry L. Eads, for respondent.

BROADDUS, J. This suit originated in a justice's court, where trial was had, and judgment was for defendant, from which plaintiff appealed to the circuit court, where he recovered a verdict, which was set aside on motion, from which action of the court he appealed here.

The evidence tended to show that William H. Poston, the infant, was the owner of a certain horse, which he desired to exchange for another, and for the purpose of making such exchange he and defendant entered into an arrangement which culminated in defendant exchanging plaintiff's animal for a certain black horse and a gray filly, the defendant paying \$15 for the difference. The defendant surrendered the black horse to the plaintiff, but kept the filly. Later, when plaintiff learned for the first time that defendant had also obtained in the exchange the gray filly, he tendered to defendant \$15 in money, and demanded the animal. The defendant refused to accept the money tendered and to surrender the said filly, whereupon plaintiff brought his action of replevin. The jury were instructed by the court to the effect that, if they found the facts as claimed by plaintiff, they would return a verdict in his favor. Amongst other instructions, the defendant asked the court to declare as a matter of law that plaintiff was not entitled to recover on the facts proved. This declaration was refused by the court. The finding of the jury was for the plaintiff, which finding, on motion, the court set aside, and assigned as a reason therefor that the giving of plaintiff's said instructions and the refusing of the one offered by the defendant was error.

The defendant insists, in the first place, that the record fails to show that the circuit court had jurisdiction, for the reason that there was no valid appeal taken from the judgment of the justice's court; and, second, that it does not appear that any affidavit for an appeal was ever filed by the plaintiff from the circuit to this court. The first objection is based upon the fact that the affidavit for an appeal from the justice's court was made not by the next friend, but by the infant himself. There was no objection to the appeal on the trial in the circuit court, and we are of the opinion it is too late to insist on

¶ 2. See *Infants*, vol. 27, Cent. Dig. §§ 5, 127.

section 4072, Rev. St. 1899, provides that: "No appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if appellant, or some person for him, will, before the motion to dismiss is determined, file in the appellate court the affidavit required." The statute evidently contemplates that such affidavits as the one under consideration shall answer the purpose intended, unless the appellee seeks to dismiss for want of a sufficient affidavit, in which case the defect may be remedied; otherwise it is waived. The case of *Turner v. Bondallier*, 31 Mo. App. 582, cited by defendant, has no application. That was a case where the objection to the affidavit was made in the trial court, and for the reason that the person making the affidavit for a writ of replevin was appointed by power of attorney by the infant to make the same; the court holding that the appointment of an agent by an infant by power of attorney was void. The proceeding there being in replevin, a writ was not authorized without a proper affidavit.

Secondly. It is true there is to be found no affidavit for an appeal to this court in the record. Still, the record proper states that one was filed. The recitation of the record imports verity, which is conclusive upon all parties to the suit. And the further contention that the plaintiff filed no motion to set aside the action of the court for granting a new trial must be disregarded for a similar reason, as the record also states that one was filed.

The remaining question is, was the court justified in setting the verdict aside for the reasons given? The evident conclusion by the court was that on the facts plaintiff was not entitled to recover. The plaintiff has presented his case upon the theory that it was the opinion of the court that the action could not be maintained in the form of replevin. We will not follow his argument in that direction, but merely content ourselves in discussing plaintiff's right to recover as a matter of law, independent of the form of proceeding. The proceeding, though in replevin, is in the nature of an affirmance by the infant of the contract made by him with the defendant, in which he constituted him his agent to exchange his horse for another horse, and to obtain the full benefit of such exchange. In short, the action is against defendant as agent of plaintiff. The question raised is, was the act of the infant in appointing defendant to make said exchange of horses for him void or voidable? In *Turner v. Bondallier*, supra, this court held that an infant could not, by power of attorney, appoint an agent to make affidavit for him in a statement of replevin. Judge Ellison, who rendered the opinion of this court, reviewed many decisions of different courts

Armstrong v. Widoe, 30 Mich. 122, wherein, in an opinion by Judge Cooley, it was held that the appointment by an infant of an agent to contract for him was void. The plaintiff was not authorized to recover under the facts, and the court acted properly in setting aside the finding of the jury.

The cause is therefore affirmed. All concur.

HYATTE v. WHEELER et al.

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

JUSTICES OF THE PEACE—APPEAL—BOND—NECESSITY.

1. Rev. St. 1899, § 3871, which empowers a justice of the peace, if he be satisfied that plaintiff is a poor person, and unable to pay the costs and expenses of suit, to permit plaintiff to prosecute the action without requiring security for costs, does not authorize the justice to permit the plaintiff to take an appeal to the circuit court without executing an appeal bond as required by section 4060.

Appeal from Circuit Court, Pemiscot County; H. C. Riley, Judge.

Action by T. E. Hyatte against J. A. Wheeler and others. Judgment for plaintiff in the circuit court, after an appeal from a justice of the peace, and defendants appeal. Reversed.

Faris & Oliver, for appellants. Brewer & Collins, for respondent.

REYBURN, J. This action was brought on an account before a justice of the peace, who rendered judgment for defendants, whereupon the plaintiff appealed to the circuit court of Pemiscot county. It is conceded by appellants that respondent filed proper affidavit for appeal from the judgment rendered by the magistrate, but by the latter respondent had been permitted to prosecute his suit in forma pauperis, and no bond for appeal to the circuit court was exacted. Appellant moved to dismiss in the circuit court for failure by plaintiff to execute and file an appeal bond before the justice, but the motion was overruled, and, a jury being waived, trial was had before the court, which rendered judgment for plaintiff. Appellants filed motions for new trial and in arrest of judgment, incorporating in both the ground that the appeal from the justice's court was improperly taken, and the motion to dismiss should have been sustained.

The sections of the Revised Statutes of 1899 governing appeals from judgments of justices of the peace to the circuit courts are as follows: Section 4060 recites, as one of the requisites to perfect such appeal, that appellant, or some person for him, together with at least one solvent surety, to be approved by the justice, must, within the period fixed, enter into a recognizance before the justice to the opposite party in an amount

of the appeal with due diligence, and payment of the judgment that may be rendered against him in the appellate court, or, if appeal be dismissed, payment of the judgment rendered by the justice, with costs. Section 4061 specifically gives the form of such appeal bond. Section 4072 provides that no appeal shall be dismissed for want of a bond, or by reason of its insufficiency or defectiveness, if appellant, or some one on his behalf, before the determination of the motion to dismiss, will in the appellate court enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs incurred, by reason of such defect or omission. Provision is made for the prosecution of a suit as a poor person in justices' courts by section 3871, which empowers the justice, in his discretion, before or after the commencement of an action, if he be satisfied that plaintiff is a poor person, and unable to pay the costs and expenses of suit, to permit plaintiff to prosecute such action without requiring security for costs. In all cases of appeal from one court to another, before the jurisdiction of the appellate court attaches, it is essential that the appeal was taken in the manner prescribed by law. A literal compliance with the requirements of the statute is the only mode by which the appellate tribunal can acquire jurisdiction of the subject-matter of the former trial. The decision of the inferior court is final, unless reopened according to law. *Robinson v. Walker*, 45 Mo. 117; *Green v. Castello*, 35 Mo. App. 127; *Devore v. Staackler*, 49 Mo. App. 547. The statute, in unequivocal terms, has made the execution of a bond a requisite step in perfecting an appeal from a justice of the peace, with the further provision in the subsequent section above alluded to permitting such bond to be given in the circuit court under the conditions therein named. The right conferred under the statutory authority by the justice, in the exercise of his discretion, upon a plaintiff, to prosecute an action as a poor person, and without securing the costs of suit, relates to the trial in the magistrate's court, and nowhere in the statutory provisions is found any authority for exemption of a plaintiff suing in forma pauperis from compliance with any of the requirements preliminary to appeal to the circuit court. The opinion of this court on the motion for rehearing in the case above cited is directly in point: "We may add, however, that leave to prosecute as a poor person can in no way dispense with the necessity of giving bond, where the duty of giving bond is statutory. The court cannot dispense with the statute." 35 Mo. App. 135. In Indiana the question here submitted was presented for determination, and it was held that an appeal bond was not dispensed with by the broad statutory enactment that "any poor person not having sufficient means

to be brought or defend as a poor person. The court is satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person and shall assign him an attorney," etc. *State ex rel. Childers v. Delano*, 37 Ind. 249, approved in *Harrison v. Stanton*, 146 Ind. 366, 45 N. E. 582. In the state of New York it has been held that the privilege of litigating as a poor person does not apply to an appeal taken by such litigant. *Ostrander v. Harper*, 14 How. Prac. 16; *Morse v. City of Troy*, 38 Hun, 301.

The trial court therefore erred in overruling appellants' motion to dismiss, and the cause is remanded to permit respondent to avail himself, if he see fit, of the right conferred on him by section 4072 of the Revised Statutes; otherwise the cause should be dismissed for want of jurisdiction.

HORMAN et al. v. CARGILL et al.

(Court of Appeals at St. Louis, Mo. April 14, 1903.)

TENANTS FROM YEAR TO YEAR—RIGHT TO GROWING CROP—SALE BY LANDLORD.

1. Persons who are tenants from year to year, and so entitled, under Rev. St. 1890, § 4109, to 60 days' notice before the end of any year in order to terminate the tenancy against their will, and who, under their contract with their landlord, own the growing crop of clover, own it as against persons buying the premises, with knowledge of the terms of their lease, after the time for giving notice had passed.

Appeal from Circuit Court, Cape Girardeau County; H. C. Riley, Judge.

Action by Henry Horman and others against Wm. G. Cargill and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Edw. D. Hays, for appellants. John A. Snider, for respondents.

Statement of Facts and Opinion.

GOODE, J. Assumpsit to recover the purchase money of 75 acres of growing wheat, 30 acres of growing clover, 22 hogs, and various farming implements, stated to have been sold by the plaintiffs to the defendants for prices aggregating \$790, on which credits are allowed to the amount of \$300, leaving \$490 unpaid, for which judgment is prayed. The answer admits the purchase of 68 acres of wheat for \$135.39, denies the purchase of any clover, and disputes several other items of plaintiffs' account. It is alleged the defendants only got 20 hogs instead of 22, 3 2-horse plows instead of 6, no 1-horse plow—though they are charged on plaintiffs' account with 6—no cider mill, and no corn drill. The total amount of the prices of the property defendants admit buying from the plaintiffs, defendants state to be \$435.28, on

owe \$135.28. Defendants set up, by way of counterclaim, that the plaintiffs are indebted to them for the rent of six houses during different months between March 10, 1900, and September 20th, in the sum of \$138.32, leaving a net balance due defendants by the plaintiffs of \$3.04, for which judgment is prayed. A replication was filed denying all the allegations of the answer.

For some years prior to April, 1901, the plaintiffs had been the tenants of Victor E. Rhodes on a farm owned by the latter in Cape Girardeau county. Their tenancy ran from year to year, they delivering to Rhodes as rent one-third of the grain raised, but none of the clover, all of which they were allowed to keep. In the fall of 1900, plaintiffs had put in their crops as usual, and in the ensuing spring were preparing to plant corn. Early in the spring Rhodes sold the farm to a man by the name of O'Toole, and, about the 1st of April, O'Toole sold it to the defendants, who lived in Illinois. About the middle of April the defendants made a contract with the plaintiffs for the purchase of the growing crops, plaintiffs' farming machinery, and hogs, for \$800. Subsequently it was agreed that plaintiffs might keep out a wagon, \$10 being deducted from the aggregate price of the articles, leaving \$790 to be paid. This sum did not represent a round price for all the property purchased by the defendants, but the total of different prices agreed on for the various articles. Defendants paid \$100 in cash, and were to execute notes for the balance; and so far there is no dispute about the facts. The notes were never given, but payments were made from time to time, and, finally, plaintiffs brought this suit to recover the balance due on the account.

The contention of the defendants is that they were only to turn over the notes to the plaintiffs in case all the property sold was delivered, and that a portion of it was never delivered, and, on account of plaintiffs' failure to make a complete delivery, a new agreement was made by which plaintiffs relinquished their claim to the notes, and stipulated other prices for the property delivered, which prices conform to the account as stated in defendants' answer. Plaintiffs, on the other hand, contend that the property was all delivered; that some of the plows and other articles were in odd nooks on the farm, but defendants knew where they were, and could get them at any time.

Another position taken by the defendants is that in the deed from Rhodes to O'Toole, and the one from O'Toole to them, the growing clover was not excepted from the force of the conveyances, and hence they acquired title to it by virtue of their deed, instead of by purchase from the plaintiffs. Defendants also contend that the plaintiffs occupied certain tenant houses on the farm after they had surrendered possession of the farm to

houses is due; but plaintiffs testified that they were to use those houses, during the time they occupied them, rent free.

It will be seen from the foregoing statement that this case presents a conflict of evidence as to what the actual facts were, and we may say that the chief point made on this appeal is that the verdict was against the weight of the evidence. The defendants, however, insist that the plaintiffs were mere occupants of the farm at will, as they were tenants under a verbal lease, and hence have no right to recover for the 30 acres of growing clover. In truth, plaintiffs were tenants of the premises from year to year, and were entitled to 60 days' notice before the end of any year in order to terminate the tenancy against their will. Rev. St. 1899, § 4109. By virtue of the terms of their contract with Rhodes, their landlord, they owned the crop of clover, and had a perfect right to sell it to the defendants, who purchased the premises with full knowledge of the terms on which plaintiffs held. The main object defendants had in view in buying plaintiffs' crops and farming implements was to get possession in the spring, as plaintiffs could hold the farm during that year, and were ready to put in a crop of corn.

We have examined several points made for reversal by defendants' counsel, and find they are wholly without merit. The court, in appropriate instructions, told the jury to allow the defendants credit for any articles sold by the plaintiffs which were not delivered in good condition; further, that, if the jury believed any of the articles sold were not delivered to the defendants at all, the jury should deduct from their award of damages the prices of such articles; and, again, if they believed the clover did not belong to the plaintiffs, but was purchased by the defendants from the owner of the land it was growing on, they should deduct the price of the clover. This last charge was in defendants' favor, but was unwarranted by the evidence, which showed the clover belonged to no one but the plaintiffs. The other charges were as full and fair as the defendants could ask, and none was given at the instance of the plaintiffs.

The weight of the testimony and the justice of the case are altogether with the plaintiffs, so the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

CARROLL v. CITY OF MARSHALL.

(Court of Appeals at Kansas City, Mo. April 27, 1903.)

STREETS—CHANGE OF GRADE—DAMAGES TO ABUTTING OWNER—REDUCTION BY BENEFITS CONFERRED.

1. Where a property owner has paid, or will be obliged to pay, through special tax bills, the cost of improvements to the street in front

of his property, the only benefit to the property which can be offset against the owner's claim for damages for a consequent elevation of the level of the streets above his lots is that which is in excess of the assessment levied against him for the improvements.

Appeal from Circuit Court, Saline County; Hon. Sam'l Davis, Judge.

Action by Daniel Carroll against the city of Marshall. From a judgment for defendant, plaintiff appeals. Reversed.

Robert M. Reynolds and Robert B. Ruff, for appellant. W. E. Rainey and J. F. Barber, for respondent.

ELLISON, J. Plaintiff is the owner of several lots in the city of Marshall, Mo., along the front of which the city raised the grade of the street so as to leave the lots below the level of such street. He brought this action for damages to such property, and failed in the trial court.

It appears that the street was not only graded, but was also macadamized and curbed. The court gave an instruction for defendant wherein it was declared that the fact the street was a graded and macadamized street, with curbs and gutters, could be taken into consideration by the jury as benefits to plaintiff which should be deducted from his damage. Plaintiff objects to the instruction. He says, in support of his objection, that he had already paid for the grading, paving, and curbing; or would, under the law, be compelled to pay for it through special tax bills issued for such improvements. That if such grading, paving, and curbing is to be now charged against his damage, it will be forcing him to a double payment. We believe the objection to be sound. The cost of specific improvement which has been paid for by a property holder ought not, in justice, to be set off against his loss by reason of damage to his property. That benefit, up to the amount of the cost thereof, has been settled by the property owner himself, and the city has no right to use it as an offset to his claim for damages.

But we think it would be going too far to say that such improvements are not to be considered at all. Grading, paving, and curbing a street may, and frequently do, benefit the abutting property largely more than the cost of the work and material evidenced by the tax bill which the property owner pays. The instruction ought to have been so worded that the only benefit to be allowed against plaintiff's damage would be that which was in excess of what such improvements had cost him by reason of the special assessment therefor. If the benefit did not exceed the cost, then no benefit would be counted against him in estimating the damage.

An expression is used in *Neenan v. Smith*, 50 Mo. 529, that special assessments for local improvements are had "to pay for the benefits which they are supposed to confer." This expression is quoted by Judge Valliant

in *Thornton v. City of Clinton*, 148 Mo. 668, 50 S. W. 295. But it was not meant by that expression that the special assessment paid for the whole benefit in such sense as to be applicable here. It only pays for that portion of the benefit which is represented in the cost of the benefit, that is to say, the cost of the improvement.

The judgment is reversed, and the cause remanded. All concur.

CURTIS v. CHICAGO, R. I. & P. RY. CO.

(Court of Appeals at Kansas City, Mo. April 27, 1903.)

MASTER AND SERVANT—INJURIES BY SERVANT—LIABILITY OF MASTER—SCOPE OF EMPLOYMENT.

1. Plaintiff was injured by being ejected from defendant's train, while in motion, by a brakeman, although defendant's rules forbade brakemen to eject parties from trains while in motion, and without first securing from the conductor authority so to do. *Held*, that defendant was liable, as it was the brakeman's duty to eject trespassers, and in so doing he was in the course of his employment, and the fact that he acted contrary to the rules or exceeded his authority was no defense.

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by Benjamin Curtis against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, H. C. McDougal, and Frank P. Seabee, for appellant. Hamilton & Dudley, for respondent.

BROADBUD, J. This is an action for damages, which plaintiff alleged he received by being ejected from defendant's passenger train, while the same was in motion, on the 7th day of May, 1901, at Cameron, Mo. The verdict and judgment were for the plaintiff for \$810, from which defendant appealed.

The evidence tended to show that while the defendant's west-bound passenger train was standing at the Cameron City Depot the plaintiff asked permission to ride on the train to the Junction Depot, about one-fourth of a mile west, and that the brakeman, after the train got in motion, kicked him off, when he struck the ladder of the switch post, and was severely injured. Plaintiff's own statement that he was kicked off the train by the brakeman is corroborated by that of two other boys; but the evidence introduced by the defendant tends strongly to contradict them, and to show that they were not in the immediate vicinity at the time of the occurrence; and there was evidence also tending to impeach their reputation for veracity. The evidence of the brakeman was that he told the boy not to get on the train, and that he did not kick him off, but that he jumped off while the train was in motion.

¶ 1. See *Carriers*, vol. 3, Cent. Dig. §§ 1413, 1414.

in evidence:

"212. Conductors and trainmen must attend to the safety and comfort of passengers lawfully on their trains; protect them against rudeness, threatened violence, abusive or obscene language, or annoyance from intoxicated or quarrelsome persons, and must not permit peddlers, beggars or gamblers to ply their vocation on trains. Persons acting offensively toward passengers, whether provided with a ticket or not, and other persons found upon a train without ticket or pass and refusing to pay fare upon being required to do so (which requirement must always be made), must be ejected from the train; but strictly in accordance with state law; only such force being used, as may be sufficient for removal, and in no case with unnecessary violence, harsh language, or display of ill temper, or while train is in motion. Ejection under such circumstances is an act of legal duty, to be performed in a reasonable manner and at a proper place. Persons should not be ejected at any place where bad weather or unseasonable hours of the night might endanger their lives or safety, and the person ejected must not be a child of tender years, of unsound mind, or in such feeble and helpless condition as to be unable to take care of him or herself at the point of ejection.

"Trainmen must not under any circumstances eject a tramp, or tramps, or other trespassers upon the train, while it is in motion, nor without first conferring with the conductor, who may delegate special authority to trainmen.

"(a) Reports of all cases of ejectments whether of passengers or others and whether from train or from one car to another, as well as of all controversies between conductors and passengers in which force is employed whether injury is claimed or not must be promptly made as required by rule 407. Ejectments should be reported on form 479 and other controversies by letter giving full details. In all cases particular care should be taken to secure the names and addresses of all passengers or other witnesses in such occurrences."

"260. A flagman or brakeman (or the conductor) must while the train is in motion, remain on the rear car of every train.

"261. It shall be the sole duty of the flagman of all passenger trains while on the main track, either running or standing, except at division or terminal points where the train is properly protected by yard rules or otherwise, to protect the rear of his train in the manner provided in the rules; and the rear brakeman, when a regular flagman is not employed, is required to perform this duty, with which nothing must be allowed to interfere. * * *

At the close of the evidence the defendant asked the court to instruct the jury to find for the defendant, which the court refused.

the plaintiff failed to show that the act of the brakeman in putting him off the train was in the line of his employment, and therefore he was not entitled to recover; and plaintiff concedes that, unless the evidence so showed, he was not entitled to a verdict. Such is the law. *Krueger v. Ry. Co.*, 84 Mo. App. 358; *Hartman v. Muehlebach*, 64 Mo. App. 565; *Farber v. Ry. Co.*, 116 Mo. 91, 22 S. W. 631, 20 L. R. A. 350. It is also well-settled law that if the brakeman, while in the performance of his duties, and within the scope of his authority, put plaintiff off the train while it was in motion, the defendant is liable. *Meade v. Ry. Co.*, 68 Mo. App. 92; *Haehl v. Ry. Co.*, 119 Mo. 325, 24 S. W. 737, and other cases cited in respondent's brief.

Rule 212 makes it the "legal duty" of conductors and trainmen to eject persons found upon a train without ticket or pass, and refusing to pay fare; this duty to be performed in a reasonable manner, and at a proper place. And "trainmen must not, under any circumstances, eject a tramp or tramps or other trespassers upon a train while it is in motion, nor without first conferring with the conductor, who may delegate special authority to trainmen." The defendant's construction of this rule is that no trainman has the authority, under the rule, to eject a passenger without the consent of the conductor, and in doing so he acts outside of the line of his employment, and that in no event is he authorized to eject a passenger while the train is in motion. The plaintiff admits that the rule requires that, before a brakeman can eject a passenger he must confer with the conductor, and that in no instance is he authorized to eject one while the train is in motion, but that the act notwithstanding is in the course of his employment, although in excess of his authority, for which the carrier is responsible. *Meade v. Railway*, 68 Mo. App. 92, was where a station agent was charged with the duty of not allowing "bums" around the station. The station agent, while plaintiff was asleep on a bench poured benzine on the bench, so that it would reach plaintiff's clothes, with the intent of firing the benzine for sport. The benzine, however, was fired by another, and plaintiff was severely burned. The defendant was held liable. The court recognized the rule in this state "that the mere fact that the tortious act is committed by the servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. It must not only be done while so employed, but it must pertain to the particular duties of that employment"—citing *Hartman v. Muehlebach*, 64 Mo. App. 565. But the court held the case came within the rule as stated in *Wood on Master & Servant*, § 307, that the master, "by putting the servant in his place, becomes responsible for all his acts

clearly falls within the rule just quoted. It was a part of the duty of a brakeman to put a trespasser off the train, and in so doing he was in the course of his employment; and the fact that he exceeded his authority, or acted contrary to the rule which forbade him from ejecting a passenger from a moving train, did not excuse the defendant. *Haehl v. Ry. Co.*, 119 Mo. 325, 24 S. W. 737. A principal is liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act. *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

For the reasons given, the cause is affirmed. All concur.

CLEVELAND v. COULSON.

(Court of Appeals at Kansas City, Mo. April 27, 1903.)

WITNESS—COMPETENCY—TRANSACTION WITH DECEDENT.

1. In an action on a note by an indorsee, a witness, though not a party to the record, is incompetent to testify that by a contract between himself, the maker, and the deceased payee, the note was made payable to the decedent, but was in fact the witness' property, and represented a debt due him from the maker.

Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by Pauline Cleveland against W. B. Coulson. Judgment for plaintiff, and defendant appeals. Affirmed.

Campbell & Ellison and C. E. Murrell, for appellant. Park & Son, for respondent.

BROADDUS, J. This is a suit by plaintiff, as assignee of a note for \$850, due in one year from date, executed by the defendant on the 28th day of January, 1898, and made payable to one Margaret Coulson. A jury was waived, and the case tried before the court. The finding and judgment were for the plaintiff, from which defendant appealed.

On the trial, defendant offered to prove by John Coulson, a son of Margaret Coulson, the payee of the note, who was shown to be deceased, that, at the time of its execution, defendant was indebted to witness in the sum of \$1,000, \$650 of which was represented in said note; that by agreement between himself, defendant, and Margaret Coulson, the note was made payable to her; that she was not the owner thereof, but that she was to collect the interest thereon, and then give the note to witness; and that it always had been his property. Upon objection to his competency by plaintiff, he was excluded as a witness. The defendant was also introduced

was right in its rulings in holding that defendant and said John Coulson were not competent witnesses, the judgment should be affirmed. The defendant has not insisted in this court that he was a competent witness, but he seriously contends that John Coulson was such. In *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654, the question of the competency of witnesses arose in a partition proceeding, where the issue on trial was a transaction between the plaintiffs and their deceased father, wherein each plaintiff was by the terms of the statute disqualified as a witness to testify in her own behalf. The court, however, held that one plaintiff was not rendered incompetent to testify as a witness in behalf of the others. The language of the court is: "In suits for partition, issues between the co-tenants in regard to their respective rights may be made and determined. One may be charged with rents or advancements, and another credited by improvements and payment of taxes. These questions become separate issues, and are to be tried independently of the general question involved." But that case is not analogous to the one under consideration, for here the proposed witness was a party to the contract in issue, and the other party was dead. In *Ford's Adm'r v. O'Donnell*, 40 Mo. App. 51, it was held that the witness was competent, both at common law and under the statute, where the other party was dead, when he was neither a party to the record nor a party in interest, and when he testifies in no sense in his own favor. In *Bank v. Hunt*, 25 Mo. App. 170, it was held in such cases a party to a contract who was not a party to the suit was a competent witness, when in no sense he was testifying in his own favor. In *Meier v. Thielemann*, 90 Mo. 433, 2 S. W. 435, the court held that, where one of the parties to the contract was dead, the other was not a competent witness in his own favor, whether he was a party to the suit or not. These three last cases are not in conflict, and seem to embody the law governing the question involved in this case. The witness offered to testify was a party to the agreement made with the deceased payee of the note in suit, and, though not a party to the record, he was such in interest. It was sought by his testimony to constitute himself payee of the note, instead of the deceased, Mary Coulson. The facts which he was to prove would have made him a rival claimant of the note. It was therefore to his interest to defeat the plaintiff in her suit, and to that extent he was testifying in his own favor. He was therefore an incompetent witness, both at common law, and under the statutes as construed by the appellate courts of the state.

For the reasons given, the cause is affirmed. All concur.

INSURANCE—APPLICATION — MISSTATEMENTS
—EVIDENCE—WITNESSES — EXAMINING PHYSICIAN—INSTRUCTIONS—HARMLESS ERROR.

1. Where, in an action on a policy, the court permitted a copy of the application to be introduced in evidence, which contained certain alleged false answers—that insured did not have discharges from her ear, and sores on her body—defendant was not prejudiced by the court's refusal to allow the examining physician to testify as to the answers made by insured with reference to such subject.

2. Where, in an action on a policy, the insurer wholly failed to prove any misstatement as to insured's age, it was not prejudiced by an instruction that, so far as insured's defense rested on such alleged misstatement, it had failed.

Appeal from Circuit Court, Jefferson County, Chancery Division No. 2.

"Not to be officially reported."

Action by Mary A. Lester's executor against the Michigan Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bennett H. Young, for appellant. Clayton B. Blakey, for appellee.

PAYNTER, J. This suit is based upon a policy issued upon the life of Mary A. Lester for \$1,000. The defendant sought to avoid its payment upon the ground that the insured had made false answers to material questions in her application for the policy. Among other alleged false answers was one as to her age, one as to the discharges from her ear, and another as to open sores on her body. The plaintiff sought to avoid this issue by showing that no copy of the application was attached to the policy when delivered to the insured. It is urged that prejudicial errors were committed upon the trial as follows: (1) That the court refused to allow Dr. Taylor to testify as to the answers which the insured made with reference to sores upon her body; (2) in instructing the jury.

There was an issue as to whether a copy of the application was attached to the policy, and delivered to the insured with it. The defendant produced what it claimed was a copy of the application; claiming that one had also been attached to, and delivered with, the policy. At first the court refused to allow the purported copy of the application and report of the medical examination to be read as evidence, but, upon reconsideration, permitted it to be done. It appeared in the purported copy of the application that the insured answered that she did not have discharges from the ear, and open sores upon her body. If the jurors believed that it was a copy of the application which insured made, then they must have believed that she had made a false answer as to open sores upon her body, etc. The testimony of Dr. Taylor could have done no more than to

err in refusing to allow the witness to testify upon the question stated. If the application had not been attached to, and delivered with, the policy, then his proposed testimony would have been incompetent, under the doctrine of the case of Provident Savings Life Assurance Society v. Puryear's Adm'r (Ky.) 59 S. W. 15, because it was there held, under sections 656, 679, Ky. St. 1899, that a defense similar to the one in this case could not be interposed unless a correct copy of the application was attached to the policy at the time it was delivered. If such a copy was delivered with the policy, and the one claimed by the defendant on the trial to be also a copy of it was so, then it showed the facts sought to be proven by Dr. Taylor. In either state of the case the rejection of the witness' testimony was not error, or prejudicial to the defendant.

By the third instruction the court told the jury that, so far as the defense rested upon alleged misstatements as to age, it had failed, because the evidence was not sufficient to show that the decedent misstated her age. While we are of the opinion that it was not proper practice for the court to give this instruction, still the defendant had wholly failed to prove any misstatement as to age. Therefore it did not prejudice the rights of the defendant.

The judgment is affirmed.

BARBER ASPHALT PAV. CO. v. GAAR.
CITY OF LOUISVILLE v. BARBER
ASPHALT PAV. CO. WALSH et al. v.
BARBER ASPHALT PAV. CO. RAFFO
et al. v. BARBER ASPHALT PAV. CO.

(Court of Appeals of Kentucky. April 22, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—BOARD OF PUBLIC WORKS—POWERS—CONTRACTS—VALIDITY—CHANGE IN SPECIFICATIONS—STIFLING COMPETITION—APPORTIONMENT OF COST OF IMPROVEMENT—METHOD—PROPERTY ASSESSABLE—LACHES.

1. Ordinances providing for a street improvement declared that "said work shall be done in accordance with the plans and specifications on file in the office of the board of public works." At the time of their passage there were general specifications on file. It had been the uniform custom of the board, where an improvement had been ordered, to prepare, after the passage of the ordinance, plans and specifications as the exigencies of the particular work demanded. Held, that it must be presumed that the board, in recommending the ordinances, and the general council in passing them, acted in view of such custom, and did not refer to the general specifications theretofore printed and on file.

2. Ky. St. 1894, § 2826, provides that no public way shall be constructed, except by ordinance recommended by the board of public works. By section 2829, whenever the board shall order any work to be done, which, according to law, is to be prepared by independent contract, the board shall prepare and place on file in the office of that department complete drawings and specifications of the work, and thereupon shall cause notice to be published

of the board, it becomes necessary, in the prosecution of any work, to make alterations or modifications in the specifications or plans of a contract, such alteration or modification shall be made only by order of the board, and the order shall be of no effect until the price to be paid shall be agreed on in writing, signed by the contractor, and approved by the board. Held to vest in the board of public works, where the council has directed an improvement in general terms, the power to prescribe the details of the work.

3. The mere fact that the board of public works, in advertising for bids for asphalt paving, called for alternative bids on two different kinds of pavement, does not invalidate the contract let by it.

4. Where the ordinance for a street improvement was silent as to how the gutters should be constructed, and the board of public works stipulated for flagstone guttering, but afterwards, as provided in Ky. St. 1894, § 2830, modified the specifications, substituting asphalt guttering, and the asphalt was cheaper, and it did not appear that more than a fair price was paid therefor, or that the board had abused a sound discretion in making the change, there was no ground for objection.

5. It is not unreasonable for a city to require a contractor doing street paving to guaranty the pavement for five years, and such a requirement does not tend to stifle competition.

6. It is not unreasonable to require the contractor to maintain a plant in the city during the five years.

7. An unconstitutional ordinance requiring payment of a license fee by contractors could be ignored by them, or, if they had paid anything under it, they could recover it on demand.

8. Unless it appears that under a different method of apportioning the cost of a street improvement the party complaining will be required to pay less, the apportionment made will not be disturbed.

9. Where the territory abutting a street on which paving was to be done had not been defined into squares by principal streets, the council was authorized in the ordinance to prescribe the depth on both sides to be assessed for the cost of making the improvement.

10. Where the apportionment of the cost of a street improvement is wrong, it is incumbent on the court, under the express provisions of Ky. St. 1894, § 2834, to correct it so as to do justice to all parties concerned.

11. Land within the limits of a city, though used for agricultural purposes, may be assessed for street improvements in a proper case.

12. A property owner should not be permitted to stand by in silence, and allow a street improvement to be made, and then, by raising objections, escape payment for the benefit his property has received.

Appeals from Circuit Court, Jefferson County.

"To be officially reported."

Two separate actions by the Barber Asphalt Paving Company against Mary H. Raffo and others and by the same plaintiff against Cornelius Walsh and others, in which actions the enforcement of all unsatisfied liens arising out of the improvement of Chestnut street, in the city of Louisville, from Thirty-First street to Shawnee avenue, was asked. The court below held that the property between Thirty-First street and Gaar's

through the medium of a sale by the commissioner of the court. As to the property between Gaar's Lane and Shawnee avenue the court below rendered judgment for the defendants, but decreed a recovery against the city. Four separate appeals were taken—one by the Barber Asphalt Paving Company, one by the city of Louisville, one by Cornelius Walsh and others, and one by Mary H. Raffo and others. Reversed on the two first appeals, and affirmed on the other appeals.

Wm. Furlong and B. F. Washer, for Barber Asphalt Co. L. N. Dembitz, for Mary J. Gaar and Mary Raffo. H. L. Stone, for city of Louisville. Lane & Harrison, O'Neal & O'Neal, Strother, Hardin & Strother, I. T. Woodson, and J. A. McHenry, for Cornelius Walsh, Mary Raffo, and Mary Gaar.

HOBSON, J. By an ordinance approved August 22, 1898, the general council of the city of Louisville provided for the improvement of the carriage way of Chestnut street from Thirty-First to Thirty-Fourth street; and by another ordinance, approved on the same day, it provided for the improvement of the carriage way of Chestnut street from Thirty-Fourth street to Shawnee avenue. Contracts were made with the Barber Asphalt Paving Company for the construction of the street under the ordinances. The company complied with its contract. The work was examined and accepted by the city. The cost was apportioned among the owners of property fronting on the street, and apportionment warrants were issued therefor. A number of these warrants remaining unpaid, the company instituted two actions in the Jefferson circuit court to enforce them. Answers were filed by the property owners controverting their liability for the improvement, and on final hearing the circuit court held that the property between Thirty-First street and Gaar's Lane, or Fortieth street, was liable to assessment for the improvement, and the lien of the plaintiff was ordered to be enforced; but as to the property between Gaar's Lane, or Fortieth street, to Shawnee's avenue, it held that the city had no authority to improve the street at the cost of the adjacent landowners, and it accordingly rendered judgment in favor of the defendants and against the contractor as to this property, but entered a judgment in favor of the contractor against the city for the amount of these warrants. From this judgment the four appeals before us are prosecuted.

In Barber Asphalt Paving Co. v. Gaar et al. the contractor complains of that portion of the judgment denying it relief against the property lying between Fortieth street and Shawnee avenue. In City of Louisville v. Barber Asphalt Paving Co. the city com-

¶ 11. See Municipal Corporations, vol. 36, Cent. Dig. § 1030.

liable for this part of the improvement. In *Cornelius Walsh et al. v. Barber Asphalt Co.* the owners of property from Thirty-Fourth street to Fortieth street complain of so much of the judgment as holds their land liable for the cost of constructing the street in front of it. In *Raffo et al. v. Barber Asphalt Paving Co.* the owners of property from Thirty-First to Thirty-Fourth street complain of the judgment holding their property liable.

The last two appeals are prosecuted separately, as two separate actions were brought in the circuit court, and the questions made are not identical in some respects. For convenience all the appeals will be considered together. The city of Louisville purchased Shawnee Park something over 10 years ago. At that time it lay without the city limits, but in the year 1894 the city limits were extended so as to take in the park. This was done by taking into the city a narrow tongue of land 460 feet in width and something over a mile long, extending from a line 200 feet west of Thirty-Fourth street to Shawnee avenue. Sixty feet of this strip throughout its entire length was taken up by Chestnut street, leaving a strip 200 feet wide on each side of it. This extension of the city limits appears to have been made without protest on the part of the property owners. After the territory was taken into the city, the county authorities ceased to keep the roadway in order, and, there being considerable travel on it, it got in very bad repair in the four years elapsing after it was taken into the city before the improvement was ordered. Some of the property owners were active in procuring the council to order the improvement, others were silent, and some held a meeting and protested, but they took no active steps to prevent the improvement being made as directed in the ordinances. The first of the ordinances under which the work was done is in these words:

"Be it ordained by the general council of the city of Louisville: That the carriage-way of Chestnut street from the center line of Thirty-First street to the center line of Thirty-Fourth street extended from the north, shall be thirty-six (36) feet in width, and shall be improved by grading, curbing and paving with the asphalt pavement, with corner stones at the intersections of streets and alleys. Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works and at the cost of owners of ground on the south side of Chestnut street from Thirty-First street to the center line of Thirty-Fourth street extended from the north and extending back to a line 171 feet distant from and parallel to Chestnut street, and on the north side of Chestnut street from Thirty-First street to Thirty-Fourth street as provided by law. The cost to be equally apportioned among the owners of property accord-

owed by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be and are hereby repealed."

The other ordinance is similar, except that after providing for the improvement, it is as follows:

"Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works and at the cost of owners of ground on the north side of Chestnut street from the center line of Thirty-Fourth street to a line at right angles to Chestnut street, passing through a point where the center line of Shawnee avenue extended from the south intersects the center line of Chestnut street and extending back to a line 171 feet distant from and parallel to Chestnut street and on the south side of Chestnut street from the center line of Thirty-Fourth street extended from the north to a line at right angles to Chestnut street, passing through a point where the center line of Shawnee avenue extended from the south intersects the center line of Chestnut street and extending back to a line 171 feet distant from and parallel to Chestnut street. The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be and are hereby repealed."

At the time the ordinances were passed there were general specifications, which had been printed, on file in the office of the board of public works, but the contract was not made according to these specifications. The board, according to its custom, prepared, after the ordinances were passed, plans and specifications for the work, and the contract was made thereunder. By section 4 of the specifications the guttering was to be made of flagstones. After the contract was let, the board of public works, by a written contract with the contractor, changed this, and allowed the guttering to be made of asphalt. By section 22 of the specifications the contractor was required to erect a permanent plant in the city limits, which should remain there during the time of the guaranty period—five years. The specifications were in the alternative for either asphalt pavement No. 1 or asphalt pavement No. 2. The advertisements were so made. Bids were received on both classes of pavement, and the board accepted the bid for pavement No. 1. The difference between No. 1 and No. 2 consists in the thickness of the pavement. No. 1 being thicker, and costing something over \$2 more per square of 100 feet than No. 2. The specifications also called for a binder course underneath the asphalt or surface pavement. Madison street runs parallel with Chestnut and 340 feet from it on the north. Magazine street runs parallel with Chestnut, and is 420 feet from it on the south. The

171 feet on the south side of Chestnut, as well as on the north side, while one-half the distance to Magazine street is 210 feet. The apportionment was made as to each fourth of a square from Thirty-First street to Thirty-Fourth street, and from Thirty-Fourth street to Shawnee Park the apportionment was made from one cross-street to the next, this territory not being defined into squares by principal streets.

It is insisted for the property owners that the proceedings are void, and created no lien upon the property for the following reasons: (1) Because the contract was not made in accordance with the general specifications in existence when the ordinances were passed, and a discretion as to the amount and the cost of the work to be done was left by the lawmaking body to an executive board. (2) Because the material for part of the work was unlawfully changed from that required by the ordinance and contract, and something else was received in place of it. (3) Because both the ordinance and the specifications tended toward stifling competition, and imposed on the lot owners burdens which they ought not to bear. (4) The burden was thrown on the property extending back from the street 171 feet, and not 210 feet, or half way to Magazine street on the south from Thirty-First to Thirty-Fourth street, and west of Thirty-Fourth street to Shawnee avenue the burden was thrown on the property running back 171 feet from the street on both sides, while the city boundary along here extended out 200 feet from the street, and thus 29 feet of land within the city boundary was exempted from the burden. (5) The territory contiguous to Chestnut street from Thirty-Fourth street to Shawnee avenue was not defined into squares by principal streets, and there existed no authority in the general council to prescribe by ordinance for the construction of an improvement for more than a mile in length at the cost of the owners of lots contiguous thereto to a depth of only 171 feet, to be apportioned equally, as set out in the ordinance. (6) This territory was in part suburban and in part agricultural, and to enforce the lien on the land is to appropriate the property of the citizen to public use without compensation therefor to the owner. These objections will be considered separately.

1. It was held in *Richardson v. Mehler* (Ky.) 63 S. W. 957, where the ordinance directed the street to be improved with vitrified brick or block pavement "in accordance with the plans and specifications on file in the office of the board of public works," that the words, "in accordance with the plans and specifications on file in the office of the board of public works," might be rejected, and that the ordinance without these was sufficient. We see no reason why the same rule should not apply to an ordinance requiring the improvement of the street with asphalt pave-

been the uniform custom of the board of public works in each case where an improvement is ordered to prepare after the passage of the ordinance plans and specifications as the exigencies of the particular work demanded, and we must presume that the board of public works, in recommending the ordinances in question, and the general council in passing them, acted in view of this well-known custom of transacting the business, and did not refer to the general specifications theretofore printed and on file in the engineer's office, which were in fact never considered in making the contract. By section 2826, Ky. St. 1894, no public way shall be constructed, except by ordinance recommended by the board of public works. By section 2829, whenever the board shall order any work to be done, which, according to law, is to be performed by independent contract, the board shall prepare and place on file in the office of that department complete drawings and specifications of the work, and thereupon shall cause notice to be published of the fact that the drawings and specifications are on file, and calling for sealed proposals for the work. By section 2830, when, in the opinion of the board, it becomes necessary in the prosecution of any work to make alterations or modifications in the specifications or plans of a contract, such alteration or modification shall be made only by order of the board, and the order shall be of no effect until the price to be paid shall be agreed upon in writing, signed by the contractor and approved by the board. These three sections must be read together, and evince, when taken together, a purpose on the part of the Legislature in creating the board of public works, to vest in it, where the council has directed an improvement in general terms, the power to carry out in detail the work so directed, on the idea that in the matter of these details the board of public works is better calculated to look into each, and properly guard the interest of the city than the general council can possibly be with the limited time at its disposal.

If the board had made plans and specifications for only asphalt pavement No. 1, and had advertised only for bids on this, it could not be maintained, under the rule laid down in the case referred to, that the contract was invalid. The fact that it advertised for alternative bids on pavement No. 1 and on one that was thinner, but rejected the bid for the thinner pavement, is of no more effect on the contract than if they had advertised alone for bids on the thicker pavement. The council having simply directed the pavement to be laid with asphalt, and of a certain width, the board was left by the statute with a discretion as to the details of the construction of the pavement, these not having been prescribed by the council. We think this is the fair meaning of the statute, and that the power to pass on the depth of the pavement

make plans and specifications and to control other matters of minutiae, such as whether there shall be a binder course, or whether a certain quality of asphalt shall be used.

2. What we have said disposes of the second objection. The ordinance was silent as to how the gutters should be constructed. This the council left to be regulated by the board of public works with the other details of the contract in the plans and specifications. The board stipulated in the contract for flagstone guttering, but afterwards, in the prosecution of the work, as provided by section 2830, modified the specifications by a contract in writing, signed by the contractor and approved by the board, substituting asphalt guttering for the flagstones. The change was in the interest of the property holders, for the asphalt was cheaper than the flagstones. There is no evidence that more than a fair price was paid for the substituted guttering, or that the board abused a sound discretion in making the change. The presumption is in favor of their official action, and, in the absence of proof, it cannot be assumed that the change was made in the interest of the contractor, or that any injury resulted therefrom to the property owners.

3. The objection that the ordinance and specifications tended toward stifling competition is based on the specifications made before the ordinance was enacted. The specifications prepared by the board of public works after the ordinances were passed seem to contain nothing which is fairly liable to objection on this ground, and, as the contract was not made under the other specifications, it was not affected thereby. It is not an unreasonable requirement on the part of the city that the contractor shall guaranty the pavement for five years, for there are many defects which are not discoverable at first, and the guaranty of the pavement for five years secures the city against a construction of the street in a manner or with material insufficient for the purposes contemplated. The requirement that the contractor shall maintain a permanent plant in the city during this period is reasonable, for in the case of an asphalt street, especially, the repairs must be made promptly and properly. The city had a right to protect itself, not only by the bond of the contractor, but by a reasonable requirement securing the performance of the bond, and relieving it of the necessity of litigation. The cost of the permanent plant was small as compared with the contract, and a large discretion is given the city authorities in matters of this sort, which the courts will not interfere with unless palpably abused.

The ordinance requiring the payment of a license fee by contractors was held unconstitutional by this court. Being unconstitutional, it was a nullity. From a nullity no rights can arise, and by it no rights are affected. The ordinance being void, the con-

not be required to pay anything under it. and, if they did pay anything, they were entitled to recover it on demand. We are unable to see, therefore, that there was anything in the ordinance or specifications looking toward stifling competition, or imposing on the lot owners burdens which they ought not to bear.

4. The rule is that, unless it appear that under a different method of apportionment the party complaining would be required to pay less than under the method adopted, the apportionment as made by the city authorities will not be disturbed. *McHenry v. Melvage*, 99 Ky. 232, 35 S. W. 645; *Barrett v. Falls City, etc., Coal Co. (Ky.)* 52 S. W. 947; *Chawk v. Beville (Ky.)* 56 S. W. 414; *Levy v. Coyne (Ky.)* 57 S. W. 790. We are unable to see from the record that the property owners on the south side of Chestnut street between Thirty-First and Thirty-Fourth streets were in any wise prejudiced by the act of the council in fixing the depth of the taxing district at 171 feet. The council seems to have acted upon the idea that this would be one-half the distance to the next street when the streets on the south were extended through this territory; and whether they were correct in this or not we need not consider, as it is not shown that any of the property holders complaining would have had to pay less if the depth on the south had been fixed at 210 feet; and the fact is we are by no means clear from the proof that the council made a mistake as to the territory lying between Thirty-First and Thirty-Fourth streets. The territory lying west of Thirty-Fourth street not being defined into squares by principal streets, the council was authorized in the ordinance to prescribe the depth on both sides fronting the improvement to be assessed for the cost of making it, and we see nothing in the evidence to show that the council abused a sound discretion in fixing the depth on each side at 171 feet.

5. This disposes also of the fifth objection, for if it be admitted that the ordinance should not have directed the cost of the improvement for more than a mile in length to be apportioned among the owners of lots contiguous thereto throughout its entire length, it is not shown that appellants were in any wise prejudiced by the apportionment which was in fact made, and, if the apportionment was wrong, it would be incumbent on the court, under section 2834, Ky. St. 1894, to correct it so as to do justice to all parties concerned. No cause is, therefore, shown for disturbing the judgment on this ground.

6. In *Oswald v. Gosnell (Ky.)* 56 S. W. 185, where an ordinance for the erection of fire hydrants in this territory was before the court, we held that all the steps in the annexation of the territory to the city had been legally taken, and that the territory was properly a part of the city. Fire hydrants have been located along the street from Thirty-

First street to Shawnee avenue. Water and gas mains have been laid. The street is illuminated by electric lights. City police control the district. The city firemen furnish it fire protection. A bus line is maintained from Twenty-Eighth street to Shawnee avenue. Property along the street as improved is numbered according to the scheme prevailing throughout the city. As far west as Fortieth street the land is cut up into building lots with a few small exceptions, and between Fortieth street and Shawnee avenue several fine houses have been built. Sewer connection has been furnished. A number of parallel projected streets north and south of Chestnut street have been dedicated in the several additions made to the city, and, as shown by the photographs of Chestnut street from Thirty-Fourth street to Shawnee avenue, it presents throughout the appearance of a city street. Before the construction of the street the property fronting on it sold for prices ranging from \$10 to \$12 a front foot; since its construction it has ranged in price from \$15 to \$22 a foot. The street cost something over \$4 a foot, and under all the evidence we are satisfied the benefit to the property from the construction of the street as a whole from one end to the other exceeds the cost of the work. This is so evident from the proof that in the elaborate argument of the case no objection was made by any of the counsel to the assessment on the ground of want of benefits. While some of the land is used for truck farming, it is all suitable for residence purposes, and is very desirable therefor. The value of the land by the front foot and character of houses that are erected along the street show that it is only a question of a short time when it will all be cut up into building lots. The annexation had been contemplated for a number of years before it was made, and the construction of the street was a necessity at the time it was ordered, and without it the building up of this territory would necessarily have been much retarded. Land within the limits of a city, although used for agricultural purposes, is subject to local assessment for street improvements, under such circumstances as are shown here. In *Smith on Municipal Corporations*, § 1236, the rule is thus stated: "Property within the limits of a city, which is unplatted, is liable to special assessment for local improvements, as if laid off into blocks and lots; and so farming lands within the limits of a town are subject to taxation by the town authorities, and it is not essential that they receive benefits and protection. Urban property may be assessed for a local improvement, though not divided into lots, and though used for farm purposes, if the surrounding property is urban property. It is sometimes difficult to determine whether the property is city property, and liable for local improvements, or whether it is rural, and not subject to assessment. No hard and fast rule on the subject can be laid down.

It necessarily depends on the special circumstances of each case." In determining the liability of the property for the cost of the improvement after it has been made, the court has a very different question before it than would be presented if the objection was now made to the annexation of the property between Fortieth street and Shawnee avenue, and the propriety of the annexation was the question to be determined, or even if the property owners had enjoined the construction of the street at their cost when ordered by the council. But they stood by, and allowed the improvement to be made, and, without notice to him, allowed the contractor to expend his money in making it upon the faith that the cost was to be a charge upon the abutting property. This distinction has often been pointed out by this court. *Preston v. Roberts*, 75 Ky. 570; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Richardson v. Mehler* (Ky.) 63 S. W. 957. In *Elliott on Roads & Streets*, § 590, it is well said: "The fact that a street is being improved by order of public officers ought to put the property owner upon inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to public officers, and there is little or no reason why a property owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed, and then escape paying for the benefit his property has received. If he would avoid this result, he should act promptly, and, if he fails, he should not demand that the persons who have done the work should go unpaid." We have been referred to no provision of the Constitution or statutes under which property within a city may be exempted from assessment for municipal improvements by the bare fact that the land is used for agricultural purposes. There is nothing in the case to warrant the application of the rule forbidding the taking of private property for public uses without just compensation. Considering the benefit which this property receives from the improvement, the size of the city of Louisville, its growth in the direction of Shawnee Park, the value of the property by the front foot, its situation and surroundings, we are satisfied that under the rule established by the current of authority none of the land, after the improvement has been made, should be exempted from paying for it. *Leitch v. La Grange*, 138 Ill. 291, 27 N. E. 917; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866, and cases cited. The case of *Graham v. Conger*, 85 Ky. 583, 4 S. W. 327, involved the constitutionality of a legislative act taxing the abutting property for the improvement of a county road. This was not city property or a city highway. The case

ing the road up was by general law placed on the entire county, and that the charge on the abutting property was so great as to amount to spoliation. The cases of Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255, and Craig v. Philadelphia, 89 Pa. 265, are equally inapplicable.

On the appeals in Barber Asphalt Company v. Gaar and of City of Louisville v. Barber Asphalt Company, the judgment is reversed, and cause remanded, with directions to enter a judgment as above indicated. On the appeals in Cornelius Walsh v. Barber Asphalt Company and Mary H. Raffo v. Barber Asphalt Company the judgment is affirmed.

HEDGES et al. v. HEDGES.

(Court of Appeals of Kentucky. April 21, 1903.)

GUARDIAN AND WARD—ACCOUNTING—CREDITS—SUPPORT—OBLIGATION OF PARENT—NECESSARIES—USE OF PRINCIPAL—OCCUPATION OF WARDS' REAL ESTATE—RENT—WILLS—CONSTRUCTION—ADVANCEMENTS.

1. Where a guardian received, as a part of his wards' estate, certain solvent notes, payable to the testator, which bore interest at 8 per cent., and on an accounting he failed to exhibit any books of account, and failed to disclose the amount of interest actually received by him, he was chargeable with the rate of interest provided in the notes.

2. Where a father was appointed guardian of his minor daughters, who resided with him and rendered to him such services as are ordinarily rendered by girls of their age, he was not entitled to charge their estate with their support, in the absence of any showing that he was not able to support them.

3. Under Ky. St. 1899, § 2034, providing that no disbursements shall be allowed a guardian for the maintenance of the ward, beyond the income of the estate, not authorized by the deed or will under which the estate was derived, except when the ward cannot be bound out as an apprentice, or when it is best that the principal of the ward's personal estate shall be so applied, and when the court, on settlement of the account, shall deem such application judicious, a father who was unable to support his minor daughters in accordance with their fortune and position in society was entitled to credit as their guardian for sums expended for necessities furnished them, not exceeding, however, the income from their estates, in the absence of a showing that the income was insufficient therefor.

4. Where a father, as guardian of his daughter, purchased carpets and other articles of household furniture from the principal of her estate, and after her maturity she took possession of such articles, she thereby ratified the purchase, and the guardian was entitled to credit therefor.

5. Where a will devised a dwelling house and lot to defendant's wife and their children, and charged as an advancement against the interest of the children the rent of the house which was occupied by defendant and his family at \$100 per annum from November, 1874, and "as long as a residence," but there was nothing in the will giving defendant the right to occupy the property after testator's death, the rent at the rate

of the only defendant's occupancy during testator's life.

6. Where a house was devised to defendant's children, for whom he was appointed guardian, and defendant occupied the house with his family after testator's death, he was liable to account to the children for the rental value of the property.

7. A father, as guardian of his minor children, should not be allowed for his services an amount exceeding 5 per cent. of the sums received and disbursed by him.

8. Entries in a testator's books tended to show that certain debts owed by defendant, who was his son-in-law, represented by a note, were to be treated as advancements to defendant's wife. His will, made six years after the entries, and a year after the note had been given, disposed of testator's entire estate, and contained no reference to such note. After the making of the will, testator collected interest and a part of the principal due thereon; and after his death his executrix treated the note as a part of the estate, and assigned the same to defendant, as guardian for his minor daughters, in part payment of their interest in the estate. Held, that such note was not an advancement, but that defendant was liable thereon to his wards' estate.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Final accounting of J. T. Hedges as guardian of Gertrude Hedges and another. From a decree settling the account, the wards appeal. Reversed.

J. T. Simon, for appellants. Berry & Webster, for appellee.

O'REAR, J. Appellee qualified January, 1887, as the guardian of his infant daughters, appellants, Gertrude and Arabella Hedges. By the will of their grandfather W. W. Trimble, they and three other children of appellee and their mother had been devised a dwelling house and lot in Cynthiana worth about \$7,500, and personal estate, the exact amount of which is not shown. The guardian had occupied the devised dwelling for many years by leave of his father-in-law, the testator, and continued to occupy it with his family, including appellants, till about the time of the majority of appellant Gertrude, and the final settlement of his accounts before the county court in February, 1892. He reported in his first settlement that he had received for each of his wards personal estate of the value of \$2,184.21, and certain items of interest. Subsequently he received from L. Trimble's estate, for each of them, \$495. He invested part of their personal estate in bank stock for them, which seems to have been judicious. Before the final settlement he sold the bank stock of appellant Gertrude at a premium. On the final settlement his accounts showed that he had on hand for appellant Gertrude \$554.49, which he paid to her, and for Arabella \$931.37. Two suits were brought to surcharge these settlements—one by appellant Gertrude Hedges, and the other by the then guardian

* 4. See Guardian and Ward, vol. 25, Cent. Dig. § 310.

pared and heard together. The circuit court found and adjudged that the settlements as made by appellee should stand, except that there was adjudged to Arabella \$183.25 in addition to the balance above stated. The wards have appealed.

The guardian received for his wards certain notes, payable to their testator's estate. The notes were taken as cash. They were solvent, and bore interest at the rate of 8 per cent. per annum. The guardian, though interrogated on this point, failed to disclose what amount of interest he collected on the notes, or at what rate. If he received 8 per cent., then the estate of the wards was entitled to it, and he should have accounted for that rate for the length of time it was collected by him. As he failed to keep books of account of his transactions with his wards' estate, or at least failed to exhibit any, and in view of his indefinite and unsatisfactory responses in his settlement, the doubts should have been resolved against him, instead of for him, as was done.

Another complaint made by the wards in the court below and here is that their father charged them with board. His first settlement with the county court was made within two years of his appointment. In those settlements was this entry: "Guardian makes no charge for board or allowance (for services), which he allows as an off-set for house rent." In the last settlement before the county court he charged each ward \$125 a year for three years (since his first settlement) as board, and credited each of them with \$20 (one-fifth of \$100, which he charges himself with for the use of their house) per year. The evidence is conclusive that a reasonable rent for the house is more than \$100 per year. Appellee must have so regarded it, for he offset its rental by his services to the wards and their board for the first two years. There is nothing in the record to show that their board was worth materially more, or that the rent of the house was materially less, for the last three years than for the first two. The record shows that appellee, for a portion of the time he was acting as guardian, was a merchant—perhaps not in a large way—and bought and sold tobacco. Latterly he was manager for an electric light company upon a salary of \$50 per month. He now claims that his children were more able to board themselves than he was to board them. But that is not the test. The general rule is that the father must support his infant children. The obligation is both a natural one, and a legal. If he is able to support them, he is required by law to do so, although they may have an estate of their own. It is only where he is unable to support them, in view of his obligation to other dependent members of his family, and where their own estate is capable for the purpose, that the courts allow, as an exception, that

infant child with its support. The father is by law entitled to the labor and the wages of his infant children. This is partly because he is charged with their support. This record discloses that appellants did render such services about appellee's household as are ordinarily rendered by girls of their age in their father's home. It would not be equitable, nor is there warrant, in our opinion, for permitting a father who is able to maintain his infant children to avail himself of their personal services, and then to compel them to pay him for board as if they were strangers. *Clement v. Hughes* (Ky.) 17 S. W. 283; *Reynolds' Adm'r v. Reynolds*, 92 Ky. 556, 18 S. W. 517; *Chapline v. Moore*, 7 T. B. Mon. 173; *Bush's Representatives v. White*, 3 T. B. Mon. 101.

The infants had each an estate of at least some \$2,500 in personalty, all of which was productively invested. Within about five years, and before the daughter Arabella had become 21 years old, the guardian had spent upon them, or permitted them to spend, as he says, all but \$554.49 in the elder's case, and \$931.83 in the other. These expenditures seem to have been nearly altogether for clothing and personal ornament, and many items not of apparent necessity. Notwithstanding the girls, from lack of experience and judgment, may have insisted on being supplied with the articles purchased, and may have then assented to their being charged with them, we cannot but regard it as a profligate waste of their estate. Their importunities and consent cannot be an excuse to appellee. It was because of their incapacity in law to choose and bind their estates in such matters that the law provides the maturer and safer judgment and control of the guardian. It was his duty to restrain them in such expenditures. We cannot say, though, that appellee was shown to have been able, in view of his obligations to other dependent members of his family, to have alone afforded appellants that character of maintenance to which their position in society and their fortune and social expectations entitled them. It would therefore be proper for the circuit court to allow appellee for their support, including clothing and other necessary expenses, such sums as he may reasonably have expended therefor, but not to exceed the income of their estates. For the guardian had not the right to use more than the income of the wards' estates for their support, in any view of the case. Section 2084, Ky. St., is clear and explicit to this effect. It is: "No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived. (1) When the ward is of such tender years or infirm health that he cannot be bound out as an

him as such. (2) When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement." In this case the wards were not shown to have been of infirm health. They were nearly full grown. The income of their estates was more than sufficient to pay for such items of education as are shown in the record. If there was a reason for encroaching upon the principal of their estates to maintain them, under the statute it must be affirmatively shown by the guardian seeking the credit, or it will be disallowed. *Bybee v. Tharp*, 4 B. Mon. 313; *Fielder v. Harbison*, 93 Ky. 482, 20 S. W. 508. No such reason was shown.

Among the items bought for the wards, and charged to them, are some carpets and other articles of household furnishings. After the maturity of appellant Gertrude, she appears to have taken these articles, which had been bought in her name by her guardian. As to such, we are of opinion that her action was a ratification, and the guardian should be credited accordingly with their cost, even if it should come out of the principal of her estate.

The guardian should be charged with the house rent for the time he occupied it after his qualification till his resignation. The price of \$100 per annum fixed by the testator in his will was not intended to extend beyond the testator's lifetime. The will charged as an advancement against the interest of the children of Mrs. Hedges the rent of the house at \$100 per annum from November, 1874, and "as long as [J. T. Hedges] may continue to occupy it as a residence"; meaning, in our opinion, during testator's lifetime. Leave was not given to Hedges to occupy it at all after testator's death. On the contrary, by the will it was disposed of absolutely to the children. Any other construction would necessarily have resulted in indefinitely postponing the grandchildren's rightful enjoyment of their property, while at the same time they would be paying out of their share of the estate for the use of their dwelling by their father and such of his family as he might choose to live with him. The value of the rental should be fixed under the proof.

For his services the guardian should be allowed not exceeding 5 per cent. on the sums received and disbursed by him. The income of the estate would then be: Rents of real estate; dividends on bank stock; interest on money loaned or not otherwise invested. Against this the guardian should be allowed the ward's reasonable board, reasonable expenditures for clothing, school tuition, medical bills, taxes, insurance, and re-

his services indicated; but all these credits should not be more, in the aggregate, than the income above named.

Appellants complain that the guardian did not charge himself with a certain note which he had received from their testator's estate, payable by appellee. The note is for \$2,257.02, dated July 24, 1882, payable by J. T. Hedges to W. W. Trimble. J. T. Hedges had married Eliza, a daughter of W. W. Trimble, and the mother of appellants. In treating of advancements made to his children, and which were to be charged in the distribution of his estate, the testator provided in his will, as affecting the Hedges children, as follows: "To my daughter Eliza Hedges now deceased I gave \$2,000.00, and hold the note of J. T. Hedges her surviving husband therefor, payable to me as trustee. * * * The children of Eliza Hedges to be charged with the \$2,000.00 above named." We understand it to be the contention of appellee that this \$2,000 is represented by the note above named, or at least that it was an advancement to the testator's daughter, not to be collected of appellee in any event. To sustain this theory, appellee offered certain entries made by the testator, and which are said to be in his book of advancements, viz.:

"March 1st, 1874. I gave to J. T. Hedges two thousand dollars for the sole and separate use of his wife Mrs. Eliza W. Hedges, 1st March, 1874, and took his receipt therefor, and this sum is to be charged as an advancement to him from me. I also loaned him one thousand dollars 23 March, 1875, one thousand dollars to bear interest at ten per cent. until paid; this I intend also as an advancement and not to be collected from him; in Dec., 1874, he moved into my dwelling house in Cynthiana, Ky., and I intend him to be only charged one hundred dollars per year rent, as an advancement out of my property as long as he occupies it. July 19, 1876."

"On the 28th of Nov., 1876, I let J. T. Hedges have \$500 at 8 per cent. which I do not wish to be collected from him, but to be charged to him as an advancement."

The will was dated July 8, 1882, and, besides the \$2,000 item quoted herein, no reference was made to any of the other matters set out in the above entries, except the one of \$100 per year for house rent. The \$2,000 mentioned in the will and the \$2,257.02 note cannot be the same sum. The difference in dates, amounts, and name of payee all indicate that they are distinct transactions. But appellee contends that the \$2,257.02 is a merging of the \$1,000 loan and the \$500 loan referred to in the foregoing entries in the book of advancements. While those loans, calculated at the rates of interest indicated in the memorandum, would have been more on the date of the note than

matter, that they are the same debt. It would then appear that testator had at the date of those entries determined to constitute as advancements those two debts for loaned money owing him by his son-in-law. But the testator evidently changed his mind with respect to them. His will, made about six years after the entries, and made about one year after the two notes had been consolidated—according to appellee's statement—into the \$2,257.02 note, disposes of all his estate. Therefore there was no intestacy, and, being none, no account of advancements, as such, can be had, other than is provided for in the will. Section 1407, Ky. St. 1899. The unexecuted intention of a parent to acquit to his child as an advancement a debt owing to the former by the latter is necessarily subject to any change of purpose by the ancestor. In addition to this change of purpose being manifested by the will in this case, the indorsements of payments on the note show that the testator had collected the interest on it to June 1, 1884, and on November 3, 1885, had collected \$500 of the principal. From all these facts, we have no hesitancy in concluding that, whatever may have been the testator's purpose at one time with reference to making this indebtedness an advancement to his daughter Mrs. Hedges, he had concluded finally not to do so, and in fact, by the terms of his will disposing of all of his estate, had treated this debt as part of it, for no reference is made to it when he was writing of his several advancements to his beneficiaries. We are also convinced that the executrix of W. W. Trimble's will treated this note as part of his estate, and that when she came to make distribution it was charged to the children of Mrs. Hedges as that much money. On the back of the note is the following indorsement: "For value received I assign the within note to J. T. Hedges, Guard. without recourse. June 9, 1888. Mary B. Trimble, Executrix." This indicates that the note was assigned to the guardian of the Hedges children as part payment of the sum to which they were entitled under the will. No different explanation of the indorsement is offered. It would therefore be immaterial, so far as appellants are concerned, whether the note and its interest was justly owing to testator's estate or not, because if the guardian took it as a valid, interest-bearing debt, in lieu of other assets to which his wards would have been entitled, he must account for it, with legal interest, in his settlement. He will not now be heard to say that it was not a valid, collectible debt.

The judgment is reversed, and cause remanded, with directions to recast the guardian's accounts upon the principles herein indicated, and for such further necessary proceedings as may not be inconsistent with this opinion.

CITY OF LOUISVILLE v. BITZER.

BITZER v. FULTON.

(Court of Appeals of Kentucky. April 24, 1903.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT—BENEFITS—SPOILIATION—EXCESSIVE ASSESSMENT.

1. The method of making assessments for street improvements by the foot is not invalid.

2. While assessments for municipal improvements rest on the basis of benefits, it is not essential to their validity that actual enhancement in value or other benefit to the owner should be shown; the judgment of the city council being conclusive as to the propriety of the improvement.

3. Where the total value of property assessed, after the improvement is made, is less or no more than the cost of the improvement, an enforcement of the lien cannot be had, as it would amount to a taking of the property without compensation.

4. It appearing that the total value of the property assessed for a municipal improvement after the improvement was made was less or no more than the cost of the improvement, and there being, in addition, proof that the property had not been benefited at all, the court could not enforce the warrant against the property, even in part.

5. Ky. St. 1899, § 2834, provides that, if a municipal improvement be made as is provided for by statute, the city shall not be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof. *Held*, that the statute does not apply to cases in which the city has no power to make the improvement at the cost of the owners, and where the city has authority to contract for the improvement, but no authority to make such charge, the city is liable to the contractor.

6. A contract between a city and a contractor for the making of an improvement provided that the contractor should look alone to the owners of the property, and should in no event be entitled to recover from the city. *Held* that, notwithstanding the contract, the work being such that the city had no power to assess the improvement against adjacent property, the city was liable to the contractor.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Petition by J. R. Gleason against Nannie M. Wilson and others to enforce a lien for a street improvement. From a judgment dismissing the petition as against the property owners, and entering judgment in favor of petitioner against the city of Louisville, John A. Fulton (as assignee of Gleason) and the city of Louisville appeal. Affirmed.

H. L. Stone, for appellant city of Louisville. Lane & Harrison, for appellant Fulton. Bodley, Baskin & Flexner, for appellee.

HOBSON, J. On September 11, 1897, the general council of the city of Louisville, by ordinance, directed the carriageway of Daisy Lane to be improved from the center line of Glenn Mary avenue extended to a line 150 feet southeast of and parallel to it. A contract was made with J. R. Gleason for the work, which was done by the contractor; the cost being \$1,778.48. The amount was apportioned to Nannie M. Wilson, \$757.50;

property owners having refused to pay, this suit was brought to enforce the lien on the property. It was shown by the proof that the Wilson lot is on the hilly side of Daisy Lane, or, as it is sometimes called, "Transit Avenue." It commences at the intersection of Daisy Lane and Glenn Mary avenue, and extends east of this 310 feet. Two-thirds of the lot fronting on Daisy Lane is from 8 to 10 feet higher than the street, and as it runs back from the street it ascends rapidly. The other third of the lot is a worked-out quarry, 40 or 50 feet higher than Daisy Lane, which it is impossible to ascend from the street, except by means of a ladder. The lot is not available for building purposes. The ordinance directed the cost of the street to be assessed against the property owners to a depth of 150 feet. The amount of land against which the cost is assessed under the ordinance is 46,574 square feet, or a little more than an acre. This ground, as shown by the evidence, is worth between \$300 and \$500. The Barker property is from 10 to 12 feet lower than the land which has been laid out for building purposes, and is below the level of the street to such an extent that to fill it up would be so costly that it is practically valueless for building purposes. The amount of this lot which is subject to the lien is 61,871 square feet, or something over an acre and a half, of value from \$300 to \$400 an acre. Neither piece of property is suited for agricultural purposes, and neither, under the evidence, has received any benefit from the improvement. Neither is worth now the amount of the charge against it. The circuit court, therefore, on final hearing, dismissed the petition of the contractor against the property owners on the ground that it was spoliation to enforce the lien; but he entered judgment in favor of the contractor against the city for the amount of the warrants, and from this judgment the city and the contractor's assignee appeal. There is little or no conflict in the evidence, and on the appeal the chief contention is that the court ought at least to have charged some part of the cost of the improvement to the property, although it might have been improper to charge it all to the property, and that no judgment should have been rendered against the city.

The method of assessment by the foot has been followed so long, and has been so often approved by this court, that it no longer remains an open question. *Preston v. Roberts*, 75 Ky. 570; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546. The rule, also, is that, while these assessments rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown; the judgment of the city council being conclusive as to the propriety of the improvement. *Pearson v. Zable*, 78 Ky. 174; *Ludlow v. Trus-*

west Covington v. Schultz (Ky.) 30 S. W. 410, 660; *Allen v. Woods* (Ky.) 45 S. W. 106; *Bullitt v. Selvage* (Ky.) 47 S. W. 255. On the other hand, it is held that when, owing to extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. *Covington v. Southgate*, 54 Ky. 491; *Louisville v. Louisville Rolling Mill Co.*, 66 Ky. 416, 96 Am. Dec. 243; *Broadway Baptist Church v. McAtee*, 71 Ky. 508, 8 Am. Rep. 490; *Preston v. Rudd*, 84 Ky. 150; *Frantz v. Jacob*, 88 Ky. 532, 11 S. W. 654; *James v. Louisville* (Ky.) 40 S. W. 912. In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters; but, where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion—that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been approved, and, while we are unwilling to extend the rule, it has been so often laid down that it cannot now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operation to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable. The rule of assessment by the foot is no less arbitrary than the rule under consideration. In matters of this sort there must be some settled rule, and it is especially important that the rule should be well defined. The proper legislative authority, not the court, must judge of the propriety of the improvement, and the benefits to the abutting property owners. But no department of the government can take the property of the citizen for public purposes without just compensation, and when the entire property is taken to pay for a public improvement there is no room for a presumption as to the benefits received, but a case of spoliation is shown.

The proof here showing conclusively that the cost of the improvement far exceeded the entire value of the property assessed after the improvement was made, the circuit court properly refused to enforce the lien upon the property. But it is insisted that, as under section 2834, Ky. St. 1899, the court is authorized to make all corrections, rules, and orders to do justice to all parties concerned, it should at least have enforced the warrants to some extent against the property, although the whole amount was not enforceable. The difficulty with this is that we have nothing to guide us, and that to enter any judgment against the property

The proof is that the property received no benefit at all from the improvement. The testimony to this effect by the witnesses is supported by the facts shown in the record. We cannot take away from the citizen his property without proof warranting the judgment. When the assessment is enforced on the ground that the judgment of the legislative authorities is conclusive of the question of benefits, the judgment of the court is based upon the decision of the legislative body fixing the boundary on which the burden of the special tax shall fall. But when the decision of the legislative authorities is rejected for the reason that a case of spoliation is established, the court has nothing to guide it in determining how far the property of the citizen is taken for public purposes without just compensation, except the proof in the case; and there can be no judgment against the citizen unless the evidence is sufficient to enable the court to reach a conclusion intelligently. The party on whom the burden of proof rests must make out his case. Without proof the chancellor cannot assume there were benefits to a certain extent, and guess at the amount. The proof here being to the effect that the property was not benefited by the improvement, and there being practically no contrary evidence, the chancellor refused to enter any judgment against the property holders; and, under the evidence, we cannot disturb his conclusion on the facts. If the case had been prepared to present this matter, or even if a motion has been made for leave to take further proof on the subject, a different question would be presented.

It remains to consider the propriety of the judgment against the city. Section 2834, Ky. St. 1899, provides: "And in no event, if such improvement be made as is provided for, either by ordinance or contract, shall the city be liable for such improvement without the right to enforce it against the property receiving the benefit thereof." It is settled, however, that this statute does not apply to cases in which the city has no power to make the improvement at the cost of the owners of adjacent property, and that where the city has complete authority to contract for the work, but no authority to make a charge on the abutting property, it is liable to the contractor for the price of his work. *Caldwell v. Rupert*, 73 Ky. 179; *Louisville v. Nevin*, 73 Ky. 549, 19 Am. Rep. 78; *Craycraft v. Selvage*, 73 Ky. 696; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Gosnell v. Louisville*, 104 Ky. 212, 46 S. W. 722. The contract under which the work was done, however, contains these words: "It is further agreed by the contractor that for the contract price or cost of all work mentioned above or required to be done by him under any of the provisions of this contract, he

erty described in the ordinance aforesaid, and that in no event shall he be entitled to recover any part thereof from the city of Louisville." The learned counsel for the city earnestly maintains that the contractor is bound by his contract, and that, having agreed not to look to the city, he cannot recover against it. A number of authorities from other states are relied on as sustaining this position. But the contract was made under the statute, and must be read in connection with it. The language of the contract is certainly no stronger than the language of the statute. Its natural construction is that it conveys the same idea as the statute. The rule is that if a contract is capable of two constructions, by one of which it is illegal, and by the other it is legal, that construction will be preferred which makes the contract legal. The city has authority to contract for the construction of streets. It has also authority in certain cases to contract for their construction at the cost of the abutting property. If the rule is that the city is responsible to the contractor where it is held that the city had no authority to contract for construction of the street at the cost of the abutting property, then the contractor, in making his bid, will not take into consideration uncertainty of pay as an element in fixing the price at which he will do the work. But if the rule is that only the property owner is to be looked to, and that the contractor will get no pay for his work where the city had no authority to contract for the improvement at his cost, then the contractor, in undertaking the work and fixing the price, must take this uncertainty into consideration, and add to the price he would otherwise charge a sum sufficient to cover the risk of nonpayment of the claim. An additional burden will therefore be laid upon the property owner, for in case he is held liable he will have to pay not only the fair cost of the improvement, but an additional sum to cover the risk of the contract. The Legislature aimed to avoid placing this burden on the property holder, and so made the city liable in this contingency, for it re-enacted the present statute with the construction which this court had placed upon it. When the Legislature has placed the burden upon the city to avoid injustice to the property holder as well as the contractor, the city cannot by contract relieve itself from the liability thus imposed upon it by law; and, if the contract before us required such a construction, we should be compelled to hold it contrary to the policy of the statute, and not enforceable. The authorities relied on from other states are therefore inapplicable.

Judgment affirmed.

BARKER, J., not sitting.

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—PAVING—ASSESSMENTS—BASIS—APPEAL—HARMLESS ERROR.

1. Where, in an action against abutting property owners for the recovery of an assessment for street paving, defendants failed to prove that if the assessment had been on a different basis, the assessment against their property would have been smaller than the assessment levied, judgment in favor of plaintiff will not be reversed, though it was doubtful whether the theory of the assessment was correct.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by the Barber Asphalt Paving Company against H. R. Snyder and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Lane & Harrison, for appellants. William Furlong, for appellee.

NUNN, J. On the 6th day of March, 1901, the appellee filed its petition in the Jefferson circuit court, chancery division, against appellants; seeking to enforce liens on appellants' property, situated on and adjacent to Baxter avenue, in the city of Louisville, Ky. Appellee claimed the liens existed for the payment to it of certain sums wanted for the original construction and improvement of the avenue, by grading, curbing, and paving with asphalt; that the work was performed under contract with the city, and after the council had duly passed an ordinance directing the improvement to be made; and alleging in detail the steps taken by the board of public works, the city council, and all other matters pertaining to the letting of the contract, and the apportionment of the cost to the owners of the property along the avenue. The appellants, by their answer, controverted appellee's petition; but it will not be necessary to notice any defense made by them, except the one made in the third paragraph of their answer, for the reason that the parties made an agreement, which is copied in the record, as follows: "On this appeal the defendants H. R. Snyder and Tom Zehender rely solely on the defense set up in the third paragraph of the answer of H. R. Snyder, filed May 11, 1901, and all other defenses are expressly waived." In the petition it was also alleged that the improvement was the original construction of the avenue; that the territory contiguous to the avenue, where the improvement was made, was not defined into squares by principal streets; that the ordinance fixed the depth (192 feet) on both sides fronting the improvement, to be assessed for the cost of making the same according to the number of

The appellants, by the third paragraph of their answer, denied these allegations, and averred that the territory contiguous to Baxter avenue, and upon each side thereof, and throughout the entire length of the way improved, was defined into squares by principal streets, and that the apportionment of the cost of the improvement as fixed by the ordinance was void, and that the cost should have been apportioned to the owners of the lots in each fourth of a square, according to the number of feet owned by them, respectively, and also alleged that, by reason of this error in assessment, their part of the cost was increased by at least 40 per cent. This was controverted by appellee, and proof was taken and a trial was had, and the court adjudged that the amounts as apportioned and assessed were a lien on the property of appellants, from which judgment they have appealed.

Upon examination of the record, we find it to be a doubtful question as to whether or not the territory contiguous to Baxter avenue, in the meaning of the statute, was defined into squares by principal streets; but, if it was so defined, the appellants failed to prove that an assessment and apportionment on this basis would have lessened the cost to them, or either of them, or would have been beneficial to them in any respect, and, under repeated decisions of this court, this failure is fatal to their cause. In the case of *McHenry v. Selvage*, etc., 99 Ky. 235, 35 S. W. 645, the court in discussing this question, said: "While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but, if it were otherwise, it does not appear that under a different method of apportionment the appellant would be requested to pay less than under the method adopted." In case of *Barrett v. Artificial Stone Co. (Ky.)* 52 S. W. 948, the court said: "It is well settled that a reversal will not be had for this reason unless it affirmatively appears that appellant was in fact prejudiced by the apportionment." In *Chawk v. Beville (Ky.)* 53 S. W. 414, the court said: "The rule is well settled that, in order to entitle the party complaining of an apportionment to relief in cases of this character, he must show that under the proper method of apportionment he would be required to pay less than under the method adopted." This rule has been followed by this court in several recent cases; and in the case of *Schuster v. Barber Asphalt Paving Co. (this day decided)* 74 S. W. 228, the same opinion is expressed.

Wherefore the judgment of the lower court is affirmed.

DIECKMAN v. WEIRICH

(Court of Appeals of Kentucky. May 1, 1903.)

WRIT OF RESTITUTION—EXECUTION—ALIAS WRIT—AGENCY—EVIDENCE—SETTING ASIDE VERDICT.

1. Where the evidence is not only conflicting, but slightly preponderates in defendant's favor, the action of the trial judge in setting aside a verdict, on the ground that it was not fully warranted by the evidence, will not be interfered with unless a manifest abuse of discretion appears.

2. Where a constable charged with the execution of a writ of restitution failed to execute it in full because of the ill health of defendant's wife and of the inclemency of the weather, the judgment was unsatisfied, and plaintiff was entitled to have full execution under an alias writ.

3. Merely showing that one was authorized to collect rent for a landlord is not evidence of authority to make contracts for renting the landlord's property.

4. The fact of agency must be proved otherwise than by the declarations of the one charged as being the agent.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by L. F. Dieckman against Nicholas Weirich. Judgment for defendant, and plaintiff appeals. Affirmed.

L. J. Crawford and Harvey Myers, for appellant. George Washington and Ramsey Washington, for appellee.

O'REAR, J. Appellant was plaintiff below. His action was grounded upon an alleged expulsion of himself and family, under color of a writ of restitution in the hands of a constable, from a house of appellee, which was occupied by appellant as a tenant from month to month. He says that his wife was ill at the time; that her illness was increased, and that he was obliged to, and did, employ medical assistance, at great expense; that she thereafter died as the result of said alleged wrongs; and that he was deprived of her assistance and company, and was prevented from attending to his usual vocation; to his damage \$5,000.

The defense was that appellee, as landlord, had procured the writ of restitution to issue by the justice of the peace in an action of forcible detainer had before him by appellee against appellant; that the constable executing the first writ issued upon the verdict and judgment had failed to execute it in full, because of the ill health of appellant's wife and of the then inclemency of the weather; that appellee thereafter caused an alias writ to issue, under which the eviction complained of was made.

Appellant claimed that after the first attempt of the constable to execute the writ, he again contracted with appellee, and paid him in part thereon, thus creating anew the relation of landlord and tenant. On the issue joined, the jury returned a verdict for appellant in the sum of \$2,000. Of this

amount the plaintiff offered to abate the sum of \$1,500, tacitly admitting its gross excessiveness; but the defendant objected, and the circuit judge, after consideration, set aside the verdict, and granted a new trial.

Upon the second trial there was a peremptory instruction for the defendant, and the case is now here, both upon the action of the circuit judge in granting the new trial, and upon the peremptory instruction at the second trial. Whether the action of the court in granting a new trial after the first verdict was based upon his honor's belief that the verdict was not fully warranted by the evidence, or that he concluded that in his instructions to the jury he had committed errors of law prejudicial to the defendant, the record does not show. If upon the former ground, in view of the state of this record (a bill of exceptions and evidence on that trial having been brought up), we could not feel justified in interfering with his action. Not only was the evidence conflicting, but slightly preponderates, in our opinion, for appellee. The trial judge in such cases has a large discretion, which, unless manifestly abused, this court will not venture to interfere with the exercise of. *Louisville v. Johnson* (Ky.) 69 S. W. 803; *Richards v. L. & N. R. R. Co.* (Ky.) 49 S. W. 419. But on the second ground we are fully satisfied that the trial judge properly awarded the new trial.

Among other errors, the following are deemed sufficient for notice: In fixing the criterion of damages the court told the jury, if they found for the plaintiff, to "fix his damages that he may have sustained in any sum in their discretion, governed by the proof, not to exceed in all the sum of \$5,000." The court instructed the jury furthermore that, if the constable had partially executed the writ, and that its further execution was stayed by appellee "for any other reason, humane or otherwise, nevertheless the action of said constable was a complete execution of same, and his act destroyed all right to have any other or additional writ issued on same at any further time." The court must have based his action in granting the new trial partly on the error involved in this instruction. The object of the writ is to restore to him adjudged the right of possession that which he cannot otherwise gain; it takes the place of the plaintiff's natural right to repossess himself of his own by his own force. Until it is executed, and fully executed, the judgment is unsatisfied, and the office of the writ is unperformed. *Murfree on Sheriffs*, § 1020, etc.; *Freeman on Executions*, §§ 474, 475; *Gresham v. Thum*, 3 Metc. 287, 77 Am. Dec. 174.

On the second trial the evidence for appellant (plaintiff) was materially weaker than on the first. But the evidence that the writ had never been executed in full till the occasion which is the basis of this suit is clearly shown. To obviate its effect, appellant had pleaded that after the judgment of eviction, and be-

¶ 4. See *Principal and Agent*, vol. 40, Cent. Dig. § 40.

fore the final execution of the writ, he had again rented the premises of his landlord, through one Matti, as his agent. Matti's agency was put in issue by the pleadings. The only proof to sustain it was appellant's testimony of Matti's declarations, not made in appellee's presence, and that Matti had collected two or three installments of rent. Merely showing that one was authorized to collect rent for the landlord is not evidence of authority to make contracts for renting respecting the landlord's property. It is so well settled that it may be taken as elemental that the fact of agency must be proven otherwise than by the declarations of the one charged as being the agent. There was a total failure in this case to show the fact of such agency. Besides, appellant seems to admit in his testimony that the alleged contract of the second renting was agreed to be submitted to appellee for approval, and none is shown.

The peremptory instruction was proper, and the judgments are affirmed.

WHITE v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 5, 1903.)
SODOMY—CONSUMMATION OF OFFENSE—NECESSITY OF EMISSION—INSTRUCTION—ASSAULT AND BATTERY.

1. On a prosecution for sodomy it was not error to fail to give instructions covering the law of assault and battery, no assault and battery having been charged except as a part of the assault to commit the crime of sodomy.

2. An emission is not necessary to the consummation of the offense of sodomy.

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

Coleman White was convicted of sodomy, and appeals. Affirmed.

M. Barnett, for appellant. C. J. Pratt and M. R. Todd, for the Commonwealth.

BURNAM, C. J. The appellant was convicted of the crime of sodomy, and his punishment fixed at two years' confinement in the penitentiary.

We are asked upon this appeal to reverse the judgment rendered pursuant thereto on two grounds: First, because the testimony did not establish the guilt of the accused; and, second, because the court erred in not pointing out and advising the jury as to the specific acts that constitute the offense.

Every person of ordinary intelligence understands what is meant by a charge of sodomy, and the instructions given in this case follow the language of the indictment, and are, we think, sufficiently specific. It is also insisted that the court erred in failing to give instructions covering the law of assault and battery. No assault and battery is charged against the defendant, except as a part of his assault to commit the crime of sodomy. This is the offense sought to be

punished, and we think the court did not err in failing to instruct the jury for any other offense.

It is also insisted that emission is necessary to the consummation of the offense of sodomy, and that, as the proof wholly failed on this point, the jury should have been directed to find the defendant not guilty. The decisions on this point have not been uniform, but the drift of the latter decisions in both the English and American courts is to hold that nothing more than res in re, without regard to the extent of the penetration or emission, is all that is required. See Bishop's New Criminal Law, vol. 2, § 1127.

Finding no error in the record, the judgment is affirmed.

HALL'S ADM'R v. HALL'S ADM'X et al.
(Court of Appeals of Kentucky. April 30, 1903.)

VENDOR AND PURCHASER—VENDOR'S LIEN—UNRECORDED DEED—MORTGAGES—PRIORITY OF LIEN.

1. Plaintiff's intestate purchased certain land by commissioner's deed, which was duly recorded. He held actual possession of the property until 1880, when he conveyed the land to defendant's intestate, retaining a lien on the property for part of the price. Defendant's intestate obtained a loan from a building association on an affidavit that he purchased the property from a commissioner in 1862, and paid therefor, and that the reason the deed was not recorded was that the records of the county clerk's office had been destroyed by fire two years after the conveyance. It did not appear that plaintiff's intestate ever sold to defendant's intestate any other lots than those in question. Held, that the building association's lien under its mortgage was inferior to the vendor's lien reserved in the deed.

Appeal from Circuit Court, Powell County.

"Not to be officially reported."

Action by T. B. Hall's administrator against G. V. Hall's administratrix and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

W. D. Jackson and A. T. Wood, for appellant. D. L. Pendleton, for appellee Blue Grass Building & Loan Ass'n.

BURNAM, C. J. The appellant, James H. Hall, as administrator of T. B. Hall, brought this suit on two notes, for \$100 each, dated on the 6th day of March, 1880, and due, respectively, on the 1st of September, 1883 and 1884. The first of these two notes is credited with \$60 paid on the 24th day of June, 1886, and the last by \$100 on September 19, 1892. Plaintiff alleged that both notes were executed by G. V. Hall to T. B. Hall as part of the purchase money of a house and certain lots situated in Stanton, Powell county, Ky., known on the town plat as lots Nos. 10 and 11; that intestate conveyed the property to G. V. Hall by deed, and retained a lien therein, which G. V. Hall failed to put on record; and that he had a lien thereon to secure the payment of the notes sued on, which he asked should be enforced by a sale of the house and lot.

By an amended petition, he alleges that on the 16th day of September, 1892, Green V. Hall and his wife gave a mortgage upon this lot to the Blue Grass Building & Loan Association to secure the payment of a note of that date for \$400, and made them defendants, but alleged that the mortgage lien of the building and loan association was inferior to his lien as a vendor. The building and loan association, in their answer, allege that when they made their loan to G. V. Hall, and took a mortgage to secure its payment on the lot sought to be subjected, there was no deed of record from T. B. Hall to G. V. Hall therefor, and that they had no notice of any claim of T. B. Hall against the lot; that G. V. Hall was in possession of the property, claiming it as his own, and had been for more than 15 years—and asked that they be adjudged a prior lien to that of plaintiff. They also deny that plaintiff's intestate ever owned the lots sought to be subjected, or that the notes sued on were given by G. V. Hall as part of the purchase money therefor. The plaintiffs filed a certified copy of a deed made to T. B. Hall on the 30th day of March, 1870, by W. H. Holt, commissioner, which recites that a judgment was rendered in the Powell circuit court, in the case of Geo. C. Everett against Green V. Hall, decreeing the sale of two lots in Stanton, Ky., which were numbered on the plat of said town as lots 10 and 11, and bounded on the north by the lot of James H. Scholl, on the east by Main street, on the south by an alley, and on the west by the land of James Turley; that pursuant to this decree the lots were sold on the 7th of June, 1869, and purchased by T. B. Hall at the price of \$282.25; that this sale was duly confirmed, and the undersigned commissioner appointed to make a deed to the purchaser to the premises. This deed was duly certified to the county court for record, and the certificate of the clerk of the county court shows that it was duly recorded. It is conclusively shown that, after his purchase, Thomas B. Hall took possession of the house and lot, and rented it out until about the date of the obligations sued on, when G. V. Hall took possession thereof. There is no record of any conveyance of the title of this property by T. B. Hall. When G. V. Hall was endeavoring to procure a loan upon this property from the building and loan association, he made an affidavit, on the 21st day of April, 1892, in which he says that he purchased that property from J. F. Clark, commissioner, in May 1862, and that he paid the consideration thereon, and that the deed was in his possession, but was not recorded in the office of the Powell county court clerk, for the reason that the records of that office were destroyed by fire in 1864, and claimed that he had been in the actual, peaceable, and continuous possession of the land from the date of his purchase.

The trial court, on this proof, adjudged the Blue Grass Building & Loan Association a prior lien upon the property, presumably upon

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the authority of *Holton & Co. v. Alley*, etc. (Ky.) 24 S. W. 113, where it was held that where the records of a county clerk's office, in which an alleged mortgage was recorded, had been destroyed by fire, it was the duty of the mortgagee to take steps to have the lost record supplied as provided by statute, and that when the mortgagee allowed five years to elapse after such fire, and then instituted suit on the mortgage without having supplied the lost record, one who had in the meantime, without notice of the alleged mortgage, and for value, bought the land covered by the mortgage, would be protected as an innocent purchaser for value without notice. But the facts in this case do not bring it within the principle controlling the decision in that case. At the time the building association made its loan to G. V. Hall, the records showed the legal title to the property to have been in T. B. Hall, and of which they were bound to take notice. And there is no allegation or proof that T. B. Hall ever owned or sold to G. V. Hall any other lots. Undoubtedly appellee was deceived in this transaction by the report made to it by its attorney, who examined the record, and who failed to discover or report the conveyance of T. B. Hall. Appellant has clearly the older and better equity, and should have been given a prior lien in the judgment of sale.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

R. B. PARK & CO. v. CANE.

(Court of Appeals of Kentucky. April 29, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENTS—APPORTIONMENT—PAYMENT OF ILLEGAL ASSESSMENTS—EFFECT.

1. Ky. St. 1899, § 2833, provides that when a street is originally improved the cost shall be assessed against the owners of lots in each one-fourth of the square, to be equally apportioned according to the number of square feet owned by them respectively, and that each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. *Held* that, where a square bounded by principal streets was irregular in shape, and not a right-angled parallelogram, the quarter square provided for by the statute should be determined by finding one-fourth of the total number of square feet in the square.

2. That an owner, of abutting property submitted to the illegal apportionment of the cost of an improvement of a street on one side of a square, and thereby paid more than he was required by law to pay, did not affect his liability to pay a valid assessment for the improvement of a parallel street.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by R. B. Park & Co. against Susan D. Cane. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Burnett & Burnett, for appellants. Lane & Harrison, for appellee.

PAYNTER, J. This action is based upon an apportionment warrant issued for the improvement of Woodbine street. The square is bounded by principal streets, which are Floyd, Brooks, and Woodbine, and Ormsby avenue. The lot against which the lien is asserted for the apportionment warrant is located almost in the center of the square. The square is not a right-angled parallelogram. It is irregular in shape. The running of a line midway between Ormsby avenue and Woodbine street would leave a greater number of square feet in one quarter square than in another. It is contended by counsel for the appellee that, although the territory within the square is defined by principal streets, the proper method for dividing the square into quarter squares is to find the central point in each boundary line of the square, and to connect the center points in the opposite streets with straight lines. On the other hand, it is contended for the appellant that the General Assembly was not dealing with geometrical squares, but with a parcel of land bounded by principal streets, which it designated as squares, though irregular in shape. The court below sustained the appellee's contention.

Section 2833, Ky. St. 1899, reads as follows: "When the improvement is the original construction of any street, * * * such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square to be equally apportioned by the board of public works, according to the number of square feet owned by them respectively. * * * Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth set out in the ordinance." The authority of the General Assembly to enact this statute is not, nor could it be, questioned. It defines the taxing district when the territory is bounded on all sides by principal streets. The improvement was made on Woodbine street between Brook and Floyd streets. The owners in each fourth of a square binding on Woodbine street were assessed for the improvement. The statute requires that the cost shall be apportioned "according to the number of square feet owned by them respectively." The square foot is made the unit, and any less than one-fourth of these units in a square would not constitute a quarter square in the meaning of the statute. In other words, a quarter square is one-fourth of the territory defined by principal streets. Unless the territory bounded by principal streets is a right-angled parallelogram, it cannot be defined by midway lines without compelling the

owners of lots in one quarter square to pay more than the owners of lots in the other quarter square assessed for the improvement. It appears that the general council in 1889 passed an ordinance to improve Ormsby avenue, and at that time the territory which is now bounded by Floyd, Brook, and Woodbine streets and Ormsby avenue was not bounded by principal streets. The ordinance designated the depth of the taxing district. According to the boundary thus designated, a small part of the appellee's lot which is now taxed for the improvement of Woodbine street was taxed under the ordinance for the improvement of Ormsby avenue. It is, therefore, urged that the small part of the lot cannot be taxed for the improvement of Woodbine street, it running parallel with Ormsby avenue. It is hardly necessary to enter into the discussion of the question as to whether the general council exceeded its authority in defining the taxing district for the improvement of Ormsby avenue. If it did so, the error was committed before the territory was defined by principal streets. If the owner of the lot in question submitted to an illegal apportionment, and thus paid more than was required by law, that fact would not invalidate the apportionment here under consideration, because the effect of it would be to cast additional burden upon other owners of lots in the quarter square in which the appellee's lot is situated; the effect of which would be to make innocent persons compensate the appellee for money which had been paid under an illegal assessment, providing the general council erred in defining the taxing district. In our opinion, the apportionment complained of in this case was correctly made.

The judgment is reversed for proceedings consistent with this opinion.

FLOYD v. PADUCAH RY. & LIGHT CO.
(Court of Appeals of Kentucky. May 5, 1903.)
STREET RAILROADS—INJURY TO TRESPASSER
—NEGLIGENCE OF MOTORMAN—DISCOVERY
OF PERIL—CONTRIBUTORY NEGLIGENCE—
GRANTING OF NEW TRIAL—DISCRETION OF
COURT.

1. The Court of Appeals is slow to disturb the action of the circuit court in granting or refusing new trials where the grounds are in the discretion of the court; especially so where it grants a new trial.

2. If an injury to a trespasser was caused by the negligence of the motorman in failing to exercise ordinary care to know of his presence on the track and of his danger, the company was liable, unless the motorman did not discover his presence in time to have avoided injuring him, and he, by his own negligence, so contributed to cause his injury that, but for such negligence, it would not have happened.

3. If the motorman discovered plaintiff's danger in time to have prevented the injury, but failed to exercise such care as was necessary and at his command, the company was liable without regard to his contributory negligence.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action for personal injuries by William Floyd against the Paducah Railway & Light Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. K. Taylor, for appellant. Reed & Berry, for appellee.

O'REAR, J. This is the second appeal of this case. The first opinion states the facts, showing the nature of the injury to appellant and its cause. 64 S. W. 653. On the return of the case a retrial was had, where substantially the same facts appeared as were shown in the opinion alluded to, except that the witness Martin Rudolph did not testify at that trial. The jury returned a verdict in favor of appellant for \$1,000. This was set aside by the court, and a new trial granted, upon application of appellee, upon numerous grounds filed; among others, that the verdict was not sustained by the evidence, and that it was contrary to the weight of the evidence. At a later term another trial was had, resulting in a verdict and judgment for appellee. Appellant asks a reversal of this last-named judgment, and that the circuit court be directed to enter a judgment upon the second verdict.

This court is slow to disturb the action of the circuit court in granting or refusing new trials, where the grounds are in discretion of the court. This is especially so where the circuit court grants a new trial, as it retains control of the case, and presumably the truth will avail the party complaining on a subsequent trial. This court will not reverse for granting a new trial, although it would have affirmed the judgment if the circuit court had refused a new trial. We are of opinion, however; that the rulings of the circuit court in instructing the jury were erroneous in several particulars. It will be remembered that appellant, who was deaf, was a trespasser upon appellee's right of way, walking on its track, going in the same direction as was the car that struck and injured him. He failed to look back, and was, therefore, unaware of the approach of the car, and, being deaf, did not hear the gong and whistle of the motorman. The evidence is pretty clear that the motorman saw appellant for a distance of from 75 to 150 feet before striking him. The car was traveling about 6 or 7 miles an hour. The repeated warnings not having attracted the attention of appellant, that fact was sufficient, it seems, to have called the attention of the motorman to appellant's danger, and to the fact that the car should be stopped, if necessary, to prevent its striking him. Instead of doing this, he continued with but slightly abated speed, until within 10 or 12 feet of appellant, when it was too late to check the momentum of the car sufficient to keep it from knocking appellant down and injuring him. Upon this state of case the court instructed the jury that appellant was a trespasser on appellee's track, and that appellee was required to exercise "only ordi-

nary care to avoid injury" to appellant, but that, as to appellant, it was "the undoubted duty of plaintiff to have used all the care and means reasonably in his power to have avoided any injury from the street car, knowing his own infirmities of speech and hearing." In addition, the court seems to have made it impossible for plaintiff to have recovered because of the form of his instructions on the subject of appellant's contributory negligence, because the court instructed the jury that they should not find for appellant in any event, however negligent appellee may have been, if they should believe from the evidence that appellant was guilty of negligence on his part which contributed to the cause of the injury, and that, but for his own negligence, he would not have been injured. The court then told the jury that appellant's walking upon the track without looking back was such contributory negligence.

We are of opinion that the instructions were objectionable, both in form and substance. Without quoting them at length, or pointing out the defects in other particulars, we will say that the court should have said to the jury that if they believed, from the evidence, that plaintiff's injury was caused by the negligence of defendant's motorman in the operation of his car by the failure of such motorman to exercise ordinary care to know of appellant's presence on the track and of his danger, then they should find for the plaintiff, unless they should believe that the motorman did not discover appellant's presence in time to have avoided injuring him, and that plaintiff, by his own negligence, so contributed to cause his injury as that, but for his own negligence, it would not have happened. But, if the jury should believe from the evidence that the motorman did discover plaintiff's danger in time to have prevented the injury to him, but failed to exercise such care as was necessary and was at his command to have prevented the injury, then the jury should find for the plaintiff, without regard to plaintiff's contributory negligence.

The measure of damages was correctly given. The definition of ordinary care was correctly given. After defining ordinary care, the court should have defined negligence as being the absence of such care.

For the errors indicated, the judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

HARPER v. PAYNE et al.

(Court of Appeals of Kentucky. April 29, 1903.)

GUARDIAN AND WARD - ACCOUNTING - SUPPORT OF WARD - LIABILITY OF PAR-
ENT - CREDITS - GIFTS.

1. A father, who was guardian of the estate of his two minor children, was 38 years of age, in good health, and owned a life estate in 255

acres of land and in a city house and lot, which yielded a net income of \$350. He had no profession or trade, and was unaccustomed to manual labor. His wards were possessed of an estate in cash amounting to \$3,185.15, together with certain real estate, which yielded a gross rental of \$320. The children were permitted to reside with their grandmother, and one of them earned 75 cents per day, and both were capable of earning their support. *Held*, that the guardian was liable to contribute to the support of his children to the extent of \$200 per year, but that he was entitled to charge the income of their estate with the cost of their education, clothing, and medical bills.

2. Where, on an accounting by a guardian, there was uncontradicted evidence that a buggy for which the guardian claimed credit was a gift from him to his ward, the amount paid therefor was properly disallowed.

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Judicial accounting by W. W. Harper as guardian of the estate of P. and S. B. Harper, minors, in which Lida Payne filed objections. From a judgment sustaining the objections, the guardian appeals. Reversed.

Montgomery & Lee, for appellant. V. F. Bradley, for appellees.

BURNAM, C. J. On the 12th day of December, 1899, the appellant, W. W. Harper, made a settlement of his accounts as guardian of his infant children, Payne Harper and Sally B. Harper, with the commissioner of the Scott county court. It appears from a former settlement made by him on the 20th of April, 1892, that there was a balance in his hands, due to his wards, of \$220.35, and that after that settlement he received from Mrs. Carrie Payne, executrix of his children's grandfather, \$966, and that he received from rent of his wards' land (inherited, presumably, from their grandfather), between the 14th of November, 1894, and the 17th of August, 1899, \$1,908.80, aggregating \$3,185.15. Deducting from this sum 5 per cent. commissions, there remained a net balance due his wards on the 30th day of January, 1900, of \$3,025.90. In this settlement he claimed the following credits:

Mrs. Carrie Payne, Board Bill from	
Sept. 1, 1888, to Sept. 1, 1899, for	
Payne Harper and S. B. Harper..	\$2,200 00
To Lewis & Coffman, Med. Bill....	35 00
To tuition College Payne and Sallie..	37 50
Rucker & Richards, Payne Harper..	115 00

—Which credits aggregated \$2,387.50.

About this time he resigned as guardian of his children, and their aunt Miss Lida Payne qualified as guardian, and filed exceptions to each of these credits, upon the ground that appellant was the father of his wards, with ample income from the property owned by him to support them and himself. The exceptions were sustained, and it was adjudged by the county court that appellant, as guardian, should not be allowed any credits for money expended by him for his wards for their maintenance, support, and education, and it gave judgment against him for \$3,025.90. From this judgment he appealed to

the Scott circuit court, and upon hearing in that court the judgment of the county court was affirmed, and he has appealed to this court.

It appears from the testimony in the record that appellant is 38 years of age, and in good health; that he owns a life estate in 255 acres of poor land, which yields a gross rental of about \$350 a year, and also a life estate in a house and lot in the city of Georgetown, which yields a rental of \$300 per year—paid, however, in board of himself and two children; that the annual taxes and insurance on this property are about \$160 a year. It is not definitely shown as to the extent of the repairs, but we think it may be safely assumed that they are not less than \$100 more, which would leave the appellant a net income of not exceeding \$350. It appears that he has no profession or trade, and is unaccustomed to manual labor, and seems thoroughly improvident. In addition to the cash in the hands of appellant belonging to his infants, it is shown that they own jointly a tract of 50 acres of land, which yields a gross rental of \$320 a year. The children have always lived in the family of their grandmother, in the city of Georgetown, and seem to have rendered no services whatever to the father. The boy is 17 years of age, and the girl 15. The proof shows that the boy is industrious, and has earned as much as 75 cents a day by his manual labor; and both no doubt, if it were necessary, are capable of earning their support. In the case of Gertrude Hedges v. J. T. Hedges (decided at the present term of the court) 73 S. W. 1112, it is said: "The general rule is that the father must support his infant children. The obligation is both a natural and a legal one. If he is able to support them, he is required by law to do so, although they may have an estate of their own. It is only where he is unable to support them, in view of his obligation to other dependent members of his family, and where their estate is sufficient for the purpose, that the courts allow as an exception that the father may charge the guardian of his infant children with their support. The father is by law entitled to the labor and wages of his infant children. This is partly because he is charged with their support." It is evident that the net income of appellant would be insufficient to support his two children and himself in the manner to which they have been accustomed. And whilst it is perhaps unfortunate both for him and them that he has not kept them with him upon his farm in the country, and required them to do some work for the benefit of the family, that is a matter which it is not our province to control.

It seems to us, under the facts of this case, that the chancellor properly refused to allow appellant the item of \$2,200 for board of his two infant children, and also for the \$115 paid to Rucker & Richards for a buggy

for Payne Harper. The uncontradicted testimony of Miss Lida Harper shows that this buggy was a gift from the father to the son, and in no event was it a proper expenditure to be charged against the estate of the wards in the hands of the guardian. We think appellant should certainly contribute as much as \$200 a year towards the support and maintenance of his infant children, but, in view of the very narrow income which would remain to him after he paid this sum, we are of the opinion that the income of the infants should be charged with the cost of their education, clothing, and medical bills, and that moneys expended for these items for them by appellant should be allowed as a credit on the funds in his hands due to his wards.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

TOWN OF FREDONIA v. RICE et al.

(Court of Appeals of Kentucky. May 1, 1903.)

MUNICIPAL CORPORATIONS—BOUNDARIES—EXTENSION—REMONSTRANCE—APPEAL—REVERSAL—DISCRETION OF APPELLATE COURT.

1. Where, subsequent to the building of a railroad depot some 800 yards from the center of a town containing not to exceed 250 people, and outside of its corporate limits as then established, an addition was platted, adjoining such depot, and an unincorporated village, containing a population of about 140 persons, sprung up in such addition, an order sustaining objections to the extension of the limits of the original town to include such village would be reversed on appeal, under Ky. St. 1899, § 3665, providing that on such appeal, if the court shall be satisfied that a failure to annex will materially retard the prosperity of the town, the annexation shall take place, notwithstanding the remonstrance.

Appeal from Circuit Court, Caldwell County.
"To be officially reported."

Suit by Henry Rice and others against the town of Fredonia to prevent the extension of the corporate limits of the town. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

P. H. Darby and James & James, for appellant. Wm. Marble, for appellees.

O'REAR, J. Appellant is a classified town of the sixth class, with a population of between 240 and 250. It is an old town, situated in a fertile section. About 1886 the Ohio Valley Railway Company, in projecting their line of road, were about to pass several miles away from this town. The citizens interested themselves in an effort to procure its location near the town. As a result, they subscribed, and procured others to subscribe, for about \$8,000 to \$10,000 of the capital stock of the company, upon condition that the road was located within 1,000 yards of the center of the town, and that the station to be there es-

tablished should always bear the name of the town. This subscription is alleged to have amounted to, and likely enough was in the nature of, a donation to the railway company. The owner of the land near the town over which the road passed in its changed route conveyed a right of way to the company, including a depot site, upon the express condition that the company should locate and maintain a station at that point, to bear the name of the town, "Fredonia," until the name of the town should be changed, and then bear such changed name. In other words, the station should always be called by the same name as was borne by the then municipality of Fredonia. The railway company accepted the subscriptions, donations, and conveyances upon these conditions, and has erected its station within 800 yards of the center of the town of Fredonia. The station is called "Fredonia." However, the corporate limits of the town did not extend out to the depot, by a quarter of a mile or more. In the course of time since the building of the railroad a number of buildings, residences, stores, shops, churches, and so forth, have been erected outside of the corporate limits of the town, and in the vicinity of the railroad depot. The owner of the land lying near the depot platted it into streets and lots, designating it in numerous deeds as "Cassidy & Co.'s Addition to Fredonia." The population of this unincorporated village is about 140. The board of trustees of Fredonia, by ordinance duly passed, proposed to extend its corporate limits so as to embrace the territory described, including the railroad station. The citizens of the territory proposed to be annexed—more than 75 per cent. of the freeholders—interposed an objection, in the form of this suit, under section 3665, Ky. St. 1899. At the same time they began proceedings to be incorporated as a town of the sixth class, under the name of "Kelsey."

In our opinion, it would be destructive of the proper government of that community to have it maintain two independent municipalities, where now its population is scarcely able to maintain even one efficient one. The matter of police protection, street improvements, and all the affairs of such a local government, can best be conserved by uniting their efforts, taxes, and interests. There is no sound reason why two municipalities, so situated as these are, should be maintained. The arguments in support of it are of that character of selfishness that would retard, if not destroy, any town's chances of growth. "In union there is strength."

The judgment of the circuit court sustaining the objections of the citizens of the territory proposed to be annexed is reversed, and the cause is remanded, with directions to enter a judgment of annexation in conformity to the ordinance passed by the board of trustees of appellant town.

NUNN, J., not sitting.

LOUISVILLE & N. R. CO. v. CRADY.

(Court of Appeals of Kentucky. May 1, 1903.)
**MASTER AND SERVANT—INJURIES TO SERV-
 ANT—NEGLIGENCE OF FOREMAN—EVIDENCE
 — VERDICT — DAMAGES — INSTRUCTIONS —
 HARMLESS ERROR.**

1. Where plaintiff's fellow servant, in prematurely casting loose a heavy beam, by reason of which plaintiff was injured, acted under the direct command of the foreman of the crew in which both plaintiff and his fellow servant were working, and it also appeared that at the time of the injury the foreman was standing within a few feet and within clear view of plaintiff, and knew or might have known of his danger, but that he was intoxicated and was rushing the men at the time, such facts were sufficient to justify a verdict for plaintiff.

2. In an action for injuries to a servant, the court's failure to confine the jury to compensatory damages for the injury done was harmless, where the verdict rendered was scarcely sufficient to amount to compensation.

Appeal from Circuit Court, Bullitt County.
 "Not to be officially reported."

Action by Daniel Crady against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, E. W. Hines, and B. D. Warfield, for appellant. Chapeze & Halstead, for appellee.

O'REAR, J. Appellee and one Thomas were fellow workmen in the same line of employment upon a bridge for appellant. They were engaged in taking down the structure of a false bridge. The foreman of the crew of workmen to which these two laborers belonged was present, and, it is charged, was directing the manner of the execution of the work. Thomas cast loose one end of a heavy beam of timber prematurely, and it fell upon appellee's thumb and crushed it off. The negligence complained of is that Thomas, in casting loose the beam at the time that he did, acted under the direct order and express command of the superior, the foreman.

For appellant, it is claimed that Thomas, being in the same line of employment with appellee, was his fellow servant, and that the negligence resulting in the accident, if any one was negligent besides appellee, was that of Thomas, and that therefore there can be no recovery. There was proof to support the claim of appellee that Thomas acted under the direct command of the superior, and therefore that his act was the same as if the superior had in person done the thing. In other words, the act was not the result of Thomas' judgment or lack of judgment, or of his care or lack of care. The controlling mind in the transaction was that of the foreman. Thomas was no more responsible than if he had been a piece of machinery operated by the foreman. Although there is evidence to support this theory, there is as much, or possibly more, to support appellee's theory. However, the matter was submitted to the jury under appropriate instructions; telling them that they could not find for appellee,

except they believed from the evidence that the negligence resulting in appellee's injury was the gross negligence of the foreman, but that if it was the negligence only of the fellow workman, Thomas, or if it was caused by the contributory negligence of appellee, but for which the accident would not have occurred, he could not recover. In addition to the above facts, it was proven that the foreman was standing within a few feet and in clear view of appellee, and knew, or might by the exercise of slight care have known, of appellee's danger; also that the foreman was rushing his men at the time and was drunk. If the jury believed appellee's version and testimony, they were clearly warranted in finding the verdict they did. Upon the matter of the credibility of witnesses, and the weight to be given their testimony, where the conflicting evidence is as nearly poised as in this case, it would be unwarranted in this court to interfere with the jury's verdict.

A complaint is made of the instruction defining the measure of damages. It is not accurate, it is true, in that it did not confine the jury to compensatory damages for the injury done. However, the verdict is small—very small—and is scarcely enough to compensate appellee, under any definition of that term. It does not appear to us to be possible that the form of that instruction could have prejudiced the substantial rights of appellee.

The judgment is affirmed, with damages.

**W. E. MERKLEY & SON v. UNITED
 STATES FIDELITY & GUAR-
 ANTY CO.**

(Court of Appeals of Kentucky. April 30, 1903.)

**FACTORS AND BROKERS—ACTION ON BRO-
 KER'S BOND—SUFFICIENCY OF PETITION.**

1. In an action on a broker's bond, the petition averred that, under the arrangement between the parties, it was the duty of the broker to safely keep the goods shipped him by plaintiffs until they should be sold for cash, after which it was his duty to promptly remit to plaintiffs on every Monday night the money received during the previous week. *Held* to sufficiently aver that the goods were sent to the broker to sell, and remit the proceeds to plaintiffs, which would constitute him, in law, their broker.

Appeal from Circuit Court, Marion County.
 "Not to be officially reported."

Action by W. E. Merkley & Son against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiffs appeal. Reversed.

H. W. Rives, for appellants. Jno. McChord, for appellee.

HOBSON, J. On the former appeal, after setting out the terms of the bond sued on, and the facts attending the shipment and leading up to it, the court concluded its opin-

ion with these words: "From the above it is perfectly clear that Bass did not buy the goods from appellees, but that they were shipped to him, as a broker, to sell, and that they understood at the time that appellant, as his surety in the bond, was only responsible in case of fraud or dishonesty on his part. The petition does not charge that the loss sued for was due to the fraud or dishonesty of Bass, and the demurrer to it should have been sustained. The instructions of the court were erroneous in so far as they allowed the jury to find against appellant for any loss not due to the fraud or dishonesty of Bass. Judgment reversed, and cause remanded for further proceedings consistent with this opinion." U. S. Fidelity & Guaranty Co. v. Merkley & Son (Ky.) 65 S. W. 614. It was thus, in effect, held that the petition would be sufficient if it charged that the loss sued for was due to the fraud or dishonesty of Bass, and that instructions were proper, allowing the jury to find against appellant for a loss due to his fraud or dishonesty. On the return of the case to the circuit court, the petition was amended so as to charge that the loss sued for was due to the fraud or dishonesty of Bass. The court thereupon sustained the demurrer to the petition as amended, and dismissed the action.

The opinion rendered on the former appeal is the law of this case, and is equally binding on this court and the circuit court. As it was then determined that appellant was responsible for any loss due to the fraud or dishonesty of Bass, the circuit court erred in sustaining the demurrer to the petition as amended. And while it is unnecessary now to elaborate the reasons on which the former opinion was based, we will add that we see nothing in the case as now presented that was not presented in the petition for rehearing then filed. We concluded then that the goods were shipped to Bass as a broker. It was charged in the petition that they were sold to Bass. This was denied by the answer. The plaintiff regarded the transaction as a sale, because a fixed price was charged to Bass when the goods were shipped to him; but, independently of whether the transaction was called a sale or a delivery to an agent, we were then of opinion that appellee was responsible for any loss due to the fraud or dishonesty of Bass, as, according to the proof, he was to remit on every Monday night for what had been sold the previous week, and to try to dispose of the goods as fast as possible in order to do a safe business. The bond was given to secure the performance of this agreement, and was binding on appellee, regardless of the name of the transaction. In the amended petition filed upon the return of the case, it was averred that under the arrangement it was the duty of Bass to safely keep the goods shipped to him by plaintiffs until they should be sold for cash, after which it was his duty to promptly remit to plaintiffs on every Monday

the money so received during the previous week. This sufficiently averred that the goods were sent to Bass to sell, and remit the proceeds to the plaintiffs, which would constitute him, in law, the plaintiffs' broker. This was not a departure from the original cause of action, but only a conforming of the allegations of the petition to the view of the law of the case which this court had laid down.

Judgment reversed and cause remanded for further proceedings consistent herewith.

HARPER v. KOPP.

(Court of Appeals of Kentucky. May 1, 1903.)

NEGLIGENCE—LEAVING LUMBER IN STREET—CONTRIBUTORY NEGLIGENCE—INFANT—PRESUMPTION.

1. One who, without necessity or license, left a dangerous pile of lumber in a public street where small children were in the habit of playing, was not relieved from liability because the lumber was not negligently stacked.

2. It is not enough, to constitute contributory negligence, that the negligence of the one injured may have contributed to his injury, but it must be such that the injury would not otherwise have occurred.

3. Before a plea of contributory negligence will be allowed as against a child of apparently tender years, it must be shown that the precocity of the child gave to it such understanding as to enable it to exercise a reasonable degree of care for its protection under the circumstances.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by R. T. Harper against William Kopp. From a judgment for defendant, plaintiff appeals. Reversed.

Wallace & Miller, for appellant. Kohn, Baird & Spindle and S. E. Sloss, for appellee.

O'REAR, J. Appellant, an infant aged about 6 years, received an injury by falling from a stack of lumber piled by appellee in a street dedicated and used as a thoroughfare in the city of Louisville. The recovery was sought upon the idea that appellee was guilty of an actionable wrong by placing his lumber upon a public street without authority from the municipality, and in a vicinity where children were in the habit of congregating in the pursuit of childish sport, in that it was an attractive and dangerous situation to such child; that appellee was aware alike of the danger and of its attractiveness, and of the fact that the children constantly resorted to it to play. The jury was instructed that appellant should not recover unless the lumber was piled so negligently that by reason thereof plaintiff was injured, and not then unless the jury should believe that plaintiff's negligence did not contribute to the injury.

The court is of opinion that this instruction in two particulars was erroneous. In the first place, it does not excuse appellee for placing

¶ 2. See Negligence, vol. 37, Cent. Dig. §§ 93, 113, 115.

a pile of lumber in a public street, and leaving it there without necessity or license, where small children are in the habit of congregating for sport, and where the nature of the thing is dangerous to such children, that the lumber was not negligently stacked. Appellee's liability rests, not upon his negligence in the manner of stacking his lumber in the street under the circumstances stated, but upon the fact that he stacked it there at all, where its unguarded situation became an attractive and accessible object of danger to very young children. It was actionable negligence to leave unguarded such an object of danger to very young children, situated as that one was.

The instruction was furthermore objectionable in that it submitted at all the question of appellant's contributory negligence to the jury, as well as that it was erroneous in form. For it is not enough, to constitute contributory negligence, that the plaintiff's negligence may have contributed to his injury, but it must be such that the injury would not have occurred but for his own negligence. Children of tender years are presumed to be civilly irresponsible for their acts, and are therefore presumed to be incapable of negligence, for, before one can be negligent, he must have judgment to appreciate the danger of the situation and to know how to avoid it. This presumption, however, is not always an irrebuttable one; but, before the plea of contributory negligence will be allowed as against a child of apparently tender years, it must be shown that the precocity of the child gave to it such understanding as to enable it to exercise a reasonable degree of care for its protection under the circumstances. *East Tenn. Coal Co. v. Harshaw* (Ky.) 29 S. W. 289; *South Covington, etc., Railway Co. v. Herrklotz*, 104 Ky. 405, 47 S. W. 265. This was not shown in this case.

The judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

LOUISVILLE & N. R. CO. v. WHITE-HEAD'S ADM'R.

(Court of Appeals of Kentucky. April 30, 1903.)

CROSS-APPEAL—FAILURE TO MOVE FOR NEW TRIAL—REVIEW OF EVIDENCE—SUFFICIENCY OF RECORD.

1. Where an appellee did not move for a new trial, his cross-appeal cannot be considered.

2. Where a bill of exceptions shows that depositions were read on the trial which are not incorporated in the bill, the sufficiency of evidence to sustain the verdict cannot be reviewed.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action by George Whitehead's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant.
S. M. Payton, for appellee.

HOBSON, J. Appellee's intestate was a brakeman in the service of appellant, and was killed at Lebanon Junction by reason of a collision of some heavily loaded coal cars with the rear cars of his train. On the trial in the circuit court a verdict was rendered in favor of the plaintiff for \$1,750, on which judgment was entered. The defendant moved for a new trial, which was refused. It then prayed an appeal to this court. After the case reached this court, the appellant waived all errors complained of, except the one objection that the court failed to instruct the jury peremptorily to find for the defendant; but the appellee in this court has sued out a cross-appeal.

The cross-appeal cannot be considered, as the appellee did not move for a new trial in the circuit court, and there can be no reversal in an ordinary action without a motion for a new trial, and grounds filed specifying the errors complained of. On the original appeal the question is made that, the proof for the plaintiff only showing that he was found injured after the collision between the coal cars and his train, and not showing what he was doing, or how he came to be caught, the peremptory instruction to find for the defendant should have been given. The proof shows that when the intestate's train reached Lebanon Junction it was cut in two, the hinder part being left north of the station, and the rear part pulled down south of it, for the purpose of putting into the train the five coal cars referred to. The proof also shows that while they were standing there in this way, at night, waiting for the five coal cars to be set in, these cars were pulled upon the main track, some distance north of them, by another engine, and then kicked down on their train, with nobody on them, and with no engine attached to them, colliding with it with great force, as it was a downgrade; and after this the intestate was found injured in such a way that he died. It is insisted for appellee that this proof made out for the plaintiff simply the case of a brakeman being injured in a collision, and that a prima facie case was made out. The proof for the defendant tended to show that the intestate had gone in between the cars to fix a hose that was leaking, or help to fix it; and it is urged that he was grossly negligent in putting himself in this place of danger, when he knew the coal cars were to be set in. The counsel for appellee, however, urges with force that there would have been no danger in this if the coal cars had been set in properly, as the intestate had a right to expect, and not turned loose to run down on the train; and that, although the intestate was imprudent, still, as the men handling the coal cars had reason to know the crew was on this train, and would be endangered by a collision such as took place, the company is liable, notwithstanding the intestate's imprudence, as the injury might have

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 1650, 1660.

been avoided by proper care on their part. *L. & N. Railroad Co. v. Adams' Adm'r*, 106 Ky. 859, 51 S. W. 577.

It is unnecessary for us to pass on these questions, as the record is insufficient to present them for determination. The bill of exceptions shows that three depositions were read on the trial. None of these depositions are incorporated in the bill of exceptions, or made a part of it. There are a number of depositions copied in the transcript, but we cannot consider any of them, and, as the evidence heard in the circuit court is not before this court, we cannot disturb the judgment. *Young v. L. & N. Railroad Co.*, 7 Ky. Law Rep. 165; *L. & N. Railroad Co. v. Finley*, 86 Ky. 294, 5 S. W. 753; *New York Life Ins. Co. v. Brown's Adm'r* (Ky.) 66 S. W. 613.

Judgment affirmed.

MEYER v. CHAS. ROSENHEIM & CO.

(Court of Appeals of Kentucky. April 30, 1903.)

CHECKS—FORGED INDORSEMENTS—LIABILITY OF INDORSEE.

1. Defendant cashed some checks belonging to plaintiff for plaintiff's agent, who had indorsed plaintiff's name thereon without authority, and thereafter defendant collected the amount of the checks from the banks on which they were drawn. *Heid*, that defendant was liable to plaintiff for the proceeds of the checks, though he had acted in good faith and without knowledge of the agent's forgery.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Charles Rosenheim & Co. against H. L. Meyer. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. K. Hendricks, for appellant. Kohn, Baird & Spindle and Quigley & Quigley, for appellees.

HOBSON, J. Appellees are wholesale merchants in Louisville. They had in their employ a bookkeeper named Altman, who forged their name on the back of checks belonging to them, and then delivered the checks to appellant, who paid him the money on them or sold him jewelry therefor. Appellant then collected the checks from the banks on whom they were drawn. Appellees, on discovering the forgery and the misappropriation of their property, brought this action against appellant to recover of him the amount he had collected on these checks belonging to them under the forged indorsement of their name by Altman. The checks amounted to \$227.92. On final hearing the court gave judgment in favor of the plaintiffs.

There is no plea of estoppel, and we see nothing in the evidence to warrant an estoppel if pleaded. Appellees were not required to anticipate a forgery. The bookkeeper had no authority as such to sign the firm's name,

and had nothing to do with the checks. He obtained them, in fact, surreptitiously, and without the line of his authority. Appellant appears to have been equally innocent, and so the precise question is on which of two equally innocent persons the loss should fall. In *Moss on Banking*, § 248, it is said: "If a negotiable instrument having a forged indorsement come to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper, and has paid over the proceeds to the party depositing the instrument for collection." See, to same effect, 3 *Randolph on Commercial Paper*, §§ 1409, 1739, 1777. The case of *Farmer v. People's Bank* (decided by the Supreme Court of Tennessee) 47 S. W. 234, is much like this case. There Head, who had possession of a check payable to Farmer, indorsed Farmer's name upon it without his knowledge or consent, and delivered it to the People's Bank, who collected the proceeds and permitted Head to check out the money. After this, Farmer demanded the money of the People's Bank, and, it refusing to pay him, sued to recover the amount collected by it on the check. The court held that the logic of the rule to the effect that a check payable to a certain person can only be properly paid upon his genuine indorsement, or to him, necessarily was that one coming into possession of such paper under a forged indorsement of his name could not successfully resist the title of the true owner, or, if it had been converted into money, a demand for its proceeds. A number of decisions from other states are collected in that opinion. The rule is that a forged indorsement is a nullity. Appellant's position then in law is the same as if he had taken appellees' checks and collected the money on them without any indorsement of them at all. The collection of the checks by him was a conversion of them, and he who converts the personal property of another is always liable to the owner therefor. Appellant has collected appellees' money. He had no right in law to the money, and he cannot retain it against them. The action is not based upon the writings, but upon the idea that appellant has converted the property of another, and that he cannot retain as against the true owner the proceeds of the property. *Bramblett v. Caldwell* (Ky.) 48 S. W. 982.

Judgment affirmed.

McCORMICK HARVESTING MACH. CO. v. DODKINS.

(Court of Appeals of Kentucky. April 30, 1903.)

SALES—FARM MACHINERY—CONTRACTS—PROVISIONS—WAIVER—ACCEPTANCE—ACTION FOR PRICE—EVIDENCE—FINDING.

1. Where, on the refusal of the buyer of a corn shredder to accept the same, by reason of defects in its operation, and offering to return it, the seller's agent requested the buyer to put it under shelter on his farm for the seller,

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 964.

which he did, such request constituted a waiver of the buyer's obligation under the contract to return the machine.

2. Where, on the delivery of a corn shredder to the buyer after trial, he refused to accept the same, for defects in its operation, and offered to return it, but the seller's agent offered to remedy the defects, and assured the buyer that the machine would do better if the corn was dry, or after it had been run awhile, and after further trial the buyer refused the machine, and never executed the notes or paid for the same as required by the contract, and thereafter housed the machine for the seller at its agent's request, a finding that he was not liable for the price, under a provision of the contract that if he used the machine at intervals through the harvesting season, or failed to notify the seller or its agent of defects, or to return the machine, he should be deemed to have accepted the same, was proper.

Appeal from Circuit Court, Logan County.

"Not to be officially reported."

Action by the McCormick Harvesting Machine Company against John B. Dodkins. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. B. Drake and S. R. Crewdson, for appellant. W. P. Sandidge, for appellee.

HOBSON, J. Appellee ordered of appellant a corn shredder. By the terms of the order, he was either to pay \$190 cash for the machine when received, or to execute two notes, each for \$100, due January 1, 1901 and 1902, respectively. The order also contained the following: "This machine is warranted to be well made, of good material, and durable, with proper care. If upon one day's trial the machine should not work well, the purchaser should give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot be made to work well, the person shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. Continuous use of the machine, or use at intervals through the harvesting season, or failure to notify the McCormick Harvesting Machine Company, or their agent, or to return the machine as agreed, shall be deemed an acceptance of the machine by the undersigned." When the machine was delivered he did not pay cash or execute the notes, and, refusing subsequently to do either, he was sued by appellant in this action in equity; praying judgment for the price of the machine, \$190, or that he be compelled to execute the notes therefor. He defended the action on the ground that the machine was not as represented or warranted, and that he had refused to accept it. The circuit court, on final hearing, dismissed the petition.

The evidence is very conflicting, but after a careful consideration of it all, and the circumstances shown thereby, we have reached the conclusion that we ought not to disturb the chancellor's finding, under the rule adopted by the court as to the effect to be given the chancellor's finding of fact in cases of this character. We deem it unnecessary to elabo-

rate our reasons for this, or to detail the conflicting evidence. The defendant brought his defense literally within the terms of the contract. It is provided in the contract, as will be seen above, that if, upon one day's trial, the machine should not work well, the purchaser should give immediate notice to the company or to its agent, and allow time to send a person to put it in order. The defendant showed that, when the machine was set up and started by the company's agents, he at once notified them that it did not work well. They then took out some parts of the machine, and agreed to put on a basket to save the corn, and agreed to return the next morning and put the basket on. This they failed to do. It will also be seen from the contract that it was provided that, if the machine could not be made to work well, the purchaser should return it to the agent of whom he received it. The defendant testified that, after giving the machine a fair trial, he offered to return it to the agent of whom he received it, and the agent requested him to put it under shelter on his farm for the company. This he did. The agent had power to waive the return of the machine, and this request on his part was a waiver; for the company, after requesting the defendant to put the machine under shelter on his farm for it, cannot complain that he did not do something else with it. It is insisted, however, that appellee is liable for the machine under the last clause of the contract, providing that continuous use of the machine, or use at intervals through harvesting season, or failure to notify the company or its agent, or to return the machine as agreed, should be deemed an acceptance of the machine by the purchaser. There is great force in this argument, if we look only to the evidence for the plaintiff. But the evidence for the defendant tended to show that the agents assured him that the machine would do better if the corn was dry, or after it was run a little while, and that they promised later to come and fix it, and make it do. Under all the evidence, it would seem pretty clear that the machine did not do good work. The great weight of the evidence shows that it so wasted the corn that a farmer could not well afford to use it for the purpose for which it was purchased. And taking into consideration the assurances given appellee by the agent, and all the circumstances, we are satisfied that he never intended to accept the machine unless it did the work better than it had done. The evidence is very conflicting as to the amount that he used it, but, taking the testimony on his behalf to be true, we do not think that there was any such use of the machine as should be deemed an acceptance of it under the contract. The testimony for the plaintiff and the defendant is very conflicting on this point, but, on the whole case, we are unable to see that the testimony for the plaintiff outweighs the testimony for the defendant. A circumstance that has great weight with

us is the fact that he executed no notes for the machine, and paid nothing on it, and no demand was made on him by the company when the machine was set up, or at any time while he was using it, for the execution of the notes or the payment of the money. He had not seen the machine before ordering it. It was an experiment, and the agents of the company were interested in the experiment being a success, for its failure would have a bad local effect on the sale of other machines.

Judgment affirmed.

LEWIS v. SCOTT.

(Court of Appeals of Kentucky. May 5, 1903.)

ERRONEOUS JUDGMENT—DISPOSSESSION— —MEASURE OF DAMAGES—HOME- STEAD—SET-OFF.

1. One who deprives another of the rightful possession of the latter's property under an erroneous judgment is liable to the owner for all damages caused by the wrongful act.

2. Where, under an erroneous judgment, defendant deprived plaintiff of the use of the latter's farm and water mill and power, plaintiff was entitled to recover the reasonable rental value of the property during the period of dispossession, and his necessary expenses in moving from and back to his premises, less taxes paid by defendant and the value of such reasonable and necessary repairs made by the latter as were of a lasting nature.

3. A debtor is entitled to the use of his homestead without regard to his debts, and where, under an erroneous judgment, defendant deprived plaintiff of the use of the latter's homestead, defendant was not entitled to set off judgments held by him against plaintiff in an action by the latter for such use.

Appeal from Circuit Court, Green County.
"Not to be officially reported."

Action by J. W. Lewis against J. L. Scott. Judgment for defendant, and plaintiff appeals. Reversed.

Noggle & Graham, for appellant. Henry Woodward, for appellee.

O'REAR, J. Appellee, under a writ of possession, obtained upon an erroneous judgment, deprived appellant of his farm of 68 acres and his water mill and power for a period of between two and three years. After the reversal of that judgment (59 S. W. 1130) appellee restored the premises. This suit was to recover the damages sustained by appellant for the wrongful eviction and detention. Proof was heard, and much of it tended to support appellant's claims. However, the trial court, at the close of all the evidence, instructed the jury peremptorily to find for appellee, which was error. Upon what theory that instruction was based we are not informed, nor can we determine. One who deprives another of the rightful possession of the latter's property under an erroneous judgment is liable to the owner for all the damages caused by the wrongful act. These damages are, as applicable to this case: (1) The reasonable rent of the land for the

time appellant was kept out by appellee. (2) The reasonable rental value of the grist mill for the same period. (3) The reasonable value of the water power connected with the mill, and used by appellant for propelling his carding machinery, of which power appellant was wrongfully deprived by appellee during the same time. (4) Appellant's necessary expenses in moving from and back to his premises. (5) The deterioration of the property while held by appellee, caused by its neglect, or improper use, if any, by appellee. That the land in question was appellant's homestead appears with reasonable certainty. In that event he was entitled to its use without regard to his debts. Collett v. Jones, 7 B. Mon. 586. So much, then, of the matters pleaded as set-off as are involved in certain judgments in appellee's favor against appellant should be ignored, except the value of the growing crop taken by appellant when he was restored to possession, which appellee had planted on the land, and had practically matured. Appellee should be allowed taxes paid, if any, and the value of such reasonable and necessary repairs as were of a lasting nature, if any, put on the premises by him.

The judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

MEMORANDUM DECISIONS.

CITY OF LOUISVILLE v. KREMER. (Court of Appeals of Kentucky. April 24, 1903.) Appeal from Circuit Court, Jefferson County, Chancery Division. "Not to be officially reported." Action by Henry L. Kremer against the city of Louisville and another to enforce a lien for a street improvement. From a judgment for plaintiff, defendant city appeals. Affirmed. H. L. Stone, for appellant. M. S. Tyler, for appellee.

HOBSON, J. The city of Louisville issued to appellee, Kremer, an apportionment warrant for \$2,258.72 against the property of Nannie M. Wilson for the improvement of Daisy lane, or Transit avenue. The property was afterwards sold by her to Cave Hill Cemetery, and this suit was brought by Kremer against the cemetery and the city of Louisville to enforce the lien upon the property, and to recover against the city in case the property was held not liable. The proof showed that the property taxed was of value not exceeding \$100, and received no benefit from the improvement. The court held the property not liable, on the ground that a case was made out in which it would be spoliation to enforce the lien, and he gave judgment against the city for the amount of the warrant. From this judgment the city appeals. Cave Hill Cemetery is not before the court, and the only question here is between the contractor and the city as to the propriety of the judgment in his favor against it. It is insisted for the city that by the contract the contractor agreed that in no event he should be entitled to recover any part of the cost of the work from the city of Louisville, and that he is bound by his contract, and therefore cannot recover. The contract is the same as in the case of City of Louisville v. Peter

Bitzer (this day decided) 73 S. W. 1115, wherein it is held that the contract was in legal effect the same as the provisions of section 2834, Ky. St. 1899, and therefore did not protect the city from liability in those cases where the city was without authority to contract for the improvement at the cost of the abutting property. Judgment affirmed.

COMMONWEALTH v. LONGNECKER et al. (Court of Appeals of Kentucky. April 15, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Information by the auditor's agent of Mason county against Benjamin Longnecker and another. From a judgment for defendants, the commonwealth appeals. Reversed. G. A. Cassidy, for the Commonwealth. G. S. Wall, E. L. Worthington, W. H. Wadsworth, W. D. Cochran, and L. W. Robertson, for appellees.

NUNN J. This case grows out of an effort by the auditor's agent to retrospectively assess the property of a decedent, and to charge the devisees with the liability for the payment of the taxes thereon. The same principles govern this case as in the case of *Commonwealth v. John G. Sweigart's Adm'r* (this day decided) 73 S. W. 758. In that case the appellees were distributees, and in this devisees. In this case there was no apparent effort on the part of the appellees to prevent the disclosure of the kind and character of the property received by them. But these differences do not alter the principles under which the appellees are liable, and for the reasons given in that case this case is reversed, and the cause remanded for further proceedings consistent therewith.

SCHNEIDER v. SCHNEIDER et al. (Court of Appeals of Kentucky. April 21, 1903.) Appeal from Circuit Court, Jefferson County, Chancery Division. "Not to be officially reported." Action between August Schneider and Elizabeth Schneider and others. From the judgment August Schneider appeals. Appeal stricken from the docket. Newton G. Rogers, for appellant. Kohn, Baird & Spindle, for appellees.

SETTLE, J. It appears that the questions raised by this appeal were all passed upon and finally adjudicated by this court on both original and cross appeals during the September term, 1902 (see opinion of Judge Paynter, delivered November 18, 1902, in *Schneider v. Kohn, Baird & Spindle*, 70 S. W. 287), upon the record brought up by the appellees Kohn, Baird & Spindle, and filed in the office of the clerk of this court, March 24, 1902, whereas this record was not filed by appellant, August Schneider, until August 23, 1902. As the judgment and opinion on the first record are conclusive of the same matters involved in this one, this appeal is stricken from the docket, at the cost of the appellant, August Schneider.

SOMERSET NAT. BANKING CO.'S RECEIVER et al. v. HAIL. (Court of Appeals of Kentucky. March 20, 1903.) Appeal from Circuit Court, Pulaski County. "Not to be officially reported." Action by G. L. Hail against Christopher L. Williams, as receiver of the Somerset National Banking Company, and others. From a judgment for plaintiff, defendants appeal. Reversed. O. H. Waddle and F. F. Oldham, for appellants. J. N. Sharp, V. P. Smith, and W. A. Morrow, for appellee.

BARKER, J. This action was instituted in the Pulaski circuit court by the appellee, G. L. Hail, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Company, and the Somerset National

Banking Company, to recover the sum of \$300, which he placed on deposit with the Somerset National Banking Company, and which has never been repaid to him, as he alleges. All of the facts as to the organization of the appellant bank, the appointment of a receiver, and the pleadings involved in this case are substantially the same as in the case of *Somerset National Banking Co.'s Receiver v. Napier Adams* (heretofore decided) 72 S. W. 1123, of which it is a counterpart; and reference is now had to that opinion for the facts necessary to illustrate this case. Upon the trial in the circuit court, the judge ruled that the burden of proof was on the defendants, who are the appellants here, and at the close of their testimony he sustained the motion made by appellee for a peremptory instruction to the jury to find for him in the sum of \$300, which they did. Appellants' motion for a new trial being overruled, they have appealed to this court. The correctness of this ruling of the circuit judge depends upon the question as to whether or not the appellants established the contract of purchase of the stock in question by appellee of the appellant bank. The opinion in the case of *Somerset National Banking Co.'s Receiver v. Napier Adams* settles the law as applicable to this case, and it is not necessary to repeat here what was said there. There was abundance of testimony introduced by appellants to show that the appellee purchased the three shares of stock involved in this action from the bank, and, if this testimony was true, they were entitled to a judgment dismissing the petition. The instruction of the court to the jury to find for the plaintiff was erroneous. Wherefore the judgment is reversed for proceedings consistent with this opinion.

ITTEL et al. v. WHITE et al. (Supreme Court of Missouri, Division No. 1. March 18, 1903.) Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge. Ejectment by Adam Ittel and others against Mary B. White and others. From an order sustaining a motion to quash an execution, plaintiffs appeal. Affirmed. Sangree & Lamm, for appellants. Wm. S. Shirk, for respondents.

MARSHALL, J. This is an appeal from an order of the circuit court sustaining a motion to quash an execution. This is the ejectment suit, referred to in the case of *Mary B. White v. Martha E. Smith et al.* (No. 10,637, just decided) 73 S. W. 610, by the trustee, Ittel, with whom are joined the cestui que trustent, for the possession of lot 1, by virtue of the deed of trust of November 23, 1890. The plaintiff-obtained judgment in the circuit court, and Mrs. White appealed to this court. She did not prosecute that appeal, and it was dismissed for failure, and thereupon the plaintiffs caused an execution to issue thereon. In the meantime the suit in equity of *White v. Smith*, aforesaid, was instituted. Mrs. White moved to quash the execution in this case, and the trial court sustained the motion. Standing alone, there is no valid ground shown by this record for the judgment in this case. But inasmuch as the deed of trust, under which the plaintiff alone would be entitled to a judgment in this case, has been canceled, and the enforcement of this judgment enjoined, and this execution quashed, in the case of *White v. Smith*, supra, it would be an idle thing to set aside the judgment in this case sustaining the motion to quash this execution. The judgment of the circuit court is therefore affirmed. All concur.

STATE ex Inf. CROW, Atty. Gen., v. SWARTZSCHILD & SULZBERGER CO. (Supreme Court of Missouri. March 20, 1903.) In Banc. Quo warranto, on information of Edward C. Crow, Attorney General, against

Frank Hagermann, for respondent.

MARSHALL, J. This is a proceeding by quo warranto, instituted by the Attorney General, ex officio, to oust the defendant, a corporation organized under the laws of the state of New York, from doing business in this state. The respondent maintains a cooler or place of business in Kansas City, Mo., and its packing plant is in Kansas City, Kan. The petition charges that the respondent had never complied with the laws of this state relating to foreign corporations, and that it was a member of a pool, trust, or conspiracy to fix and maintain the price of dressed beef in this state; the other members being charged to be the Armour Packing Company, Swift & Co., the Cudahy Packing Company, the Hammond Packing Company, Nelson, Morris & Co., and the Krug Packing Company. The answer is similar to the answer of the respondents in the case of *State ex Inf. Atty. Gen. v. Armour Packing Company et al.* (No. 11,182, just decided) 73 S. W. 645, except as to the question of failure to qualify as a foreign corporation under the laws of this state; and as to that it is admitted that it had never so qualified prior to the institution of this proceeding, because of a misunderstanding of the advice of counsel as to the necessity to do so, but that since the institution of this action it has so qualified and been regularly licensed to do business in this state. The case was referred to the same special commissioner, and he found that, while the evidence was not very strong, it was sufficient to make out a prima facie case against the respondent. The evidence was taken at the same time as the evidence in the other case, and it was agreed that it should all apply to this case so far as it was pertinent. The respondent pursued the same course in this case that it did in the other case, and makes practically the same contentions, and what is said in that case applies equally to this case. The direct testimony in this case as to the admissions and statements of the respondent's cooler manager, and as to the rebates and uniformity of price, rests upon the testimony of Joseph A. Stanley, a butcher in Kansas City; but that testimony is not even attempted to be controverted by the respondent. There is, therefore, no substantial difference between this case and the other case, so far as the pool, trust, or conspiracy is concerned; and as the respondent has, since the institution of this suit, qualified and been licensed to do business in this state, the same order will be made in this case as was made in that case, to wit, that the respondent pay to the clerk of this court, within 30 days from this date, the sum of \$5,000 as a fine, and also all the costs in this case, and, failing so to do, the respondent be ousted from all right, privilege, and franchise of every nature and kind under the laws of this state, and be forever prohibited from doing business in this state. All concur.

A. A. COOPER WAGON & BUGGY CO. v. WOOLRIDGE. (Court of Appeals at Kansas City, Mo. April 6, 1903.) Appeal from Circuit Court, Nodaway County; Gallatin Craig, Judge. Action by the A. A. Cooper Wagon & Buggy Company against Fred Woolridge. From a judgment for defendant, plaintiff appeals. Affirmed. E. A. Vinsonhaler, for appellant. James B. Newman, for respondent.

BROADDUS, J. This is an action of replevin for certain articles, included in the order of Bailey & George made on the plaintiff on July 15, 1901, referred to in a case decided at this term of court between the same parties as here. 73 S. W. 724. The articles in question remained unsold, and passed into the hands of the

were furnished by plaintiff said firm from time to time. The plaintiff seeks to recover under said original order, which we have decided it cannot do. The plaintiff having parted with both the title and possession of the property in controversy, it cannot maintain replevin. Cause affirmed. All concur.

OLARK et ux. v. VERITY. (Court of Appeals at Kansas City, Mo. April 6, 1903.) Appeal from Circuit Court, Mercer County; Paris C. Stepp, Judge. Action by Joseph W. Clark and wife against W. H. Verity, assignee. Decree for plaintiffs, and defendant appeals. Reversed. Morton Jourdon and Conklin & Rea, for appellant. Platt Hubbell, Geo. Hubbell, and Martin Read, for respondents.

ELLISON, J. This case was submitted at same time as that of Stanley against this defendant (decided at this term) 73 S. W. 727, and is quite like it in all respects. The decree in the trial court was for plaintiff. This plaintiff became a member and stockholder of the Missouri Guarantee Savings & Building Association, and borrowed of it \$250, in December, 1893. The question here, as in the Stanley Case, is whether plaintiff became a stockholder in the association. His charge of fraud on the part of the association in inducing him to execute his papers pertaining to his membership and become a stockholder is not only not supported by the evidence, but is wholly contradicted by his own testimony. There was no artifice or device practiced or attempted at the beginning, and throughout several years he knowingly paid his installments on stock. Plaintiff totally failed to make a case. As to his contention that his becoming a member and stockholder of the association was for the purpose of evading the usury laws, we need do no more than refer to what was said on that head in the Stanley Case. That case settles the law arising in this case adversely to plaintiff, and the decree will be reversed, and cause remanded. All concur.

CURTIS v. CHICAGO, R. I. & P. RY. CO. (Court of Appeals at Kansas City, Mo. April 27, 1903.) Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge. Action by William A. Curtis against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed. W. F. Evans, H. C. McDougal, and Frank P. Sebree, for appellant. Hamilton & Dudley, for respondent.

BROADDUS, J. This is a suit against defendant, instituted by plaintiff to recover for loss of services of his minor son, caused by injuries sustained by reason of his having been forcibly ejected from defendant's train, while the same was in motion, at Cameron, Mo. The plaintiff recovered judgment, from which defendant appealed. The former is the father of the plaintiff in the case of Benjamin Curtis against this same defendant, 73 S. W. 1103, decided at this term of court. The facts being the same upon which the defendant is sought to be held liable as in said former case, and the question of law being identical, for the reason there given this cause is affirmed. All concur.

WOODSMALL v. MERCANTILE TOWN MUT. INS. CO. (Court of Appeals at Kansas City, Mo. April 27, 1903.) Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge. Action by Francis M. Woodsmall against the Mercantile Town Mutual Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed. Fyke Bros., Snider &

Richardson, for appellant. Campbell & Ellison, for respondent, cited Breckinridge v. Insurance Co., 87 Mo. 62; Thomas v. Insurance Co., 20 Mo. App. 150; Flournoy v. Insurance Co., 80 Mo. App. 655; Hamilton v. Insurance Co., 94 Mo. 368, 7 S. W. 261; Stiepel v. Association, 55 Mo. App. 233; Fink v. Insurance Co., 60 Mo. App. 678; Fulkerson v. Lynn, 64 Mo. App. 633; Shields v. McClure, 75 Mo. App. 631; Gulbreath v. Newton, 80 Mo. App. 381.

ELLISON, J. This is an action on a policy of fire insurance. The judgment in the trial court was for the plaintiff. It appears that the subject of insurance was personal property, and that plaintiff described himself in his application as the absolute owner; that the policy contained a provision stating that, if he was not the absolute and unconditional owner, the policy should be void; and that there was a chattel mortgage on the property, which the agent of the company who effected the insurance and issued the policy knew of at the time. In point of fact, the plaintiff signed the application in blank, and the agent himself filled it out, stating plaintiff to be the absolute owner, when he knew to the contrary; that is, he knew of the mortgage. Besides authorities cited in plaintiff's brief, the recent case of Ross-Langford v. Ins. Co. (not yet officially reported) 71 S. W. 720, practically disposes of this case in plaintiff's favor. The judgment is affirmed. All concur.

BROWN et al. v. CURRENT RIVER LAND & CATTLE CO.* (Court of Appeals at St. Louis, Mo. March 3, 1903.) Appeal from Circuit Court, Shannon County; W. N. Evans, Judge. Action by John C. Brown and others against the Current River Land & Cattle Company. From the judgment plaintiffs appeal. Modified. John C. Brown, for appellants. Orchard & Shuck, for respondent.

REYBURN, J. This case was argued and submitted with the case of T. J. Rowe and others against the same defendant, 73 S. W. 362, and presents the same question. For the reasons given in the latter case, the judgment of the court below will be modified. In so far as it subjects the realty described to a lien in favor of defendant for its disbursements for taxes, in the purchase of such realty and thereafter, it will be reversed. In other respects, it will be affirmed, respondent to pay costs of this court. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

STATE v. RIDDLE. (Court of Appeals at St. Louis, Mo. March 31, 1903.) Appeal from Criminal Court, Greene County; J. T. Neville, Judge. J. R. Riddle was convicted of assault, and appeals. Affirmed. L. H. Musgrave, for appellant. Roscoe Patterson, for the State.

REYBURN, J. Defendant was convicted before a justice of the peace of Greene county, upon an information by the assistant prosecuting attorney charging him with assault upon George Moore on the 13th day of September, 1901; and on appeal to the Greene county criminal court, upon a trial anew, he was again found guilty, and sentenced to pay a fine of \$50. A motion for new trial being unsuccessful, an appeal has been prosecuted to this court. No statement of facts, assignment of errors, or argument of counsel, oral or printed, has been filed or presented in this court, and the case is before us on the naked record. A careful review of the testimony and of the proceedings below reveals no error warranting this court in reversing the finding of the jury, and the judgment and sentence of the criminal court thereon, which are fully supported by substantial testimony in the record

of trial in the criminal court. The judgment will accordingly be affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE ex rel. YOUNG et al. v. BENNETT et al. (Court of Appeals at St. Louis, Mo. March 31, 1903.) Appeal from Circuit Court, Dent County; L. B. Woodside, Judge. Certiorari by the state, on the relation of W. A. Young and others, against H. A. Bennett and others. From a judgment in favor of relators, defendants appeal. Affirmed. L. Judson, for appellants. J. J. Cope, for respondents.

REYBURN, J. With unimportant differences in minor details, this case presents the same questions as those passed upon in State ex rel. J. J. Cope et al. v. H. A. Bennett et al. (decided by this court) 73 S. W. 737; and, in fact, both cases were argued and submitted at the same time. For the reasons therein given, the order of the county court granting to Peter Brock and S. D. Hendricks a dramshop license was without authority in law, and void; and the judgment of the circuit court, annulling the order of the county court in granting such license, is hereby affirmed.

BLAND, P. J., and GOODE, J., concur.

BECKHAM v. STATE. (Court of Criminal Appeals of Texas. March 18, 1903.) Appeal from District Court, Bexar County; John H. Clark, Judge. Brooks Beckham was convicted of manslaughter, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of three years. We find neither bill of exceptions, statement of facts, nor motion for new trial in the record. The indictment, charge of the court, judgment, and sentence are in accordance with law. No error appearing in the record, the judgment is affirmed.

HENDERSON, J., absent.

JOYCE v. STATE. (Court of Criminal Appeals of Texas. March 18, 1903.) Appeal from District Court, Tarrant County; M. E. Smith, Judge. John J. Joyce, alias D. L. Kemp, alias Chas. Lovett, was convicted of forgery, and he appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of seven years. There are neither bill of exceptions nor statement of facts in the record. The indictment and charge of the court are correct. No error appearing, the judgment is affirmed.

MARKHAM v. STATE. (Court of Criminal Appeals of Texas. March 25, 1903.) Appeal from District Court, Montague County; D. E. Barrett, Judge. B. F. Markham was convicted of swindling, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of swindling, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal. The only question presented for our consideration is, was the evidence sufficient to support the conviction? We have examined the record carefully, and in our opinion the evidence is ample. The judgment is affirmed.

BLYTHER v. CRUMP BROS. (Court of Civil Appeals of Texas. April 22, 1903.) Ap-

*Rehearing denied March 21, 1903.

peal from Bowie County Court; A. S. Watlington, Judge. Action between A. S. Blythe against Crump Bros. From a judgment for the latter, the former appeals. Affirmed. Hart & Mahaffey, for appellant. H. W. Vaughan, for appellee.

NEILL, J. The nature of this suit, the issues of fact involved, and the law pertaining to them are stated and enunciated in the opinion rendered upon a prior appeal. Blythe v. Crump, 66 S. W. 885. Under the opinion referred to, the determination of the case was made to turn upon the question: Which of the mortgage liens given on the property by Vandiver was superior—the one to Surpentine, or the one to appellees? This issue was submitted to the jury by a charge upon the law to guide them in its determination which is not complained of; and, as the jury decided it in favor of the appellees, we will, upon authority of the opinion referred to, affirm the judgment.

G. W. PREWITT & CO. et al. v. NEWTON, WELLER & WAGNER CO.* (Court of Civil Appeals of Texas. March 18, 1903.) Appeal from Bastrop County Court; J. B. Price, Judge. Action by the Newton, Weller & Wagner Company against G. W. Prewitt & Co. and others. Judgment for plaintiffs, and defendants appeal. Affirmed. Robertson & Goldstein, for appellants. Webb & Goeth, for appellees.

KEY, J. After careful consideration, our conclusion is that no reversible error is shown in this case. There was testimony which authorized the court to find that the contract sued on was executed by appellants, was breached by them, and that appellees sustained injury to the extent awarded them by the judgment. Judgment affirmed.

H. M. LAUGHHEIMER & SONS (COOP, Intervener) v. SAUNDERS.† (Court of Civil Appeals of Texas. March 11, 1903.) Appeal from District Court, Coryell County; W. J. Oxford, Judge. Injunction by J. R. Saunders against H. M. Laughheimer & Sons to restrain an execution sale, in which G. Y. Coop intervened. Judgment for plaintiff, and defendants appeal. Affirmed. F. T. Bryan, for appellants. H. N. Atkinson and McDowell & Sadler, for appellee. J. H. Arnold, for intervener.

FISHER, C. J. This is the fourth appeal in this case. The history of the case and the questions involved will be found reported in 47 S. W. 543, 57 S. W. 70, and 65 S. W. 500. The question involved is whether or not the land in controversy was a part of the appellee's homestead on the 2d and 9th days of April, 1897, and whether the nine acres upon which he resided was an urban or rural homestead upon those dates. The court submitted these questions to the jury, and by their verdict they determined the fact that Saunders' residence and lands connected with it was a rural homestead at that time. The facts, in connection with the principles of law decided in the cases of *Bauk v. Hulen* (Tex. Civ. App.) 52 S. W. 278, *Wilder v. McConnell* (Tex. Sup.) 45 S. W. 145, *Mortgage Co. v. Abbott* (Tex. Civ. App.) 37 S. W. 252, and *Posey v. Bass*, 77 Tex. 512, 14 S. W. 156, authorize the conclusion reached by the verdict of the jury. While it is a close case on the facts, we cannot say that the verdict of the jury is without evidence to support it. The charge of the court, when considered as a whole, is not objectionable. It presented the material issues arising upon the homestead question. There was no

error in refusing the charges requested by appellants and intervener. The conclusion that we have reached in affirming the judgment upon the homestead issue relieves us of the necessity of passing upon the questions of priority of right between the appellants and the intervener. We find no error in the record, and the judgment is affirmed.

INTERNATIONAL & G. N. R. CO. v. HOOKER.* (Court of Civil Appeals of Texas. Feb. 11, 1903.) Appeal from Milam County Court; R. B. Pool, Judge. Action by Charles Hooker against the International & Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed. S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. Nelson & Little, for appellee.

STREETMAN, J. Appellee recovered a judgment for injuries sustained by him in having his foot mashed by a hand car. Appellee, a section hand, was riding on the car, and by direction of the foreman applied the brake, and the car stopping quicker than he had expected, and jarring and shaking, threw him off and ran over his foot. The negligence alleged consisted in furnishing a car which was old and out of repair, and loose and in a "shackled" condition. There were other grounds of negligence alleged, but they were not submitted to the jury. Appellant complains in several assignments that the evidence does not sustain the allegations, but shows that the accident did not result from the negligence alleged in the petition. There is sufficient evidence, however, to sustain the finding of the jury upon this issue, and also upon the issues of contributory negligence and assumed risk. Error is assigned upon the refusal to give certain instructions upon the question of assumed risk. The charge of the court, in our opinion, presented this question correctly, and as fully as required by the evidence. Finding no error in any of the assignments, the judgment is affirmed.

ROACH & CO. v. FENN. (Court of Civil Appeals of Texas. April 9, 1903.) Error from District Court, Harris County; Wm. H. Wilson, Judge. Action by Roach & Co. against J. J. and J. R. Fenn. From a judgment in favor of defendant J. R. Fenn, plaintiffs bring error. Affirmed. W. G. Love, for plaintiffs in error. Hutcheson, Campbell & Hutcheson, for defendant in error.

GARRETT, C. J. This was an action of debt, brought by Roach & Co. against J. R. Fenn and J. J. Fenn to recover upon an alleged balance on account of the sum of \$1,221.02. There was a trial below to the court without a jury, which resulted in a judgment in favor of the plaintiffs against J. J. Fenn for the amount sued for, and in favor of the defendant J. R. Fenn. The plaintiffs have appealed. They present no error, except that the judgment is contrary to the evidence. We have carefully examined the testimony introduced by the parties, and conclude that there was sufficient evidence to sustain the conclusion of the trial judge that the defendant J. R. Fenn was not liable for the account sued on, and the judgment is affirmed.

TOWN OF GRANGER v. STANDLEE.* (Court of Civil Appeals of Texas. Feb. 11, 1903.) Appeal from Williamson County Court; Chas. A. Wilcox, Judge. Action between W. N. B. Standlee and the town of Granger. Judgment for Standlee, and the town of Granger

*Rehearing denied May 6, 1903.

†Rehearing denied April 23, 1903.

*Rehearing denied March 25, 1903.

appeals. Affirmed. Posey & Sheffield and Chessher & Wilcox, for appellant.

FISHER, C. J. We find no error in the record, and the judgment is affirmed.

WILLIAMS v. ISAACS & LOCKETT.
(Court of Civil Appeals of Texas. March 18, 1903.) Error from Milam County Court; R. B. Pool, Judge. Action between R. E. Williams

and Isaacs & Lockett. Judgment for Isaacs & Lockett, and Williams brings error. Affirmed. Morrison & Wallace, for plaintiff in error. N. H. Tracy and Henderson, Streetman & Freeman, for defendants in error.

FISHER, C. J. We find no error in the record, and the judgment is affirmed.

STREETMAN, J., being of counsel, did not sit.

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An objection to evidence not taken on trial will not be considered on appeal.—*St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Tex. Civ. App.) 976.

§ 4. Requisites and proceedings for transfer of cause.

Specification of error in Supreme Court, on application for writ of error to Court of Civil Appeals, *held* too general.—*J. E. Dunn & Co. v. Smith* (Tex. Sup.) 945.

A judge of the district court has no power to question an appeal bond approved by the clerk, or entertain a motion to expunge the clerk's approval therefrom.—*Hill v. Halliburton* (Tex. Civ. App.) 21.

§ 5. Record and proceedings not in record.

Only the record proper *held* to be before the Supreme Court for review.—*City of St. Charles ex rel. Budd v. Deemar* (Mo. Sup.) 469.

A document treated by the trial court as in evidence, though by oversight not formally introduced, *held* to be before the court on appeal.—*Reed v. Morgan* (Mo. App.) 381.

An objection that no exception was taken to the overruling of defendant's motion for a new trial *held* not sustainable.—*Morris v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1004.

The recitals of the record on appeal, as to affidavit for appeal and motion to set aside grant of new trial, *held* conclusive on the parties to the suit.—*Poston v. Williams* (Mo. App.) 1099.

On appeal the Supreme Court cannot try on affidavits the question whether the bill of exceptions was in fact signed and filed after the term.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

Where record contains no statement of facts, appellate court will not pass on instructions, unless it appears that they are so palpably erroneous as to have controlled the verdict.—*Luna v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 1061.

Where the agreed statement of facts is not approved by the district judge, it cannot be considered on appeal.—*Galveston, H. & S. A. Ry. Co. v. Perkins* (Tex. Civ. App.) 1067.

Parties to a cause *held* not authorized to waive approval of trial court to statement of facts, as required by Rev. St. 1895, art. 1379.—*Galveston, H. & S. A. Ry. Co. v. Keen* (Tex. Civ. App.) 1074.

§ 6. — Defects, objections, amendment, and correction.

Where, in an action against a sheriff, serving an attachment, for having taken insolvent sureties on a forthcoming bond, an order sustaining the attachment was not introduced below, it cannot be added to the record on appeal.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

In action against a sheriff for taking insolvent sureties on forthcoming bond, failure to allege that the attachment was sustained *held* not remediable by filing on appeal a copy of an order sustaining the attachment.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

The recitals of the bill of exceptions cannot supply the other necessary record entries.—*City of St. Charles ex rel. Budd v. Deemar* (Mo. Sup.) 469.

A mistake in a judgment describing lands sued for could be corrected by the pleading and evidence, and would not necessitate a reversal.—*Adkinson v. Porter* (Tex. Civ. App.) 43.

A probable clerical error in the transcript cannot be corrected by the appellate court. Resort must be had to certiorari.—*Smith v. Bunch* (Tex. Civ. App.) 559.

A statement of facts *held* not open to consideration on appeal, under Rev. St. 1895, art. 1382.—*Galveston, H. & S. A. Ry. Co. v. Perkins* (Tex. Civ. App.) 1067.

Certiorari *held* not to lie to secure approval of statement of facts nunc pro tunc.—*Galveston, H. & S. A. Ry. Co. v. Perkins* (Tex. Civ. App.) 1067.

§ 7. — Questions presented for review.

Where a bill of exceptions shows that depositions were read which are not in the bill, the sufficiency of evidence cannot be reviewed.—*Louisville & N. R. Co. v. Whitehead's Adm'r* (Ky.) 1128.

Where the bill of exceptions contains no exception taken at the time of the court's rulings, only such errors as appear in the record proper can be reviewed.—*Hartman v. City of Brunswick* (Mo. App.) 726.

An assignment of error as to admission of opinion *held* not to point out error.—*Smith v. Bunch* (Tex. Civ. App.) 559.

An instruction *held* not open to objection on appeal, in the absence of any statement of facts.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

In the absence of a statement of facts on appeal, assignments of error, based on the existence of facts proved in the trial court, cannot be considered, except where the charge is obviously erroneous in the light of the pleadings and verdict.—*Galveston, H. & S. A. Ry. Co. v. Perkins* (Tex. Civ. App.) 1067.

§ 8. Assignment of errors.

An assignment of error, insufficient because complaining of two distinct rulings, is not aided by propositions and statements in the brief.—*Cammack v. Rogers* (Tex. Sup.) 795.

Assignments of error in a case appealed on a statement of facts will not be considered, where not filed below.—*Gidcumb v. Gidcumb* (Tex. Civ. App.) 827.

The question whether answers of the jury to special issues entitled a party to a judgment cannot be considered on appeal, where the trial court set aside such findings and there was no assignment requiring a review of such ruling.—*Casey-Swasey Co. v. Manchester Fire Assur. Co.* (Tex. Civ. App.) 864.

§ 9. Briefs.

Where appellant failed to file and serve on respondent the abstract and briefs, as required by court rule 15, the appeal will be dismissed.—*O'Neal v. Saville* (Mo. App.) 726.

Affidavit held insufficient to excuse appellants' delay in filing their brief with the clerk of the trial court.—*Harris v. Bryson & Hartgrove* (Tex. Civ. App.) 548.

Where appellants' failure to file their briefs in the trial court in time deprived appellees of their right to 20 days to file their briefs before submission, the appeal will be dismissed.—*Harris v. Bryson & Hartgrove* (Tex. Civ. App.) 548.

Circumstances stated under which judgment will be affirmed at appellee's request, appellant having failed to file briefs.—*Davison v. Keeton* (Tex. Civ. App.) 1083.

Where an appellee has filed briefs asking an affirmance, the appeal will not be dismissed for appellant's failure to file briefs, though it constitutes an abandonment of the appeal.—*Davison v. Keeton* (Tex. Civ. App.) 1083.

§ 10. Dismissal, withdrawal, or abandonment.

Failure to set out judgment in the abstract of record held not ground for dismissing appeal.—*State ex rel. City of Stanberry v. Smith* (Mo. Sup.) 134.

Right of appellant to writ of mandamus compelling court of appeals to reinstate his appeal held not barred by laches.—*State ex rel. City of Stanberry v. Smith* (Mo. Sup.) 134.

§ 11. Review—Scope and extent in general.

A right judgment in equity will be affirmed, though based on reasoning different from that justifying it to the supreme court.—*Johnson v. Franklin Bank* (Mo. Sup.) 191.

The giving of an instruction that plaintiff was not entitled to recover under the pleadings and proof entitled the plaintiff to have the theory of law on which the case was tried reviewed on appeal.—*Kansas City v. Ferd Heim Brewing Co.* (Mo. App.) 302.

Where defendant's request for a peremptory instruction at the close of all the evidence was refused, he is entitled on appeal to a review of the evidence as a whole.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

On appeal in an action for injuries to minor, held, that case must be considered as though the minor were an adult, in so far as concerned his responsibility.—*Over v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.) 535.

§ 12. — Parties entitled to allege error.

In action against commercial agency for circulating report that plaintiff was not in sound financial condition, defendant held to have waived objection to certain instruction.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

A party cannot complain of a clause in an instruction given of the court's own motion which was contained in an instruction given at such party's request.—*Frank v. St. Louis Transit Co.* (Mo. App.) 239.

Defendant, who objected to evidence of a certain transaction, but in his own evidence went fully into the details thereof, could not predicate error on the overruling of his objection.—*Hunter v. Helsley* (Mo. App.) 719.

An appellant held not entitled to urge error in instructions which it invited by requesting other instructions on the same theory.—*Blom-Collier Co. v. Martin* (Mo. App.) 729.

An intervener in garnishment held entitled to raise question of legality of proceedings below.—*Raley v. Smith* (Tex. Civ. App.) 54.

An appellant cannot avail himself of errors in instructions, where he has asked charges containing the same erroneous matter.—*Over v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.) 535.

A party cannot complain of a charge submitting the issue as made in his pleading, and a refusal to submit it otherwise.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

On appeal by one defendant only, cross-assignment by another as to the judgment of plaintiff against him cannot be considered.—*Smith v. Bunch* (Tex. Civ. App.) 559.

A party cannot complain that a verdict does not name another party who is not claiming adversely to himself.—*May v. Martin* (Tex. Civ. App.) 840.

On appeal in action for injuries, criticised instruction held invited by the form of the charge requested by appellant.—*Baca v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 1073.

§ 13. — Amendments, additional proofs, and trial of cause anew.

On appeal to the county court, plaintiff has a right to amend and increase his claim for damages by the insertion of an item involved in the same transaction, though such increase has the effect of giving the Court of Civil Appeals jurisdiction.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

§ 14. — Presumptions.

Judgment for a sheriff, in a suit against him for taking insolvent sureties on a forthcoming bond, held to create a presumption of a finding of reasonable care to ascertain the financial condition of the sureties.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

Under the statute authorizing the trial court, in its discretion, to extend the period for filing the bill of exceptions, it will be presumed that its discretion was properly exercised.—*Dodd v. Guiseff* (Mo. App.) 304.

A judgment for defendant in an action on a special tax bill held not sustainable, where one of two defenses was improperly submitted to the jury, and it could not be determined on which defense the verdict was based.—*Heman v. Franklin* (Mo. App.) 314.

An order in vacation extending time for filing bill of exceptions will be presumed to be "for good cause shown," as authorized by Rev. St. 1899, § 728.—*Smith v. H. D. Williams Cooperative Co.* (Mo. App.) 315.

On an affidavit of a justice's clerk showing the appeal to be taken in time, it will be presumed that the appeal was so taken.—*United States Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co.* (Mo. App.) 364.

The record of a suit removed from a justice to the circuit court on the same day the summons was served held to sufficiently show that the writ of certiorari was not issued until after such service.—*Gossett v. Devorss* (Mo. App.) 731.

The burden is on an appellant to show reversible error, and the appellee is not bound to contest the points raised on the appeal.—*Gulf, C. & S. F. Ry. Co. v. Blanchard* (Tex. Civ. App.) 88.

In the absence of a statement of facts, held, that certain presumptions would obtain on a

writ of error, in an action of trespass to try title.—*Rountree v. Haynes* (Tex. Civ. App.) 435.

§ 15. — Discretion of lower court.

Unless a manifest abuse of discretion appears, action of trial judge in setting aside a verdict on conflicting evidence will not be interfered with.—*Dieckman v. Weirich* (Ky.) 1119.

Court of Appeals *held* slow to disturb action of circuit court in granting or refusing new trials.—*Floyd v. Paducah Ry. & Light Co.* (Ky.) 1122.

Setting aside a verdict for insufficiency of evidence *held* not an abuse of discretion.—*Stephens v. Deatherage Lumber Co.* (Mo. App.) 291.

Order granting a new trial will not be disturbed, unless an abuse of discretion is shown.—*Stephens v. Deatherage Lumber Co.* (Mo. App.) 291.

An application for a postponement on account of absent witnesses is addressed to the court's discretion.—*Central Texas & N. W. Ry. Co. v. Smith* (Tex. Civ. App.) 537.

Refusal of a severance *held* matter of discretion not reviewable; injury not being shown.—*Smith v. Bunch* (Tex. Civ. App.) 559.

§ 16. — Questions of fact, verdicts, and findings.

Where the evidence is conflicting, the jury, and not the appellate court, must pass on the weight thereof.—*Hutchinson v. Gorman* (Ark.) 793.

On the appeal of a suit against a sheriff for having taken insolvent sureties on a forthcoming bond, the chancellor's findings will not be disturbed, unless palpably against the weight of evidence.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

On appeals in equity, the chancellor's conclusions of fact should not be disturbed in matters of doubt.—*McDowell v. McDowell* (Ky.) 1022.

The findings of the chancellor will not be disturbed, where the proof is conflicting.—*Strong v. South* (Ky.) 1026.

In reviewing oral evidence in equity, the Supreme Court will defer somewhat to the chancellor's judgment.—*L. M. Rumsey Mfg. Co. v. Kaime* (Mo. Sup.) 470.

Conclusions of a referee on questions of fact, approved by the trial court, will not be disturbed, where the evidence is conflicting.—*Rector, etc., of Mt. Calvary Church v. Albers* (Mo. Sup.) 508.

An appellate court may set aside a verdict, where it is manifestly arbitrary and dictated by prejudice.—*Jeans v. Morrison* (Mo. App.) 235.

Where the evidence is conflicting, the general finding of the court, sitting as a jury, is conclusive on appeal.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Under Rev. St. 1899, § 801, a verdict on a second trial cannot be disturbed, because against the weight of the evidence.—*Dodd v. Guisefi* (Mo. App.) 304.

Verdict based partly on oral conflicting evidence cannot be disturbed on appeal.—*Dodd v. Guisefi* (Mo. App.) 304.

Where there is evidence to support a verdict, it will not be disturbed on appeal.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

The jury's finding of fact on conflicting evidence will not be disturbed on appeal.—*Helf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

In an action to recover goods alleged to have been fraudulently conveyed, findings cannot be set aside on appeal as contrary to the preponderance of the evidence.—*Blom-Collier Co. v. Martin* (Mo. App.) 729.

A finding of the trial judge as to the credibility of witnesses will not be reversed on appeal.—*Blom-Collier Co. v. Martin* (Mo. App.) 729.

A trial court's finding that alleged delays in making payments on a contract for the erection of a building were not unreasonable upheld.—*Ramlose v. Dollman* (Mo. App.) 917.

Ruling of trial court on affidavits showing misconduct of jury, opposed by counter affidavits, will not be disturbed on appeal.—*Gulf, C. & S. F. Ry. Co. v. Blanchard* (Tex. Civ. App.) 88.

The court on appeal will not pass on the weight of the evidence.—*M. A. Cooper & Co. v. Sawyer* (Tex. Civ. App.) 992.

§ 17. — Harmless error.

Where a servant in a distillery received injuries, confining him to his bed for several months, causing him great pain, and permanently injuring his arm, a verdict of \$600 *held* to show that exemplary damages were not allowed under instruction erroneous for allowing same.—*Kentucky Distilleries & Warehouse Co. v. Schreiber* (Ky.) 769.

The exclusion of a deposition was not prejudicial, where there was nothing new in the testimony of a witness, whose deposition was taken, and the admission thereof could not have affected the result.—*McDowell v. McDowell* (Ky.) 1022.

In an action on a policy, exclusion of evidence of the examining physician as to answers made by insured *held* harmless, where a copy of the application containing such answers was introduced.—*Michigan Mut. Life Ins. Co. v. Lester's Ex'r* (Ky.) 1100.

In an action on a policy, an instruction that, so far as insured's defense rested on an alleged misstatement of insured's age, it had failed, *held* harmless.—*Michigan Mut. Life Ins. Co. v. Lester's Ex'r* (Ky.) 1106.

Failure of an instruction in an action for injuries to confine the jury to compensatory damages *held* harmless.—*Louisville & N. R. Co. v. Crady* (Ky.) 1126.

In action for libel against commercial agency, *held*, that refusal of court to instruct that plaintiff could not recover, because of defendant's statement that they were behind and could not meet indebtedness, was not prejudicial to defendant.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In an action for the alienation of husband's affections, the erroneous admission of evidence tending to show a conceded fact *held* harmless.—*Love v. Love* (Mo. App.) 235.

Where the object of evidence was to show ill will of a witness toward a party, its exclusion was harmless, when the fact was abundantly proven by other evidence.—*Love v. Love* (Mo. App.) 235.

An instruction that the jury might assess punitive damages was, if error, harmless, when the jury refused to assess such damages.—*Love v. Love* (Mo. App.) 255.

The erroneous admission of evidence *held* harmless in view of instructions.—*Buckman v. Missouri, K. & T. Ry. Co.* (Mo. App.) 270.

Where the judgment is manifestly for the right party, it should be affirmed, regardless of errors occurring at the trial.—*S. Albert Grocery Co. v. Grossman* (Mo. App.) 292.

Defendants in an action on a note *held* not to be in a position to complain of a ruling excluding the note.—*First Nat. Bank v. Wells* (Mo. App.) 293.

In an action to recover a balance due for threshing wheat, instruction as to the date of the contract *held* not prejudicial.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

Where facts relating to a mortgage were made to appear by oral testimony, the exclusion of the mortgage was, if error, harmless.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

Where the judgment was right as a matter of law under the facts admitted, any formal errors in the trial were harmless.—*Carmony v. Hanick* (Mo. App.) 344.

Sustaining of a demurrer to a replication *held* harmless error.—*Dwyer v. Rohan* (Mo. App.) 384.

Error in refusing to strike out counterclaim, if any, *held* harmless.—*Dwyer v. Rohan* (Mo. App.) 384.

Failure to instruct not to award more damages than claimed in petition *held* harmless error.—*Noll v. St. Louis Transit Co.* (Mo. App.) 907.

Since the original pleadings in an action fully covered all the issues, an alleged error in permitting an amendment at the trial will not be considered on appeal.—*Ramlose v. Dollman* (Mo. App.) 917.

Where evidence admitted over a party's objection was not prejudicial to him, and did no harm, it furnishes him with no ground for complaint.—*Ramlose v. Dollman* (Mo. App.) 917.

Where plaintiff's own evidence showed that he was not entitled to recover, rulings adverse to him were not prejudicial on the merits.—*Cutshall v. McGowan* (Mo. App.) 933.

In an action by a bankruptcy trustee to set aside a preference, the introduction of defendant's motion to require security for costs is not ground for reversal.—*Calkins v. Farmers' & Mechanics' Bank* (Mo. App.) 1098.

Error in an instruction in action for injuries to trespasser on railroad bridge *held* harmless.—*McCowen v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 46.

In trespass, where it was in issue whether a hedge marked the boundary between plaintiff's and defendant's land, any error in instructions as to limitations *held* immaterial.—*Brown v. Johnson* (Tex. Civ. App.) 49.

In ejectment, the finding that defendant's grantors were not shown to be heirs of the original owner of the certificates *held*, if error, harmless.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

Use of word "verdict," instead of word "suit," in judgment, *held* harmless.—*Staacke Bros. v. Walker & Chilcoat* (Tex. Civ. App.) 408.

In an action on a bond, where the citation had attached thereto a copy of the petition, a want of fullness in the citation in stating the nature of the plaintiff's demand *held* not to prejudice defendant.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

In an action against a partnership, the individual members thereof, and the surety on a bond, where the evidence showed that one of the partners was insolvent and a nonresident, it was immaterial that proof of these facts was not made prior to the granting of a motion to dismiss as to him.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

In an action against a railroad for injuries to one crossing the track by a path, an instruction that, if the path had been used for a long time, defendant owed certain duties to those crossing it, *held* not prejudicial to plaintiff.—*Over v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.) 535.

Refusal to charge as to old and defective cars *held* not injurious to defendant railroad, in action for negligently transporting cattle.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

Error in judgment in mortgage foreclosure *held* harmless to defendant.—*Powers v. McKnight* (Tex. Civ. App.) 549.

Improper admission of evidence is not ground for reversal, where the trial is by the court.—*Smith v. Bunch* (Tex. Civ. App.) 559.

A defendant may not complain of a postponement of the trial not showing that he was injured by it.—*Smith v. Bunch* (Tex. Civ. App.) 559.

An exclusion of evidence was harmless, where the excluded facts were otherwise testified to by the same witness.—*Gulf, C. & S. F. Ry. Co. v. Brooks* (Tex. Civ. App.) 571.

Error in admitting certain evidence on rebuttal *held* harmless.—*Chicago, R. I. & P. Ry. Co. v. Buie* (Tex. Civ. App.) 853.

The erroneous admission of testimony should not work a reversal, where substantially the same testimony was allowed to be introduced without objection.—*St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Tex. Civ. App.) 976.

In action against railroad for injuries to a servant, an instruction as to assumption of risk *held* not erroneous.—*Galveston, H. & S. A. Ry. Co. v. Keen* (Tex. Civ. App.) 1074.

In an action against a street railway company for injuries by collision, error in admission in evidence of an ordinance not pleaded, and instructing in the language of the ordinance, *held* not prejudicial.—*Dallas Consol. Electric St. Ry. Co. v. Illo* (Tex. Civ. App.) 1076.

§ 18. — Error waived in appellate court.

The Court of Civil Appeals is not deprived of authority to decide a point defectively raised by an assignment which is not in strict compliance with the statute and the rules of the court.—*Cammack v. Rogers* (Tex. Sup.) 795.

§ 19. — Subsequent appeals.

All questions raised on a former appeal and that were in the record and might have been adjudicated, must be construed, on a subsequent appeal, as having been adjudicated.—*Dinkelspiel v. Central Kentucky Asylum for Insane* (Ky.) 771.

The trial court's ruling on a question having been sustained by the appellate court, it becomes the law of the case.—*Herf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

The decision of a question of law on a former appeal, on which judgment declaring the rights of the parties was not rendered, is not binding on second appeal.—*Magnolia Park Co. v. Tinsley* (Tex. Sup.) 5.

§ 20. Determination and disposition of cause.

Where a party to a cause is awarded a sum by judgment, and withdraws the same from the court on a reversal, he should be ordered to pay the sum into court, with 6 per cent., and not with 10 per cent. interest.—*Fox v. Willis* (Ky.) 743.

The court on appeal will not set aside the damages as excessive, unless the amount awarded shocks the judicial sense of right and justice.—*Malloy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 159.

Where a curative act was passed pending an appeal of an action to quiet title to swamp lands, but before decision, the appellate court had authority to apply and enforce such act on such appeal.—*Simpson v. Stoddard County* (Mo. Sup.) 700; *L. & J. H. Himmelberger v. Samp, Id.*

Where no instructions were asked or refused, and no exceptions preserved to the admission or rejection of evidence, and the judgment rendered can be upheld on any theory of law applicable to the facts, the court on appeal must affirm it.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Decision on sufficiency of evidence to show death before forfeiture, on appeal in suit on mu-

tual benefit certificate, *held* law of the case.—*Winter v. Supreme Lodge K. P.* (Mo. App.) 877.

Under Gen. Laws 1901, p. 122, c. 54, a remand from the Supreme Court or Courts of Civil Appeals, issued after the time limited has expired, is a sufficient basis for a judgment of dismissal of the action.—*Watson v. Boswell* (Tex. Civ. App.) 985.

Under Gen. Laws 1901, p. 122, c. 54, on filing in the trial court of a certificate of the clerk of the appellate court that a remand has not been taken out within the time limited, the action is properly dismissed, and costs taxed to plaintiff.—*Watson v. Mirike* (Tex. Civ. App.) 986.

§ 21. Liabilities on bonds and undertakings.

The petition in an action on appeal bond *held* defective.—*Hoskins v. Southern Nat. Bank* (Ky.) 786.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 3.

APPLICATION.

For continuance of criminal prosecution, see "Criminal Law," § 10.

For physical examination of party, see "Discovery," § 1.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of municipal officer, see "Municipal Corporations," § 3.

Of receiver, see "Receivers," § 2.

APPORTIONMENT.

Of local assessments, see "Municipal Corporations," § 8.

APPURTENANCES.

See "Easements."

ARBITRATION AND AWARD.

Submission to arbitration as consideration for note given in pursuance of award, see "Contracts," § 1.

§ 1. Submission.

It is not necessary that there be a legal cause of action to furnish a basis for an arbitration.—*Downing v. Lee* (Mo. App.) 721.

§ 2. Award.

One who accepts an award cannot contend that the submission was not to arbitration, but to appraisement.—*Downing v. Lee* (Mo. App.) 721.

Proof that a controversy about a deed had been submitted to arbitration *held* properly excluded.—*Royals v. Lacey* (Tex. Civ. App.) 1062.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 2.

In criminal prosecutions, see "Criminal Law," § 11.

ARREST.

See "Bail"; "Prisons."

Illegal arrest, see "False Imprisonment."

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 16.

ASSAULT AND BATTERY.

Liability of master for assault by employé, see "Master and Servant," § 8.

§ 1. Civil liability.

In a civil action for assault, evidence of particular acts of the plaintiff going to demonstrate his character for violence is inadmissible.—*Houston & T. O. R. Co. v. Bell* (Tex. Civ. App.) 56.

Evidence in action for assault *held* not to show any act of plaintiff warranting admission of evidence of his general character for violence.—*Houston & T. O. R. Co. v. Bell* (Tex. Civ. App.) 56.

§ 2. Criminal responsibility.

Where one by abuse provokes another, so that the latter attacks him, and the former injures the attacking party, the defense of self-defense is not available.—*Shaw v. State* (Tex. Cr. App.) 1046.

Where defendant was charged with an aggravated assault, and only this feature of the case was submitted to the jury, a verdict finding defendant guilty as charged in the indictment was sufficient.—*Lockland v. State* (Tex. Cr. App.) 1054.

In a prosecution for assault, certain evidence by the state *held* admissible as against attempted justification by defendant.—*Lockland v. State* (Tex. Cr. App.) 1054.

Where defendant assaulted an agent after allowing him to take peaceable possession of a machine, evidence by the state that the machine was in good condition *held* relevant to rebut certain testimony of defendant.—*Lockland v. State* (Tex. Cr. App.) 1054.

Where defendant allowed an agent to take peaceable possession of a sewing machine, and then assaulted such agent, evidence as to the terms of the contract in reference to the possession of such machine was immaterial.—*Lockland v. State* (Tex. Cr. App.) 1054.

In a prosecution for an aggravated assault, where a pistol was not used or attempted to be used by defendant as a bludgeon, it will be presumed, in the absence of evidence to the contrary, that such pistol was loaded, and so was a deadly weapon.—*Lockland v. State* (Tex. Cr. App.) 1054.

Under White's Ann. Pen. Code 1895, art. 680, one who has parted with the possession of personal property may not regain it by an assault.—*Lockland v. State* (Tex. Cr. App.) 1054.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of damages, see "Damages," § 7.

Of expenses of public improvements, see "Municipal Corporations," §§ 8, 9.

Of loss on insured, see "Insurance," § 5.

Of tax, see "Taxation," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 8.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

Transfers of particular species of property, rights, or instruments.

See "Covenants," § 1; "Insurance," § 6; "Judgment," § 9; "Landlord and Tenant," § 3.

Of partnership chose in action by surviving partner, see "Partnership," § 3.

§ 1. Requisites and validity.

Complaint in action on judgment *held* demurrable for failure to show proper assignment of cause of action to plaintiff, under Laws 1899, p. 154.—*Fordyce v. McPhetridge & Johnson* (Ark.) 1096.

§ 2. Actions.

Attorneys, to whom plaintiff has assigned an interest in her cause of action, cannot be made parties to the suit on motion of the adverse party.—*Galveston, H. & S. A. Ry. Co. v. Mathes* (Tex. Civ. App.) 411.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.**§ 1. Construction and operation in general.**

A general assignment for the benefit of his creditors by one holding trust property does not include the trust property or divest him of the power to convey it.—*Rutherford v. Loving* (Tex. Civ. App.) 418.

ASSOCIATIONS.

See "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 15.

Presumption as to government of voluntary association by parliamentary rules, see "Parliamentary Law."

ASSUMPTION.

Of risk by employe, see "Master and Servant," § 6.

ATTACHMENT.

See "Execution"; "Garnishment."

Constitutional guaranty against impairment of obligation of contracts as applied to statutes relating to dissolution of attachment, see "Constitutional Law," § 3.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

Exemptions, see "Exemptions"; "Homestead."

§ 1. Wrongful attachment.

An allegation in a complaint in an action for wrongful attachment *held*, as against a general demurrer, a mere recitation of the effect of the judgment in the attachment suit, and not an allegation of return of the attached property.—*Chandler v. Howell* (Tex. Civ. App.) 426.

ATTENDANCE.

Of witness, see "Witnesses," § 1.

ATTORNEY AND CLIENT.

Allowance to administrator for counsel fees, see "Executors and Administrators," § 2.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 2.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 11.

Attorneys in fact, see "Principal and Agent." Attorney to whom interest in claim has been assigned as party to action against assignor, see "Assignments," § 2.

Fraud of attorneys as ground for setting aside judgment, see "Judgment," § 4.

§ 1. Retainer and authority.

The authority of an attorney to represent the client in an election contest having terminated, authority to collect a sum allowed by the Legislature to reimburse his client for expenses incurred will not be implied.—*Hallam v. Coulter* (Ky.) 772.

An attorney of record, who prosecutes a suit to judgment, has authority to receive the money due on the judgment.—*Rhinehart v. New Madrid Banking Co.* (Mo. App.) 315.

A general attorney of a carrier *held* authorized to agree that hearsay testimony might be introduced in consideration of the abandonment of an attempt to take an injured person's deposition in a proceeding to perpetuate testimony.—*Thompson v. Ft. Worth & R. G. Ry. Co.* (Tex. Civ. App.) 29.

§ 2. Duties and liabilities of attorney to client.

An assignment of a father's entire interest in his son's estate to his attorney *held* invalid.—*Barrett v. Ball* (Mo. App.) 865.

A suit to set aside an assignment of plaintiff's interest in an estate to an attorney who had previously represented him will be considered in the same manner as though the relation existed at the time of the assignment.—*Barrett v. Ball* (Mo. App.) 865.

§ 3. Compensation and lien of attorney.

Under Ky. St. 1890, § 107, an attorney's lien does not arise on an appropriation made by the Legislature to reimburse his client for expenses in an election contest.—*Hallam v. Coulter* (Ky.) 772.

An attorney rendering services in the collection of an inheritance due a minor *held* to have no lien on the inheritance.—*Kersey v. O'Day* (Mo. Sup.) 481.

Attorneys, reducing claim to judgment under contract for its collection, *held* entitled to agreed commission, even though judgment was collected by another.—*Raley v. Smith* (Tex. Civ. App.) 54.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

Of attorney, see "Attorney and Client," § 1.

Of road commissioner, see "Highways," § 2.

AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 2.

AWARD.

See "Arbitration and Award," § 2.

BAGGAGE.

Of passenger, see "Carriers," § 12.

BAIL.**§ 1. In criminal prosecutions.**

Under Cr. Code Prac. §§ 82, 85, a bail bond *held* not invalid as to the sureties because of insufficient description of offense.—*Allen v. Commonwealth* (Ky.) 1027.

In scire facias on a forfeited bail bond, the judgment nisi must be introduced in evidence.—*Nelson v. State* (Tex. Cr. App.) 398.

A plea of non est factum is not necessary, in scire facias on a forfeited bail bond, where the bond is not signed at all.—*Nelson v. State* (Tex. Cr. App.) 398.

Unsigned bail bond *held* absolutely void.—*Nelson v. State* (Tex. Cr. App.) 398.

Appeal dismissed on account of defect in the record for failure to file recognizance in proper time.—*Douthitt v. State* (Tex. Cr. App.) 809.

Under Code Cr. Proc. art. 910, seizure of defendant on *capias pro fine* after affirmation of conviction *held* to satisfy recognizance.—*Carleton v. State* (Tex. Cr. App.) 1044.

Recognizance, on appeal from conviction of peddling stoves without a license, *held* fatally defective, under Code Cr. Proc. 1895, art. 887.—*Hannon v. State* (Tex. Cr. App.) 1053.

Under Code Cr. Proc. 1895, art. 887, where a recognizance on appeal from conviction of a misdemeanor fails to state punishment assessed, the appeal will be dismissed.—*Jackson v. State* (Tex. Cr. App.) 1055.

BAILMENT.

See "Banks and Banking," § 2; "Carriers," §§ 2-6; "Livery Stable Keepers"; "Pledges"; "Warehousemen."

Distinguished from sale, see "Sales," § 1. Embezzlement or larceny by bailee, see "Embezzlement."

A bailee of third persons can recover possession of the property as against the levy of an attachment running against her husband.—*Vermillion v. Parsons* (Mo. App.) 994.

BALLOTS.

See "Elections," § 1.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Petition, adjudication, warrant, and custody of property.

Under Bankr. Act. 1898, § 70, subd. 5 (30 Stat. c. 541 [U. S. Comp. St. 1901, p. 8451]), and section 87d [page 3449], a pledge by a bankrupt of personal property, accepted by the pledgee in good faith and without notice of the bankruptcy proceedings, before adjudication of bankruptcy, *held* valid.—*Kennedy v. Pierce's Loan Co.* (Mo. App.) 357.

Adjudication in bankruptcy is not *res judicata* against the rights of a creditor in bankrupt's property acquired prior to adjudication.—*Pepperdine v. Bank of Seymour* (Mo. App.) 890.

Resistance by a creditor, under Bankr. Act 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 8418], of bankruptcy proceedings against his debtor, does not bind him as a party by the judgment.—*Pepperdine v. Bank of Seymour* (Mo. App.) 890.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

Bankr. Act 1898, § 67, subsec. "f," 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 8450], *held* to apply to attachments sued out in state as well as in federal courts.—*Wood v. Carr* (Ky.) 762.

Under Bankr. Act. c. 7, § 87f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8450], judgment entered in an attachment suit within four months of institution of bankruptcy proceedings does not avoid lien of attachment acquired more than four months prior to such proceedings.—*Pepperdine v. Bank of Seymour* (Mo. App.) 890.

In a suit by a trustee in bankruptcy to avoid a preference, the adjudication is admissible.—*Calkins v. Farmers' & Mechanics' Bank* (Mo. App.) 1098.

In a bankruptcy trustee's action to avoid a preference, it is proper to show that defendant's attorney was present when the bankruptcy proceedings were had, as showing notice thereof.—*Calkins v. Farmers' & Mechanics' Bank* (Mo. App.) 1098.

In a trustee's suit to avoid a preference, an instruction assuming the bankrupt's insolvency and that he intended a preference *held* not erroneous.—*Calkins v. Farmers' & Mechanics' Bank* (Mo. App.) 1098.

§ 3. Rights, remedies, and discharge of bankrupt.

A court is bound to take notice of a discharge in bankruptcy under the national bankruptcy act of 1898, when pleaded.—*Wood v. Carr* (Ky.) 762.

BANKS AND BANKING.

§ 1. Banking corporations and associations.

Persons intending to conduct private banking business *held* entitled to a certificate, notwithstanding the fact that they intend to conduct business in their department store. Rev. St. 1899, §§ 1277, 1299.—*State ex rel. Jones v. Cook* (Mo. Sup.) 489.

Under Rev. St. 1899, §§ 1278, 1299, 1301, individuals desiring to conduct private banking business in city of over 150,000 *held* not required to have paid-up capital of over \$5,000.—*State ex rel. Jones v. Cook* (Mo. Sup.) 489.

§ 2. Functions and dealings.

Notice to a bank, in which plaintiff's attorney had deposited money collected, that there was a certain amount of the deposit due plaintiff, *held* insufficient to charge the bank with liability to plaintiff therefor.—*Rhinehart v. New Madrid Banking Co.* (Mo. App.) 315.

Where an attorney deposited money collected for plaintiff to his credit in a bank, the trust relation between plaintiff and the attorney did not charge the bank as trustee for plaintiff.—*Rhinehart v. New Madrid Banking Co.* (Mo. App.) 315.

BAR.

Of action by former adjudication, see "Judgment," § 6.

Of dower, see "Dower," § 1.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 15.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 3.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 2.

BILLS AND NOTES.

Pledge of note, see "Pledges."

Submission to arbitration as consideration for note, see "Contracts," § 1.

§ 1. Requisites and validity.

Notes given to a national bank, in pursuance of an agreement with the makers for the organization of a corporation to purchase and operate a flouring mill acquired by the bank, *held* based on a sufficient consideration.—*Third Nat. Bank v. Reichert* (Mo. App.) 893.

individual capacity.—*Warford v. Temple* (Ky.) 1023.

In action on notes, the pleadings *held* to show that they were the obligation of a school district, and not of the individual signers.—*Warford v. Temple* (Ky.) 1023.

§ 3. Modification, renewal, and rescission.

A subsequent verbal agreement with surety, without consideration, in derogation of a stipulation in a note as to notice of extension of time, will not be upheld.—*First Nat. Bank v. Wells* (Mo. App.) 293.

The cancellation of an old note is sufficient consideration for a new one in lieu thereof.—*Zuendt v. Doerner* (Mo. App.) 873.

§ 4. Rights and liabilities on indorsement or transfer.

Bona fide purchaser of note, who has discounted the same to bank and takes it up on dishonor, assumes the position of bank as a bona fide purchaser.—*Coyne v. Anderson's Ex'rs* (Ky.) 753.

Bona fide purchaser of note *held* not affected by notice to his agent of equitable defenses on renewal thereof.—*Coyne v. Anderson's Ex'rs* (Ky.) 753.

One cashing a check on a forged indorsement *held* liable to the true owner.—*Meyer v. Chas. Rosenheim & Co.* (Ky.) 1129.

A purchaser of a note given for a part of the price of land after maturity *held* to take the same subject to all defenses.—*Williams v. Baker* (Mo. App.) 339.

The purchaser of a note given by the purchaser of a machine who knows of any breach of warranty in the contract of sale takes it subject to any defense that could have been made to a suit on it by the seller of the machine.—*J. I. Case Threshing Mach. Co. v. Hall* (Tex. Civ. App.) 835.

§ 5. Actions.

Holder of a note *held* not to be presumed to have surrendered it for a renewal note before the signatures of the sureties on the old note were attached to the new note.—*First Nat. Bank v. Wells* (Mo. App.) 293.

In view of customs prevailing in country banks, *held*, that the law will not imply an acceptance of a renewal note before signed by the old sureties.—*First Nat. Bank v. Wells* (Mo. App.) 293.

A subsequent purchaser of land *held* not estopped to set up a breach of warranty of title as a defense to a note for a part of the purchase price by letters written by her grantors to plaintiff's assignor, the payee of the note.—*Williams v. Baker* (Mo. App.) 339.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.

Of land, see "Vendor and Purchaser," § 2.

Of property held on secret trust, see "Trusts," § 3.

Pledges as bona fide purchasers, see "Pledges."

BONDS.

Municipal bonds, see "Municipal Corporations," § 13.

Of liquor dealers, see "Intoxicating Liquors," § 3.

Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Sheriffs and Constables," § 2.

On appeal from justice's court, see "Justices of the Peace," § 2.

On appeal in election contest, see "Elections," § 2.

On appeal in criminal prosecutions, see "Criminal Law," § 17.

BOOKS OF ACCOUNT.

As evidence in civil actions, see "Evidence," § 8.

BOUNDARIES.

See "Fences"; "Municipal Corporations," § 1.

§ 1. Description.

Calls in office surveys made under a mistake may be disregarded, and effect given the real intention of the person who made the field notes.—*Sellman v. Sellman* (Tex. Civ. App.) 48.

§ 2. Evidence, ascertainment, and establishment.

Where adjoining landowners agree that a certain hedge is the boundary line, such agreement settles all questions between them as to the extent of their ownership.—*Brown v. Johnson* (Tex. Civ. App.) 49.

In an action to establish a boundary, the original field notes are admissible at the instance of either party.—*Hamilton v. Saunders* (Tex. Civ. App.) 1069.

Where plaintiff introduced the original field notes of the survey in a boundary dispute, defendant was entitled to show that the line contended for by him corresponded with one or more of the calls of such field notes.—*Hamilton v. Saunders* (Tex. Civ. App.) 1069.

BREACH.

Of condition, see "Insurance," § 8.

Of contract, see "Contracts," § 4; "Sales," § 2.

Of warranty, see "Insurance," § 8; "Sales," §§ 3, 5.

BREACH OF MARRIAGE PROMISE.

A petition for breach of marriage contract *held* not demurrable because alleging the contract was to be performed "on the _____ day of July, 1901."—*Grubbs v. Pence* (Ky.) 785.

Evidence *held* not tending to show that a person was not at a certain place at a certain time.—*Grubbs v. Pence* (Ky.) 785.

An instruction *held* to properly state the measure of damages for breach of a marriage contract.—*Grubbs v. Pence* (Ky.) 785.

BRIDGES.

§ 1. Establishment, construction, and maintenance.

Gen. St. 1865, c. 69, § 16, as amended by Rev. St. 1879, §§ 929, 953, *held* to authorize the organization of a corporation to maintain and operate a railroad toll bridge.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 453.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 9.

BROKERS.

See "Principal and Agent."

Insurance brokers, see "Insurance," § 2.

§ 1. Compensation and lien.

When a broker produces a purchaser willing to buy on the seller's terms, he is entitled to his commissions, though the sale is not consummated, if the fault is not his.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

Where a principal told her broker that the title to property intrusted to him was good, she cannot evade payment of commissions to him by proof of a lien on the property.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

A broker cannot be held responsible for a disagreement between the purchaser, secured by him, and his principal, as to title to the property.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

§ 2. Actions for compensation.

In an action for commissions for the lease of certain property, evidence *held* not to show that plaintiff was acting in the interests of tenant, so as to preclude recovery.—*Rutledge & Kilpatrick Realty Co. v. Neely* (Mo. App.) 359.

In an action by broker for commissions, where principal had stated that her title was perfect, evidence of what the purchaser would have done, had there been an incumbrance, was properly excluded.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

Whether a broker had secured a purchaser for property, so as to entitle him to a commission, *held* a question for the jury.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

BUILDING AND LOAN ASSOCIATIONS.

Notice of withdrawal from a building and loan association by a shareholder gives him no right to preference in the distribution of the company's assets.—*Reitz v. Hayward* (Mo. App.) 374.

A credit allowed a withdrawing shareholder in a building and loan association of interest on interest rightly paid *held* erroneous.—*Reitz v. Hayward* (Mo. App.) 374.

A tender of settlement of a loan advanced by a building and loan association releases the further payment of interest.—*Reitz v. Hayward* (Mo. App.) 374.

Under Rev. St. 1899, § 1370, the withdrawal of stock from building and loan association on payment of a loan is not prohibited, since section 1368 expressly provides therefor.—*Reitz v. Hayward* (Mo. App.) 374.

Notice of intention to repay a loan advanced by a building and loan association, as required by Rev. St. 1899, § 1368, *held* waived.—*Reitz v. Hayward* (Mo. App.) 374.

A set-off in favor of a withdrawing shareholder in a building and loan association, on account of stock assigned him, *held* properly refused.—*Reitz v. Hayward* (Mo. App.) 374.

A withdrawing shareholder in a building and loan association is entitled to be credited on his loan with dividends earned previous to the association's insolvency.—*Reitz v. Hayward* (Mo. App.) 374.

A withdrawing shareholder in a building and loan association *held* chargeable with interest on the full value of the loan advanced.—*Reitz v. Hayward* (Mo. App.) 374.

Under Rev. St. 1899, § 1368, the credit to be allowed a withdrawing shareholder in a building and loan association for his shares is to be computed according to their actual value.—*Reitz v. Hayward* (Mo. App.) 374.

Withdrawal by a shareholder from a building and loan association before insolvency gives him a right to be credited with the withdrawal value of pledged stock and dividends previously declared.—*Reitz v. Hayward* (Mo. App.) 374.

A stockholder in a building association cannot claim that his contract of membership and stock subscription was a fraud on the usury law, under Rev. St. 1899, § 2814, Rev. St. 1899, § 1364.—*Stanley v. Verity* (Mo. App.) 727.

Stockholder in building association *held* not entitled to have monthly payments on stock credited on loan.—*Stanley v. Verity* (Mo. App.) 727.

Act of building and loan association in arbitrarily fixing the time when certain stock would mature *held* ultra vires.—*Williams v. Verity* (Mo. App.) 732.

Assignee of building and loan association *held* estopped by ultra vires representation from claiming that a deed of trust had not been extinguished.—*Williams v. Verity* (Mo. App.) 732.

BURGLARY.**§ 1. Offenses and responsibility therefor.**

Temporary ownership or actual care and control of stolen property constitutes ownership, in the sense used in an indictment for burglary.—*Blackwell v. State* (Tex. Cr. App.) 960.

§ 2. Prosecution and punishment.

In a prosecution for burglary, evidence as to the finding of some of the stolen goods *held* admissible.—*McAnally v. State* (Tex. Cr. App.) 404.

In a prosecution for burglary, evidence as to the finding of some of the stolen goods a week after the burglary *held* admissible.—*McAnally v. State* (Tex. Cr. App.) 404.

In a prosecution for burglary, evidence as to the finding of some of the stolen goods while defendant was in jail *held* admissible.—*McAnally v. State* (Tex. Cr. App.) 404.

In a prosecution for burglary, certain articles *held* admissible in evidence, although not positively identified as those stolen.—*McAnally v. State* (Tex. Cr. App.) 404.

In a prosecution for burglary, evidence as to the arrest of one having some of the stolen goods *held* admissible.—*McAnally v. State* (Tex. Cr. App.) 404.

Evidence *held* to show the person occupying the house burglarized was in temporary ownership or actual control of the property.—*Blackwell v. State* (Tex. Cr. App.) 960.

Evidence *held* to sustain a conviction of burglary.—*Blackwell v. State* (Tex. Cr. App.) 960.

BY-LAWS.

Of municipal corporation, see "Municipal Corporations," § 2.

CANALS.

See "Waters and Water Courses," § 2.

CANCELLATION OF INSTRUMENTS.

See "Reformation of Instruments."

Cancellation of insurance policy, see "Insurance," § 7.

Cancellation of leases of public lands, see "Public Lands," § 2.

Rescission of contract, see "Contracts," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Right of action and defenses.

Facts *held* to show sufficient grounds for cancellation of a deed given by a father to his son in consideration of support for the rest of such father's life.—*McDowell v. McDowell* (Ky.) 1022.

Allowance made in a decree canceling a deed given in consideration of support of one of the parties *held* sufficient compensation for expenses incurred in such support to the date of the cancellation.—*McDowell v. McDowell* (Ky.) 1022.

CAPITAL.

Of bank, see "Banks and Banking," § 1.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

§ 1. Control and regulation of common carriers.

Under Rev. St. 1895, arts. 4565, 4566, *held*, that the court's inquiry, in an action against railroad commission, is not limited to whether a freight rate amounts to the taking of property without due process of law.—*Railroad Commission of Texas v. Weld & Neville* (Tex. Sup.) 529.

The freight rate on cotton made by the railroad commission *held* not unreasonable and unjust to plaintiff, within Rev. St. 1895, art. 4566.—*Railroad Commission of Texas v. Weld & Neville* (Tex. Sup.) 529.

An interstate shipment of corn *held* to have terminated at Texarkana, and a further shipment from that point to G. was an intrastate shipment, for which defendant was only entitled to charge the rates fixed by the state railroad commission.—*Gulf, C. & S. F. Ry. Co. v. State* (Tex. Civ. App.) 429.

In action under Rev. St. 1895, art. 4574, against railroad company for unjust discrimination, evidence *held* insufficient to show that railroad had known that certain cotton billed abroad was really intended as a local shipment.—*State v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 572.

The intent that the destination of a shipment shall be a point in another state *held* to make it an interstate shipment.—*Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.* (Tex. Civ. App.) 845.

§ 2. Carriage of goods.

Railroad corporation cannot refuse to take freight from shippers.—*Bedford-Bowling Green Stone Co. v. Oman* (Ky.) 1038.

Railroad company *held* not liable for an overcharge for freight exacted by a connecting carrier, in the absence of any showing that it ever received any part of such overcharge.—*Chicago, R. I. & T. Ry. Co. v. Henderson* (Tex. Civ. App.) 38.

Where goods are not demanded by a consignee immediately after their arrival, the carrier is liable only as a warehouseman.—*St. Louis & S. F. R. Co. v. Akers* (Tex. Civ. App.) 848.

§ 3. Bills of lading, shipping receipts, and special contracts.

In Missouri a carrier is not required to notify a consignee of the arrival of a shipment.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

A station agent may bind railroad by verbal contract to furnish freight cars at a given time.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

§ 4. — Transportation and delivery by carrier.

A failure by a carrier to give a consignee a notice required by local usage *held* to constitute a breach of the contract of shipment.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

whether a carrier gave a consignee personal notice of the arrival of a shipment.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

A usage requiring a carrier to notify a consignee of the arrival of a shipment is not dispensed with by a stipulation that the goods are to be called for on the day of their arrival.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

A uniformly observed usage at a certain place, requiring carrier to give consignee notice of arrival of shipment, *held* binding on a carrier.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

Facts *held* to make it a question for the jury whether a consignee received notice by mail of the arrival of a shipment.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

Initial carrier may select route, in absence of selection by shipper.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

§ 5. — Loss of or injury to goods.

A shipper *held* not authorized to abandon goods and recover for them, except on a showing that the carrier negligently kept them in an unsafe place till they materially deteriorated.—*Hurf & Frerichs Chemical Co. v. Lackawanna Line* (Mo. App.) 346.

A carrier is liable for damages resulting from deviation from route selected by shipper.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

§ 6. — Connecting carriers.

Authority of the station agent to bind a railroad on a contract of carriage beyond its terminus may be inferred from course of dealing.—*Faulkner v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 927.

Station agent's authority to bind a railroad on a contract of carriage to a point beyond its line must be proved.—*Faulkner v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 927.

Court *held* to have jurisdiction, under express provisions of Gen. Laws 1899, p. 214, of action against several connecting carriers for breach of contract to furnish return passage.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

Acceptance of freight from a connecting line *held* ratification of contract of shipment, whereby plaintiff was to receive return passage, under Rev. St. art. 331a, relating to liability of connecting carriers on contracts for through shipment.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

Where a connecting railroad was not sued as a partner, the terms of a contract limiting its liability to injuries caused on its own line were valid.—*Askew v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 846.

§ 7. Carriage of live stock.

In action by shipper for loss of live stock in transit, issues as to whether amount realized by carrier on forwarding goods to market and selling them was all that could be realized, and whether amount tendered was amount realized, *held* not determinable under pleadings.—*Spalding v. Chicago, B. & Q. R. Co.* (Mo. App.) 274.

The fact that a shipment of live stock is delayed, and the property injured and depreciated in value, will not justify the shipper in abandoning the property and charging the carrier as for a conversion.—*Spalding v. Chicago, B. & Q. R. Co.* (Mo. App.) 274.

A shipper's refusal to care for live stock en route, as the contract required, will not relieve the carrier from the duty to transport and care for them at the shipper's expense.—*Spalding v. Chicago, B. & Q. R. Co.* (Mo. App.) 274.

In an action against a railroad company for injury to cattle caused by delay of connecting carrier, evidence of previous course of dealing *held* sufficient to submit the issue of station agent's authority to make the contract to the jury.—*Faulkner v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 927.

In an action against a railroad company for injury to cattle caused by delay of connecting carrier, evidence *held* sufficient to submit the issue of the construction of the contract as for through carriage to the jury.—*Faulkner v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 927.

In an action against a railroad company for injury to stock in transit, the charge *held* not erroneous, as authorizing a recovery for injuries sustained while the stock was in the possession of a connecting carrier.—*Chicago, R. I. & T. Ry. Co. v. Henderson* (Tex. Civ. App.) 36.

Severe cold weather and snow in Missouri in December *held* not an "act of God," so as to exempt a carrier from damage to cattle resulting therefrom, when the exposure was caused by unreasonable delay.—*Texas & P. Ry. Co. v. Smissen* (Tex. Civ. App.) 42.

In an action for injuries to live stock, an instruction that defendant was liable for all injuries received on its line *held* too broad.—*Gulf, C. & S. F. Ry. Co. v. Butler* (Tex. Civ. App.) 84.

Where plaintiff sold cattle which died in transit, the amount received therefor should be deducted from damages recoverable from the carrier for the loss of the cattle.—*Gulf, C. & S. F. Ry. Co. v. Butler* (Tex. Civ. App.) 84.

The measure of a carrier's liability for cattle dying from injuries in transit, arising from the carrier's negligence, is their market value at the point of destination.—*Gulf, C. & S. F. Ry. Co. v. Butler* (Tex. Civ. App.) 84.

In an action against a carrier for injuries to live stock, evidence as to the notice to defendant of the arrival of the stock by a connecting carrier *held* properly excluded.—*Gulf, C. & S. F. Ry. Co. v. Butler* (Tex. Civ. App.) 84.

A contract which shippers expected, when they delivered the stock to the carrier, to sign, *held* to govern.—*Texas P. Ry. Co. v. Byers Bros.* (Tex. Civ. App.) 427.

A contract of shipment of stock *held* not to require the carrier to feed and water, but only to furnish facilities.—*Texas P. Ry. Co. v. Byers Bros.* (Tex. Civ. App.) 427.

Connecting carriers *held* not jointly liable on an interstate contract of shipment, limiting the liability of each to its line.—*Texas P. Ry. Co. v. Byers Bros.* (Tex. Civ. App.) 427.

Where there was no evidence as to increased damages resulting from shipment of cattle over a longer route than that selected by shipper, submission of such issue *held* error.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

In an action against a railroad for negligently transporting cattle, evidence of death of cattle after leaving cars *held* admissible.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

Evidence of customary running time of cattle trains over route selected by shipper *held* admissible, where railroad deviated from such route, but not evidence as to running time of one particular train.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

Shippers *held* not bound to demand other cars in writing to entitle them to recover for injuries to cattle by reason of defective cars.—*Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

§ 8. Carriage of passengers.

A carrier is entitled to limit the use of an excursion ticket, sold at a reduced rate, to any

particular train or trains.—*England v. International & G. N. R. Co.* (Tex. Civ. App.) 24.

The relation of carrier and passenger continues after a man has left a railroad car, until he has had reasonable time to leave the depot, without reference to the object of his journey.—*Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 981.

§ 9. — Personal injuries.

Evidence *held* not to show that railroad was guilty of negligence causing injury to passenger.—*Illinois Cent. R. Co. v. Boles* (Ky.) 1034.

In an action for injuries sustained in a railway collision, plaintiff *held* to have made out prima facie case, without charging or showing specific negligence of any particular servant.—*Malloy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 159.

Under the evidence, in an action for injuries sustained by a passenger on an electric car on account of a collision, a certain instruction requested by defendant *held* properly refused.—*Hennessy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 162.

Railroad company *held* guilty of negligence in permitting collision in which plaintiff was injured.—*Hennessy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 162.

Evidence in an action for injury to a passenger by derailment of a street car *held* sufficient to authorize the jury to find that the car left the track because of defects in the flange of a wheel, and because the car was run around a curve at the usual rate of speed at which sound cars are run around it.—*Johnson v. St. Louis & S. Ry. Co.* (Mo. Sup.) 173.

The negligence charged by a petition in an action for injury to a passenger from derailment of a car *held* not accurately specific.—*Johnson v. St. Louis & S. Ry. Co.* (Mo. Sup.) 173.

There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

A carrier by elevator is not an insurer, but is required to exercise the highest degree of care.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

A carrier by elevator must allow reasonable time for passengers to enter and leave the car with safety.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

In an action for injuries received by a passenger in an elevator, the rule that plaintiff cannot count on one cause of action and recover on another *held* not to apply.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

Duty of elevator operator to passengers, when one of them directs him to stop at a certain floor, defined.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

Duty of elevator operator, before starting his car after stopping at a certain floor, defined.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

A street railway *held* not liable to one who, trying to catch a car, falls over a stump in the street around which the company had built a platform.—*Lucas v. St. Louis & S. Ry. Co.* (Mo. Sup.) 589.

In an action for injuries to a passenger, an instruction defining negligence *held* correct.—*St. Louis Southwestern Ry. Co. v. Harrison* (Tex. Civ. App.) 38.

In an action for injuries to a passenger, an instruction *held* not objectionable as charging that a failure to stop a sufficient length of time to enable the passenger to alight in safety was

negligence as a matter of law.—*St. Louis Southwestern Ry. Co. v. Harrison* (Tex. Civ. App.) 38.

In an action for injuries to a passenger, a requested instruction *held* erroneous, as making the question of negligence depend on the conductor's belief, and as requiring ordinary care, instead of the care owed by carriers of passengers.—*St. Louis Southwestern Ry. Co. v. Harrison* (Tex. Civ. App.) 38.

In an action for injuries to a passenger in attempting to alight, an instruction that if the train was held a reasonable length of time after the station was announced, and plaintiff failed to get off until after the train was started, she could not recover, *held* improperly refused.—*Galveston, H. & S. A. Ry. Co. v. Mathes* (Tex. Civ. App.) 411.

An instruction that a carrier owed a passenger no duty to stop at an intermediate station *held* properly refused.—*Galveston, H. & S. A. Ry. Co. v. Mathes* (Tex. Civ. App.) 411.

In an action for injuries to a passenger in attempting to alight, a requested instruction, erroneously refused, *held* not covered by the charge.—*Galveston, H. & S. A. Ry. Co. v. Mathes* (Tex. Civ. App.) 411.

A railroad must equip its engines with the most approved spark arresters in use to prevent the escape of sparks or cinders.—*St. Louis Southwestern Ry. Co. v. Parks* (Tex. Civ. App.) 439.

Allegation in complaint against railroad for personal injuries *held* merely matter of inducement, and not of substance.—*St. Louis Southwestern Ry. Co. v. Parks* (Tex. Civ. App.) 439.

Proof that plaintiff was struck in the eyes by sparks from defendant's engine *held* to make out a prima facie case of negligence.—*St. Louis Southwestern Ry. Co. v. Parks* (Tex. Civ. App.) 439.

Negligence of railroad, resulting in injury to passenger, *held* to be so gross as to make almost any kind of error in the charge on negligence immaterial.—*Central Texas & N. W. Ry. Co. v. Smith* (Tex. Civ. App.) 537.

In coupling cars on a freight train a railroad company owes passengers thereon the duty exercised by very cautious persons under similar circumstances.—*Chicago, R. I. & P. Ry. Co. v. Buie* (Tex. Civ. App.) 853.

A railroad *held* guilty of negligence for not waiting for a passenger while he was purchasing a ticket at the conductor's direction.—*Missouri, K. & T. Ry. Co. of Texas v. Gist* (Tex. Civ. App.) 857.

Where a passenger had used insulting language to the conductor, who assaulted the passenger after leaving the car, the jury should be permitted to consider such conduct in assessing his damages.—*Houston & T. C. R. Co. v. Batchler* (Tex. Civ. App.) 981.

Defendant's requested instruction, which presents affirmatively its theory as made by the evidence, and would assist the jury, should be given.—*St. Louis Southwestern Ry. Co. of Texas v. Patterson* (Tex. Civ. App.) 987.

§ 10. — Contributory negligence of person injured.

It is the duty of a passenger in an elevator to use ordinary care to keep from being hurt.—*Becker v. Lincoln Real Estate & Building Co.* (Mo. Sup.) 581.

A charge on contributory negligence in action against a carrier *held* not misleading.—*Chicago, R. I. & P. Ry. Co. v. Buie* (Tex. Civ. App.) 853.

A passenger on a freight train, injured while standing in the caboose, *held* not guilty of contributory negligence as a matter of law.—*Chi-*

cago, R. I. & P. Ry. Co. v. Buie (Tex. Civ. App.) 853.

§ 11. — Ejection of passengers and intruders.

Railroad *held* liable for injuries to trespasser ejected from train while in motion by a brakeman, although acting in violation of company's rules.—*Curtis v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1108.

Where a passenger's ticket did not entitle him to travel on the train, from which he was ejected with no unnecessary force, he was not entitled to recover for such ejection.—*England v. International & G. N. R. Co.* (Tex. Civ. App.) 24.

Where plaintiff was wrongfully ejected from defendant's train, enhanced pain in his injured hand, caused by such expulsion, *held* properly considered in assessing damages.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

Where plaintiff was wrongfully and forcibly expelled from train by negro porter, verdict for \$1,500 *held* not excessive.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

In an action for forcible ejection from train in breach of contract for return passage, plaintiff's failure to present transportation request to defendant's agent *held* immaterial, where he did present the contract and was told it would be "all right."—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

Plaintiff *held* not required to pay his fare to entitle him to recover for forcible ejection from train, in breach of defendant's contract to furnish return passage.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

§ 12. — Passengers' effects.

Whether, in an action against a sleeping car company by a passenger for the recovery for the loss of his personal belongings while a passenger, plaintiff's evidence, tending to prove that the goods were stolen by defendant's porter, was overcome by defendant's evidence, *held* a question for the jury.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Whether a sleeping car company, in an action against it by a passenger for the recovery for the loss of his personal belongings, was negligent, *held*, under the evidence, a question for the jury.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Whether a passenger, in an action against a sleeping car company by him for the recovery for the loss of his personal belongings while a passenger, was guilty of contributory negligence, *held*, under the evidence, a question for the jury.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A sleeping car company is liable for the thefts of its servants to the extent of the necessary baggage or money of the passenger, regard being had to the character, duration, and purposes of the journey, though the passenger was negligent.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A sleeping car company, permitting a passenger to occupy the smoking compartment of its car, *held* to assume to the passenger the same duties as if he had occupied a regular berth.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

The articles of wearing apparel, etc., belonging to a passenger occupying under a special arrangement the smoking compartment of a sleeping car, *held* during the night to be in the mixed custody of the passenger and the company.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A passenger, occupying the smoking compartment of a sleeping car under an arrangement with the servant in charge of the car, *held* not

to assume any special risk as to the safety of his personal belongings.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A sleeping car company is not an insurer of the personal belongings of its passenger, but its liability is that of a bailee for hire.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

It is the duty of a sleeping car company, in order to protect the personal belongings of its passengers, to maintain in its cars a reasonable watch during the night while the passengers are asleep.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A passenger occupying the smoking compartment of a sleeping car, under a special agreement with the servant in charge of the car, *held* not guilty of contributory negligence in retiring with knowledge that one of the windows in the compartment was open.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

A passenger occupying the smoking compartment of a sleeper car *held* not precluded from recovering the loss of his personal belongings by mere proof showing that he retired, leaving one of the windows open.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Connecting railroad *held* not liable for injuries to baggage caused by other carriers, where contract sued on limited its liability to injuries on its own line.—*Askew v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 846.

CASE ON APPEAL.

Making and settlement, see "Appeal and Error," § 5.

Necessity for purpose of review, see "Appeal and Error," § 5.

CATTLE.

See "Animals."

Transportation by carrier, see "Carriers," § 7.

CAUSE OF ACTION.

See "Action"; "Malicious Prosecution," § 1.

CERTIFICATE.

To transcript on charge of venue, see "Criminal Law," § 2.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 2.

To correct error in transcript or to bring up record on appeal or error, see "Appeal and Error," § 6.

To review issuance of liquor license, see "Intoxicating Liquors," § 3.

§ 1. Nature and grounds.

Where the opinion of the Court of Appeals does not show that the court in any way exceeded its jurisdiction, as defined in Const. art. 6, § 8, certiorari will not lie to review its decision.—*State ex rel. Hobart v. Smith* (Mo. Sup.) 211.

Where no judge of the Court of Appeals deems a decision thereof contrary to ruling decisions of the Supreme Court or Court of Appeals, the cause cannot be reviewed in the Supreme Court, under Const. Amend. art. 6, § 6.—*State ex rel. Hobart v. Smith* (Mo. Sup.) 211.

Certiorari will not lie to review a decision of the Court of Appeals on the merits under Const. Amend. art. 6, § 8.—*State ex rel. Hobart v. Smith* (Mo. Sup.) 211.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 1.

Of criminal prosecutions, see "Criminal Law," § 2.

CHARACTER.

Of witness, see "Witnesses," § 4.

CHARGE.

To jury in civil actions, see "Trial," §§ 4-10.

To jury in criminal prosecutions, see "Criminal Law," § 13.

CHATTEL MORTGAGES.

See "Pledges."

§ 1. Requisites and validity.

In an action to recover corn under an alleged mortgage, a plea that defendant was illiterate, and that the mortgage as read by plaintiff did not cover the corn, *held* a valid defense.—*Layson v. Cooper* (Mo. Sup.) 472.

§ 2. Rights and liabilities of parties.

In an action to recover corn under a chattel mortgage, an instruction ignoring a defense of deception in the execution of the mortgage *held* properly refused.—*Layson v. Cooper* (Mo. Sup.) 472.

Evidence that corn mortgaged did not belong to the mortgagor, who was illiterate, *held* admissible on an issue as to whether the mortgage was obtained by a fraudulent concealment.—*Layson v. Cooper* (Mo. Sup.) 472.

§ 3. Foreclosure.

Evidence *held* to show that certain notes secured by mortgage were purchased by plaintiff, and not paid.—*Powers v. McKnight* (Tex. Civ. App.) 549.

Where a chattel mortgage covered three mules, one of which was exempt from execution, the nonexempt mules must be first sold to satisfy the debt.—*Baughn v. Allen* (Tex. Civ. App.) 1063.

CHEAT.

See "Fraud."

CHECKS.

See "Bills and Notes."

CHILD.

See "Adoption"; "Guardian and Ward"; "Infants"; "Parent and Child."

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCH.

See "Religious Societies."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1. Equal protection of laws, see "Constitutional Law," § 5.

Privileges and immunities, see "Constitutional Law," § 4.

CIVIL RIGHTS.

See "Constitutional Law," §§ 4, 5.

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 3.
To property levied on, see "Execution," § 4.

CLASS LEGISLATION.

See "Constitutional Law," § 4.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 9.

COLLATERAL ATTACK.

On allowance of claim against estate of decedent, see "Executors and Administrators," § 3.
On appointment of receiver, see "Receivers," § 2.
On judgment, see "Judgment," § 5.
On submission to arbitration, see "Arbitration and Award," § 2.
On tax judgment, see "Taxation," § 4.

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1.

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.
Of taxes, see "Taxation," § 3.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

§ 1. Subjects of regulation.

In action under Rev. St. 1895, art. 4574, for unjust discrimination, *held*, that certain shipments of cotton were not local ones.—State v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 572.

COMMERCIAL AGENCIES.

Liability for libel or slander, see "Libel and Slander."

COMMISSION.

Inquisition of lunacy, see "Insane Persons," § 1.
To take testimony, see "Depositions."

COMMISSIONS.

Of attorneys, see "Attorney and Client," § 3.
Of broker, see "Brokers," § 1.
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COMMON CARRIERS.

See "Carriers."

COMMON LAW.

As to fences, see "Animals."

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
Of attorney, see "Attorney and Client," § 3.
Of broker, see "Brokers," § 1.
Of guardian, see "Guardian and Ward," § 2.
Of municipal officers, see "Municipal Corporations," § 3.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 3.
Of experts as witnesses, see "Evidence," § 11.
Of juror, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 2.

COMPLAINT.

In civil actions, see "Pleading."
In criminal prosecution, see "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

See "Payment"; "Release," § 1.

Attachment defendant *held* to have waived the question whether there were reasonable grounds for suing out the writ.—American Hardwood Lumber Co. v. Nickey (Mo. App.) 331.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCLUSION.

Of witness, see "Evidence," §§ 10, 11.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 3.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 6.

CONDITIONS.

In insurance policies, see "Insurance," § 8.
In mortgages, see "Mortgages," § 4.
Precedent to action for breach of marriage promise, see "Breach of Marriage Promise."

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 3.
Pleading by way of confession and avoidance, see "Pleading," § 2.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 3.
What law governs insurance policies, see "Insurance," § 4.

CONNECTING CARRIERS.

See "Carriers," §§ 6, 7, 12.

CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.
Of contract, see "Contracts," § 1.
Of contract of suretyship, see "Principal and Surety," § 2.
Of renewal of note, see "Bills and Notes," § 3.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Eminent Domain," § 1; "Intoxicating Liquors," § 1; "Jury," § 1.
Enactment and validity of statutes, see "Statutes," § 1.

§ 1. Distribution of governmental powers and functions.

Rev. St. 1895, arts. 4565, 4566, authorizing review by the court of a freight rate made by the railroad commission, *held* not to confer legislative power on the court, contrary to the Constitution.—Railroad Commission of Texas v. Weld & Neville (Tex. Sup.) 529.

§ 2. Vested rights.

Gen. Laws 1901, p. 122, c. 54, relating to remands from the Courts of Civil Appeals and Supreme Court, *held* constitutional.—Watson v. Boswell (Tex. Civ. App.) 985.

§ 3. Obligation of contracts.

Dissolution of an attachment under express provisions of Bankr. Act 1898, § 67, subsec. "f," 30 Stat. c. 541 [U. S. Comp. St. 1901, p. 3450], *held* not to impair obligation of contract or to divest creditor of vested right.—Wood v. Carr (Ky.) 762.

§ 4. Privileges or immunities, and class legislation.

The local option law (Rev. St. 1895, tit. 69, arts. 3384-3399) and Pen. Code, art. 402, prescribing a penalty for violation thereof, *held* not to contravene provisions of Constitution of United States against abridging privileges and immunities of citizens of United States.—Rippey v. State (Tex. Cr. App.) 15.

The local option law (Rev. St. 1895, tit. 69, arts. 3384-3399) and Pen. Code, art. 402, prescribing a penalty for violation thereof, *held* not unconstitutional as class legislation.—Rippey v. State (Tex. Cr. App.) 15.

§ 5. Equal protection of laws.

The local option law (Rev. St. 1895, tit. 69, arts. 3384-3399) and Pen. Code, art. 402, prescribing a penalty for violation thereof, *held* not unconstitutional as denying to citizens the equal protection of the laws.—Rippey v. State (Tex. Cr. App.) 15.

§ 6. Due process of law.

The local option law (Rev. St. 1895, tit. 69, arts. 3384-3399) and Pen. Code, art. 402, pre-

scribing a penalty for violation thereof, *held* not unconstitutional as depriving citizens of liberty and property without due process of law.—Rippey v. State (Tex. Cr. App.) 15.

CONTEMPT.

Violation of injunction, see "Injunction," § 3.

CONTEST.

Of election, see "Elections," § 2.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 4.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 10.
Of action against partnership, see "Partnership," § 2.
Review of ruling on motion for continuance, see "Appeal and Error," § 15.

Statements contained in an application for a continuance, which it was admitted would be given in evidence by witness, *held* improperly excluded.—American Hardwood Lumber Co. v. Nickey (Mo. App.) 331.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."
Impairing obligation, see "Constitutional Law," § 3.

Liquidated damages or penalties, see "Damages," § 3.

Operation and effect of customs or usages, see "Customs and Usages."

Operation and effect of gaming laws, see "Gaming," § 1.

Operation and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 9.

Reformation, see "Reformation of Instruments."

Subrogation to rights or remedies of creditors, see "Subrogation."

Wrongfully causing breach of contract by third person, see "Torts."

Contracts of particular classes of parties.

See "Carriers," §§ 3, 7, 8; "Counties," § 1;

"Infants," § 2; "Master and Servant"; "Municipal Corporations," § 6; "Warehousemen."

Agents, see "Principal and Agent," § 2.

Contracts relating to particular subjects.

See "Adoption."

Ground for mechanics' liens, see "Mechanics' Liens," § 1.

Limitation of railway's liability for injuries to servant, see "Master and Servant," § 2.

Transportation of goods, see "Carriers," § 3.

Transportation of live stock, see "Carriers," § 7.

Transportation of passengers, see "Carriers," § 8.

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Exchange of Property"; "Insurance"; "Rewards"; "Sales."

Agency, see "Principal and Agent."

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Marriage settlements, see "Husband and Wife," § 2.

Mutual benefit insurance, see "Insurance," § 16.

Sale of realty, see "Vendor and Purchaser."

Stipulations in actions, see "Stipulations."
Suretyship, see "Principal and Surety."

Particular modes of discharging contracts.

See "Compromise and Settlement"; "Payment"; "Release," § 1.

§ 1. Requisites and validity.

A contract is not void for lack of mutuality, if the party on whom it is not binding has complied with its conditions.—Allen v. New Domain Oil & Gas Co. (Ky.) 747.

Contract by members of a building company construed, and *held*, that a provision therein, whereby interest on a loan made to another member was to be first charged on the income of a building, had become ineffective.—Maginn v. Lancaster (Mo. App.) 368.

Submission to arbitration is sufficient consideration to support a note given in pursuance of the award.—Downing v. Lee (Mo. App.) 721.

Where a railroad's contract to maintain a private switch did not impair the railroad's obligations to the public, it could not legally destroy the switch on the ground that the contract was against public policy.—Scholten v. St. Louis & S. F. R. Co. (Mo. App.) 915.

Agreement for indemnity from damages occasioned by the wrongful seizure of property *held* void.—Rice Bros. & Nixon v. National Bank of Commerce (Mo. App.) 930.

Permission by a city to a company to use land for a cemetery in a prohibited district, under the superintendence of the city sexton, *held* consideration for its agreement not to charge over \$25 for burial lots.—City of Austin v. Austin City Cemetery Ass'n (Tex. Sup.) 525.

An agreement that hearsay testimony might be introduced in consideration of the abandonment of a proceeding to perpetuate testimony *held* not contrary to public policy.—Thompson v. Ft. Worth & R. G. Ry. Co. (Tex. Civ. App.) 29.

§ 2. Construction and operation.

A claim of an attorney for services rendered another attorney in the collection of an inheritance due a minor *held* not enforceable against the fund or the minor's estate.—Kersey v. O'Day (Mo. Sup.) 481.

A party to a contract made by members of a building company *held* not to have construed the contract as continuing, in view of the fact that he protested against making certain payments under the contract.—Maginn v. Lancaster (Mo. App.) 368.

Provision in a contract by partners selling business *held* to bind them that neither should re-engage in it.—Raymond v. Yarrington (Tex. Sup.) 800.

§ 3. Rescission and abandonment.

In order to set aside a contract on the ground of mistake, it must have been mutual, and the party must seek relief without delay upon discovering it.—Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 978.

§ 4. Performance or breach.

Defendant, in an action by a contractor against the owner of a building for not letting him do his work thereon, is entitled, the contract specifying no time, to an instruction to find for him if plaintiff failed to begin or prosecute the work in a reasonable time.—Andrae v. Watson (Tex. Civ. App.) 991.

§ 5. Actions for breach.

In an action to recover for threshing wheat mortgaged to defendant, an instruction as to the amount paid by defendant *held* not error.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

Where a mortgagee contracted to pay plaintiffs for threshing mortgaged wheat, plaintiff was entitled to recover for the whole crop

threshed, irrespective of the amount necessary to pay the mortgage.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

In an action to recover a balance due for threshing wheat mortgaged to defendant, a separate mortgage executed by mortgagor to defendant's agent was properly excluded.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

Evidence, in an action to recover freight under a contract, *held* sufficient to show that plaintiff had paid freight thereunder.—Hunter v. Helsley (Mo. App.) 719.

The owner of a building *held* entitled to withhold the demurrage due for delay in completing the structure.—Ramlose v. Dollman (Mo. App.) 917.

Defendants in an action for breach of contract *held* not in a position to complain of plaintiff's failure to perform his part, when they had declined his offer to do so.—Ramlose v. Dollman (Mo. App.) 917.

In an action by the owner of a building against the contractor for breach of contract, *held*, that plaintiff was not required to plead that he had made all the payments under the contract.—Ramlose v. Dollman (Mo. App.) 917.

The complaint by a contractor against the owner of a building for not letting him do the work thereon according to the contract should be specific as to expenses incurred in preparation, and should allege what profits would have been made.—Andrae v. Watson (Tex. Civ. App.) 991.

CONTRADICTION.

Of record, see "Appeal and Error," § 5.

Of witness, see "Witnesses," § 4.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

A will construed, and *held* to direct a sale of real estate and division of the proceeds.—McElroy v. McElroy (Tenn.) 105.

The doctrine of equitable conversion does not affect the mode of actual conversion of real into personal property for division under a will.—McElroy v. McElroy (Tenn.) 105.

The trustee of shares of stock by securing partition of the company's land, whereby the interest of the trustor was allotted to her, *held* to hold the land on the same trust, as attached to the stock.—Magnolia Park Co. v. Tinsley (Tex. Sup.) 5.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Restrictions on perpetuities, see "Perpetuities."

Conveyances by or to particular classes of parties.

See "Husband and Wife," § 1; "Infants," § 1.

Conveyances of particular species of property.

Mortgaged property, see "Mortgages," § 3.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

Admissions by employes, see "Evidence," § 5.
 Combinations in restraint of trade, see "Monopolies," § 1.
 Necessity of pleading *ultra vires*, see "Pleading," § 6.
 Right of stockholder to intervene in action for reorganization, see "Parties," § 1.
 Taxation of corporations and corporate property, see "Taxation," §§ 1, 2.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads," § 1; "Religious Societies."

Banks, see "Banks and Banking," § 1.
 Bridge companies, see "Bridges," § 1.
 Electric light companies, see "Electricity."
 Insurance companies, see "Insurance," §§ 1, 15.
 Water companies, see "Waters and Water Courses," § 3.

§ 1. Capital, stock, and dividends.

Overvaluation of merchandise turned in, in payment of corporate stock, *held pro tanto* a fraud on creditors.—*L. M. Rumsey Mfg. Co. v. Kalme* (Mo. Sup.) 470.

An instruction in a suit on a note given for a stock subscription *held* misleading in putting in issue a conceded fact.—*Byers Bros. v. Maxwell* (Tex. Civ. App.) 437.

To entitle one to rescind a contract for the subscription of stock on the ground of false representations, it is not necessary that the representations were knowingly false and made with intent to deceive.—*Byers Bros. v. Maxwell* (Tex. Civ. App.) 437.

False promise by president of corporation to subscribe for stock *held* sufficient to avoid a subscription made by another in reliance thereon.—*Byers Bros. v. Maxwell* (Tex. Civ. App.) 437.

False representations, inducing a subscription to stock, *held* sufficient to avoid the subscription, when actually relied on.—*Byers Bros. v. Maxwell* (Tex. Civ. App.) 437.

§ 2. Foreign corporations.

A corporation can have no legal existence beyond the sovereignty where created.—*Chapman v. Hallwood Cash Register Co.* (Tex. Civ. App.) 969.

Enforcement of contracts of a foreign corporation will not be permitted, when the exercise of powers of such corporation are prejudicial to the state's interest or policy.—*Chapman v. Hallwood Cash Register Co.* (Tex. Civ. App.) 969.

Under Rev. St. arts. 745, 746, relative to filing articles of foreign corporations with the Secretary of State, a foreign corporation must allege in its petition a compliance with the provisions of the statute, or bring itself within one of the exceptions.—*Chapman v. Hallwood Cash Register Co.* (Tex. Civ. App.) 969.

CORRECTION.

Of record on appeal or writ of error, see "Appeal and Error," § 6.

COSTS.

In action against sheriff, see "Sheriffs and Constables."
 In mandamus, see "Mandamus," § 3.

§ 1. Nature, grounds, and extent of right in general.

In trespass to try title, *held*, that all the costs were properly adjudged against plaintiff.—*Rountree v. Haynes* (Tex. Civ. App.) 435.

On the dismissal of an action for failure to procure a remand within the time limited by Gen. Laws 1901, p. 122, c. 54, costs *held* properly taxed against the plaintiff.—*Watson v. Boswell* (Tex. Civ. App.) 985.

Under Gen. Laws 1901, p. 122, c. 54, on filing in the trial court of a certificate of the clerk of the appellate court that a remand has not been taken out within the time limited, the action is properly dismissed, and costs taxed to plaintiff.—*Watson v. Mirike* (Tex. Civ. App.) 986.

§ 2. On appeal or error, and on new trial or motion therefor.

Under Civ. Code Prac. § 93, subsec. 2, where the cost of an appeal is occasioned by appellant's failure to file a demurrer to the petition, he is required to pay the same.—*Bush v. Louisville Trust Co.* (Ky.) 775.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 2.

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

§ 1. Property, contracts, and liabilities.

A county is not estopped to deny the validity of a sale of land made by its officers contrary to law.—*Missouri & S. W. Land Co. v. Quinn* (Mo. Sup.) 184.

Under 1 Wag. St. pp. 394-398, c. 40, art. 1, a sale of lots under execution issued on a judgment recovered by a county on notes given to its commissioner for the purchase price of such lots *held* void.—*Missouri & S. W. Land Co. v. Quinn* (Mo. Sup.) 184.

An order of county commissioners authorizing a committee to build a sewer for the county courthouse *held* to give it no implied authority to agree that persons on the street may connect with the sewer.—*Fayette County v. Krause* (Tex. Civ. App.) 51.

Verbal permission given to persons by members of a county commissioners' court to connect with a county sewer is not the act of such court.—*Fayette County v. Krause* (Tex. Civ. App.) 51.

The agreement of a committee appointed by county commissioners to build a county sewer, that persons on the street might connect with the sewer, *held* not ratified by the commissioners.—*Fayette County v. Krause* (Tex. Civ. App.) 51.

Permission given by a county commissioners' court to connect with a county sewer, being without consideration, is but a revocable license.—*Fayette County v. Krause* (Tex. Civ. App.) 51.

COURTS.

Judges, see "Judges."

Judicial power, see "Constitutional Law," § 1.
 Jurisdiction in criminal prosecutions, see "Criminal Law," § 1.

Justices' courts, see "Justices of the Peace."
 Mandamus to inferior courts, see "Mandamus," § 2.

Province of court and jury, see "Trial," § 4.
 Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."
 Right to trial by jury, see "Jury," § 1.

Transfer of prosecution to other court, see "Criminal Law," § 1.

§ 1. Establishment, organization, and procedure in general.

A decision on appeal in ejectment in favor of defendant *held* not controlling in a subsequent action on additional evidence.—Finley v. Babb (Mo. Sup.) 180.

The decision of the court of a state in which one became a member of a beneficial association that such a provision as was in his certificate authorized by-laws impairing his contract of insurance will not be followed.—Campbell v. American Ben. Club Fraternity (Mo. App.) 342.

A decision of the Supreme Court that defendant held a bequest to certain minors as trustee *held* conclusive on the Court of Appeals in a subsequent action to recover the fund and to remove the trustee.—Gaston v. Hayden (Mo. App.) 938.

§ 2. Courts of appellate jurisdiction.

Under Const. art. 6, § 2, and section 8 of the amendment of 1884, the Supreme Court has jurisdiction to require one of the Courts of Appeals to hear and determine a cause.—State ex rel. City of Stanberry v. Smith (Mo. Sup.) 134.

A constitutional question *held* not raised, so as to give supreme court jurisdiction of an appeal under constitutional amendment adopted in November, 1884.—Woody v. St. Louis & S. F. Ry. Co. (Mo. Sup.) 475.

Decisions of the St. Louis Court of Appeals as to the custody of the personal belongings of a sleeping car passenger during the daytime *held* not in conflict with a decision as to the custody of such property during the night, while the passenger is asleep.—Morrow v. Pullman Palace Car Co. (Mo. App.) 281.

Record *held* to disclose constitutional question, giving Supreme Court exclusive jurisdiction.—Suess v. Imperial Life Ins. Co. (Mo. App.) 353.

Where the disposition of surplus money realized on foreclosure is in question, the title to real estate is involved, and the Supreme Court has exclusive jurisdiction of the appeal.—Eubank v. Finnell (Mo. App.) 354.

Objection that an act under which a county conveyed swamp lands was void should be raised by objection to the deed as evidence.—Houck v. Patty (Mo. App.) 389.

Rev. St. 1895, art. 946, does not authorize the supreme court to mandamus the board of eclectic medical examiners, they not being "state officers."—Betts v. Johnson (Tex. Sup.) 4.

Under Const. art. 5, as amended in 1891, and Rev. St. 1895, art. 996, and in view of the construction given to Const. 1876, art. 5, §§ 3, 16, and Rev. St. 1879, art. 1068, Court of Civil Appeals *held* to have jurisdiction of an appeal from district court in action brought before justice for less than \$100, though when suit was commenced appeal lay to county court.—Southern Kansas Ry. Co. of Texas v. Cooper (Tex. Sup.) 947.

§ 3. Concurrent and conflicting jurisdiction, and comity.

The court which first acquires jurisdiction over a controversy should maintain it, undisturbed by the interference of any other court of co-ordinate jurisdiction.—Stone v. Byars (Tex. Civ. App.) 1086.

COVENANTS.

§ 1. Construction and operation.

Subsequent purchasers, claiming through a recorded deed with covenants, are chargeable with notice of them, and occupy the same posi-

tion as to them as the original grantee did.—Stevens v. Annex Realty Co. (Mo. Sup.) 505.

Covenant in deed *held* such that, though it did not run with land, a purchaser with notice was bound to observe it.—Stevens v. Annex Realty Co. (Mo. Sup.) 505.

Covenant in a deed *held* to run with the land.—Stevens v. Annex Realty Co. (Mo. Sup.) 505.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 4.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Of devisees or legatees, see "Wills," § 5.

Of intestate, see "Descent and Distribution."

Remedies against surety, see "Principal and Surety," § 8.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Bail, see "Bail," § 1.

Fines, see "Fines."

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Power of city to punish offense against state laws, see "Municipal Corporations," § 10.

Prisons, see "Prisons."

Offenses by particular classes of parties.

See "Municipal Corporations," § 14.

Particular offenses.

See "Assault and Battery," § 2; "Burglary"; "Embezzlement"; "Forgery"; "Gaming," § 2; "Homicide"; "Larceny"; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Sodomy."

Combinations to regulate prices, see "Monopolies," § 1.

Violation of liquor laws, see "Intoxicating Liquors," §§ 5, 6.

Violation of Sunday laws, see "Sunday."

Well poisoning, see "Homicide," § 4.

§ 1. Jurisdiction.

Transfer of indictment from district court to county court *held* not error.—Racer v. State (Tex. Cr. App.) 968.

§ 2. Venue.

Under Rev. St. 1899, § 2586, clerk's certificate to transcript on change of venue of murder prosecution *held* sufficient.—State v. Rodman (Mo. Sup.) 605.

An insufficient certificate to the clerk's transcript, required on a change of venue in a murder prosecution, will not affect the jurisdiction of the court to which the cause is transferred.—State v. Rodman (Mo. Sup.) 605.

§ 3. Evidence.

Statements of a victim of a homicide *held* not a part of the res gestæ.—State v. Hendricks (Mo. Sup.) 194.

Permitting clerk of court, from which murder prosecution is transferred, to testify to his official capacity and to identify original indictment, *held* not an improper admission of parol evidence.—State v. Rodman (Mo. Sup.) 605.

In a prosecution for rape, evidence of acts of intercourse with prosecutrix subsequent to the offense alleged in the indictment *held* inadmissible.—*Smith v. State* (Tex. Cr. App.) 401.

On criminal prosecution, a confession made by accused *held* properly received in evidence.—*Godwin v. State* (Tex. Cr. App.) 804.

On the issue as to the age of the prosecuting witness in a prosecution for rape, *held*, that a fly leaf on which her father had written down the date of her birth was not admissible as original testimony.—*Stone v. State* (Tex. Cr. App.) 956.

§ 4. — Other offenses, and character of accused.

In a prosecution for burglary, testimony showing the commission of a different burglary than that charged in the indictment *held* inadmissible.—*Hill v. State* (Tex. Cr. App.) 9.

On a prosecution for selling liquor on Sunday, it was error to admit evidence of sales on other Sundays after that charged.—*Allen v. State* (Tex. Cr. App.) 397.

On a trial for rape on a girl under age of consent, proof of prior offenses between the parties *held* inadmissible.—*Barnett v. State* (Tex. Cr. App.) 399.

Where defendant was charged with burglarizing a store of the prosecuting witness, evidence that he burglarized a store of the witness in another town on the preceding night *held* inadmissible.—*McAnally v. State* (Tex. Cr. App.) 404.

On prosecution for violation of local option law, *held* error to admit evidence of prior prosecution for similar offense.—*Lee v. State* (Tex. Cr. App.) 407.

In a prosecution for violating local option law, evidence of distinct sales from that mentioned in the information *held* admissible to show system.—*Hollar v. State* (Tex. Cr. App.) 961.

§ 5. — Admissions, declarations, and hearsay.

Statements by third persons, occurring one or two days after an alleged embezzlement, in defendant's absence, *held* inadmissible.—*Feinstein v. State* (Tex. Cr. App.) 1052.

In a prosecution for embezzlement, evidence of acts and statements of others, in defendant's absence, before prosecutor's money was delivered to defendant, *held* inadmissible.—*Feinstein v. State* (Tex. Cr. App.) 1052.

§ 6. — Documentary evidence and exclusion of parol evidence thereby.

Contents of indictment *held* provable by original, instead of by copy.—*State v. Rodman* (Mo. Sup.) 605.

On prosecution for horse theft, bill of sale of the horse, executed by third person and offered in evidence by defendant, *held* not admissible.—*Godwin v. State* (Tex. Cr. App.) 804.

§ 7. — Opinion evidence.

Witness *held* to have qualified himself as an expert in regard to the use of shotguns.—*Bearden v. State* (Tex. Cr. App.) 17.

Expert testimony is admissible to show to what extent a muzzle-loading shotgun will scatter shots at various distances.—*Bearden v. State* (Tex. Cr. App.) 17.

In a prosecution for abortion, a statement of decedent that it was the cotton-root tea that caused her abortion *held* inadmissible.—*Stanley v. State* (Tex. Cr. App.) 400.

On prosecution for violation of local option law, *held* not error to allow witness to testify that he considered the shipment a C. O. D. shipment.—*Davidson v. State* (Tex. Cr. App.) 808.

In a prosecution for assault, a witness' opinion that the shooting of prosecutrix by defendant

could not have been accidental *held* inadmissible.—*Barnard v. State* (Tex. Cr. App.) 957.

§ 8. — Testimony of accomplices and co-defendants.

Prosecutrix, under the age of consent, who consents to intercourse, *held* not an accomplice to the crime of rape.—*Smith v. State* (Tex. Cr. App.) 401.

In a prosecution for receiving stolen goods, certain evidence *held* not corroborative of the accomplice.—*Bismarck v. State* (Tex. Cr. App.) 965.

§ 9. — Evidence at preliminary examination or at former trial.

Where accused has been sworn as a witness in his own behalf, his testimony can be used by the state on a retrial, although he does not testify on such trial.—*Smith v. State* (Tex. Cr. App.) 401.

In a criminal prosecution, it is competent to prove on a retrial facts testified to on the former trial by the stenographer's notes.—*Smith v. State* (Tex. Cr. App.) 401.

§ 10. Time of trial and continuance.

On criminal prosecution, a continuance *held* erroneously denied.—*Hendrickson v. Commonwealth* (Ky.) 764.

Witness for the defense having, in effect, testified to the same effect as an absent witness was expected to testify, *held* not error to refuse a continuance.—*Bearden v. State* (Tex. Cr. App.) 17.

In criminal prosecution, *held* not prejudicial to defendant to deny continuance because of absence of codefendant.—*Godwin v. State* (Tex. Cr. App.) 804.

In a prosecution for assault with intent to murder, continuance on the ground of absence of a witness *held* properly refused.—*Wilson v. State* (Tex. Cr. App.) 964.

Continuance for absence of witness *held* improperly denied.—*Bismarck v. State* (Tex. Cr. App.) 965.

On a prosecution for receiving stolen goods, certain testimony that it was claimed could be obtained from an absent witness *held* material.—*Bismarck v. State* (Tex. Cr. App.) 965.

That the contents of a certain letter was permitted to be proven on a criminal prosecution *held* no reason for denying continuance in order to obtain the letter.—*Bismarck v. State* (Tex. Cr. App.) 965.

Due diligence to secure presence of absent witness *held* to have been shown.—*Bismarck v. State* (Tex. Cr. App.) 965.

Where defendant requested a continuance for the absence of four witnesses by whom certain facts were to be proved, and two of the witnesses appeared and testified, a denial of the continuance was not error.—*Lively v. State* (Tex. Cr. App.) 1048.

An application for continuance for absence of witnesses *held* insufficient, for failure to show that the witnesses had personal knowledge of the facts sought to be proved.—*Lively v. State* (Tex. Cr. App.) 1048.

Motion for continuance, in trial for perjury, *held* properly overruled.—*McCoy v. State* (Tex. Cr. App.) 1057.

Defendant, in prosecution for perjury, *held* not entitled to new trial for refusal of a motion for continuance on account of absent witness.—*McCoy v. State* (Tex. Cr. App.) 1057.

§ 11. Trial.

Remarks of state's counsel in murder prosecution *held* not ground for reversal.—*State v. Rodman* (Mo. Sup.) 605.

An accused *held* not to have been peremptorily forced to trial.—*Godwin v. State* (Tex. Cr. App.) 804.

Failure of the defendant to request that the objectionable testimony be stricken out, or that the court charge thereon, did not deprive him of the right to complain of its admission.—*Barnard v. State* (Tex. Cr. App.) 957.

Charge in a prosecution for violating the local option law *held* objectionable as on the weight of the evidence.—*Hollar v. State* (Tex. Cr. App.) 961.

Objection to jurisdiction of court, on ground that there was no county clerk or deputy in attendance, *held* not well taken.—*Hollar v. State* (Tex. Cr. App.) 961.

§ 12. — Reception of evidence.

Excluding repetition of testimony as to threats by decedent *held* not error in murder prosecution.—*State v. Rodman* (Mo. Sup.) 605.

Error in excluding evidence in murder prosecution *held* not to exist, where counsel excused witness from answering.—*State v. Rodman* (Mo. Sup.) 605.

A school census, purporting to contain statement of ages of children of defendant's father, *held* competent to contradict statement of defendant as to his age.—*McAnally v. State* (Tex. Cr. App.) 404.

Where what occurred between defendant and prosecutor some half hour after the alleged assault, and at another place, was proved by defendant and not controverted by the state, further testimony thereon was properly excluded.—*Lockland v. State* (Tex. Cr. App.) 1054.

§ 13. — Necessity, requisites, and sufficiency of instructions.

On prosecution for aiding and abetting a third party in a murder, instruction *held* not erroneous as assuming that such third party killed decedent.—*Fuqua v. Commonwealth* (Ky.) 782.

On prosecution for aiding and abetting a murder, *held* error not to instruct that contradictory statements of defendant's co-indictee were not to be considered as substantive evidence.—*Fuqua v. Commonwealth* (Ky.) 782.

A requested instruction on circumstantial evidence *held* properly refused, when the court has given one correctly stating the law.—*State v. Hendricks* (Mo. Sup.) 194.

Admissions of the defendants being admitted in evidence, they were entitled to an instruction thereon.—*State v. Hendricks* (Mo. Sup.) 194.

It is the court's duty to give an instruction on a proper subject when its attention has been called thereto.—*State v. Hendricks* (Mo. Sup.) 194.

Failure to define an accomplice *held* error, where the question whether a witness was an accomplice was submitted to the jury.—*Thomas v. State* (Tex. Cr. App.) 1045.

Instruction on circumstantial evidence, in a prosecution for perjury, *held* correctly to state the law.—*McCoy v. State* (Tex. Cr. App.) 1057.

§ 14. — Requests for instructions.

The court's modification of an instruction, so as to require the state to prove defendant's guilt "beyond a reasonable doubt," *held* proper.—*State v. Hendricks* (Mo. Sup.) 194.

The modification of a requested instruction on defendants' motive *held* proper.—*State v. Hendricks* (Mo. Sup.) 194.

The court's action in modifying an instruction on the weight to be given dying declarations *held* proper.—*State v. Hendricks* (Mo. Sup.) 194.

Where the court charged the jury to convict if they found that the whisky was sent into the local option precinct C. O. D. it was not error to refuse to charge them to acquit unless they found that it was so sent.—*Davidson v. State* (Tex. Cr. App.) 808.

On prosecution for aggravated assault failure to charge that insulting language does not justify an assault *held* not available error.—*Shaw v. State* (Tex. Cr. App.) 1046.

In a prosecution for embezzlement, error cannot be predicated on the court's failure to charge on defendant's theory, in the absence of a request therefor.—*Feinstein v. State* (Tex. Cr. App.) 1052.

§ 15. — Custody, conduct, and deliberations of jury.

A conviction will be set aside when the jury, after retirement, discussed defendant's failure to testify.—*Doulton v. State* (Tex. Cr. App.) 396.

Affidavit of jurors *held* not to show misconduct of jury, furnishing grounds for new trial.—*Blackwell v. State* (Tex. Cr. App.) 960.

§ 16. Motions for new trial and in arrest.

The disqualification of trial jurors is waived, where it is not taken advantage of until motion for a new trial.—*Cubine v. State* (Tex. Cr. App.) 396.

Excuse given for not attaching affidavits showing what testimony of witnesses would be, on motion for new trial, *held* without merit.—*Winn v. State* (Tex. Cr. App.) 807.

A new trial will not be granted on the ground of newly discovered evidence, where no diligence is shown.—*Winn v. State* (Tex. Cr. App.) 807.

The court is authorized to overrule a motion for a new trial, without having the same read, when informed that it is on the ground of error in charges given and refused.—*Pollard v. State* (Tex. Cr. App.) 953.

Affidavits of jurors are inadmissible to show the grounds upon which they found their verdict.—*Blackwell v. State* (Tex. Cr. App.) 960.

On a prosecution for violation of the local option law, an objection, made in arrest, that the information did not state on what day it was filed, is made too late.—*Hollar v. State* (Tex. Cr. App.) 961.

Motion for new trial on the ground of statements made by juror showing incompetency *held* properly overruled.—*Lazenby v. State* (Tex. Cr. App.) 1051.

§ 17. Appeal and error, and certiorari.

An appeal to the Court of Criminal Appeals from a conviction by the county court on appeal from a justice, assessing the punishment at a fine of less than \$100, will not lie.—*Conner v. State* (Tex. Cr. App.) 15.

Appeal will be dismissed, if the recognizance does not state the amount of the punishment assessed, as required by Code Cr. Proc. 1895, art. 887.—*Floyd v. State* (Tex. Cr. App.) 960.

An exception that an indictment for forgery charged no offense *held* sufficient to present an alleged variance between the purport and tenor clause thereof.—*Crayton v. State* (Tex. Cr. App.) 1046.

§ 18. — Record and proceedings not in record.

Court of Appeals has no jurisdiction, under Cr. Code Prac. §§ 334, 337, of an appeal by the state in a criminal action, when the transcript has not been filed within 60 days from decision.—*Commonwealth v. Nelson* (Ky.) 751.

Unless the exceptions to trial court's rulings on the admission of evidence appear in the bill of exceptions, they will not be considered on appeal.—*State v. Hendricks* (Mo. Sup.) 194.

On appeal of criminal case, only question reviewable *held*, in view of the condition of the record, to be the sufficiency of the indictment.—*State v. Hensley* (Mo. App.) 1007, 1008.

Under the condition of the record, *held*, that the court's action in sustaining a demurrer to a plea of former jeopardy by defendant could not be revised.—*Johnson v. State* (Tex. Cr. App.) 15.

The refusal of a continuance cannot be reviewed, where a proper bill of exceptions has not been reserved.—*Cubine v. State* (Tex. Cr. App.) 396.

Exclusion of a question on cross-examination as to whether witness had not talked with the county attorney, offered to impeach the witness by showing an agreement not to prosecute her husband, *held* not error.—*Stanley v. State* (Tex. Cr. App.) 400.

Agreement between prosecuting attorney and attorney for defendant in a criminal case *held* not to excuse the filing of a bill of exceptions after term time.—*Pollard v. State* (Tex. Cr. App.) 953.

Where there is no statement of facts, the sufficiency of evidence cannot be reviewed.—*Staling v. State* (Tex. Cr. App.) 962.

The sufficiency of evidence to sustain a conviction cannot be considered on appeal, in the absence of a statement of facts.—*Stuart v. State* (Tex. Cr. App.) 963.

A statement of facts *held* not open to consideration on appeal.—*Stuart v. State* (Tex. Cr. App.) 963.

Objection to remarks of district attorney, in prosecution for perjury, *held* not properly presented in the bill of exceptions.—*McCoy v. State* (Tex. Cr. App.) 1057.

§ 19. — Review.

The jury is the judge of the weight of statements made by witnesses.—*Kentucky Distilleries & Warehouse Co. v. Commonwealth* (Ky.) 746.

When there is evidence to establish the guilt of accused, the court on appeal will not disturb the verdict.—*Kentucky Distilleries & Warehouse Co. v. Commonwealth* (Ky.) 746.

A defendant *held* not prejudiced in his rights by an instruction that the penalty be that provided by the law in force when the offense was committed, though the penalty had since been changed.—*Cockerell v. Commonwealth* (Ky.) 760.

Under Cr. Code Prac. §§ 280, 281, errors complained of appearing for first time on motion for new trial cannot be considered on appeal.—*Fuqua v. Commonwealth* (Ky.) 782.

Filing original indictment in court to which murder prosecution is transferred *held* not prejudicial error.—*State v. Rodman* (Mo. Sup.) 606.

A defendant in a murder trial *held* not entitled to complain of an alleged error in a charge; it being favorable to him.—*Bearden v. State* (Tex. Cr. App.) 17.

The record not showing defendant, accused of murder, to have been injured by an alleged conversation with a juror, his conviction will not be reversed.—*Bearden v. State* (Tex. Cr. App.) 17.

Continuance for absent witnesses *held* properly refused in a criminal case.—*Godwin v. State* (Tex. Cr. App.) 804.

Confession by accused *held* admissible under the facts, though inducement to make it had been made.—*Godwin v. State* (Tex. Cr. App.) 804.

In a prosecution for assault with intent to murder, error in charge on insanity, not justified by the evidence, *held* not prejudicial to defendant.—*Wilson v. State* (Tex. Cr. App.) 964.

In a prosecution for embezzlement, the court's inadvertent statement in one portion of the charge that defendant was on trial for bur-

glary was not reversible error.—*Thomas v. State* (Tex. Cr. App.) 1045.

CROPS.

Rights as to on leased premises, see "Landlord and Tenant," § 4.

CROSS-EXAMINATION.

See "Witnesses," § 3.

CURTESY.

See "Dower."

CUSTOMS AND USAGES.

An exporter of corn, having knowledge of the customs of the business, *held* bound by a general custom limiting cargo shipments to 10 per cent. over or under the amount specified.—*Heyworth v. Miller Grain & Elevator Co.* (Mo. Sup.) 493.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Damages for particular injuries.

See "Breach of Marriage Contract"; "Death," § 2; "Libel and Slander," § 3; "Trespass," § 1. Alienation of affections, see "Husband and Wife," § 4.

Failure of abstractor of title to disclose defects, see "Abstracts of Title."

Injuries caused by public improvements, see "Municipal Corporations," § 7.

Interference with use of highway by railroad, see "Railroads," § 3.

Personal injuries, see "Carriers," § 9.

Resulting from negligence in delivery of telegram, see "Telegraphs and Telephones," § 1.

To child, see "Parent and Child."

To live stock, see "Carriers," § 7.

Wrongful ejection of passenger, see "Carriers," § 11.

Wrongful ejection, see "Ejection," § 3.

Wrongful execution, see "Execution," § 7.

Recovery in particular actions or proceedings.

See "Trove and Conversion," § 1.

§ 1. Nominal damages.

Purchaser of business *held* entitled in any event to nominal damages for breach by seller of his agreement not to re-engage in the business.—*Raymond v. Yarrington* (Tex. Sup.) 800.

§ 2. Grounds and subjects of compensatory damages.

In an action for injuries, plaintiff is entitled to recover for obligations incurred for medical treatment, as well as for sums expended therefor.—*Curtis v. McNair* (Mo. Sup.) 167.

In an action for personal injuries plaintiff *held* entitled to recover for future, as well as past, pain and suffering.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

A motorman, injured by a collision with a car of another company at a crossing, *held* entitled to recover for medical treatment in an action against the owner of such colliding car.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

In an action against a carrier for damages to cattle resulting from delay in transportation and a collision, interest is recoverable as a part of the damages.—*Texas & P. Ry. Co. v. Smitsen* (Tex. Civ. App.) 42.

§ 3. Liquidated damages and penalties.

Demurrage of \$10 per day for delay in completing a building *held* not unreasonable, when

the building would have rented for \$300 per month.—*Ramlose v. Dollman* (Mo. App.) 917.

§ 4. Exemplary damages.

Exemplary damages can be recovered only where actual damages are sustained.—*Flanary v. Wood* (Tex. Civ. App.) 1072.

A judgment for \$2,344 exemplary damages held excessive, where the actual damages were assessed at \$56.—*Flanary v. Wood* (Tex. Civ. App.) 1072.

§ 5. Measure of damages.

Where plaintiff furnished cross-ties and graded a right of way for a railroad switch, in consideration of the railroad's maintaining the same, and thereafter the railroad removed the switch and appropriated the ties, plaintiff was entitled to recover the value of the ties and the cost of the grading.—*Scholten v. St. Louis & S. F. R. Co.* (Mo. App.) 915.

§ 6. Inadequate and excessive damages.

In an action for personal injuries, a verdict for \$7,000 held not excessive.—*Malloy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 159.

A verdict for \$3,900 for injuries in a railway collision held not excessive.—*Hennessy v. St. Louis & S. Ry. Co.* (Mo. Sup.) 162.

In an action for injuries to a servant, a verdict for \$4,650 held not excessive.—*Curtis v. McNair* (Mo. Sup.) 167.

A verdict for \$2,000 for personal injury held not excessive.—*Dover v. Mississippi River & B. T. Ry.* (Mo. App.) 298.

A verdict of \$4,100 for the loss of earning capacity of a laborer having 23 or 24 years' expectancy, and an earning capacity of \$1.25 to \$1.50 a day, is not excessive.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

§ 7. Pleading, evidence, and assessment.

In an action for injuries to a servant, an instruction held not erroneous as authorizing a recovery for loss of time in the future.—*Curtis v. McNair* (Mo. Sup.) 167.

Acts 1895, p. 168 (Rev. St. 1899, § 595), relative to verdicts where punitive damages are given, held to have no application to an action pending at time of its passage.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In an action for alienation of the affections of husband, evidence by plaintiff of financial condition of defendants was properly admitted.—*Love v. Love* (Mo. App.) 255.

An instruction which did not limit the amount of recovery of expenses to such as were reasonable held not erroneous, there being no conflict of evidence and no request for the limitation.—*Texas & Pac. Ry. Co. v. Ball* (Tex. Civ. App.) 420.

Submission to the jury of the question as to amount paid out by plaintiff for medical attention held error, where there was no evidence as to it.—*Central Texas & N. W. Ry. Co. v. Smith* (Tex. Civ. App.) 537.

In a personal injury action, evidence of increased susceptibility to disease held admissible.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

In an action for injuries, the trial court has no authority to compel plaintiff to submit to an examination by physicians to be appointed by the court.—*Austin & N. W. R. Co. v. Cluck* (Tex. Civ. App.) 569.

DEATH.

Of partner, see "Partnership," § 3.

§ 1. Evidence of death and of survivorship.

Rev. St. arts. 1821, 3372, construed, and held to mean that proof of seven years' absence from

his home without being heard from is necessary to establish death of a party.—*Latham v. Tombs* (Tex. Civ. App.) 1060.

§ 2. Actions for causing death.

Rev. St. 1899, § 548, held void, and that a person appointed thereunder cannot prosecute an action, given by 2 Starr & C. Ann. St. Ill. pp. 2155, 2156, c. 70, para. 1, 2, to recover for a death in Illinois caused by negligence.—*McGinnis v. Missouri Car & Foundry Co.* (Mo. Sup.) 588.

An instruction on damages for negligent death, that the jury might assess such damages as they deemed fair and just, not exceeding \$5,000, where defendant asked for no instructions or modification, was not error.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

In an action for negligent death, a verdict of \$5,000 held not excessive.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

An action for death resulting from negligence of a servant of a railroad company, employed to nurse a smallpox patient in connection with the railroad's hospital department, held maintainable under Rev. St. 1895, art. 3017.—*Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Tex. Civ. App.) 542.

Where, in an action for death, there was no evidence of pecuniary loss to decedent's father, a finding in his favor was erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Tex. Civ. App.) 542.

An instruction in an action against a railroad for killing plaintiff's minor son held not misleading, though not directing that cost of boy's "keep" be deducted in estimating the value of his services.—*Texas & P. Ry. Co. v. Yarbrough* (Tex. Civ. App.) 844.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 1.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6. As evidence in criminal prosecutions, see "Criminal Law," § 5.

Dying declarations, see "Homicide," § 8.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Cancellation, see "Cancellation of Instruments." Covenants in deeds, see "Covenants."

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Parol or extrinsic evidence, see "Evidence," § 9. Restrictions on perpetuities, see "Perpetuities."

Deeds by or to particular classes of parties.

See "Infants," § 1.

Particular classes of deeds.

Of trust, see "Mortgages."

Tax deeds, see "Taxation," §§ 4, 5.

§ 1. Construction and operation.

Parties acquiescing for over 30 years in possession of land by those claiming under a deed *held* to have given a construction thereto precluding them from recovery.—*Huff v. Miniard* (Ky.) 1036.

Deed construed, and *held* to create two life estates, with vested remainders to the grantee's children living and subsequently born.—*Blackburn v. Blackburn* (Tenn.) 100.

The reclamation of a deed by a grantor after delivery to the grantee will not divest the latter's title.—*McClendon v. Brockett* (Tex. Civ. App.) 854.

Recital in the record as to land conveyed being part of a certain survey *held* a misrecital.—*Lynch v. Pittman* (Tex. Civ. App.) 862.

§ 2. Pleading and evidence.

Deed executed by elderly wife at solicitation of young husband, shortly after marriage, *held* obtained by fraud and undue influence.—*Highland v. Highland* (Ky.) 791.

Evidence *held* insufficient to sustain a finding for defendant in an action to set aside a deed on the ground of undue influence.—*Ryan v. Ryan* (Mo. Sup.) 494.

Where, in trespass to try title, affidavit of forgery is filed by plaintiff, burden of proving execution of deed is on defendant and remains there.—*Williamson v. Gore* (Tex. Civ. App.) 563.

Evidence *held* to support a finding that a married woman had executed and acknowledged a deed according to law.—*Royals v. Lacey* (Tex. Civ. App.) 1062.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.

DELAY.

Laches, see "Equity," § 1.

DELIVERY.

Of goods by carrier, see "Carriers," § 4.

Of goods sold, see "Sales," § 2.

Of goods to carrier, see "Carriers," § 6.

Of insurance policy, see "Insurance," § 4.

DEMURRER.

In pleading, see "Pleading," § 3.

To evidence, see "Trial," § 3.

To indictment, see "Indictment and Information," § 3.

DEPOSITIONS.

See "Affidavits"; "Witnesses."

Harmless error in admission or exclusion, see "Appeal and Error," § 17.

The overruling of an objection to depositions taken in another suit, on the ground that such suit involved different issues from that on trial, *held* not error.—*Heyworth v. Miller Grain & Elevator Co.* (Mo. Sup.) 498.

A stipulation for the introduction of hearsay testimony concerning a passenger's injuries *held* sufficiently broad to authorize the introduction of the evidence offered.—*Thompson v. Ft. Worth & R. G. Ry. Co.* (Tex. Civ. App.) 29.

A deposition should not be suppressed because an answer is irresponsible to an interrogatory, where it is responsive to a subsequent interrogatory.—*Houston & T. O. R. Co. v. Bell* (Tex. Civ. App.) 56.

DEPOSITS.

In bank, see "Banks and Banking," § 2.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Wills."

§ 1. Persons entitled and their respective shares.

Under Rev. St. 1895, art. 1695, and article 1688, § 4, certain heirs *held* to take per stirpes.—*Jernigan v. Lauderdale* (Tex. Civ. App.) 39.

§ 2. Rights and liabilities of heirs and distributees.

Heirs take property of an ancestor subject to its liability for omitted taxes, the collection of which is not barred by limitations.—*Commonwealth v. Sweigart's Adm'r* (Ky.) 758.

A petition to establish heirship, and enforce a resulting trust of conveyances of land by other alleged heirs of decedent, *held* demurrable.—*Craig v. Welch-Hackley Coal & Oil Co.* (Ky.) 1035.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 4.

Of property conveyed, see "Boundaries," § 1;

"Deeds," § 1.

Of property demised, see "Landlord and Tenant," § 4.

Of property devised or bequeathed, see "Wills," § 4.

DEVICES.

See "Wills."

DILATORY PLEAS.

See "Pleading," § 2.

DILIGENCE.

In procuring evidence as condition to granting new trial for newly discovered evidence, see "New Trial," § 1.

DIRECTING VERDICT.

In civil actions, see "Trial," § 3.

DISABILITIES.

Contributory negligence of persons under disability, see "Negligence," § 2.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, see "Bankruptcy," § 3;

"Compromise and Settlement"; "Release."

From liability as surety, see "Principal and Surety," § 2.

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCOVERY.**§ 1. Under statutory provisions.**

In action for injuries, a motion during trial that plaintiff submit a sample of his urine for

examination by physicians to be appointed by the court *held* too late.—Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 569.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 15.

DISCRIMINATION.

By carriers, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

Costs on dismissal of action, see "Costs," § 1. Dismissal of appeal or writ of error, see "Appeal and Error," §§ 9, 10. Dismissal of suit against partners, see "Partnership," § 2.

§ 1. Voluntary.

A cause *held* finally submitted, and the granting of a nonsuit thereafter to be error, under Rev. St. 1899, § 639.—Lawyers' Co-op. Pub. Co. v. Gordon (Mo. Sup.) 155.

Under Rev. St. 1899, § 695, a plaintiff who desires to retain the right to take a nonsuit until after the questions of law are decided should request a finding thereon before the issues of fact are submitted.—Lawyers' Co-op. Pub. Co. v. Gordon (Mo. Sup.) 155.

Reorganization committee of corporation *held* entitled to dismiss a certain action brought by it, subject only to the right of intervener therein to be heard on his claim for affirmative relief.—Bangs v. Sullivan (Tex. Civ. App.) 74.

The fact that one of the members of the reorganization committee of a corporation refused to join with the rest in taking a nonsuit of a certain action *held* not to prevent the nonsuit.—Bangs v. Sullivan (Tex. Civ. App.) 74.

Court *held* to have discretion to set aside order of nonsuit and permit stockholder in corporation to intervene in action by reorganization committee, where there is collusion between such committee and the defendant in the action.—Bangs v. Sullivan (Tex. Civ. App.) 74.

§ 2. Involuntary.

Dismissal of case for want of prosecution *held* not to show abuse of discretion.—Hall v. City of Austin (Tex. Civ. App.) 32.

A petition in an action for rent *held* properly dismissed on an exception pleading the statute of limitations.—Roller v. Zundelowitz (Tex. Civ. App.) 1070.

DISQUALIFICATION.

Of judge, see "Judges," § 1.

DISSOLUTION.

Of partnership, see "Partnership," § 3.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of foreclosure, see "Mortgages," § 6.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVIDENDS.

By insurance company, see "Insurance," § 1.

DIVORCE.

§ 1. Defenses.

Drunkenness in a husband cannot excuse cruel treatment of the wife.—Harl v. Harl (Ky.) 756.

§ 2. Jurisdiction, proceedings, and relief.

On appeal in divorce, the court will give great weight to the judgment of the chancellor in refusing a divorce, and will not reverse unless the evidence clearly shows complainant's right to a divorce.—Harl v. Harl (Ky.) 756.

Evidence *held* to show a wife entitled to a divorce.—Harl v. Harl (Ky.) 756.

Evidence in a suit for divorce *held* not such as to require reversal of the decree denying the divorce for abandonment.—Hale v. Hale (Ky.) 784.

Evidence *held* to justify an inference that a separation of husband and wife was by consent, and therefore insufficient to justify a divorce for desertion.—Walthen v. Walthen (Mo. App.) 736.

§ 3. Operation and effect of divorce, and rights of divorced persons.

In a proceeding to modify a foreign decree awarding the custody of a child in divorce proceedings, evidence as to the conduct and situation of the parties prior to such foreign decree *held* admissible in corroboration.—Wilson v. Elliott (Tex. Sup.) 946.

Foreign decree, determining the custody of a minor child in a divorce suit, *held* not a bar to a subsequent proceeding to modify it, on proof that the situation and character of the respective parties had changed.—Wilson v. Elliott (Tex. Sup.) 946.

Foreign decree awarding custody of infant child in divorce suit *held* res judicata of all questions relating to the fitness of the parties at all times prior to such decree.—Wilson v. Elliott (Tex. Sup.) 946.

A husband and wife, after divorce, became tenants in common of the community property, and either may recover the entire interest as against a trespasser.—Williamson v. Gore (Tex. Civ. App.) 563.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.

As evidence in criminal prosecutions, see "Criminal Law," § 6.

DONATIONS.

See "Gifts."

Of public moneys, see "Municipal Corporations," § 13.

DOWER.

§ 1. Inchoate interest.

A widow, by remaining in the mansion house until dower assigned, *held* not to have elected to take such house under an antenuptial contract in lieu of dower.—Moran v. Stewart (Mo. Sup.) 177.

An antenuptial contract, providing for the support of the intended wife during widowhood only, *held* insufficient to bar dower as a legal or equitable jointure.—Moran v. Stewart (Mo. Sup.) 177.

An antenuptial agreement for jointure *held* not subject to renunciation by the widow, under Rev. St. 1899, § 2951, where she was of age at the time she executed the contract.—Moran v. Stewart (Mo. Sup.) 177.

DRUGGISTS.

Sales of liquor by, see "Intoxicating Liquors," § 4.

Sales of poisons, see "Poisons."

DRUNKENNESS.

Ground for divorce, see "Divorce," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 6.

DYING DECLARATIONS.

See "Homicide," § 3.

EASEMENTS.

See "Highways."

§ 1. Creation, existence, and termination.

Owner of land abutting on strip designated as alley in plat *held* entitled to the use of the same as appurtenant to his property.—*Douthitt v. Canaday, Gillium & Key* (Ky.) 757.

The right to take cutting stone from a tract of land necessarily carries with it such reasonable use of the surface over the stone as is necessary to make the right available.—*Bedford-Bowling Green Stone Co. v. Oman* (Ky.) 1038.

EJECTION.

Of passenger, see "Carriers," § 11.

EJECTMENT.

See "Trespass to Try Title."

§ 1. Right of action and defenses.

Owner *held* entitled to recover land occupied by a tram railway, which had been laid without her consent and without power to exercise the right of eminent domain.—*Hughey v. Walker* (Ark.) 1093.

Ejectment cannot be maintained on a title which is merely equitable.—*Nalle v. Parks* (Mo. Sup.) 596.

Ejectment cannot be maintained by one holding a merely equitable title against one in possession under the legal title.—*Nalle v. Thompson* (Mo. Sup.) 599.

The owner of an undivided half interest in the equity to certain land cannot maintain ejectment against one holding the legal title.—*Nalle v. Thompson* (Mo. Sup.) 599.

Ejectment cannot be maintained, unless plaintiff is vested with the legal title when he commences the action.—*Nalle v. Thompson* (Mo. Sup.) 599.

The owner of a mere easement is not entitled to maintain ejectment or trespass to try title, as against the fee owner of land rightfully in possession.—*Cornick v. Arthur* (Tex. Civ. App.) 410.

§ 2. Pleading and evidence.

One seeking to establish title to land against a purchaser from the original owner, on the ground of bona fide purchase from his heirs, must show that they were the heirs.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

In ejectment, probate proceedings and recitals in deeds of a grantor in plaintiff's chain of title *held* admissible.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

Judgment by a grantee from a grantor in plaintiff's chain of title against defendant's predecessors in interest *held* admissible in evidence as an assertion of title.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

An unlocated land certificate is a chattel, long-continued possession of which may support the presumption of a sale.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

§ 3. Trial, judgment, enforcement of judgment, and review.

Where, under an erroneous judgment, defendant deprived plaintiff of the use of the latter's homestead, defendant *held* not entitled to set off judgments held by him against plaintiff in an action by the latter for such use.—*Lewis v. Scott* (Ky.) 1131.

One who deprives another of the rightful possession of the latter's property under an erroneous judgment is liable to the owner for the damages.—*Lewis v. Scott* (Ky.) 1131.

Measure of damages defined, where, under an erroneous judgment, defendant deprived plaintiff of the use of the latter's property.—*Lewis v. Scott* (Ky.) 1131.

ELECTION OF REMEDIES.

Election between causes of action pleaded, see "Pleading," § 5.

ELECTIONS.

Local option elections, see "Intoxicating Liquors," § 2.

Submission of issuance of municipal bonds to popular vote, see "Municipal Corporations," § 13.

§ 1. Ballots.

Rev. St. 1899, § 6995, requiring ballot to have registration number of voter indorsed on it, *held* not repealed by Act 1891, § 11, amending Act 1889, § 4785.—*Donnell v. Lee* (Mo. App.) 997.

Rev. St. 1899, § 7104, providing that judges of election shall write their names or initials on back of ballots, *held* not controlling in election of city officer.—*Donnell v. Lee* (Mo. App.) 997.

§ 2. Contests.

Under election law (Acts Ex. Sess. 1900, p. 40, c. 5, § 12), *held*, that it is not necessary that appellants sign the appeal bond.—*Keller v. Ferguson* (Ky.) 785.

The ballots in a contested election case can under no circumstances be produced in open court and be made a record of.—*Donnell v. Lee* (Mo. App.) 997.

Appellate court will adopt findings of triers in contested election cases, where there is substantial evidence in support thereof.—*Donnell v. Lee* (Mo. App.) 997.

ELECTRICITY.

A petition for causing death from a live wire *held* to state a cause of action.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

Whether a laborer, engaged in taking down a sign from a building, was guilty of contributory negligence in coming in contact with an electric wire, *held* a question for the jury.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

The fact of death from contact with electric wires at a place where deceased had a right to be, *held* conclusive proof of defective insulation and of the negligence of defendant.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

A petition for death caused by contact with defendant's electric wires *held* sufficiently broad to justify an instruction that it was incumbent on defendant to keep its wires reasonably safe.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

An instruction that if electric wires, where deceased was standing, had the appearance of being properly insulated, it was an inducement to risk contact with them, when considered in

In an action for death resulting from contact with electric wire, instruction as to plaintiff's negligence in failing to protect himself *held* properly qualified by reference to his occupation.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

An instruction, in an action for death resulting from contact with electric wire, as to the knowledge of plaintiff of the danger, *held* properly modified by reference to his knowledge of the defective insulation of the wire causing death.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

In an action for death resulting from contact with an electric wire, it was not necessary for plaintiff to prove that at the exact point of contact the insulation was off the wire.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

It is the duty of an electric light company to keep its wires safe.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

It is the duty of an electric lighting company to use every accessible precaution to insulate its wires at all points where people have the right to go.—*Geismann v. Missouri-Edison Electric Co.* (Mo. Sup.) 654.

ELEVATORS.

See "Carriers," §§ 9, 10.

EMBEZZLEMENT.

In a prosecution for embezzlement, defendant *held* liable as a principal, and not as an accessory.—*Thomas v. State* (Tex. Cr. App.) 1045.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," §§ 4-10.

§ 1. Nature, extent, and delegation of power.

Where the total value of property assessed, after the improvement is made, is less or more than the cost of the improvement, an enforcement of the lien cannot be had.—*City of Louisville v. Bitzer* (Ky.) 1115; *Bitzer v. Fulton*, *Id.*

A foreign bridge corporation, authorized to do business in Missouri, *held* entitled to condemn land in Missouri necessary for its purposes, under Rev. St. 1899, § 1024, without regard to its right of eminent domain in the state of its residence.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 453.

The legislature of Missouri has power to confer on foreign corporations the right of eminent domain, to be exercised in the construction of a toll bridge for public use.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 453.

Gen. St. 1865, c. 69, § 17, as amended by Laws 1871-72, p. 15, *held* to authorize a corporation organized for the maintenance of a railroad bridge to condemn land for the approaches and necessary tracks to its bridge.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 453.

The right of eminent domain conferred in Rev. St. 1899, c. 131, *held* not given to corporations for furnishing light, power, and water for hire.—*Southwest Missouri Light Co. v. Scheurich* (Mo. Sup.) 496.

§ 2. Compensation.

Evidence in condemnation proceedings of probable character of lands as suburban prop-

Measure of damages in condemnation proceedings by a railroad is the difference between the value of property just before and just after construction of railroad.—*St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Tex. Civ. App.) 978.

§ 3. Proceedings to take property and assess compensation.

Preliminary questions involved in the construction of a charter of a railroad, in proceedings to condemn land for a proposed line, *held* for the court.—*Tennessee Central R. Co. v. Campbell* (Tenn.) 112; *Same v. Murphy Land Co., Id.*

EMPLOYES.

See "Master and Servant."

ENTICEMENT.

Of husband or wife, see "Husband and Wife," § 4.

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 6.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE ESTOPPEL.

See "Estoppel," § 2.

EQUITY.

Equitable conversion, see "Conversion."

Equitable estoppel, see "Estoppel," § 2.

Execution against equitable interests, see "Execution," § 1.

Sufficiency of equitable title to maintain ejectment, see "Ejectment," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Account"; "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Reformation of Instruments"; "Receivers"; "Trusts."

Relief against judgment, see "Judgment," § 4.

§ 1. Laches and stale demands.

As a general rule courts of equity will adopt the length of time to bar causes of action that prevail in analogous cases in actions at law.—*Watson v. Texas & P. Ry. Co.* (Tex. Civ. App.) 830.

ERASURE.

In will, see "Wills," § 2.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

Of prisoners, see "Prisons."

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.

Of highways, see "Highways," § 1.

Of railroads, see "Railroads," § 4.

Of trusts, see "Trusts," § 3.

Of will, see "Wills," § 3.

ESTATES.

See "Dower."

Created by deed, see "Deeds," § 1.

Created by will, see "Wills," § 4.

Decedents' estate, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

Restrictions on creation of future estates, see "Perpetuities."

Tenancy in common, see "Tenancy in Common."

ESTIMATES.

For public improvements, see "Municipal Corporations," § 5.

ESTOPPEL.

By judgment, see "Judgment," §§ 6, 7.

Of married woman to claim separate estate, see "Husband and Wife," § 3.

To allege error, see "Appeal and Error," § 12.

To avoid or forfeit insurance policy, see "Insurance," § 10.

To object to local assessments, see "Municipal Corporations," § 8.

To question pledge of note, see "Pledges."

To sue for fraud, see "Fraud," § 2.

§ 1. By deed.

Corporation president, acquiring private interest after conveying company's realty to trustee, *held* estopped to assert it against purchaser of equity assuming debt.—*Central Coal & Iron Co. v. Walker's Ex'r* (Ky.) 778.

In an action to recover property under a chattel mortgage, the mortgagor *held* estopped to plead that the property mortgaged did not belong to him.—*Layson v. Cooper* (Mo. Sup.) 472.

A purchaser from a member of a class in which a remainder expectant on the death of the life tenant is vested takes title against his vendor by estoppel on the death of the life tenant.—*Nichols v. Guthrie* (Tenn.) 107.

A deed *held* not to pass by estoppel land without its description.—*Smith v. Bunch* (Tex. Civ. App.) 559.

§ 2. Equitable estoppel.

Rule that a representation relating to something to be afterwards brought into existence cannot be the basis of an estoppel *held* not to apply as to an estoppel from claiming that a deed of trust had not been extinguished.—*Williams v. Verity* (Mo. App.) 732.

Surety on a note *held* estopped to deny holder's title.—*Zuendt v. Doerner* (Mo. App.) 873.

Creditor, who took possession of goods under a mortgage, *held* not entitled to afterwards claim that he took possession under a pledge.—*Duckett v. Keet & Rountree Dry Goods Co.* (Mo. App.) 928.

A statement by plaintiff that he did not own land in controversy, made through a lapse of memory, which did not influence defendants in purchasing the land from another, *held* not to estop plaintiff from claiming the land.—*Wagoner v. Dodson* (Tex. Sup.) 517.

One *held* not estopped by failure to deny a certain statement.—*Powers v. McKnight* (Tex. Civ. App.) 549.

EVIDENCE.

See "Affidavits"; "Depositions"; "Discovery"; "Witnesses."

Absence of evidence as ground for continuance of criminal prosecution, see "Criminal Law," § 10.

Admissibility of evidence under pleading, see "Pleading," § 6.

Applicability of instructions to evidence, see "Trial," § 7.

Harmless error in admission of evidence in criminal prosecutions, see "Criminal Law," § 19.

Harmless error in rulings on evidence, see "Appeal and Error," § 17.

Instructions as to evidence, see "Trial," §§ 5, 6.

Presentation for review of errors in rulings on evidence, see "Appeal and Error," § 7.

Questions of fact for jury, see "Trial," § 3.

Reception at trial, see "Criminal Law," § 12; "Trial," § 1.

Review dependent on presentation in record, see "Criminal Law," § 18.

Review on appeal, see "Appeal and Error," § 16.

As to particular facts or issues.

See "Adverse Possession," § 3; "Arbitration and Award," § 2; "Boundaries," § 2; "Damages," § 7; "Death," § 1; "Deeds," § 2; "Fraudulent Conveyances," § 2; "Gifts," § 1; "Payment," § 1.

Agency, see "Principal and Agent," § 1.

Credibility of witness, see "Witnesses," § 4.

Existence of trust, see "Trusts," § 1.

Interest of witness in controversy, see "Witnesses," § 2.

Tenancy, see "Landlord and Tenant," § 1.

Testamentary capacity, see "Wills," § 1.

Wife's separate estate, see "Husband and Wife," § 3.

In actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 7, 9; "Master and Servant," §§ 7, 8; "Municipal Corporations," § 12; "Railroads," §§ 8-10; "Sheriffs and Constables," § 1; "Street Railroads," § 1.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Trustees in bankruptcy, see "Bankruptcy," § 2.

Turnpike companies, see "Turnpikes and Toll Roads," § 1.

In particular civil actions or proceedings.

See "Assault and Battery," § 1; "Breach of Marriage Contract"; "Divorce," § 2; "Ejectment," § 2; "Injunction," § 2; "Libel and Slander," § 3; "Malicious Prosecution," § 2; "Negligence," § 3; "Reformation of Instruments," § 1; "Trespass to Try Title," § 1.

Election contest, see "Elections," § 2.

For alienation of affections, see "Husband and Wife," § 4.

For breach of contract, see "Contracts," § 5.

For breach of warranty, see "Sales," § 5.

For collection of taxes, see "Taxation," § 3.

For compensation of broker, see "Brokers," § 2.

For discharge from employment, see "Master and Servant," § 1.

Foreclosure, see "Chattel Mortgages," § 3.

For fires caused by operation of railroad, see "Railroads," § 10.

For injuries to animals on or near railroad tracks, see "Railroads," § 9.

For injuries to live stock, see "Carriers," § 7.

For personal injuries, see "Carriers," § 9.

"Electricity"; "Master and Servant," § 7.

"Municipal Corporations," § 12; "Railroads," § 8; "Street Railroads," § 1; "Turnpikes and Toll Roads," § 1.

For price of goods, see "Sales," § 4.

For sale of land for local assessments, see "Municipal Corporations," § 9.

For torts of employes, see "Master and Servant," § 8.

On bail bond, see "Bail," § 1.

On insurance policy, see "Insurance," §§ 14, 19.

On note, see "Bills and Notes," § 5.

Probate proceedings, see "Wills," § 3.

To recover mortgaged goods, see "Chattel Mortgages," § 2.

In criminal prosecutions.

See "Assault and Battery," § 2; "Burglary," § 2; "Criminal Law," § 3; "Homicide," §§ 2-4; "Larceny," § 2; "Perjury," § 2; "Rape," § 2; "Receiving Stolen Goods," § 2.

For violation of liquor laws, see "Intoxicating Liquors," § 6.

§ 1. Judicial notice.

The courts of Missouri will not take judicial notice of the legislative acts or statutes of another state not introduced in evidence at the trial.—Southern Illinois & M. Bridge Co. v. Stone (Mo. Sup.) 453.

Where garnishment was issued to collect a judgment of which the court took judicial notice, it was not necessary to introduce the judgment in evidence as against the garnishee.—Dinkins v. Crunden-Martin Woodenware Co. (Mo. App.) 246.

In garnishment proceedings, the court must take judicial notice of the provisions of the main judgment.—Jeffries v. Smith (Tex. Civ. App.) 48.

§ 2. Presumptions.

There is no presumption in favor of the validity of official acts involving the forfeiture of an individual's rights.—Irwin & Sanders v. Mayes (Tex. Civ. App.) 33.

§ 3. Relevancy, materiality, and competency in general.

Statement of motorman of an electric car, made after an accident, *held* not part of *res gestæ*.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 637.

In an action to recover for threshing wheat mortgaged to defendant, statement of accounts rendered by defendant's agent *held* admissible.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

In an action to recover for threshing mortgaged wheat, evidence explaining why plaintiff's account was kept in mortgagor's name *held* admissible.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

Where reputation for truth of party to an action had not been attacked on trial, evidence to show it was good *held* inadmissible.—McCowen v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 46.

Statements made by plaintiff, several hours after he was injured by a train, *held* not part of the *res gestæ*.—McCowen v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 46.

Evidence that a party's reputation for truth and veracity was good 30 years ago where he then lived, and ever since has lived, is not admissible.—Daugherty v. Lady (Tex. Civ. App.) 337.

Evidence in condemnation proceedings of market value of other land *held* not irrelevant or immaterial.—St. Louis Southwestern Ry. Co. of Texas v. Hughes (Tex. Civ. App.) 976.

The real issue being whether a fire was built in a depot, testimony of a person that he heard the depot agent tell a boy to go to a car and get some coal, and saw him give the boy a key to unlock the car where the coal was, is admissible as part of the *res gestæ*.—St. Louis Southwestern Ry. Co. of Texas v. Patterson (Tex. Civ. App.) 987.

§ 4. Best and secondary evidence.

Parol evidence that, since the institution of a suit to restrain cutting of timber, plaintiff had conveyed the timber to a third person, *held* inadmissible, as not the best evidence.—Houck v. Patty (Mo. App.) 389.

In ejectment, secondary evidence *held* admissible on the issue of transfer of title.—Lochridge v. Corbett (Tex. Civ. App.) 96.

§ 5. Admissions.

To show a combination of packing houses to regulate prices of meats, in violation of Rev.

St. 1899, §§ 8965, 8966, statements of the persons employed to do the selling in the state, made while so engaged and relating to the business transacted, *held* admissible.—State ex inf. Crow v. Armour Packing Co. (Mo. Sup.) 645.

Declarations of agents *held* admissible in evidence.—Hill Bros. v. Bank of Seneca (Mo. App.) 307.

Testimony in a civil action as to admissions by a decedent are to be received with great caution.—Reed v. Morgan (Mo. App.) 381.

Evidence of ascertainment of liability by parties, not made by way of compromise, *held* admissible.—Hunter v. Helsley (Mo. App.) 719.

A party is concluded by the strongest admissions he makes against himself, in determining the effect of his testimony.—Cogan v. Cass Ave. & F. G. Ry. Co. (Mo. App.) 735.

Self-serving declaration of husband in testimony in former suit *held* not admissible against his wife, interpleading in attachment suit against him.—Vermillion v. Parsons (Mo. App.) 994.

On an issue as to whether a telephone company knew the object of a call, certain evidence *held* inadmissible.—Merrill v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.) 422.

In an action against a railroad for injuries to minor from being struck by railroad train, *held* proper to permit witness to testify as to what a boy had said to the minor as to how the accident occurred, to which the latter assented.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action against a railroad for negligently transporting cattle, declarations of one not the shipper's agent *held* inadmissible.—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 540.

§ 6. Declarations.

In a prosecution for rape, book of family physician *held* admissible on the issue of age of prosecutrix.—Smith v. State (Tex. Cr. App.) 401.

In an action for injuries, owing to a minor having been struck by a railroad car while crossing a path over the tracks, it was not error to exclude the declarations of the minor that he did not know that it was dangerous to stop where he did on the track.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

§ 7. Hearsay.

In an action for alienation of plaintiff's husband's affections, declarations of plaintiff's husband *held* hearsay and inadmissible.—Love v. Love (Mo. App.) 255.

§ 8. Documentary evidence.

In an action for the alienation of husband's affections, a letter showing ill will of witness toward defendants *held* inadmissible, without evidence of genuineness.—Love v. Love (Mo. App.) 255.

Entries on a book of payments on a note *held* not to come within Rev. St. 1899, §§ 4652, 4653.—Gregory v. Jones (Mo. App.) 899.

Copies of entries in a book of charges against third parties *held* inadmissible in evidence to corroborate a disputed entry or the witness.—Gregory v. Jones (Mo. App.) 899.

Entries on a book of payments made on a note *held* not admissible in evidence.—Gregory v. Jones (Mo. App.) 899.

A plat of land *held* not admissible, as independent evidence, on mere testimony of one who was with the surveyor.—Smith v. Bunch (Tex. Civ. App.) 559.

Where, in trespass to try title, plaintiff files an affidavit that the deed under which defend-

ant claims is a forgery, such deed cannot be received in evidence until its execution has been proved as at common law.—Williamson v. Gore (Tex. Civ. App.) 563.

§ 9. Parol or extrinsic evidence affecting writings.

Parol evidence is inadmissible to prove that a written contract was delivered on condition that it should take effect on certain conditions.—Findley v. Means (Ark.) 101.

Parol expert evidence held admissible to show the meaning of unusual technical words in correspondence relating to the exportation of grain.—Heyworth v. Miller Grain & Elevator Co. (Mo. Sup.) 498.

A prior verbal agreement with surety as to notice of extension of time of a note held merged in a stipulation in the note.—First Nat. Bank v. Wells (Mo. App.) 293.

A parol agreement that a note sued on was payable only on a certain contingency held not available as a defense to the note, which contains no reference to such agreement.—Third Nat. Bank v. Reichert (Mo. App.) 893.

Contemporaneous writing, modifying a written order for goods, held admissible.—Eastern Mfg. Co. v. Brenk (Tex. Civ. App.) 538.

Description of property insured in a policy held ambiguous, so that parol evidence was competent to show the property intended to be covered.—Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 558.

A written warranty on the sale of a machine excludes any proof of a different parol one.—J. I. Case Threshing Mach. Co. v. Hall (Tex. Civ. App.) 835.

Parol condition as to time of taking effect, attached to delivery of absolute deed, held void.—McClendon v. Brockett (Tex. Civ. App.) 854.

Where field notes of a survey were clear and unambiguous, parol evidence held inadmissible to show that a different survey was in fact made.—Giddings v. Winfree (Tex. Civ. App.) 1066.

§ 10. Opinion evidence.

Conclusions to be drawn from fact that electric car ran for 125 feet, before stopping, after striking a child, held for the jury, and not for expert witnesses.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 637.

Plaintiff's agent held competent to prove deceased's signature to a contract he had made with her.—Monumental Bronze Co. v. Doty (Mo. App.) 534.

In an action against a railroad for injuries to minor, held not error to refuse to permit plaintiff to ask his mother if she knew whether he understood the danger of going around trains.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

Expert in shipping cattle could testify as to necessity for feeding them at certain point.—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 540.

In an action against a master for personal injuries, certain evidence by plaintiff as to the result of the injuries held not objectionable as stating conclusions.—St. Louis Southwestern Ry. Co. of Texas v. McDowell (Tex. Civ. App.) 974.

§ 11. — Competency of experts.

Persons held sufficiently qualified to testify to the time required to stop a train.—Buckman v. Missouri, K. & T. Ry. Co. (Mo. App.) 270.

The discharge of a railroad employé and his inability to get employment with another railroad, unless for incompetency, held not to affect his qualification to testify as an expert in regard to handling trains.—Buckman v. Missouri, K. & T. Ry. Co. (Mo. App.) 270.

Plaintiff held qualified to testify as an expert to the weight of shoes.—Hunter v. Helsley (Mo. App.) 719.

It is for the court to determine whether testimony given by an expert expresses his judgment.—Hunter v. Helsley (Mo. App.) 719.

In action against railroad for damages from fire communicated by spark, a witness held competent to testify as an expert as to whether locomotive was properly handled.—Texas Southern Ry. Co. v. Hart (Tex. Civ. App.) 833.

In action against railroad for damages from fire communicated by spark, held, that question to fireman was not improper on the ground that engineer could have answered it.—Texas Southern Ry. Co. v. Hart (Tex. Civ. App.) 833.

§ 12. Weight and sufficiency.

Defendant's testimony, directly contrary to the fact as pleaded by him, is conclusive against him.—Daugherty v. Lady (Tex. Civ. App.) 837.

EXAMINATION.

Of adverse party before trial, see "Discovery,"

§ 1.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS.

Necessity for purpose of review, see "Criminal Law," § 17.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 18.

Sufficiency for presentation of questions for review, see "Appeal and Error," § 7.

EXCESSIVE DAMAGES.

See "Damages," § 6.

EXCHANGE OF PROPERTY.

A contract for the sale of land construed.—Ellis v. Light (Tex. Civ. App.) 551.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions"; "Homestead."

§ 1. Property subject to execution.

Where a mortgagor took up the mortgage with money of a third party, and turned the mortgage over as collateral for a loan, he had an equity in the mortgaged premises which might be subjected to his debts.—Bracken v. Milner (Mo. App.) 225.

A conveyance of swamp lands by a county held to confer title, as against a purchaser at a subsequent execution sale of the lands on a judgment against the county.—Houck v. Patty (Mo. App.) 389.

Contingent remainder to a member of a class held not subject to execution.—Nichols v. Guthrie (Tenn.) 107.

Shannon's Code, § 63, defining real estate, real property, and lands, held not to subject the interest of an individual in a class remainder to the claims of an execution creditor.—Nichols v. Guthrie (Tenn.) 107.

§ 2. Issuance, form, and requisites of writ.

An alias execution *held* not invalid, because prior executions had been returned by plaintiff's direction before they had run 90 days.—State ex rel. Clement v. Stokes (Mo. App.) 254.

§ 3. Stay, quashing, vacating, and relief against execution.

Injunction will not lie to restrain the sale of land, where there is an adequate legal remedy.—Hahn v. P. J. Willis & Bro. (Tex. Civ. App.) 1084.

Injunction by an administrator to prevent sale on execution of interest of certain heirs in land belonging to an estate in course of administration *held* not to lie.—Hahn v. P. J. Willis & Bro. (Tex. Civ. App.) 1084.

§ 4. Claims by third persons.

Bond given officer to indemnify him in selling certain property *held* not invalid for misdescription of property.—Smith v. Rogers (Mo. App.) 243.

A bond given an officer to indemnify him against levy on property *held* a good common-law obligation, and not invalid for duress.—Smith v. Rogers (Mo. App.) 243.

Rev. St. 1899, § 4043, *held* to authorize a constable to demand a bond to indemnify him against levy of execution, though he had previously attached the property.—Smith v. Rogers (Mo. App.) 243.

§ 5. Sale.

Where a wife with her own funds purchases her husband's land at execution sale, without collusion, she acquires a good title as against his creditors.—Bracken v. Milner (Mo. App.) 225.

Lien of an attachment, and title thereunder, date from date of levy.—Pepperdine v. Bank of Seymour (Mo. App.) 890.

Where a deed by a purchaser at execution sale by its terms passes the legal title, and is recorded, the title given is, as against one claiming under a subsequent deed from the execution debtor, valid, though the grantee of the execution purchaser makes no claim to the land.—Williamson v. Gore (Tex. Civ. App.) 563.

§ 6. Return.

In an action against a constable for failure to execute a writ, his return, showing the reason the writ was returned unexecuted, *held* prima facie evidence only of such fact.—State ex rel. Clement v. Rainey (Mo. App.) 250.

§ 7. Wrongful execution.

In an action for an alleged wrongful levy, the measure of damages *held* the value of the goods seized, less the amount of the judgment.—Avidino's Heirs v. Fr. Beck & Co. (Tex. Civ. App.) 539.

A finding of the value of goods illegally sold under execution *held* justified by the evidence.—Avidino's Heirs v. Fr. Beck & Co. (Tex. Civ. App.) 539.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Testimony as to transactions with decedents, see "Witnesses," § 2.

§ 1. Appointment, qualification, and tenure.

Under Rev. St. 1899, § 4, providing for the issuance of letters of administration, letters granted by the probate court of the wrong county cannot be disregarded by the probate court of the proper county.—In re Davison's Estate (Mo. App.) 373; Davison v. Davison, Id.

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§ 2. Collection and management of estate.

Under Rev. St. 1899, §§ 100, 101, 189, 181, and the orders of the probate court, an administrator could not in his final settlement be allowed credits paid on the real estate of the estate, or charged with rents accruing after the intestate's death collected by him.—Langston v. Canterbury (Mo. Sup.) 151.

Under Rev. St. 1899, § 223, an administrator is entitled to a credit in his settlement for a reasonable sum paid by him for legal services.—Langston v. Canterbury (Mo. Sup.) 151.

A bill to enforce a resulting trust of land for money contributed by defendant's deceased wife *held* properly brought by the wife's heirs, and not by her administrator.—Johnston v. Johnston (Mo. Sup.) 202.

When a will directs a sale of land, but provides no executor, a sale by the administrator with the will annexed is void.—McElroy v. McElroy (Tenn.) 105.

The power of persons to convey *held* inferable, after a lapse of 60 years, from recitals in a bond for title given by them that they were administrators.—Lynch v. Pittman (Tex. Civ. App.) 862.

§ 3. Allowance and payment of claims.

Under Rev. St. 1899, §§ 183-191, 223 (Rev. St. 1899, §§ 184-193, 224), an administrator could not be allowed a credit for paying claims against the estate which had been not allowed by the probate court.—Langston v. Canterbury (Mo. Sup.) 151.

An allowance of a claim by a probate court cannot be collaterally attacked in a suit to set aside as fraudulent a conveyance by deceased.—Clark v. Thias (Mo. Sup.) 616.

A demand against an administrator, who had waived service of notice thereof, showing the balance due and demanded, to which was attached the contract and order under which the claim arose, was sufficient.—Monumental Bronze Co. v. Doty (Mo. App.) 234.

EXEMPLARY DAMAGES.

See "Damages," § 4.

EXEMPTIONS.

See "Homestead."

§ 1. Nature and extent.

Rev. St. 1899, § 3435, providing an exemption of 30 days' wages to a resident head of a family, *held* not to justify allowance of such exemption to a nonresident.—Dinkins v. Crunden-Martin Woodenware Co. (Mo. App.) 246.

Right to an exemption against execution under Rev. St. 1899, § 3162, *held* not lost by removal from the state after claim of exemption.—Caldwell v. Renfro (Mo. App.) 340.

§ 2. Protection and enforcement of rights.

Exemption of wages prescribed by Rev. St. 1899, § 3435, *held* personal to the debtor, and not available as a defense to a garnishee.—Dinkins v. Crunden-Martin Woodenware Co. (Mo. App.) 246.

EXPERT TESTIMONY.

In civil actions, see "Evidence," §§ 10, 11.

In criminal prosecutions, see "Criminal Law," § 7.

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil Liability.

An instruction in an action for arrest for drunkenness when plaintiff was not drunk *held* not open to the charge that, before a verdict could be returned for defendants, it required the jury to find that plaintiff was sober.—*Parham v. Shockler* (Tex. Civ. App.) 839.

FALSE SWEARING.

See "Perjury."

FEES.

Of attorney, see "Attorney and Client," § 3.

FEE SIMPLE.

Creation by will, see "Wills," § 4.

FELLOW SERVANTS.

See "Master and Servant," § 5.

FENCES.

See "Animals."

A hedge *held* not a "fence," within Rev. St. 1895, art. 2502, authorizing removal of fences owned by one person and connected with fences owned by another.—*Brown v. Johnson* (Tex. Civ. App.) 49.

FILING.

Bill of exceptions in criminal prosecutions, see "Criminal Law,"

Criminal information or complaint, see "Indictment and Information," § 1.

Transcript on appeal in criminal prosecutions, see "Criminal Law," § 18.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Harmless error, see "Appeal and Error," § 17. Irregularities or defects ground for new trial, see "New Trial," § 1.

Review on appeal or writ of error, see "Appeal and Error," § 17.

Special findings by jury, see "Trial," § 11.

FINES.

Acts 1899, p. 246, c. 146 (anti-trust act), is not in violation of Const. art. 1, § 13, providing that excessive fines shall not be imposed.—*State v. Laredo Ice Co.* (Tex. Sup.) 961.

Under Code Cr. Proc. art. 980, a county prisoner *held* not entitled to release on habeas corpus; no affidavit showing his inability to pay the fine having been filed as required by article 856.—*Ex parte Rodriguez* (Tex. Cr. App.) 1050.

FIRES.

Caused by operation of railroad, see "Railroads," § 10.

FIXTURES.

Railroad switch, constructed by lessees of right to work and use all the fine cutting stone on certain tracts of land, *held* to belong, at expiration of lease, to the owners of the land to which it was affixed.—*Bedford-Bowling Green Stone Co. v. Oman* (Ky.) 1038.

FLOWAGE.

See "Waters and Water Courses," § 2.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 3.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Abatement of action for rent by subsequent action for forcible entry and detainer, see "Abatement and Revival," § 1.

§ 1. Civil Liability.

Although a lessee has not settled on that part of the premises which his lessor claims under a junior patent, he can maintain forcible entry against a stranger to the elder title who attempts to take possession thereunder.—*Kirby v. Scott* (Ky.) 749.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 4.

Of mortgage, see "Chattel Mortgages," § 3; "Mortgages," §§ 5, 6.

FOREIGN CORPORATIONS.

See "Corporations," § 2.

FOREIGN JUDGMENTS.

See "Divorce," § 3; "Judgment," § 8.

FORFEITURES.

Of dower, see "Dower," § 1.

Of homestead, see "Homestead," § 2.

Of insurance, see "Insurance," § 17.

FORGERY.

Effect of forged acknowledgment, see "Acknowledgment," § 1.

An indictment for forging a convict bond *held* insufficient for failure to allege that the bond was approved by the county judge.—*Crayton v. State* (Tex. Cr. App.) 1046.

That an indictment alleged forgery of a convict bond to pay the balance of a judgment, and the bond was to pay the judgment, *held* not a fatal variance.—*Crayton v. State* (Tex. Cr. App.) 1046.

Where the purport clause of an indictment for forgery charged the instrument to be the act of one person, and the instrument set out showed that it was the act of several, the indictment was void.—*Crayton v. State* (Tex. Cr. App.) 1046.

A convict bond *held* to create both a common-law and statutory obligation, and therefore could be made the subject of forgery.—*Crayton v. State* (Tex. Cr. App.) 1046.

FORMER ADJUDICATION.

See "Judgment," §§ 6, 7.

FORMS OF ACTION.

See "Action," § 1; "Ejectment"; "Trespass," § 1; "Trove and Conversion."

FRANCHISES.

See "Taxation," § 1.

FRAUD.

See "Fraudulent Conveyances."

Effect on limitation, see "Limitation of Actions," § 2.

Of attorneys as ground for setting aside judgment, see "Judgment," § 4.

In particular classes of conveyances, contracts, or transactions.

See "Chattel Mortgages," § 1; "Insurance," § 8; "Release," § 1.

Subscriptions to corporate stock, see "Corporations," § 1.

§ 1. **Deception constituting fraud, and liability therefor.**

Plaintiff in action for deceit must prove, not only that he was misled and damaged, but that it was knowingly false, or not known to be true, and made with intent to deceive.—*Hutchinson v. Gorman* (Ark.) 793.

Willfully false representations by a grantor as to the amount of an incumbrance on property *held* actionable, though plaintiff might himself have ascertained the amount thereof.—*Hutchinson v. Gorman* (Ark.) 793.

§ 2. **Actions.**

Acceptance of deed and assumption of debt by grantee did not estop him from maintaining an action for deceit against his grantor for misrepresenting the amount of the debt.—*Hutchinson v. Gorman* (Ark.) 793.

Action *held* to be for deceit, and not for breach of contract, and accordingly triable in the county where the deceit was effected, under Rev. St. 1895, art. 1194.—*Howe Grain & Mercantile Co. v. Galt* (Tex. Civ. App.) 828.

In an action for damages for false representations on sale of personaity, an instruction *held* not erroneous as limiting jury to defects in the article sold existing at the identical time of the sale.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

In an action for damages for false representations on the sale of personaity, the burden of proof being on plaintiff, it was not error to repeat in the charges the rule of law as to the burden.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

In an action for damages for false representations on a sale of personaity, the verdict *held* not such as to render judgment for plaintiff on the merits erroneous.—*Von Boeckmann v. Loepp* (Tex. Civ. App.) 849.

FRAUDS, STATUTE OF.

§ 1. **Promises to answer for debt, default, or miscarriage of another.**

A promise to indemnify person against loss from purchase of corporate stock *held* to be within the statute of frauds (Rev. St. 1899, § 3418).—*Gansey v. Orr* (Mo. Sup.) 477.

An agreement for threshing wheat mortgaged to defendant *held* not within the statute of frauds as a special promise to answer for the debt of another.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

§ 2. **Real property and estates and interests therein.**

Contract to divide the profits derived from the sales of lands *held* not within statute of frauds. *Sand & H. Dig. § 8469*.—*McClintock v. Thweatt* (Ark.) 1093.

Under Ky. St. § 470, subsecs. 6, 7, a contract of sale of standing timber, the sale not con-

templating immediate separation from the soil, is void, not being in writing.—*Wiggins v. Jackson* (Ky.) 779.

FRAUDULENT CONVEYANCES.

§ 1. **Transfers and transactions invalid.**

Wife *held* not charged with notice of fraudulent character of deed of trust executed by her son, by reason of knowledge in her husband.—*M. A. Cooper & Co. v. Sawyer* (Tex. Civ. App.) 992.

§ 2. **Remedies of creditors and purchasers.**

While a voluntary conveyance is not fraudulent per se against creditors, *held*, that the grantee has the burden of establishing the circumstances to overcome the presumption.—*Clark v. Thias* (Mo. Sup.) 616.

Conveyance by insolvent to his wife in fraud of existing creditors *held* also fraudulent as to subsequent creditors.—*Bracken v. Milner* (Mo. App.) 225.

In an action to recover goods alleged to have been fraudulently conveyed, an instruction *held* erroneous as eliminating the question of the fraudulent intention of the parties.—*Blom-Collier Co. v. Martin* (Mo. App.) 729.

On the issue whether a debt included in a deed of trust was fictitious and fraudulent as to other creditors, certain testimony *held* relevant.—*M. A. Cooper & Co. v. Sawyer* (Tex. Civ. App.) 992.

GAMING.

§ 1. **Gambling contracts and transactions.**

Demand on stakeholder for repayment of money bet *held* sufficient under Rev. St. 1899, § 2431, to charge him.—*Vandolah v. McKee* (Mo. App.) 233.

In an action to recover money deposited with defendant as a wager on a horse race, plaintiff's evidence *held* to show that his dissent was made too late.—*Cutshall v. McGowan* (Mo. App.) 933.

Stakeholder incurs a common-law liability for money deposited with him for a wager on refusal to return the same on demand made by depositor before determination of wager.—*Cutshall v. McGowan* (Mo. App.) 933.

Petition in action to recover money intrusted to a stakeholder to hold for a wager *held* not to state a cause of action under Rev. St. §§ 3431, 3432.—*Cutshall v. McGowan* (Mo. App.) 933.

§ 2. **Criminal responsibility.**

Information for permitting a game of cards to be played on defendant's premises *held* supported by the evidence.—*Douthit v. State* (Tex. Cr. App.) 809.

GARNISHMENT.

See "Attachment"; "Execution."

Abatement of action against garnishee, by debtor, by pendency of appeal in garnishment proceedings, see "Abatement and Revival," § 1. Judicial notice of main judgment, see "Evidence," § 1.

Of partnership claim for individual debt of partner, see "Partnership," § 2.

§ 1. **Persons and property subject to garnishment.**

A purchaser, after giving his check for the price, *held* not liable to garnishment as the seller's debtor.—*Prewitt v. Brown* (Mo. App.) 897.

§ 2. **Proceedings to procure.**

A resident judgment creditor of a nonresident is entitled to enforce the judgment by gar-

nishment against a resident creditor of the debtor.—*Dinkins v. Crunden-Martin Woodenware Co.* (Mo. App.) 246.

Application for a writ of garnishment *held* sufficient.—*Jeffries v. Smith* (Tex. Civ. App.) 48.

§ 3. Writ or summons and notice, service, and return.

Where a garnishment was abandoned, the garnishee in a subsequent action to recover the goods *held* entitled to show that the garnishment was not served on the day stated in the return.—*Blom-Collier Co. v. Martin* (Mo. App.) 729.

§ 4. Lien of garnishment and liability of garnishee.

Where a garnishee, after levy and before answer, permitted the defendant to continually overdraw his salary, he rendered himself liable for the amount accruing during such time.—*Dinkins v. Crunden-Martin Woodenware Co.* (Mo. App.) 246.

Under Rev. St. 1899, § 3436, wages unearned at the date of notice of garnishment, but accrued at the time of the filing of the garnishee's answer, *held* subject to the garnishment.—*Dinkins v. Crunden-Martin Woodenware Co.* (Mo. App.) 246.

Rev. St. 1899, §§ 3445, 3446, *held* not to limit the effect of a garnishment, as provided by section 3436, to an indebtedness accruing against the garnishee prior to the return term of the writ.—*Dinkins v. Crunden-Martin Woodenware Co.* (Mo. App.) 246.

§ 5. Proceedings to support or enforce.

A judgment rendered against a garnishee *held* not excessive.—*Dinkins v. Crunden-Martin Woodenware Co.* (Mo. App.) 246.

GIFTS.

§ 1. Inter vivos.

The burden of proof is on the donee to establish a gift.—*Jones v. Falls* (Mo. App.) 903.

Defendant's letter, written after decedent's death, *held* admissible, in action by decedent's administrator to recover money claimed by defendant as a gift.—*Jones v. Falls* (Mo. App.) 903.

Evidence of decedent's intention to leave defendant her property *held* properly excluded, in action by administrator for money claimed by defendant as a gift.—*Jones v. Falls* (Mo. App.) 903.

The general rule requiring gifts *inter vivos* to be established by conclusive evidence is especially applicable where the gift is not asserted until after the donor's death.—*Jones v. Falls* (Mo. App.) 903.

Evidence, in an action by an administrator to recover of decedent's son money claimed by the latter as a gift, *held* insufficient to show decedent's intention to donate the money.—*Jones v. Falls* (Mo. App.) 903.

Defendant's requested instruction, in action by administrator against decedent's son to recover money claimed by the latter as a gift, *held* sufficiently covered by charge given.—*Jones v. Falls* (Mo. App.) 903.

Defendant's requested instructions, in an action by an administrator against decedent's son for money claimed by the latter as a gift, *held* properly refused.—*Jones v. Falls* (Mo. App.) 903.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 4; "Vendor and Purchaser," § 2.

GRAND JURY.

See "Indictment and Information."

Under constitutional amendment of November, 1892, relating to poll taxes, indictment presented January 15, 1903, by jurors who had not paid taxes *held* not subject to motion to quash.—*Cubine v. State* (Tex. Cr. App.) 396.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

GUARDIAN AND WARD.

§ 1. Custody and care of minor's person and estate.

Under Ky. St. 1899, § 2034, a father, who was unable to support his minor daughters in accordance with their position and fortune, *held* entitled to credit as their guardian for necessities furnished them, not exceeding the income from their estates.—*Hedges v. Hedges* (Ky.) 1112.

A father, as guardian of his minor daughters, *held* not entitled to charge their estate with their support, unless he was unable to support them.—*Hedges v. Hedges* (Ky.) 1112.

A father *held* liable to account as guardian of his minor children for the rental value of property devised to them, which he occupied after testator's death.—*Hedges v. Hedges* (Ky.) 1112.

Where a ward took possession of property purchased from the principal of her estate by her father as her guardian after arriving at maturity, she thereby ratified the same.—*Hedges v. Hedges* (Ky.) 1112.

A father, as guardian of his minor children, *held* liable to contribute to their support to the extent of \$200 per year, but entitled to charge for their education, clothing, and medical bills.—*Harper v. Payne* (Ky.) 1123.

§ 2. Accounting and settlement.

A guardian *held* liable to account for the rate of interest stipulated for in notes received as part of the wards' estate.—*Hedges v. Hedges* (Ky.) 1112.

A father, as guardian of his minor children, *held* not to be allowed for his services an amount exceeding 5 per cent. of the sums received and disbursed by him.—*Hedges v. Hedges* (Ky.) 1112.

A guardian *held* not entitled to credit for the price paid for a buggy, which the uncontradicted evidence showed he gave to his ward.—*Harper v. Payne* (Ky.) 1123.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

Notwithstanding *Sayles' Ann. Civ. St.* 1897, art. 4343, right of aldermen to hold office under governor's appointment *held* determinable in habeas corpus.—*Ex parte Lewis* (Tex. Cr. App.) 811.

HANDWRITING.

Opinion evidence, see "Evidence," § 10.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 17. In criminal prosecutions, see "Criminal Law," § 19.

HEARING.

In probate proceedings, see "Wills," § 3

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 7.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," §§ 11, 12; "Turnpikes and Toll Roads."

Accidents at railroad crossing, see "Railroads," § 7.

Crossing by railroads, see "Railroads," § 4.

Rights of railroads in, see "Railroads," § 8.

§ 1. Establishment, alteration, and discontinuance.

Under Rev. St. arts. 4671, 4687, 4688, commissioners' court *held* to have authority to lay out a road along different lines than those specified in application.—*Kelly v. Honea* (Tex. Civ. App.) 846.

The notice to landowner required by Rev. St. art. 4691, relating to laying out highways, *held* not required, where the damages are not assessed at time road is laid out.—*Kelly v. Honea* (Tex. Civ. App.) 846.

Notice of proceedings to open a highway may be waived.—*McCown v. Hill* (Tex. Civ. App.) 850.

One consenting to route of projected highway as reported cannot complain that it varies from that ordered.—*McCown v. Hill* (Tex. Civ. App.) 850.

§ 2. Highway districts and officers.

Commissioner of a road district *held* to have no authority to sue to restrain a turnpike company from collecting tolls on the ground that its charter had expired.—*Ledbetter v. Clarksville & R. Turnpike Co.* (Tenn.) 117.

§ 3. Construction, improvement, and repair.

Under Rev. St. 1895, art. 4694, failure of commissioners' court to provide for payment of assessed damages *held* to entitle landowner to enjoin opening of highway.—*McCown v. Hill* (Tex. Civ. App.) 850.

Allegation, in petition to enjoin opening highway, that plaintiff's damages have not been paid, *held* sufficient to let in proof.—*McCown v. Hill* (Tex. Civ. App.) 850.

§ 4. Regulation and use for travel.

Where plaintiff, five years of age, ran into the street and was struck by a horse driven by defendant's servant, who was not shown to have been negligent, defendant *held* not liable.—*Hoff v. Hahn* (Ky.) 1015.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

See "Exemptions."

§ 1. Nature, acquisition, and extent.

The lien of a county on a sheriff's real estate for taxes collected and unpaid under Ky. St. § 4130, *held* not subject to the sheriff's homestead exemption.—*Baker v. Fidelity & Deposit Co.* (Ky.) 1025.

Under Rev. St. 1899, § 3616, a man owning and living on 160 acres cannot, on losing such tract, make an adjoining tract, in which he

has a life estate, his homestead by mere intention.—*Feurt v. Caster* (Mo. Sup.) 576.

One's occupancy of land in which she has only an interest in common draws to it contiguous land, owned exclusively by her, so as to make it all a homestead; its extent and value being within the limit.—*Clark v. Thias* (Mo. Sup.) 616.

One may acquire a homestead right in property in which she has only an interest in common.—*Clark v. Thias* (Mo. Sup.) 616.

Under Gen. St. 1865, p. 450, § 7, the homestead exemption *held* to attach to estates existing when the law went into effect, as against after-contracted debts.—*Clark v. Thias* (Mo. Sup.) 616.

Under Gen. St. 1865, p. 450, § 7, a homestead *held* not exempt against a debt contracted before the deed was filed for record.—*Clark v. Thias* (Mo. Sup.) 616.

Judgment creditor *held* not to have acquired a lien on certain land purchased by judgment debtor with proceeds of a sale of his homestead.—*Ellis v. Light* (Tex. Civ. App.) 551.

Designation of certain lands as homestead by husband alone *held* binding.—*Anderson v. Brin* (Tex. Civ. App.) 838.

§ 2. Abandonment, waiver, or forfeiture.

Instruction, not making homestead right depend on intention at time of execution sale, *held* erroneous.—*White v. Epperson* (Tex. Civ. App.) 851.

In trespass to try title, a letter *held* admissible as tending to show an abandonment of a homestead.—*White v. Epperson* (Tex. Civ. App.) 851.

HOMICIDE.**§ 1. Excusable or justifiable homicide.**

The fact that a decedent had previously assaulted and wounded his murderer, and that bitter feeling existed between them, would not justify the latter in lying in wait and killing the decedent.—*State v. Rodman* (Mo. Sup.) 605.

A defendant should be acquitted of murder, if the homicide was committed on his premises, while he reasonably believed his life was threatened by the victim.—*Bearden v. State* (Tex. Cr. App.) 17.

An asked instruction on justifiable homicide *held* to have been properly refused, in view of charge given.—*Bearden v. State* (Tex. Cr. App.) 17.

A homicide by a person trying to avoid being ejected from his own premises *held* to be justifiable.—*Bearden v. State* (Tex. Cr. App.) 17.

§ 2. Evidence—Admissibility in general.

In a prosecution for murder, growing out of accused's attentions to the daughter of deceased, it is not error to exclude the daughter's testimony in regard to her engagement to accused, or how she departed herself in his presence.—*State v. Rodman* (Mo. Sup.) 605.

Evidence of personnel of neighborhood committee calling on deceased *held* inadmissible in murder prosecution.—*State v. Rodman* (Mo. Sup.) 605.

In a prosecution for assault, evidence that F., on whose farm the offense was committed, whipped people to enforce obedience, *held* inadmissible to show motive for the assault or the relationship of the parties.—*Barnard v. State* (Tex. Cr. App.) 957.

§ 3. — Dying declarations.

Certain statements of deceased *held* admissible as a dying declaration.—*Hendrickson v. Commonwealth* (Ky.) 764.

A certain paper writing *held* admissible as a dying declaration.—*Hendrickson v. Commonwealth* (Ky.) 784.

That there were other witnesses who testified to the killing did not render decedent's dying declaration inadmissible.—*Fuqua v. Commonwealth* (Ky.) 782.

Writing, neither signed, read over, nor recognized by decedent, *held* inadmissible as his dying declaration.—*Fuqua v. Commonwealth* (Ky.) 782.

A witness who heard a dying declaration may testify orally as to what was said by decedent.—*Fuqua v. Commonwealth* (Ky.) 782.

Dying declarations, to be admissible, must be shown to have been made under the influence of impending dissolution.—*Fuqua v. Commonwealth* (Ky.) 782.

Decedent, making dying declaration, *held* to have sufficiently realized impending dissolution.—*Fuqua v. Commonwealth* (Ky.) 782.

Dying declarations *held* not to be governed by the same strict rules that govern admissions of defendants.—*State v. Hendricks* (Mo. Sup.) 194.

Statements of a victim of a homicide, other than his dying declarations, are not admissible in corroboration of his dying declarations.—*State v. Hendricks* (Mo. Sup.) 194.

Only the statement of a victim of a homicide proven to be a dying declaration should be admitted against those accused of his murder.—*State v. Hendricks* (Mo. Sup.) 194.

Declarations of a deceased, made some time prior to his death, *held* admissible as dying declarations.—*State v. Hendricks* (Mo. Sup.) 194.

§ 4. — Weight and sufficiency.

Evidence in a prosecution for murder considered, and *held* to sustain a conviction of murder in the second degree, as against the defense of self-defense and circumstances relied on to reduce the crime to manslaughter.—*State v. Rodman* (Mo. Sup.) 605.

Evidence *held* to justify a verdict of murder in the second degree.—*Teel v. State* (Tex. Cr. App.) 11.

Evidence on prosecution for poisoning a well *held* sufficient to support a conviction.—*Lazenby v. State* (Tex. Cr. App.) 1051.

§ 5. Trial.

Instruction as to self-defense *held* not objectionable as limiting defendant's right of self-defense to real danger of being shot or killed by deceased.—*Teel v. State* (Tex. Cr. App.) 11.

Where defendant claimed to have shot deceased unintentionally, while attempting to strike him with his pistol to avoid being shot himself, there was no question of negligent homicide.—*Teel v. State* (Tex. Cr. App.) 11.

Under the evidence introduced in a prosecution for murder, it was error to refuse to instruct on manslaughter.—*Gardner v. State* (Tex. Cr. App.) 13.

In a prosecution for murder, where it was shown that deceased was suffering from an incurable disease, and an instruction was given on the cause of death in accordance with Pen. Code 1895, art. 652, a further instruction for acquittal, if deceased would not have died except for such disease, *held* properly refused.—*Gardner v. State* (Tex. Cr. App.) 13.

A definition of assault and battery *held* not necessary in a charge on manslaughter.—*Bearden v. State* (Tex. Cr. App.) 17.

The guilt of a person charged with murder *held* to depend on his criminal intent at the time he fired the fatal shot.—*Bearden v. State* (Tex. Cr. App.) 17.

Failure to instruct on aggravated assault *held* error, in prosecution for assault with in-

tent to murder.—*Cubine v. State* (Tex. Cr. App.) 396.

Evidence in a prosecution for murder *held* not to justify a charge on the law of provoking the difficulty.—*Pollard v. State* (Tex. Cr. App.) 953.

In a prosecution for murder, charge on manslaughter *held* not required by the evidence.—*Pollard v. State* (Tex. Cr. App.) 953.

Under the peculiar wording of a charge on murder in the second degree, a charge on manslaughter, defining adequate cause for sudden passion, *held* necessary.—*Pollard v. State* (Tex. Cr. App.) 953.

In a prosecution for assault with intent to murder, evidence *held* not to require a charge on aggravated assault.—*Wilson v. State* (Tex. Cr. App.) 964.

HORSE RACING.

See "Gaming," § 1.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Divorce"; "Dower."

Admissions by husband as against wife, see "Evidence," § 5.

Competency as witnesses, see "Witnesses," § 2. Insurable interest of husband in wife's property, see "Insurance," § 3.

§ 1. Mutual rights, duties, and liabilities.

An estate by the entirety in personal property may be created in Missouri, and the common law in reference thereto has not been changed, except by the married woman's act.—*Johnston v. Johnston* (Mo. Sup.) 202.

Where a husband invested the separate money of his wife with his own money in a secured note payable to the husband and wife jointly, an estate by the entirety was not created, but each held their proportionate share of the note.—*Johnston v. Johnston* (Mo. Sup.) 202.

§ 2. Marriage settlements.

A limitation in an antenuptial contract of a provision for the wife to widowhood only *held* not a condition subsequent, so as not to defeat the contract as a jointure.—*Moran v. Stewart* (Mo. Sup.) 177.

An antenuptial contract, by which an intended wife released her dower, *held* not based on a sufficient consideration.—*Moran v. Stewart* (Mo. Sup.) 177.

§ 3. Wife's separate estate.

In an action to enforce a trust of a wife's interest in certain real estate, evidence *held* to establish that a certain part of the money advanced belonged to the wife, and not to the husband.—*Johnston v. Johnston* (Mo. Sup.) 202.

The agreement between a mortgagor and a mortgagee *held* to constitute an extension of time of payment sufficient to discharge a surety.—*White v. Smith* (Mo. Sup.) 610.

Where property of a wife was mortgaged to secure a debt of her husband, for which the wife received no benefit, she was liable as a surety only.—*White v. Smith* (Mo. Sup.) 610.

In order to estop a married woman from asserting claim to real estate, it is essential that she be guilty of some fraud, or something equivalent to fraud.—*Williamson v. Gore* (Tex. Civ. App.) 563.

Deed from purchaser at execution sale construed, and *held* to vest the beneficial interest

in the grantee, as well as the legal title, under certain facts.—*Williamson v. Gore* (Tex. Civ. App.) 563.

§ 4. Enticing and alienating.

Parents are not justified in disrupting marriage ties entered into by their minor son without their consent.—*Love v. Love* (Mo. App.) 255.

The intentional enticement of the husband to separate from his wife is in itself an unlawful act.—*Love v. Love* (Mo. App.) 255.

In an action by a wife for the alienation of her husband's affections, evidence *held* to support a verdict for the plaintiff.—*Love v. Love* (Mo. App.) 255.

In an action for the alienation of husband's affections, verdict of \$2,250 *held* not excessive.—*Love v. Love* (Mo. App.) 255.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 3.

IMPEACHMENT.

Of record, see "Appeal and Error," § 5.

Of witness, see "Witnesses," § 4.

IMPRISONMENT.

See "Bail"; "False Imprisonment."

For nonpayment of fine, see "Fines."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," §§ 4-10.

IMPUTED NEGLIGENCE.

See "Negligence," § 2.

INCOMPETENT PERSONS.

See "Insane Persons."

INCUMBRANCES.

On property of intestate, see "Descent and Distribution."

INDEMNITY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

To officer levying execution, see "Execution," § 4.

INDICTMENT AND INFORMATION.

See "Grand Jury."

Parol evidence of contents of, see "Criminal Law," § 6.

For particular offenses.

See "Forgery"; "Gaming," § 2; "Larceny," § 2.

Violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. Filing and formal requisites of information or complaint.

An information in the name of the acting assistant prosecuting attorney of St. Louis Court of Criminal Correction, *held* not objectionable on the ground that no such officer is provided for by law.—*State v. Ittner* (Mo. App.) 289.

§ 2. Requisites and sufficiency of accusation.

An indictment for unlawfully practicing medicine, which fails to negative exceptions in Act Feb. 22, 1901, *held* defective.—*Salter v. State* (Tex. Cr. App.) 395.

It is not a variance in an indictment, subjecting it to a motion to quash, that, after properly designating accused as "R. D. E.," in a later clause it refers to him as the "said R. H. E."—*Eddison v. State* (Tex. Cr. App.) 397.

An indictment of "one Morgan, whose given name is to the grand jury unknown," is not defective for insufficient description of accused.—*Morgan v. State* (Tex. Cr. App.) 968.

§ 3. Motion to quash or dismiss, and demurrer.

The question of the disqualification of grand jurors cannot be raised on a motion to quash an indictment.—*Cubine v. State* (Tex. Cr. App.) 396.

A motion to quash an indictment, because erroneously designating accused, is properly overruled, where his true name is not suggested therein.—*Eddison v. State* (Tex. Cr. App.) 397.

INDORSEMENT.

Of ballots, see "Elections," § 1.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Contributory negligence on part of children, see "Negligence."

Emancipation of minor as defense on liquor dealer's bond, see "Intoxicating Liquors," § 3.

§ 1. Property and conveyances.

Under the facts, *held* proper to refuse to set aside a deed from son to third person of land conveyed to the son by his father, and afterwards reconveyed to the father by the son before attaining his majority; the latter deed having been disaffirmed.—*Estep v. Estep* (Ky.) 777.

§ 2. Contracts.

An infant's appointment of an agent *held* void.—*Poston v. Williams* (Mo. App.) 1099.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

Restraining construction of levee, see "Waters and Water Courses," § 2.

Restraining execution, see "Execution," § 3.

§ 1. Nature and grounds in general.

Injunction *held* issuable to prevent defendant from obtaining leases of the oil and gas privileges under land already leased to plaintiff.—*Allen v. New Domain Oil & Gas Co.* (Ky.) 747.

A licensee to remove ore from land *held* entitled to injunction against a trespasser, under Rev. St. 1899, § 3649; he having no other remedy.—*Lytle v. James* (Mo. App.) 287.

Under Rev. St. 1895, art. 2989, relating to granting injunctions, in a suit to restrain an owner of land bordering on a stream from constructing a levee, so as to cause the stream to unnaturally overflow the lands of plaintiff bordering on the other side of the stream, it is unnece-

essary to allege the insolvency of defendant.—*Sullivan v. Dooley* (Tex. Civ. App.) 82.

§ 2. Actions for injunctions.

Under Ky. St. § 2361, the petition in an action to restrain trespass to land need not allege plaintiff has the actual possession.—*Wiggins v. Jackson* (Ky.) 779.

In a suit to restrain the cutting of timber, plaintiff *held* entitled to show that conveyances under which defendants claimed title to the land were shams, and intended merely to defeat criminal prosecutions for cutting the timber.—*Houck v. Patty* (Mo. App.) 389.

In an action for an injunction to restrain the cutting of timber, an amended petition *held* not subject to a motion to strike as a departure.—*Houck v. Patty* (Mo. App.) 389.

In an action to restrain defendants from cutting timber, an answer alleging a conveyance of plaintiff's right and title to another *held* available as a partial defense only.—*Houck v. Patty* (Mo. App.) 389.

§ 3. Violation and punishment.

A violation of an injunction restraining the final publication of a local option election notice *held* no defense to a prosecution for the violation of the local option law.—*Lively v. State* (Tex. Cr. App.) 1048.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INQUISITION.

Of lunacy, see "Insane Persons," § 1.

INSANE PERSONS.

§ 1. Inquisitions.

Act Jan. 16, 1882 (Gen. St. 1888, p. 751, c. 53; 1 Laws 1881-82, p. 10, c. 55), authorized city or police courts, when no circuit court was in session, to hold inquests in lunacy proceedings.—*Dinkelspiel v. Central Kentucky Asylum for Insane* (Ky.) 771.

§ 2. Actions.

Code does not require that summons in an action be served on physician in charge of lunatic, unless personal service would be injurious to lunatic.—*Dinkelspiel v. Central Kentucky Asylum for Insane* (Ky.) 771.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of building and loan association, see "Building and Loan Associations."

INSTRUCTIONS.

In civil actions, see "Trial," §§ 4-10.

In criminal prosecutions, see "Criminal Law," § 13; "Homicide," § 5.

INSURANCE.

Duty of warehouseman to insure, see "Warehousemen."

§ 1. Insurance companies.

Limitation of dividend by insurance companies to such policies as might be continued in force by payment of next premium *held* void.—*Mutual Ben. Life Ins. Co. v. Davis* (Ky.) 1020.

§ 2. Insurance agents and brokers.

A firm of insurance agents, placing insurance on the property of a corporation, *held* insurance

brokers, under Rev. St. 1899, § 7997, and not special agents of the insured.—*Edwards v. Home Ins. Co.* (Mo. App.) 881.

§ 3. Insurable interest.

A husband has an insurable interest in property owned by his wife and minor children by a former husband, and occupied as the homestead of husband and wife.—*Continental Fire Ass'n v. Wingfield* (Tex. Civ. App.) 847.

§ 4. The contract in general.

Amendment of certain Missouri statute relative to life insurance *held* not to affect a non-resident policy holder, whose policy was issued prior to the amendment.—*Franklin Life Ins. Co. v. Galligan* (Ark.) 102.

A life policy *held* a Missouri contract.—*Franklin Life Ins. Co. v. Galligan* (Ark.) 102.

An agreement by an insurance agent that a policy should not be canceled until other insurance was substituted *held* not invalid as a verbal agreement to insure.—*Edwards v. Sun Ins. Co.* (Mo. App.) 886.

An insurance agent's agreement that a policy issued by him should not be canceled until another policy had been substituted *held* within the scope of such agent's authority.—*Edwards v. Sun Ins. Co.* (Mo. App.) 886.

Goods stored with one are within the insurance policy taken out by him on goods "held in trust."—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Tex. Civ. App.) 545.

The delivery of a policy by an insurance company in accordance with a written application constitutes a contract between the parties.—*Travelers' Ins. Co. v. Jones* (Tex. Civ. App.) 978.

An iron safe clause, attached to an insurance policy, *held* to be a part thereof, and to constitute a warranty.—*Couch & Gilliland v. Home Protection Fire Ins. Co.* (Tex. Civ. App.) 1077.

§ 5. Premiums, dues, and assessments.

Under Rev. St. 1899, § 7960, the directors of a mutual insurance company have power to order an assessment, although insurance losses have been paid by the guarantor provided for in section 7958.—*American Guaranty Fund Mut. Ins. Co. v. Mattson* (Mo. App.) 365.

Under Rev. St. 1899, § 7960, and under the provisions of a premium note, the order of assessment of the directors of a mutual insurance company is prima facie evidence of its necessity.—*American Guaranty Fund Mut. Ins. Co. v. Mattson* (Mo. App.) 365.

An order and notice of assessment made by the directors of a mutual insurance company *held* sufficient.—*American Guaranty Fund Mut. Ins. Co. v. Mattson* (Mo. App.) 365.

§ 6. Assignment or other transfer of policy.

Interest of a beneficiary in regular life policy is vested, and insured cannot change the beneficiary without authority derived from the contract itself.—*Franklin Life Ins. Co. v. Galligan* (Ark.) 102.

§ 7. Cancellation, surrender, abandonment, or rescission of policy.

Insurance brokers *held* authorized to receive notice of cancellation of a policy which they obtained through another agency.—*Edwards v. Home Ins. Co.* (Mo. App.) 881.

Notice of cancellation of an insurance policy pledged in a deed of trust *held* not necessary to be given to the trustee.—*Edwards v. Sun Ins. Co.* (Mo. App.) 886.

Insurance agents *held* not justified in believing that a bank from which they obtained a policy had authority to surrender the same or receive notice of its cancellation without no-

tice to assured.—*Edwards v. Sun Ins. Co. (Mo. App.) 886.*

Notice of the cancellation of a policy to insurance agents who represented the insurer *held* no notice to insured.—*Edwards v. Sun Ins. Co. (Mo. App.) 886.*

Action of insurance company in demanding payment of premium *held* a rejection of insured's offer of rescission of policy.—*Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 978.*

Death of insured revokes all offers of cancellation made by him prior to his death, and not accepted by insurer prior thereto.—*Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 978.*

Rights of parties to contract of insurance having become fixed by death of insured, insurance company could not then accept insured's offer of cancellation by withdrawal of its order for payment of premium.—*Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 978.*

Plaintiff *held* not estopped by her conduct from collecting amount of insurance policy by suit.—*Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 978.*

§ 8. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

False answers to questions in application for life policy *held* not to have avoided the policy.—*Franklin Life Ins. Co. v. Galligan (Ark.) 102.*

Under statute of Missouri, misrepresentations in application for life policy will not avoid the policy, unless the matter misrepresented contributes to the contingency making policy payable.—*Franklin Life Ins. Co. v. Galligan (Ark.) 102.*

Condition in fire policy *held* to have been breached by insured.—*Curlee v. Texas Home Fire Ins. Co. (Tex. Civ. App.) 831.*

§ 9. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Under a statute requiring notice that, unless a premium on a policy is paid at maturity, the policy will be forfeited, except the insured's right to the surrender value or paid-up policy, a mere notice that, if the premium is not paid, the policy lapses, *held* insufficient.—*Security Trust & Life Ins. Co. v. Hallum (Tex. Civ. App.) 554.*

§ 10. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Knowledge of an examining physician for a life insurance company that answers in application for life policy were false *held* to estop company from forfeiting policy on account of such falsity.—*Franklin Life Ins. Co. v. Galligan (Ark.) 102.*

Breach of condition in fire policy *held* not to have been waived by company.—*Curlee v. Texas Home Fire Ins. Co. (Tex. Civ. App.) 831.*

§ 11. Risks and causes of loss.

Death from rupture from an accidental fall *held* the result of the accident, "independent of all other causes," notwithstanding a cancerous condition made the rupture possible.—*Fetter v. Fidelity & Casualty Co. of New York (Mo. Sup.) 592.*

§ 12. Notice and proof of loss.

An insurer's denial of liability *held* a waiver of proofs of loss and of the insurer's right to 60 days within which to pay the same.—*Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 558.*

§ 13. Right to proceeds.

Insurance by a warehouseman *held* to inure to the benefit of a bailor.—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co. (Tex. Civ. App.) 545.*

§ 14. Actions on policies.

Plaintiff, in an action on an accident policy, having made out a prima facie case, defendant *held* to have the burden of proving its claim that insured died of cancer.—*Fetter v. Fidelity & Casualty Co. of New York (Mo. Sup.) 592.*

Whether insured's bookkeeper had authority to receive notice of the cancellation of a policy *held* for the jury.—*Edwards v. Sun Ins. Co. (Mo. App.) 886.*

Petition on a contract of fire insurance *held* sufficient as against a general exception.—*Pennsylvania Fire Ins. Co. v. Jameson Bros. (Tex. Civ. App.) 418.*

Where an insurance policy was assigned to the purchaser of the property with the company's consent, previous dealings between the company and the vendor, without the knowledge of vendee, *held* inadmissible against the purchaser to show the property intended to be covered.—*Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 558.*

In an action on a policy, a requested instruction defining the term "attached additions" *held* properly refused.—*Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 558.*

In an action on a policy of fire insurance, petition *held* to sufficiently allege ownership of the property destroyed as against a general demurrer.—*American Cent. Ins. Co. v. White (Tex. Civ. App.) 827.*

Testimony of the insured that the property described in the policy sued on was in his private dwelling *held* prima facie proof of ownership.—*American Cent. Ins. Co. v. White (Tex. Civ. App.) 827.*

Evidence in an action on an insurance policy *held* to make it a question for the jury whether a forfeiture had been waived.—*Couch & Gilliland v. Home Protection Fire Ins. Co. (Tex. Civ. App.) 1077.*

§ 15. Mutual benefit insurance—Corporations and associations.

Foreign fraternal beneficiary associations *held* exempt from the general insurance laws, under Rev. St. 1899, §§ 1408, 1410.—*Shotliff v. Modern Woodmen of America (Mo. App.) 326.*

§ 16. — The contract in general.

Where a benefit insurance company had recognized a liability in case insured committed suicide, it could not object to a recovery on the ground that it was contrary to public policy.—*Morton v. Supreme Council of Royal League (Mo. App.) 259.*

A provision of a benefit certificate that the holder should comply with future regulations of the order *held* not to include a by-law subsequently passed, limiting a recovery on the certificate to one-half thereof in case insured committed suicide.—*Morton v. Supreme Council of Royal League (Mo. App.) 259.*

A by-law of a beneficiary association against waiver of its laws *held* to refer to a completed contract of insurance, and not the preparing and acceptance of applications.—*Shotliff v. Modern Woodmen of America (Mo. App.) 326.*

Objection to answer of applicant for insurance in a beneficiary association as to insanity in family *held* waived by examining physician.—*Shotliff v. Modern Woodmen of America (Mo. App.) 326.*

Provision in certificate of membership in a beneficial association, as to future by-laws, *held* not to authorize by-laws impairing his contract of insurance.—*Campbell v. American Ben. Club Fraternity (Mo. App.) 342.*

§ 17. — Forfeiture or suspension.

Local secretaries of a benefit society *held* without authority to waive a forfeiture of a member's rights for failure to promptly pay as-

assessments, by accepting such assessments after they had become delinquent.—*Boyce v. Royal Circle* (Mo. App.) 300.

A benefit society *held* entitled to enforce a forfeiture of a certificate for the holder's failure to pay a semiannual per capita tax at maturity, as well as for a failure to pay assessments.—*Boyce v. Royal Circle* (Mo. App.) 300.

Provision in constitution of benefit society relative to forfeiture for nonpayment of assessments *held* waived.—*Courtney v. St. Louis Police Relief Ass'n* (Mo. App.) 878.

§ 18. — Beneficiaries and benefits.

Facts *held* to show that beneficiary in a mutual benefit certificate was killed in consequence of violation of law.—*Davis v. Modern Woodmen of America* (Mo. App.) 923.

In a mutual benefit certificate, providing that it should be void if assured should be killed in a "duel," that assured was killed in combat did not avoid the certificate, in the absence of any evidence of prearrangement.—*Davis v. Modern Woodmen of America* (Mo. App.) 923.

§ 19. — Actions for benefits.

Where, in an action on a benefit certificate, the laws of the state where the contract was made were not pleaded, defendant's liability must be construed according to the common law.—*Morton v. Supreme Council of Royal League* (Mo. App.) 259.

A finding that insured did not commit suicide *held* supported by the evidence.—*Shotliff v. Modern Woodmen of America* (Mo. App.) 326.

Change of beneficiary by insured in benefit certificate *held* binding.—*Schmitt v. New Braunfels Unterstuetzungs Verein* (Tex. Civ. App.) 568.

INTENT.

As element of rape, see "Rape," § 1.
Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."
Element of damages, see "Damages," § 2.
Form and sufficiency of verdict allowing interest, see "Trial," § 11.

On particular classes of liabilities.

For loss resulting from negligence of abstractor of title, see "Abstracts of Title."
Legacies, see "Wills," § 5.
Loans by building and loan associations, see "Building and Loan Associations."
Of guardian, see "Guardian and Ward," § 2.

Pecuniary interest in particular subjects.

Disqualification as witness, see "Witnesses," § 2.
Insurable interest, see "Insurance," § 3.

INTERLINEATIONS.

In wills, see "Wills," § 2.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERNAL IMPROVEMENTS.

Grants of lands in aid, see "Public Lands," § 1.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INTERVENTION.

In actions in general, see "Parties," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Constitutional guaranty against abridging privileges and immunities of citizens as applied to local option laws and statutes prescribing penalties for violation thereof, see "Constitutional Law," § 4.

Constitutional guaranty against class legislation as applied to local option laws and statutes prescribing penalties for violation thereof, see "Constitutional Law," § 4.

Constitutional guaranty against deprivation of property without due process of law as applied to local option laws and statutes prescribing penalties for violation thereof, see "Constitutional Law," § 6.

Constitutional guaranty of equal protection of laws as applied to local option laws and statutes prescribing penalties for violation thereof, see "Constitutional Law," § 5.

§ 1. Constitutionality of acts and ordinances.

Pen. Code, art. 405, prescribing a penalty for giving liquor prescriptions, exceeds authority given to the Legislature by Const. art. 16, § 20, providing for local option law.—*Stephens v. State* (Tex. Cr. App.) 1056.

§ 2. Local option.

Under Rev. St. 1895, art. 3397, where grounds alleged in a proceeding to contest a local option election were not based on any irregularity in holding the election, the petition *held* insufficient.—*Lowery v. Briggs* (Tex. Civ. App.) 1062.

Orders, appearing in the minutes of the commissioners' court, for a local option election, counting and declaring the vote, and publication, *held* valid, though such minutes were not signed.—*Davidson v. State* (Tex. Cr. App.) 806.

Under Sayles' Rev. Civ. St. arts. 1533, 1534, local option law *held* not invalid because county judge was not present at opening day of term of commissioners' court which ordered the election.—*Racer v. State* (Tex. Cr. App.) 968.

An order of the commissioners' court prohibiting the sale of intoxicants *held* sufficient, though it did not contain the statutory exceptions.—*Racer v. State* (Tex. Cr. App.) 968.

§ 3. Licenses and taxes.

Application for certiorari to review errors of record in the issuance of a liquor license *held* not defective, on the ground that one of the relators administered the oath to his correlator.—*State ex rel. Cope v. Bennett* (Mo. App.) 737.

Under Rev. St. 1899, § 2995, a dramshop license, issued by the county court before the approval of the required bond, *held* void.—*State ex rel. Cope v. Bennett* (Mo. App.) 737.

Under Sess. Laws 1901, p. 314, c. 136, well-grounded belief that a minor is of age *held* not defense to action on liquor dealer's bond for permitting him to enter and remain in a saloon.—*Cox v. Thompson* (Tex. Sup.) 950.

Emancipation of minor *held* not a defense to parent's action on liquor dealer's bond for permitting the minor to enter and remain in saloon.—*Cox v. Thompson* (Tex. Sup.) 950.

In an action on a liquor dealer's bond for alleged illegal sales, where the evidence showed that the sales complained of were without doubt made by persons for whose acts defendants were liable, it was not necessary to give in-

structions defining the terms "agency" and "employee."—Geo. Scalfi & Co. v. State (Tex. Civ. App.) 441.

Under Rev. St. 1895, art. 5060c, and Pen. Code, art. 411b, sureties on liquor bond *held* not liable for sales of liquor at a certain place.—Saffroi v. Cobun (Tex. Civ. App.) 828.

§ 4. Offenses.

A druggist *held* entitled to sell liquors on physician's prescriptions in local option counties.—State v. Russell (Mo. App.) 297.

The clerk of a registered pharmacist, selling liquors on a physician's prescription at his employer's command, *held* not guilty of illegal sale of intoxicating liquors.—State v. Russell (Mo. App.) 297.

Under Pen. Code 1895, art. 405, *held* not an offense to give prescriptions in local option territory, consisting of a school district.—Gordon v. State (Tex. Cr. App.) 398.

Where liquor was sent to a third party to deliver, with instructions not to deliver without receiving the pay therefor, he was the agent of the consignor, and the sale was consummated at the place of delivery.—Davidson v. State (Tex. Cr. App.) 808.

To constitute a violation of the local option law, there must be a sale alleged and proved.—Stephens v. State (Tex. Cr. App.) 1056.

§ 5. Criminal prosecutions — Indictment, information, or complaint.

An indictment charging an illegal sale of "intoxicating liquors, to wit, whisky, brandy, ale, beer, and wine, a mixture thereof," *held* to sufficiently charge the offense, within the meaning of Cr. Code, § 124.—Cockerell v. Commonwealth (Ky.) 760.

Under an indictment charging an unlawful sale of "intoxicating liquors, to wit, whisky, brandy, ale, beer, and wine, a mixture thereof," a defendant may be convicted if the "hop tonic" he had sold was "whisky, brandy, beer, or wine, or a mixture thereof."—Cockerell v. Commonwealth (Ky.) 760.

A complaint for keeping a saloon open on Sunday *held* not insufficient because it did not state the purpose for which the saloon was kept open.—City of Louisiana v. Anderson (Mo. App.) 875.

Complaint for violating local option law *held* to sufficiently show the local option law was in force in the county at the time of the commission of the offense.—Hollar v. State (Tex. Cr. App.) 961.

Complaint for violation of local option law, although not alleging that the crime was committed "thereofore," *held* good.—Hollar v. State (Tex. Cr. App.) 961.

§ 6. — Evidence.

In a prosecution for illegal selling, *held* competent to prove that hop tonic was intoxicating.—Cockerell v. Commonwealth (Ky.) 760.

In the prosecution of a clerk of a registered pharmacist for selling liquors, a physician's prescription on which the sale was made *held* admissible.—State v. Russell (Mo. App.) 297.

A conviction of violating the local option law cannot be sustained, where the evidence fails to show that the law was in force.—Bottoms v. State (Tex. Cr. App.) 16, 20, 963.

A conviction cannot be had on evidence of a gift of intoxicants, though made for the purpose of evading the law.—Bottoms v. State (Tex. Cr. App.) 16.

The testimony *held* not to warrant conviction for violating local option law.—Racer v. State (Tex. Cr. App.) 807.

Testimony *held* not to sustain conviction for violating local option law.—Faucett v. State (Tex. Cr. App.) 807.

In a prosecution for violating local option law, admission in evidence of whisky bottles, not identified as bought from defendant, *held* error.—Hollar v. State (Tex. Cr. App.) 961.

In a prosecution for violating a local option law, the introduction of orders of the commissioners' court, containing the field notes of the justice's precincts in which the local option was established, *held* not error.—Lively v. State (Tex. Cr. App.) 1048.

Where defendant introduced an injunction restraining proceedings for the establishment of a local option district, a judgment dissolving such injunction *held* admissible in rebuttal.—Lively v. State (Tex. Cr. App.) 1048.

ISSUES.

In civil actions, see "Pleading," § 6.
Presented for review on appeal, see "Appeal and Error," § 3.

JAILS.

See "Prisons."

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."
Mandamus to judge, see "Mandamus," § 2.

§ 1. Disqualification to act.

On criminal prosecution, a remark of the trial judge *held* not to have disqualified him from trying the case.—Bismarck v. State (Tex. Cr. App.) 965.

JUDGMENT.

See "Partnership," § 2.

Authority of attorney to receive payment of judgment obtained, see "Attorney and Client," § 1.

Decisions of courts in general, see "Courts," § 1.

Harmless error, see "Appeal and Error," § 17.

Judicial notice of, see "Evidence," § 1.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

In particular civil actions or proceedings.

See "Divorce," § 3; "Fraud," § 2; "Garnishment," § 5.

Foreclosure, see "Mortgages," § 6.

For injuries to animals on or near railroad tracks, see "Railroads," § 9.

For possession of leased premises, see "Landlord and Tenant," § 6.

For sale of land for taxes, see "Taxation," § 4.

On appeal or writ of error, see "Appeal and Error," § 20.

§ 1. Nature and essentials in general.

Under Rev. St. 1899, § 570, a judgment by default, based on a return of service of the summons by leaving a copy at defendant's residence, which did not show that a copy of the petition was left with the summons, is void, and may be attacked collaterally.—Feurt v. Caster (Mo. Sup.) 576.

§ 2. By default.

While a demurrer to a petition remains undisposed of, it is error to render a default judgment against defendants.—Warford v. Temple (Ky.) 1023.

§ 3. On trial of issues.

A verdict awarding title to the cause of action to an intervenor authorizes a judgment against plaintiff, though he is not named therein.—May v. Martin (Tex. Civ. App.) 840.

§ 4. Equitable relief.

A judgment may be set aside on the ground of fraud of attorneys after the term at which it is rendered.—*Watson v. Texas & P. Ry. Co.* (Tex. Civ. App.) 880.

§ 5. Collateral attack.

A judgment cannot be collaterally attacked on the ground that it was rendered in vacation without consent of the parties.—*Bracken v. Milner* (Mo. App.) 225.

Judgments of probate court are not subject to collateral attack.—*In re Davison's Estate* (Mo. App.) 373; *Davison v. Davison*, Id.

Where a judgment is rendered by virtue of a compromise of the suit, it will be presumed, as against a collateral attack, that plaintiff's attorney was authorized to compromise the claim.—*Hartford Fire Ins. Co. v. King* (Tex. Civ. App.) 71.

§ 6. Merger and bar of causes of action and defenses.

Failure of a wife, who was surety for her husband on a mortgage, to plead her release in an action of ejectment, *held* no objection to her urging such fact in a subsequent suit to enjoin the enforcement of an adverse judgment therein.—*White v. Smith* (Mo. Sup.) 610.

Judgment recovered by a landlord against a purchaser of his tenant's crop as garnishee *held* not a bar to a subsequent action directly against the purchaser.—*Belshe v. Batdorf* (Mo. App.) 888.

A judgment *held* res judicata as to existence of landlord's lien.—*Bond v. Carter* (Tex. Civ. App.) 45.

§ 7. Conclusiveness of adjudication.

Under the facts, *held*, the defendant was liable to plaintiff on the ground of a mistake in their settlement.—*Carmony v. Hanick* (Mo. App.) 344.

A judgment in a suit instituted by plaintiff in the name of another for his own benefit *held* res judicata in a subsequent suit by plaintiff in his own name for the same relief.—*Hartford Fire Ins. Co. v. King* (Tex. Civ. App.) 71.

In ejectment, a judgment by a grantee from a grantor in plaintiff's chain of title against defendant's predecessors in interest *held* not res judicata.—*Lochridge v. Corbett* (Tex. Civ. App.) 96.

§ 8. Foreign judgments.

The judgments of the federal courts are entitled to equal rank and presumption of regularity as judgments of the state courts.—*Bracken v. Milner* (Mo. App.) 225.

§ 9. Assignment.

The assignee of a judgment alone has the right to sue on it.—*Bond v. Carter* (Tex. Civ. App.) 45.

§ 10. Payment, satisfaction, merger, and discharge.

Evidence that satisfaction of a judgment was obtained by fraud, *held* sufficient to sustain the setting of it aside on that ground.—*Pannell v. Pannell* (Mo. App.) 289.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL POWER.

See "Constitutional Law," § 1.

JUDICIAL SALES.

On execution, see "Execution," § 5.

Evidence *held* insufficient to show that an order of court directing that a conveyance be

made to defendant of land sold to plaintiff at a judicial sale was obtained by fraud.—*Smith's Adm'r v. Wells* (Ky.) 742.

A commissioner's deed of an interest in the cutting stone on certain land *held* not to pass any rights in railroad switch over which the stone was carried to the line of a railroad company.—*Bedford-Bowling Green Stone Co. v. Oman* (Ky.) 1038.

JURISDICTION.

Dismissal for want of jurisdiction, see "Dismissal and Nonsuit," § 2.

Jurisdiction of particular actions or proceedings.

Criminal prosecutions, see "Criminal Law," § 1.

For breach of contract, see "Carriers," § 6.

Inquisition of lunacy, see "Insane Persons," § 1.

Special jurisdictions.

Appellate jurisdiction, see "Criminal Law," § 17.

Particular courts, see "Courts."

JURY.

See "Grand Jury."

Custody and conduct, see "Criminal Law," § 15.

Disqualification of juror as ground for new trial in criminal prosecution, see "Criminal Law," § 16.

Instructions in civil actions, see "Trial," §§ 4-10.

Instructions in criminal prosecutions, see "Criminal Law," § 13.

Questions for jury in civil actions, see "Trial," § 3.

Questions for jury in criminal prosecutions, see "Criminal Law," § 11.

Taking case or question from jury at trial, see "Trial," § 3.

Verdict in civil actions, see "Trial," § 11.

§ 1. **Right to trial by jury.**

Where cause is transferred from county court in probate to district court, parties become entitled to a trial by jury.—*Stone v. Byars* (Tex. Civ. App.) 1086.

§ 2. Summoning, attendance, discharge, and compensation.

Under Rev. St. 1899, §§ 3769, 3770, where a regular jury panel had been discharged prior to the calling of the case, the sheriff was properly ordered to summon a jury therefor.—*State v. Stuckey* (Mo. App.) 735.

§ 3. Competency of jurors, challenges, and objections.

That jury commissioners and jurors selected to try defendant for a violation of a local option law were Prohibitionists *held* no ground for reversal of a conviction.—*Lively v. State* (Tex. Cr. App.) 1048.

JUSTICES OF THE PEACE.**§ 1. Procedure in civil cases.**

Rev. St. 1899, § 8850, does not make it competent to show by an entry in a justice docket when a summons was delivered to a constable.—*Heman v. Larkin* (Mo. App.) 218.

The time of delivery of a summons not being indorsed thereon, *held* to be competent to show it by evidence aliunde.—*Heman v. Larkin* (Mo. App.) 218.

Rev. St. 1899, § 3850, controls section 506 in regard to the time when suits in a justice court are deemed commenced.—*Heman v. Larkin* (Mo. App.) 218.

Under Rev. St. 1899, §§ 3972, 3973, a justice's judgment rendered after the filing of an affidavit for a change of venue is a nullity.—*Baskowitz v. Guthrie* (Mo. App.) 227.

Appellant in circuit court from justice's judgment *held* not to have waived refusal of change of venue by appearing generally in circuit court.—*Baskowitz v. Guthrie* (Mo. App.) 227.

§ 2. Review of proceedings.

Under Rev. St. 1899, § 4074, notice of appeal, stating the style of the cause and name of the justice rendering the judgment, *held* not defective because of failure to state the date of the judgment.—*Munroe v. Herrington* (Mo. App.) 221.

Under its general power of supervision over inferior courts, it is competent for the circuit court to vacate the judgment of a justice, rendered after refusal of the change of venue, and send the cause back with directions to grant the change.—*Baskowitz v. Guthrie* (Mo. App.) 227.

Refusal of trial court to permit defendants, sued as partners, to file affidavit denying partnership, on the ground that it was too late, *held* error.—*Simon v. Ryan* (Mo. App.) 353.

On trial de novo in circuit court after appeal from justice, *held*, that defendants, sued as partners, could for the first time deny the partnership.—*Simon v. Ryan* (Mo. App.) 353.

Rev. St. 1899, § 4079, *held* not to justify an amendment of the complaint on appeal from a justice for the purpose of conferring jurisdiction.—*United States Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co.* (Mo. App.) 364.

Where an action was dismissed by a justice for want of jurisdiction, and an amended complaint reducing the damages, attached to transcript on appeal, did not show that it was filed with the justice, it would be presumed that the amendment was not allowed.—*United States Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co.* (Mo. App.) 364.

Under Rev. St. 1899, §§ 3852, 4078, a set-off or counterclaim not pleaded before a justice is not available on appeal.—*Hunter v. Helsley* (Mo. App.) 719.

Under Rev. St. 1899, § 3385, where the clerk neglected to indorse his approval on a certiorari bond, the court properly permitted him to make such indorsement *nunc pro tunc*.—*Gossett v. Devorss* (Mo. App.) 731.

Writ of certiorari issued to a justice may be served by a private person.—*Gossett v. Devorss* (Mo. App.) 731.

Under Rev. St. 1899, § 4072, the insufficiency of an affidavit for appeal from a justice is waived, if no motion to dismiss is made.—*Poston v. Williams* (Mo. App.) 1099.

Rev. St. § 3871, does not authorize justice to permit a poor person to take an appeal to circuit court without executing an appeal bond, as required by section 4060.—*Hyatte v. Wheeler* (Mo. App.) 1100.

JUSTIFICATION.

Of actionable words, see "Libel and Slander," § 2.

Of homicide, see "Homicide," § 1.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

By testator of contents of will, see "Wills," § 2.

Of falsity of representations, see "Fraud," § 1.

LACHES.

Effect in equity, see "Equity," § 1.

In seeking reinstatement of appeal, see "Appeal and Error," § 10.

LANDLORD AND TENANT.

See "Forcible Entry and Detainer," § 1.

Leases of public lands, see "Public Lands," § 2.

§ 1. Creation and existence of the relation.

In action for rent of land, instructions predicated on agreement to pay rent *held* erroneous.—*Gillespie v. Hendren* (Mo. App.) 361.

One who had grazed his cattle on plaintiff's land *held* bound to pay a reasonable compensation under an implied promise to pay rent.—*Gillespie v. Hendren* (Mo. App.) 361.

A denial of the lessor's title by an assignee of the lease, and an assertion of title in itself, terminates the assignee's rights under the lease.—*Wilkey Lodge No. 21, I. O. O. F., v. City of Paris* (Tex. Civ. App.) 69.

§ 2. Leases and agreements in general.

Where the consideration for a lease was the lessee's agreement to maintain a certain kind of school on the premises, and an assignee of the lease maintained a school for several years to the character of which the lessor did not object until some 17 years after it was instituted, the lessor was not then entitled to object.—*Wilkey Lodge No. 21, I. O. O. F., v. City of Paris* (Tex. Civ. App.) 69.

§ 3. Terms for years.

Rev. St. 1899, § 4107, does not prevent a tenant from subletting.—*Moore v. Guardian Trust Co.* (Mo. Sup.) 143.

Action of tenant in paying into court fund which had been paid to it to protect it against loss from failing to occupy respondent's building, and in compelling the parties to interplead therefor, *held* not to affect rights in the fund.—*Moore v. Guardian Trust Co.* (Mo. Sup.) 143.

Payment to a tenant of amount equal to rent that it had agreed to pay for building leased from another *held* to have been made merely to indemnify the tenant against loss from failing to occupy the building as agreed.—*Moore v. Guardian Trust Co.* (Mo. Sup.) 143.

One who leased his building to a board of trade, and afterwards enjoined the board from assigning or subletting to a third party, *held* to have breached the lease.—*Moore v. Guardian Trust Co.* (Mo. Sup.) 143.

Under Rev. St. 1895, § 8250, a lessor waived its right to object to the assignment of the lease.—*Wilkey Lodge No. 21, I. O. O. F., v. City of Paris* (Tex. Civ. App.) 69.

§ 4. Premises, and enjoyment and use thereof.

The mere fact that a board of trade, in leasing respondent's building, intended to move into it, gave respondent no right to compel it to do so.—*Moore v. Guardian Trust Co.* (Mo. Sup.) 143.

Tenants from year to year, entitled to growing crops of clover under lease, *held* entitled thereto against one purchasing premises, with knowledge, after time limited by Rev. St. 1899, § 4109, for terminating lease.—*Horman v. Cargill* (Mo. App.) 1101.

§ 5. Rent and advances.

In an action for rent by a landlord against a purchaser of his tenant's crop, evidence *held* sufficient to submit the issue of defendant's knowledge of tenancy to the jury.—*Belshe v. Batdorf* (Mo. App.) 888.

Expiration of rent lien will not bar an action, under Rev. St. 1899, § 4123, against a purchaser of tenant's crop during lifetime of lien.—*Belshe v. Batdorf* (Mo. App.) 888.

A landlord's lien *held* waived.—*Bond v. Carter* (Tex. Civ. App.) 45.

A holding over for a third term *held* under an implied contract, and not under the written lease, and hence an action for rent accrued was subject to the two-year statute of limitations.—*Roller v. Zundelowitz* (Tex. Civ. App.) 1070.

§ 6. Re-entry and recovery of possession by landlord.

Where writ of restitution was not fully executed, plaintiff *held* entitled to full execution under alias writ.—*Dieckman v. Weirich* (Ky.) 1119.

A constable *held* not justified in refusing to serve an alias execution awarding possession of certain premises, on the ground that the judgment was not within the justice's jurisdiction.—*State ex rel. Clement v. Rainey* (Mo. App.) 250.

That a landlord, in an action for possession and rent under Rev. St. 1899, § 4131, obtained a landlord's attachment, under section 4123, did not deprive the justice of jurisdiction to render judgment for the rent and possession.—*State ex rel. Clement v. Rainey* (Mo. App.) 250.

A statement filed in an action by a landlord for rent and possession *held* not objectionable for failure to allege that the relation of landlord and tenant existed between the parties.—*State ex rel. Clement v. Rainey* (Mo. App.) 250.

In a dispossession action, under Rev. St. 1899, § 4133, a tender of rent and costs for the first time on appeal will not prevent a forfeiture of the demised premises.—*Walter Commission Co. v. Gilleland* (Mo. App.) 295.

In a dispossession action, under Rev. St. 1899, §§ 4130, 4133, circuit court, on appeal from justice, cannot enter judgment for an amount in excess of justice's jurisdiction; but plaintiff may elect to take judgment of possession.—*Walter Commission Co. v. Gilleland* (Mo. App.) 295.

In an action by a lessor to recover leased premises, an allegation that a corporation to which the lease was assigned was incapable of accepting an assignment *held* not sufficient to show the invalidity of the assignment.—*Wilkey Lodge No. 21, I. O. O. F., v. City of Paris* (Tex. Civ. App.) 69.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement"; "Receiving Stolen Goods."

§ 1. Offenses and responsibility therefor.

The act of the manager of a store in taking certain goods therefrom *held* not a larceny, but merely a breach of trust.—*Bismarck v. State* (Tex. Cr. App.) 965.

§ 2. Prosecution and punishment.

Indictment for theft *held* to sufficiently negative want of consent of the owners of the property.—*Wesley v. State* (Tex. Cr. App.) 960.

There was no variance between indictment for theft and the proof, though indictment described owner of the property as "M." when he was in fact "M., Jr."—*Wesley v. State* (Tex. Cr. App.) 960.

Evidence of possession of stolen property, a year after it was missed, *held* insufficient to sustain a conviction for the theft thereof.—*Porter v. State* (Tex. Cr. App.) 1053.

In a prosecution for theft, refusal to charge that the jury should acquit, if defendant's possession of the property was not recent, *held* error.—*Porter v. State* (Tex. Cr. App.) 1053.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 19.

LEADING QUESTIONS.

See "Witnesses," § 8.

LEASES.

See "Landlord and Tenant."

Of public lands, see "Public Lands," § 2.

LEGACIES.

See "Wills."

LETTERS.

As evidence in civil actions, see "Evidence," § 8.

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

Conduct of officers of commercial agency in circulating reports as to plaintiff's financial condition *held* such as to subject them to charge of malice.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against commercial agency for circulation of report as to plaintiff's financial condition, instruction as to malice *held* not erroneous.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

§ 2. Justification and mitigation.

In action against a commercial agency for circulating a report that plaintiffs were not in a sound financial condition, fact that defendant's agent, from whom it received the information, may have believed it true, *held* no defense, unless it was made without malice.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

§ 3. Actions.

In action against commercial agency for circulating report that plaintiffs were not in sound financial condition, burden *held* on defendant to show plaintiff's insolvency by a preponderance of evidence.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

Where a commercial agency with express malice circulates a report that a merchant is not in a sound financial condition, the merchant, in an action for damages, is entitled to punitive damages.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against a commercial agency for circulating certain report as to plaintiff's financial condition, a verdict for \$30,000 in favor of plaintiffs *held* not excessive under the evidence.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against commercial agency for circulating a report that plaintiff was said to have given a bank security, an instruction submitting question whether security had been given *held* not prejudicial to defendant.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against a commercial agency for circulating a report that plaintiff was not in a sound financial condition, and where the defense was truth of the report, evidence examined, and *held* sufficient to render the question of solvency for the jury.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against commercial agency for circulating report that plaintiffs were not in a sound financial condition, evidence *held* not to warrant an instruction that plaintiffs could not recover because of defendant's statement that it was reported plaintiffs had given a bank security.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against commercial agency for circulating report that plaintiffs were not in sound financial condition, an instruction *held* not erroneous because it did not mention defendant's privilege.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action against commercial agency for circulating report that plaintiff was not in sound financial condition. Instructions on the question of damages *held* not obnoxious to objection that court had given a "roving commission as to damages."—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

In action for libel, *held* not duty of trial court to instruct on mitigation of damages, where defendant failed to request any such instruction. Rev. St. 1899, § 2081.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 3.

§ 1. For occupations and privileges.

Under Kansas City Charter, art. 5, § 78, and Rev. St. 1899, § 8540, a manufacturer is a merchant if he keeps his goods for sale at a store, stand, or other place.—*Kansas City v. Ferd Heim Brewing Co.* (Mo. App.) 302.

A dealer is not always a merchant within the statute.—*Kansas City v. Ferd Heim Brewing Co.* (Mo. App.) 302.

A manufacturer who only manufactures on order is not a merchant, within Kansas City Charter, art. 5, § 78, and Rev. St. 1899, § 8540.—*Kansas City v. Ferd Heim Brewing Co.* (Mo. App.) 302.

License tax of \$50 per day, imposed on "fire sale" and "bankrupt sale" stores of temporary character, *held* oppressive and unreasonable.—*City of Springfield v. Jacobs* (Mo. App.) 1097.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

Liens acquired by particular remedies or proceedings.

See "Garnishment," § 4.

Particular classes of liens.

See "Mechanics' Liens."

Landlord's lien for rent, see "Landlord and Tenant," § 5.

Mortgage, see "Mortgages," § 1.

Of attorneys, see "Attorney and Client," § 3.

Of broker, see "Brokers," § 1.

Of livery stable keeper, see "Livery Stable Keepers."

Pledge, see "Pledges."

Tax lien, see "Taxation," § 5.

Vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

LIFE ESTATES.

See "Dower."

LIFE INSURANCE.

See "Insurance," § 9.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Action for recovery of land sold for taxes, see "Taxation," § 5.

Action for rent, see "Landlord and Tenant," § 5.

Laches, see "Equity," § 1.

§ 1. Statutes of limitation.

An action to set aside a judgment on the ground of fraud on the part of attorneys representing the party at the time the judgment was rendered *held* barred after four years, by Rev. St. 1895, art. 3358.—*Watson v. Texas & P. Ry. Co.* (Tex. Civ. App.) 830.

§ 2. Computation of period of limitation.

Rev. St. 1899, § 4285, providing that if an action be commenced within the period of limitation, and plaintiff suffers a nonsuit, he may commence a new action within a year, *held* not applicable to the case at bar.—*Missouri & S. W. Land Co. v. Quinn* (Mo. Sup.) 184.

A petition on a note, misnaming defendant, *held* not to toll the statute of limitations.—*Martinez v. Dragna* (Tex. Civ. App.) 425.

The claim on which a plea in reconvention is based is not barred by limitations, though the plea filed before the claim was barred was defective; it being susceptible of amendment.—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Tex. Civ. App.) 545.

Limitations commence to run against an action to set aside a judgment on account of the fraud of plaintiff's attorneys, representing him at the time it was rendered, from the time when the fraud is discovered, or should have been.—*Watson v. Texas & P. Ry. Co.* (Tex. Civ. App.) 830.

LIMITATION OF LIABILITY.

Of connecting carriers, see "Carriers," § 6.

LIQUIDATED DAMAGES.

See "Damages," § 3.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

LIVERY STABLE KEEPERS.

Livery stable keepers *held* to have no lien, under Rev. St. 1899, § 4228, on a carriage for board of a horse which came into their possession before the carriage did.—*Zartman-Thalman Carriage Co. v. Reid* (Mo. App.) 942.

LIVE STOCK.

See "Animals."

Carriage of, see "Carriers," § 7.

Injuries from operation of railroads, see "Railroads," § 9.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 2.

LOCATION.

Of railroads, see "Railroads," § 2.

LUNATICS.

See "Insane Persons."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 3.
Production and use of electricity, see "Electricity."

MALICE.

See "Libel and Slander," § 1.

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. Want of probable cause.

That defendant consulted counsel *held* not to exonerate him of liability for causing plaintiff's arrest.—*Butcher v. Hoffman* (Mo. App.) 266.

§ 2. Actions.

Where want of probable cause is shown, the burden is on defendant to show that he acted without malice.—*Butcher v. Hoffman* (Mo. App.) 266.

Evidence in an action for malicious arrest *held* to show a want of probable cause.—*Butcher v. Hoffman* (Mo. App.) 266.

MANDAMUS.

Jurisdiction of supreme courts to issue, see "Courts," § 2.

§ 1. Nature and grounds in general.

Mandamus will not lie to compel the land commissioner to reinstate a sale, when disputed questions of fact must be determined.—*Wooten v. Rogan* (Tex. Sup.) 799.

§ 2. Subjects and purposes of relief.

Fact that Court of Appeals had adjourned *held* not to affect jurisdiction of Supreme Court to issue writ compelling it to reinstate an appeal.—*State ex rel. City of Stanberry v. Smith* (Mo. Sup.) 134.

Mandamus *held* to lie to compel district court to hear evidence on exceptions to report of commissioners, under Rev. St. 1899, §§ 1035, 1268, as regards their determination as to point and manner of the crossing of one railroad by another.—*State ex rel. Mississippi River & B. T. Ry. v. Dearing* (Mo. Sup.) 485.

Mandamus *held* to lie to compel Secretary of State to issue certificate authorizing private banking under Rev. St. 1899, §§ 1278, 1299, 1301.—*State ex rel. Jones v. Cook* (Mo. Sup.) 489.

Where a constable refuses to execute a writ awarding possession of land, he may be compelled to enforce the writ by mandamus.—*State ex rel. Clement v. Stokes* (Mo. App.) 254.

§ 3. Jurisdiction, proceedings, and relief.

In mandamus to compel an officer to execute a writ of possession, the vacation of the premises pending such suit, in which relator subsequently recovered, did not relieve the officer from liability for costs.—*State ex rel. Clement v. Stokes* (Mo. App.) 254.

An alternative writ of mandamus against a city to compel the levy of taxes to pay a judgment *held* sufficient.—*Hartman v. City of Brunswick* (Mo. App.) 728.

A petition for mandamus against the Commissioner of the General Land Office, to command him to rescind his action in canceling a purchase of public land under Act Feb. 23, 1900, p. 32, c. 11, § 6. *held* insufficient for failing to show the land was out of a tract of 2,560 acres or less.—*Moore v. Rogan* (Tex. Sup.) 1.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 20.

MARRIAGE.

See "Breach of Marriage Promise"; "Divorce"; "Husband and Wife."

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 2.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Error in instructions in action against master as on weight of evidence, see "Trial," § 4.
Exemption of wages, see "Exemptions."
Taking goods by employé as larceny, see "Larceny," § 1.

§ 1. The relation.

Evidence in action by a servant *held* not to show the company liable as employer.—*St. Louis Southwestern Ry. Co. v. Smith* (Ark.) 101.

In an action by a servant for wrongful discharge, certain evidence *held* properly excluded.—*Heagy v. Irondale Lead Co.* (Mo. App.) 1006.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

Injury to conductor of electric car *held* caused by negligence of motoneer in failing to close apparatus against current.—*Sams v. St. Louis & M. R. Co.* (Mo. Sup.) 686.

A railway company *held* not relieved of liability to an employé for injury because of an accident policy, part of premium on which was paid by the employer.—*Dover v. Mississippi River & B. T. Ry.* (Mo. App.) 298.

§ 3. — Tools, machinery, appliances, and places for work.

The failure of a master to have a screen in front of a blast furnace replaced *held* negligence sufficient to justify a recovery for injuries to a servant.—*Curtis v. McNair* (Mo. Sup.) 167.

An instruction, in an action for injuries to a servant by being struck by molten material from a blast furnace, that it was defendants' duty to have a certain screen in front of the furnace, *held* proper.—*Curtis v. McNair* (Mo. Sup.) 167.

Evidence *held* insufficient to establish negligence on the part of a railroad company in failing to provide a safe handle bar on hand car.—*Howard v. Missouri Pac. Ry. Co.* (Mo. Sup.) 467.

Master *held* not liable for injuries to servant occasioned by his falling into a hole dug without authority in the master's premises by a third person.—*Chandler v. Kansas City, Missouri, Gas Co.* (Mo. Sup.) 502.

In an action for injuries to a servant caused by a coal gate giving way, evidence *held* sufficient to establish defendant's negligence.—*Gulf, C. & S. F. Ry. Co. v. Brooks* (Tex. Civ. App.) 571.

§ 4. — Warning and instructing servant.

Railroad company *held* negligent in failing to warn a call boy in a switchyard of the danger of being struck by certain scales while riding

on the side of a freight car.—*St. Louis Southwestern Ry. Co. of Texas v. Spivey* (Tex. Civ. App.) 973.

§ 5. — Fellow servants.

No recovery of damages will be allowed to an employé against an employer for injuries not resulting in death, received through the negligence of a superior in the service of such employer, unless such negligence be gross, and even then the recovery is limited to compensatory damages.—*Kentucky Distilleries & Warehouse Co. v. Schreiber* (Ky.) 769.

In an action for injuries to a servant, evidence that the injury was caused by the negligence of plaintiff's foreman, etc., *held* sufficient to warrant a verdict for plaintiff.—*Louisville & N. R. Co. v. Crady* (Ky.) 1126.

A car starter, having authority to direct motormen and conductors of electric cars when to start, *held* a fellow servant of such employes.—*Sams v. St. Louis & M. R. Co.* (Mo. Sup.) 686.

Rev. St. 1899, § 2873, the "fellow servant act," *held* not applicable to street railroads.—*Sams v. St. Louis & M. R. Co.* (Mo. Sup.) 686.

Charter of corporation operating a street railway *held* not decisive of question whether or not it was within the fellow servant act.—*Sams v. St. Louis & M. R. Co.* (Mo. Sup.) 686.

§ 6. — Risks assumed by servant.

In an action for injuries to a servant by being struck by molten material, whether the "blow-out" was caused by a hard blast *held* immaterial.—*Curtis v. McNair* (Mo. Sup.) 167.

Where the absence of a screen in front of a blast furnace was due to the negligence of a master, a plea of assumption of risk *held* unavailable.—*Curtis v. McNair* (Mo. Sup.) 167.

Where it was not shown whether injury resulted from negligence of master or from risks assumed by servant, *held*, that servant could not recover for such injury.—*Cothron v. Cudahy Packing Co.* (Mo. App.) 279.

Servant *held* to have assumed certain risks.—*Cothron v. Cudahy Packing Co.* (Mo. App.) 279.

Whether risks assumed by servant were or were not so obviously and immediately dangerous as to deter ordinarily prudent person from undertaking the work *held* immaterial.—*Cothron v. Cudahy Packing Co.* (Mo. App.) 279.

Railway conductor *held* not to have assumed the risk of being injured through the negligence of the railroad company.—*St. Louis Southwestern Ry. Co. of Texas v. McDowell* (Tex. Civ. App.) 974.

§ 7. — Actions.

In an action for death of a brakeman, evidence *held* insufficient to show any negligence on the part of defendant.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r* (Ky.) 765.

Where a servant was injured by the negligence of one of two defendant's other servants, the question as to which one was negligent was for the jury.—*Kentucky Distilleries & Warehouse Co. v. Schreiber* (Ky.) 769.

Master *held* liable for gross negligence of superior servant in failing to properly protect inferior servants.—*Kentucky Distilleries & Warehouse Co. v. Schreiber* (Ky.) 769.

In an action for injuries to a servant by being struck by material from a blast furnace, the modification of a requested instruction *held* not error.—*Curtis v. McNair* (Mo. Sup.) 167.

In an action for injuries to a servant, a requested instruction as to the master's duty to use safety appliances *held* properly refused.—*Curtis v. McNair* (Mo. Sup.) 167.

In an action for injuries to a servant from molten material shot from a blast furnace, in-

struction *held* not objectionable as unsupported by the evidence.—*Curtis v. McNair* (Mo. Sup.) 167.

A servant in a foundry, injured by flying material from a furnace, *held* not guilty of contributory negligence as a matter of law.—*Curtis v. McNair* (Mo. Sup.) 167.

That a servant returned to work after objecting to the absence of a safety appliance and receiving an assurance of safety from the foreman *held* sufficient evidence of reliance on such assurance.—*Curtis v. McNair* (Mo. Sup.) 167.

Where a servant's injuries arose solely from risks incident to the business, the defense of assumption of risk *held* provable under a general denial.—*Curtis v. McNair* (Mo. Sup.) 167.

In an action by a servant for injuries, the doctrine of "res ipsa loquitur" *held* not to apply.—*Cothron v. Cudahy Packing Co.* (Mo. App.) 279.

The question of negligence in leaving open a switch, into which a train ran, injuring the baggage agent, *held* for the jury.—*Dover v. Mississippi River & B. T. Ry.* (Mo. App.) 298.

A petition *held* to justify a recovery for injuries to a servant on the ground of the master's negligence in ordering her to operate a machine, though such negligence was not one of the acts of negligence specifically enumerated.—*Adolff v. Columbia Pretzel & Baking Co.* (Mo. App.) 321.

In an action for injuries to a servant while operating an alleged defective machine, instructions *held* erroneous as not limited to defects alleged in the petition.—*Adolff v. Columbia Pretzel & Baking Co.* (Mo. App.) 321.

In an action for injuries to a servant, instructions for defendant as to act of negligence alleged *held* inconsistent and misleading.—*Adolff v. Columbia Pretzel & Baking Co.* (Mo. App.) 321.

An inexperienced servant's mode of operating a dough-kneading machine and the danger incident thereto *held* not such as to render the servant guilty of contributory negligence as a matter of law.—*Adolff v. Columbia Pretzel & Baking Co.* (Mo. App.) 321.

Where plaintiff was commanded to operate a dangerous machine under penalty of discharge for refusal, whether plaintiff assumed the risk of injury therefrom *held* a question for the jury.—*Adolff v. Columbia Pretzel & Baking Co.* (Mo. App.) 321.

In an action for personal injuries, alleged to have been caused by the negligence of plaintiff's employer in compelling her to remain in the street, awaiting admittance to the building, evidence *held* to show plaintiff not entitled to recover.—*Reames v. Jones Dry Goods Co.* (Mo. App.) 935.

In an action for injuries to a section hand by a collision between a train and a hand car, evidence *held* sufficient to justify a jury finding that plaintiff was not guilty of contributory negligence.—*Texas & P. Ry. Co. v. Carter* (Tex. Civ. App.) 50.

In an action against a railway company for injuries to servant, a charge *held* to sufficiently present issue of contributory negligence as proximate cause.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

In an action against a railway company for injuries to servant, requested charge *held* not to assume defendant's negligence.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

In an action against a railway company for injuries to servant, requested charge *held* sufficient to call for a proper charge on negligence.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

Whether servant, injured while inspecting train, knew that brake shoes were not set, *held* to be a question for the jury.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

In an action against a railway company for injuries to servant, evidence *held* sufficient to submit the issue of assumption of risk to jury.—*Rea v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 555.

In an action for injuries to a servant caused by a coal gate giving way, rebuttal testimony *held* properly admitted.—*Gulf, C. & S. F. Ry. Co. v. Brooks* (Tex. Civ. App.) 571.

In an action against a railroad company for death of a servant, evidence *held* not to show any negligence on defendant's part.—*Jones v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 1090.

§ 8. Master's liability for injuries to third persons.

Railroad *held* liable for malicious act of brakeman in pushing boy off car, if done within scope of employment.—*Williams' Adm'r v. Southern Ry. in Kentucky* (Ky.) 779.

Evidence in action against railroad company for assault by employe *held* to warrant submitting to the jury the question as to scope of employe's duties.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

Evidence in an action against a railroad company for an assault by its depot hands on one getting freight from the depot *held* to sustain a finding that the assault was not in self-defense.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

A railroad company is liable for an assault committed by its depot hands in protecting freight from rough handling, though they may have exceeded their instructions, or have been expressly forbidden to commit such wrongful act.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

Evidence in an action against a railroad company for an assault by its depot hands *held* to sustain a finding that the assault was within the scope of assailant's employment.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

In an action for intestate's death from smallpox, inoculated by the negligence of defendant's nurse, an instruction on intestate's contributory negligence *held* properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Tex. Civ. App.) 542.

A petition for the death of plaintiff's intestate from smallpox communicated to him by a nurse employed by defendant's servant *held* not objectionable for failure to allege that at the time intestate was inoculated the nurse was in defendant's service and acting within the scope of his employment.—*Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Tex. Civ. App.) 542.

A railroad company *held* liable for the negligence of its physician in employing an incompetent nurse to care for a smallpox patient, by whose negligence the disease was communicated to plaintiff's intestate.—*Missouri, K. & T. Ry. Co. of Texas v. Freeman* (Tex. Civ. App.) 542.

That a railroad employe, assaulting a licensee at a depot, lost his temper and used an unreasonable amount of force, though without provocation from the person assaulted, would not acquit the company of liability.—*Texas & N. O. R. Co. v. Taylor* (Tex. Civ. App.) 1081.

Evidence in action by licensee at railroad depot for assault by railway policeman *held* to show that the assailant was acting as agent of the company.—*Texas & N. O. R. Co. v. Taylor* (Tex. Civ. App.) 1081.

§ 9. Interference with the relation by third persons.

It is an actionable wrong to induce the servant of another to break his contract of employment.—*J. S. Brown Hardware Co. v. Indiana Stove Works* (Tex. Sup.) 800.

MEASURE OF DAMAGES.

See "Damages," § 5.

MECHANICS' LIENS.

§ 1. Right to lien.

Under Rev. St. 1889, §§ 6705, 6706, a mechanic's lien may be enforced, where contract for improvements was made with the equitable owner of the property.—*Sawyer Austin Lumber Co. v. Clark* (Mo. Sup.) 137.

§ 2. Proceedings to perfect.

Description of property in a lien paper *held* sufficient to subject building to a mechanic's lien.—*Sawyer Austin Lumber Co. v. Clark* (Mo. Sup.) 137.

Under Rev. St. 1899, § 4212, the executors of a deceased owner of property are the proper parties to serve with notice of subcontractor's claim of lien.—*P. M. Bruner Granitoid Co. v. Klein* (Mo. App.) 313.

Notice of claim of mechanic's lien, served on executors of deceased owner, was sufficient to notify trustees of the property under the will, when the executors were also trustees.—*P. M. Bruner Granitoid Co. v. Klein* (Mo. App.) 313.

§ 3. Operation and effect.

Under Rev. St. 1889, § 6707, a lien may be enforced against a building for which material has been furnished, under contract with the equitable owner of the land, after such owner's title to the land has failed.—*Sawyer Austin Lumber Co. v. Clark* (Mo. Sup.) 137.

§ 4. Enforcement.

Error in description in an action to enforce a mechanic's lien *held* not fatal.—*Sawyer Austin Lumber Co. v. Clark* (Mo. Sup.) 137.

Erroneous specific description in an action to enforce mechanic's lien could be disregarded, and the proceeding had under the general description.—*Sawyer Austin Lumber Co. v. Clark* (Mo. Sup.) 137.

MEDICINES.

See "Poisons."

MEETINGS.

Of religious societies, see "Religious Societies."

MEMORANDA.

Use of by witness to refresh memory, see "Witnesses," § 3.

MERCANTILE AGENCIES.

Liabilities for libel and slander, see "Libel and Slander."

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

By insured, see "Insurance," § 8.
Procuring subscriptions to corporate stock, see "Corporations," § 1.

MODIFICATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.
Of requested instruction in criminal prosecution, see "Criminal Law," § 14.

MONOPOLIES.

Grants of privileges or immunities, see "Constitutional Law," § 4.

§ 1. Trusts and other combinations in restraint of trade.

Evidence *held* sufficient to show a combination to regulate the prices of meats, in violation of Rev. St. 1899, §§ 8965, 8966.—State ex inf. Crow v. Armour Packing Co. (Mo. Sup.) 645.

To constitute the offense of entering into a combination to regulate prices, in violation of Rev. St. 1899, §§ 8965, 8966, a complete monopoly or injury to the public is not necessary.—State ex inf. Crow v. Armour Packing Co. (Mo. Sup.) 645.

Under Rev. St. 1899, § 8971, punishment for a combination to fix prices may be a fine, without forfeiture of right to do business, the combination having been abandoned.—State ex inf. Crow v. Armour Packing Co. (Mo. Sup.) 645.

Acts 1899, p. 251, c. 146, § 14 (anti-trust law of 1899), *held* not to make the act of 1899 a part of the act of 1895 (Acts 1895, p. 112, c. 83), so as to incorporate into the former the provisions of section 12 of the latter.—State v. Laredo Ice Co. (Tex. Sup.) 951.

MORTGAGES.

See "Acknowledgment," § 1.

Harmless error in judgment on foreclosure, see

"Appeal and Error," § 17.

Of personal property, see "Chattel Mortgages."

Of wife's separate estate, see "Husband and Wife," § 3.

§ 1. Construction and operation.

Rights of heirs of a deceased wife to enforce a resulting trust as to certain land standing in the name of the husband *held* subject to the rights of a bona fide mortgagee of the husband.—Johnston v. Johnston (Mo. Sup.) 202.

One in possession of realty, and whose duty it is to pay the taxes, cannot impair the right of a mortgagee by neglecting to pay and then purchasing at a tax sale.—Davis v. Evans (Mo. Sup.) 512.

The holder of a second mortgage cannot impair the rights of the first mortgagee by purchasing an outstanding tax title from which he had the right to redeem.—Davis v. Evans (Mo. Sup.) 512.

§ 2. Rights and liabilities of parties.

A trustee and beneficiary under a deed of trust may maintain trover for the conversion of trust property.—Edge v. Emerson (Ark.) 793.

Where a wife mortgaged her separate property as surety for her husband, and was discharged from liability, she was entitled to rent collected for the mortgagees' use from such property under a contract with her husband.—White v. Smith (Mo. Sup.) 610.

§ 3. Transfer of property mortgaged or of equity of redemption.

Grantor in a trust deed given to secure a note *held* released from liability thereon to the extent of loss he sustained by reason of fraudulent foreclosure sale.—Dwyer v. Rohan (Mo. App.) 384.

§ 4. Payment or performance of condition, release, and satisfaction.

A trust deed *held* to authorize grantor to pay indebtedness before maturity with money obtained from second mortgage on the property.—Snow v. Bass (Mo. Sup.) 630.

Rev. St. 1899, § 4363, *held* not enforceable against mortgagee, refusing in good faith to satisfy mortgage on ground that indebtedness secured was not due.—Snow v. Bass (Mo. Sup.) 630.

§ 5. Foreclosure by exercise of power of sale.

A purchaser under foreclosure of a second deed of trust *held* entitled to the rights of the cestui que trust thereunder as of the date of its execution.—Finley v. Babb (Mo. Sup.) 180.

Duty of trustee, to grantor in a trust deed given to secure a note, to fairly conduct foreclosure sale under the deed, *held* not changed by subsequent sale by grantor to one who assumed the note.—Dwyer v. Rohan (Mo. App.) 384.

Grantor in a trust deed given to secure a note *held* entitled to have sale under the deed honestly conducted, so as to realize best possible price.—Dwyer v. Rohan (Mo. App.) 384.

Trustee in trust deed cannot purchase at a foreclosure sale without the grantor's consent.—Dwyer v. Rohan (Mo. App.) 384.

Evidence *held* to show a wrongful appropriation of security by trustee under a trust deed given to secure a note.—Dwyer v. Rohan (Mo. App.) 384.

§ 6. Foreclosure by action.

A judgment on foreclosure of a mortgage *held* to properly include the mortgagees' future interests in the property.—Rudd v. Travelers' Ins. Co. (Ky.) 759.

Purchaser at a sale under a mortgage foreclosure *held* to take only the interests of mortgagees.—Rudd v. Travelers' Ins. Co. (Ky.) 759.

Averments in a petition to foreclose a mortgage *held* insufficient to entitle plaintiff to a personal judgment for mortgage debt.—Bush v. Louisville Trust Co. (Ky.) 775.

A deed by a remainderman after the death of the life tenant *held* to convey no title, where such remainderman's interest had been barred by foreclosure of a deed of trust there.—Finley v. Babb (Mo. Sup.) 180.

A surplus arising on the sale of property where the wife, who was surety for her husband, had been discharged from liability on a mortgage, *held* payable to the wife, and subject to such second mortgage.—White (Mo. Sup.) 610.

§ 7. Redemption.

Where a mortgage is foreclosed by as authorized by Rev. St. 1899, § 43:1, the grantor is not entitled to redeem.—White v. Smith (Mo. Sup.) 610.

Where a mortgage is foreclosed as authorized by Rev. St. 1899, § 43:1, the right of redemption exists, notwithstanding fraud, etc.—White v. Smith (Mo. Sup.) 610.

MOTIONS

Arrest of judgment in criminal case, see "Criminal Law," § 16.

Continuance in civil action, see "Practice," § 16.

Direction of verdict in civil case, see "Practice," § 16.

New trial in civil actions, see "New Trial," § 2.
 New trial in criminal prosecutions, see "Criminal Law," § 16.
 Presentation of objections for review, see "Appeal and Error," § 3.
 Quashing indictment or information, see "Indictment and Information," § 3.
 Relating to pleadings, see "Pleading," § 5.
 Striking out evidence, see "Criminal Law," § 11.

MUNICIPAL CORPORATIONS.

See "Counties."

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."
 Regulation of railroads, see "Railroads," § 5.
 Street railroads, see "Street Railroads."
 Water supply, see "Waters and Water Courses," § 3.

§ 1. Creation, alteration, existence, and dissolution.

An order sustaining a remonstrance to the extension of the limits of a town *held* subject to reversal, under Ky. St. 1899, § 3665, where the appellate court found that a failure to annex would materially retard the prosperity of the town.—*Town of Fredonia v. Rice* (Ky.) 1125.

§ 2. Proceedings of council or other governing body.

City ordinance relating to impounding of stray animals *held* not repealed by subsequent ordinance.—*Jears v. Morrison* (Mo. App.) 235.

§ 3. Officers, agents, and employes.

A city may reimburse a policeman, who, pursuant to his duty to remove nuisances in the street (Acts 1860-61, p. 448, § 5), shoots at a mad steer, but hits a child, for which he is held liable.—*State ex rel. Crow v. City of St. Louis* (Mo. Sup.) 623.

Act April 19, 1901 (Galveston special charter), authorizing appointment of mayor and aldermen by the governor, *held*, notwithstanding Const. art. 11, § 5, to violate principle of local self-government embodied in Bill of Rights, §§ 1, 2, Const. art. 6, § 2, and Laws 1895, p. 113, c. 100.—*Ex parte Lewis* (Tex. Cr. App.) 811.

Where a policeman of Houston was not reappointed after two years, he ceased to be an officer de jure under Const. art. 16, § 30, and Houston City Charter, § 26 (Sp. Laws 1897, p. 61, c. 7), after which the city was only liable for services actually performed and accepted.—*City of Houston v. Albers* (Tex. Civ. App.) 1084.

Whether the suspension of a policeman after the expiration of his term of office was in accordance with the city charter *held* immaterial.—*City of Houston v. Albers* (Tex. Civ. App.) 1084.

§ 4. Public improvements — Power to make improvements or grant aid therefor.

Facts that board of public works substituted asphalt guttering for flagstone guttering *held* not objectionable.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

Ky. St. 1894, §§ 2826, 2829, 2830, vest in the board of public works, where the council directs an improvement in general terms, power to prescribe the details.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

§ 5. — Preliminary proceedings and ordinances or resolutions.

Ordinance for street improvement, in declaring that the work should be done in accord-

ance with plans and specifications on file with board of public works, *held* not to refer to the general specifications then on file.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

Council *held* authorized, under the facts, to prescribe the depth on both sides of a street to be assessed for the cost of paving.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

In action on tax bill for street improvement, *held*, that no grade for the street was established.—*City of De Soto ex rel. Irwin v. Showman* (Mo. App.) 257.

Under Rev. St. 1899, § 5860, contract for street improvement *held* invalid.—*City of De Soto ex rel. Irwin v. Showman* (Mo. App.) 257.

Under Rev. St. 1899, § 5838, an estimate *held* a prerequisite to letting of a contract for a municipal improvement.—*City of De Soto ex rel. Irwin v. Showman* (Mo. App.) 257.

§ 6. — Contracts.

An unconstitutional ordinance, requiring payment of a license fee by contractors, could be ignored by them.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

Conditions imposed on contractors for street paving *held* not unreasonable, and not to tend to stifle competition.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

The mere fact that the board of public works, in advertising for bids for asphalt paving, called for alternative bids on two different kinds of pavement, does not invalidate the contract let by it.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

Under Ky. St. 1899, § 2834, a city *held* liable for a public improvement to the contractor, notwithstanding provisions of contract between him and the city.—*City of Louisville v. Bitzer* (Ky.) 1115; *Bitzer v. Fulton*, Id.

Ky. St. 1899, § 2834, providing that city shall not be liable for street improvement, *held* to have no application to cases where a city has no authority to make the improvement at the cost of adjacent property owner.—*City of Louisville v. Bitzer* (Ky.) 1115; *Bitzer v. Fulton*, Id.

No contract can be entered into for a municipal improvement at a price exceeding the estimate of its probable cost.—*City of De Soto ex rel. Irwin v. Showman* (Mo. App.) 257.

§ 7. — Damages.

The only benefit to property which can be offset against the owner's claim for damages for an elevation of the street above the grade of the lots is that in excess of what such owner has paid by tax bills assessed against him for the improvements.—*Carroll v. City of Marshall* (Mo. App.) 1102.

§ 8. — Assessments for benefits, and special taxes.

Where the apportionment of the cost of a street improvement is wrong, it is incumbent on the court, under Ky. St. 1894, § 2834, to correct it, so as to do justice to all parties concerned.—*Barber Asphalt Pav. Co. v. Gaar* (Ky.) 1106; *City of Louisville v. Barber Asphalt Pav. Co.*, Id.; *Walsh v. Same*, Id.; *Raffo v. Same*, Id.

A property owner should not be permitted to stand by in silence and allow a street improvement to be made, and then by raising objections escape payment.—*Barber Asphalt Pav. Co.*

v. Gaar (Ky.) 1106; City of Louisville v. Barber Asphalt Pav. Co., Id.; Walsh v. Same, Id.; Raffo v. Same, Id.

One cannot complain of method of apportioning cost of street improvement, unless he is injured.—Barber Asphalt Pav. Co. v. Gaar (Ky.) 1106; City of Louisville v. Barber Asphalt Pav. Co., Id.; Walsh v. Same, Id.; Raffo v. Same, Id.

Land within the limits of a city, though used for agricultural purposes, may be assessed for street improvements.—Barber Asphalt Pav. Co. v. Gaar (Ky.) 1106; City of Louisville v. Barber Asphalt Pav. Co., Id.; Walsh v. Same, Id.; Raffo v. Same, Id.

It is not essential to the validity of a special assessment that actual enhancement in value or other benefit to the owner should be shown; the judgment of the city council being conclusive.—City of Louisville v. Bitzer (Ky.) 1115; Bitzer v. Fulton, Id.

It appearing that the total value of the property assessed, after the improvement was made, was no more than the cost of the improvement, and there being, in addition, proof that the property had not been benefited at all, the court could not enforce the warrant against the property, even in part.—City of Louisville v. Bitzer (Ky.) 1115; Bitzer v. Fulton, Id.

The method of making assessments for street improvements by the foot is not invalid.—City of Louisville v. Bitzer (Ky.) 1115; Bitzer v. Fulton, Id.

That a property owner paid more than he was legally required to pay for the improvement of a street *held* not to affect his liability on a valid assessment for the improvement of a parallel street.—R. B. Park & Co. v. Cane (Ky.) 1121.

Where a square, bounded by principal streets, to be assessed for a street improvement under Ky. St. 1899, § 2833, is not a right-angled parallelogram, the quarter section provided for is to be found by obtaining one-fourth of the total number of square feet in the square.—R. B. Park & Co. v. Cane (Ky.) 1121.

Sess. Acts 1893, p. 90, § 108, and Id. p. 92, § 110, which provide for the apportionment of the cost of a street improvement by the front-foot rule, is constitutional.—City of St. Charles ex rel. Budd v. Deemar (Mo. Sup.) 469.

A tax bill issued for street improvement *held* not void for the contractor's failure to complete the work within the time required, if finished within a reasonable time.—Hill-O'Meara Const. Co. v. Hutchinson (Mo. App.) 318.

§ 9. — Enforcement of assessments and special taxes.

Petition in suit to enforce special assessment *held* to sufficiently show plans and specifications filed with board of public works before contract was let.—Button v. Gast (Ky.) 1014.

A street or alley assessment will not be disturbed, unless it affirmatively appear that under a proper method the defendant would be charged materially less.—Button v. Gast (Ky.) 1014.

A judgment on an assessment for street paving will not be reversed, in the absence of proof of loss to defendants, though it was doubtful whether the theory on which the assessment was based was correct.—Snyder v. Barber Asphalt Paving Co. (Ky.) 1118.

Under Kansas City Charter 1889, pp. 155, 156, as amended, the issuance and recording of a sheriff's certificate is essential to the validity of a sale for nonpayment of a special assessment.—Davis v. Evans (Mo. Sup.) 512.

In action on tax bill for street improvement, evidence *held* to show that no estimate

was submitted to the city council.—City of De Soto ex rel. Irwin v. Showman (Mo. App.) 257.

Under St. Louis City Ord. § 16,630, the determination of the question of the need of repairs to a sidewalk *held* within the discretion of the city authorities.—Heman v. Franklin (Mo. App.) 314.

Under St. Louis City Charter, art. 6, § 25 (Rev. St. 1899, p. 2513), an abutting owner, assessed for street paving, *held* entitled to defend on the ground of the contractor's failure to lay the paving according to the contract.—Hill-O'Meara Const. Co. v. Hutchinson (Mo. App.) 318.

In an action on a special tax bill the general denial *held* insufficient to raise an issue that the work was not completed in time.—Hill-O'Meara Const. Co. v. Hutchinson (Mo. App.) 318.

In an action on a tax bill for street paving, where defective construction was alleged, evidence concerning the condition of the pavement during the first year it was laid was admissible.—Hill-O'Meara Const. Co. v. Hutchinson (Mo. App.) 318.

In an action on a special tax bill for street paving, whether defendants were estopped to object to a reduction in the width of the roadway *held* a question for the jury.—Hill-O'Meara Const. Co. v. Hutchinson (Mo. App.) 318.

Under Acts 1893, p. 107 (Rev. St. 1899, §§ 9202, 9203), a suit on special city tax bills *held* properly brought against a purchaser of the land for taxes after the city tax lien accrued.—City of Excelsior Springs, to Use of McCormick, v. Henry (Mo. App.) 944.

§ 10. Police power and regulations.

A city of the fourth class may punish a disturbance of the peace, though it is also punishable as an offense against the state law.—City of Lebanon v. Gordon (Mo. App.) 222.

Under the power conferred by Rev. St. 1899, § 5957, a city of the fourth class may punish drunkenness in public, though it is not an offense against the state.—City of Lebanon v. Gordon (Mo. App.) 222.

Under Rev. St. 1899, § 5959, cities of the fourth class are empowered to regulate or prohibit the running at large of horses and other animals.—Jeans v. Morrison (Mo. App.) 235.

City ordinance relating to impounding and sale of stray animals *held* sufficiently complied with in respect to entry of items of cost in judgment for sale of impounded animal.—Jeans v. Morrison (Mo. App.) 235.

Animal straying within city limits, though belonging to a nonresident, may be impounded.—Jeans v. Morrison (Mo. App.) 235.

Ordinances relating to impounding and sale of stray animals *held* valid.—Jeans v. Morrison (Mo. App.) 235.

A city *held* empowered under its charter to take up and impound stray animals found within its borders, whether they escape by the owner's negligence or not.—Dorton v. Burks (Mo. App.) 239.

§ 11. Use and regulation of public places, property, and works.

Streets, shown on a plat and referred to by the deeds conveying the lots, *held*, on annexation of the land to a city, principal streets thereof, within Ky. St. 1899, §§ 2833, 2834, limiting the territory which may be assessed for a street improvement.—R. B. Park & Co. v. Orth (Ky.) 1015.

Obstruction of terminus of an alley is an actionable private wrong to abutting property owners.—Dries v. City of St. Joseph (Mo. App.) 723.

§ 12. Torts.

City held not liable for accident from open manhole in its streets, in absence of actual notice of defect.—*Canfield v. City of Newport (Ky.)* 788.

One who left dangerous pile of lumber in public street held not relieved from liability because the lumber was not negligently stacked.—*Harper v. Kopp (Ky.)* 1127.

Whether defendant city, in an action for negligent injuries, had notice of the defects in the sidewalk, held, on the facts, to be a question for the jury.—*Goodman v. City of Kahoka (Mo. App.)* 355.

Evidence examined, and held to warrant submitting to the jury the question whether plaintiff was injured by defects in defendant's sidewalk.—*Goodman v. City of Kahoka (Mo. App.)* 355.

A court may allow an amendment of a petition at the trial.—*Goodman v. City of Kahoka (Mo. App.)* 355.

A city held entitled to a peremptory instruction in its favor in a personal injury suit; no actual or constructive notice of the defect complained of being shown.—*City of Sherman v. Greening (Tex. Civ. App.)* 424.

Under 10 Laws Tex. p. 1035, plaintiff, in an action against the city of Sherman for negligent injuries, must show that the city had actual or constructive notice of the defect in its street, before the city is liable.—*City of Sherman v. Greening (Tex. Civ. App.)* 424.

Provisions of a city charter held not to exempt city from liability for injuries owing to a hole in a sidewalk.—*City of Dallas v. Strayer (Tex. Civ. App.)* 980.

Lack of funds on the part of a municipality is no justification for its failure to repair streets and sidewalks.—*City of Dallas v. Strayer (Tex. Civ. App.)* 980.

§ 13. Fiscal management, public debt, securities, and taxation.

The fact that voters residing in territory added to the city before an election for the issuance of bonds were not afforded an opportunity to vote did not invalidate the election.—*Lancaster v. City of Owensboro (Ky.)* 775.

An ordinance reimbursing a policeman for expense incurred while in the discharge of his duty held not a donation of public money to an individual, in contravention of Const. art. 4, §§ 46, 47.—*State ex rel Crow v. City of St. Louis (Mo. Sup.)* 623.

A contract for the construction of a city hall held to constitute a debt, within Const. art. 11, § 5, and void for the city's failure to provide for the payment thereof as prescribed by such section.—*Fourth Nat. Bank v. City of Dallas (Tex. Civ. App.)* 841.

Where no vote by a city council as a body was made applying lands owned by the city to a debt created by a contract to build a city hall, the fact that the city had such lands and intended so to apply them did not exempt the contract from Const. art. 11, § 5.—*Fourth Nat. Bank v. City of Dallas (Tex. Civ. App.)* 841.

A sale of land by a city for taxes and costs is void in the absence of any provision by charter or ordinance authorizing a sale for costs.—*May v. Jackson (Tex. Civ. App.)* 988.

§ 14. Criminal responsibility.

Municipal corporation held not criminally liable for permitting a nuisance on private property within its limits.—*City of Georgetown v. Commonwealth (Ky.)* 1011.

MUTUAL BENEFIT INSURANCE.

See "Insurance," §§ 15-19.

MUTUAL INSURANCE COMPANIES.

See "Insurance," § 1.

NAVIGABLE WATERS.

See "Waters and Water Courses."

NEGLIGENCE.

Causing death, see "Death," § 2.

By particular classes of parties.

See "Carriers," §§ 5, 6; "Municipal Corporations," § 12.

Abstracters of title, see "Abstracts of Title." Employers, see "Master and Servant," §§ 2-7. Railroad companies, see "Railroads," §§ 5-10. Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, or machinery.

See "Electricity"; "Highways," § 4; "Poisons"; "Railroads," §§ 5-10; "Street Railroads," § 1; "Turnpikes and Toll Roads," § 1.

Contributory negligence.

Of owner of lost baggage, see "Carriers," § 12.

Of passenger, see "Carriers," §§ 9, 10.

Of person injured at railroad crossing, see "Railroads," § 7.

Of person injured by poison, see "Poisons."

Of person injured on or near railroad track, see "Railroads," § 8.

Of person injured on street railroad track, see "Street Railroads," § 1.

Of person injured on toll road, see "Turnpikes and Toll Roads," § 1.

§ 1. Proximate cause of injury.

There can be no recovery for injuries resulting from accident without negligence.—*Rea v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.)* 555.

§ 2. Contributory negligence.

A child cannot be held guilty of contributory negligence, unless shown to have been of sufficient understanding to enable it to exercise reasonable care.—*Harper v. Kopp (Ky.)* 1127.

To constitute contributory negligence, it must have been such that the injury would not otherwise have occurred.—*Harper v. Kopp (Ky.)* 1127.

Negligence of plaintiff which does not contribute to his injury will not bar a recovery.—*Frank v. St. Louis Transit Co. (Mo. App.)* 239.

Rule that where defendant by ordinary care may discover and avert plaintiff's peril, he must use such care, does not apply where testimony fails to show facts essential to its application.—*Cogan v. Cass Ave. & F. G. Ry. Co. (Mo. App.)* 738.

A child six years of age is too young to be guilty of contributory negligence.—*Ollis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.)* 30.

Where a minor is sui juris in an action for injuries sustained by him, negligence of his mother cannot be imputed to him.—*Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.)* 535.

§ 3. Actions.

The fact of injury does not raise a presumption of negligence or make out a prima facie case.—*Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r (Ky.)* 765.

In a personal injury action, instruction that failure to exercise ordinary care ordinarily constitutes negligence held error.—*Pelfrey v. Texas Cent. Ry. Co. (Tex. Civ. App.)* 411.

In an action for injuries to a minor, the fact that the father was absent from home, and

left the government of the children to the mother, was not evidence of negligence on his part.—*Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.*

The burden of proving contributory negligence is on the party pleading it.—*Chicago, R. I. & P. Ry. Co. v. Buie (Tex. Civ. App.) 853.*

Burden of proving contributory negligence held to be on defendant in an action against a carrier for injuries.—*Missouri, K. & T. Ry. Co. of Texas v. Gist (Tex. Civ. App.) 857.*

Possible defect in a charge on contributory negligence held to be cured by other paragraphs of the charge in the same issue.—*Missouri, K. & T. Ry. Co. of Texas v. Gist (Tex. Civ. App.) 857.*

In an action against railroad for injuries, an instruction that the jury should find for defendant, if plaintiff was guilty of contributory negligence, held, under the evidence, not erroneous.—*Baca v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 1073.*

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

Ground for new trial in criminal prosecution, see "Criminal Law," § 16.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 16.

Necessity of motion for purpose of review, see "Appeal and Error," § 3.

Review of order granting or refusing within discretion of court, see "Appeal and Error," § 15.

§ 1. Grounds.

Affidavits for a new trial on ground of newly discovered evidence held not to show due diligence in securing evidence before trial.—*Gulf, C. & S. F. Ry. Co. v. Blanchard (Tex. Civ. App.) 88.*

Motion for new trial for newly discovered evidence held properly refused for want of diligence, and because the evidence was cumulative.—*Parham v. Shockler (Tex. Civ. App.) 839.*

A new trial held properly denied for new evidence which would only reduce the amount of recovery.—*Missouri, K. & T. Ry. Co. of Texas v. Gist (Tex. Civ. App.) 857.*

Under Rev. St. art. 1332, where special findings are set aside as not sustained by the evidence, a new trial should be granted.—*Casey-Swasey Co. v. Manchester Fire Assur. Co. (Tex. Civ. App.) 864.*

§ 2. Proceedings to procure new trial.

Affidavits for a new trial on ground of newly discovered evidence held too general to support the motion.—*Gulf, C. & S. F. Ry. Co. v. Blanchard (Tex. Civ. App.) 88.*

NEXT OF KIN.

See "Descent and Distribution."

NOMINAL DAMAGES.

See "Damages," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Mechanics' Liens," § 2.

Appeal from justice's court, see "Justices of the Peace," § 2.

Application for appointment of receiver, see "Receivers," § 2.

Arrival of shipment, see "Carriers," § 4.

Cancellation of insurance policy, see "Insurance," § 7.

Defects in streets, see "Municipal Corporations," § 12.

Highway proceedings, see "Highways," § 1.

Time for payment of premiums on policy, see "Insurance," § 9.

To particular classes of parties.

See "Principal and Agent," § 5.

Consignees, see "Carriers," § 4.

NUISANCE.

Liability of city, see "Municipal Corporations," § 14.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

OFFER.

Of reward, see "Rewards."

OFFICERS.

Mandamus, see "Mandamus," § 2.

Presumption as to validity of official acts, see "Evidence," § 2.

Particular classes of officers.

See "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Highway officers, see "Highways," § 2.

Municipal officers, see "Municipal Corporations," § 3.

Prison officers, see "Prisons."

OPINION EVIDENCE.

In civil actions, see "Evidence," §§ 10, 11.

In criminal prosecutions, see "Criminal Law," § 7.

OPINIONS.

Of courts, see "Courts," § 1.

ORDER OF PROOF.

At trial, see "Trial," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 2, 5, 10.

OVERCHARGE.

By carrier, see "Carriers," § 6.

PARENT AND CHILD.

See "Adoption"; "Guardian and Ward"; "Infants."

Declarations as to birth or pedigree, see "Evidence," § 6.

Negligence of parent imputable to child, see "Negligence," § 2.

In an action against a carrier for injuries to an infant, the parent *held* not entitled to recover for pain suffered by the infant.—*St. Louis S. W. Ry. Co. of Texas v. Gregory* (Tex. Civ. App.) 28.

A parent *held* entitled to recover for the reasonable value of medical service and for necessary expenses in the care of his infant child, injured by the carrier's negligence.—*St. Louis S. W. Ry. Co. of Texas v. Gregory* (Tex. Civ. App.) 28.

That a parent, who was a physician, rendered medical services to his child, who was injured by a carrier's negligence, instead of employing a stranger, did not preclude his recovery for the reasonable value of his services.—*St. Louis S. W. Ry. Co. of Texas v. Gregory* (Tex. Civ. App.) 28.

A practicing physician, who treated his wife and child, injured by a carrier's negligence, *held* not entitled to recover for loss of business while attending such wife and child.—*St. Louis S. W. Ry. Co. of Texas v. Gregory* (Tex. Civ. App.) 28.

A father *held* not entitled to recover for mental anguish suffered by himself and wife from injuries to their child.—*St. Louis S. W. Ry. Co. of Texas v. Gregory* (Tex. Civ. App.) 28.

PARLIAMENTARY LAW.

A voluntary association will not be presumed, as a matter of law, to be governed by the commonly accepted parliamentary rules.—*Gipson v. Morris* (Tex. Civ. App.) 85.

A fraudulent or arbitrary ruling on a vote by a presiding officer of a voluntary association will not be upheld.—*Gipson v. Morris* (Tex. Civ. App.) 85.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 6.

PARTIES.

In actions by or against assignors or assignees, see "Assignments," § 2.

In actions for sale of land for local assessments, see "Municipal Corporations," § 9.

Persons concluded by judgment, see "Judgment," § 7.

Persons entitled to allege error, see "Appeal and Error," § 12.

Persons entitled to damages for injuries to animals on or near railroad tracks, see "Railroads," § 9.

Persons entitled to enforce vendor's lien on lands, see "Vendor and Purchaser," § 3.

Persons entitled to maintain ejectment, see "Ejectment," § 1.

Persons entitled to sue for wrongful death, see "Death," § 2.

Persons liable on personal covenants, see "Covenants," § 1.

Persons who may claim exemptions, see "Exemptions," § 2.

To particular classes of conveyances, contracts, or transactions.

See "Bills and Notes," § 2; "Contracts," § 2; "Release," § 2; "Usury," § 1.

§ 1. New parties and change of parties.

Motions to intervene in an action, and to be substituted as curator for the plaintiff, not filed

until after judgment, were properly overruled.—*Morton v. Supreme Council of Royal League* (Mo. App.) 259.

Stockholder of corporation *held* not to have such a cause of action as to entitle him to intervene in action by reorganization committee against the corporation's mortgagee.—*Bangs v. Sullivan* (Tex. Civ. App.) 74.

PARTNERSHIP.

Contracts relating to partnership business, see "Contracts," § 2.

§ 1. The relation.

The sharing of the profits on a certain shipment with an assistant in lieu of wages does not constitute a partnership.—*Texas & P. Ry. Co. v. Smitten* (Tex. Civ. App.) 42.

§ 2. Rights and liabilities as to third persons.

A partnership claim cannot be garnished for an individual member's debt.—*Raley v. Smith* (Tex. Civ. App.) 54.

Under Rev. St. 1895, arts. 1204, 1224, 1256, 1257, 1259, 1347, refusal to continue an action on a bond against a partnership and the surety, for service on a nonresident and insolvent partner, *held* not error.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

Under Rev. St. 1895, arts. 1204, 1224, 1256, 1257, 1259, 1347, dismissal as to a nonresident and insolvent partner in an action on a bond against a partnership *held* not error.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

Under Rev. St. 1895, arts. 1204, 1224, 1256, 1257, 1259, 1347, rendition of a judgment against the surety on a bond, after dismissal as to a nonresident and insolvent member of the firm, which was principal obligor, *held* proper.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

Under Rev. St. 1895, arts. 1204, 1224, 1256, 1257, 1259, 1347, rendition of judgment against a partnership on a bond, after dismissal as to a nonresident and insolvent partner, *held* not error.—*Geo. Scalfi & Co. v. State* (Tex. Civ. App.) 441.

§ 3. Death of partner, and surviving partners.

The surviving member of a partnership has the right to assign a chose in action which belonged to the partnership.—*American Hardwood Lumber Co. v. Nickey* (Mo. App.) 331.

A banking partnership *held* not dissolved by the death of one of its members, and that the estate of such member was bound to contribute to a loss sustained on a guaranty executed by the surviving partners.—*Hax v. Burnes* (Mo. App.) 928.

PASSENGERS.

See "Carriers," § 8.

PAVING.

See "Municipal Corporations," §§ 4-10.

PAYMENT.

See "Compromise and Settlement."

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities. See "Mortgages," § 4.

Claims against estate of decedent, see "Executors and Administrators," § 3.

Price of land sold, see "Vendor and Purchaser," § 1.

Subscriptions to corporate stock, see "Corporations," § 1.

§ 1. Pleading, evidence, trial, and review.

Payment made by a debtor *held* not presumably made on a mortgage debt, instead of on another.—*Powers v. McKnight* (Tex. Civ. App.) 549.

PEDIGREE.

Declarations as evidence, see "Evidence," § 6.

PERJURY.**§ 1. Offenses and responsibility therefor.**

Jury, in trial for perjury, *held* authorized to convict on proof of falsity of the statement on which the prosecution was predicated.—*McCoy v. State* (Tex. Cr. App.) 1057.

§ 2. Prosecution and punishment.

In a prosecution for perjury, *held*, that the admission of certain evidence was not reversible error.—*McCoy v. State* (Tex. Cr. App.) 1057.

In a prosecution for perjury, certain testimony *held* properly received.—*McCoy v. State* (Tex. Cr. App.) 1057.

PERPETUITIES.

A conveyance *held* not to violate rule against perpetuities.—*Stevens v. Annex Realty Co.* (Mo. Sup.) 505.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Negligence."

Damages, see "Damages," § 2.

To employé, see "Master and Servant," §§ 2-7.

To passenger, see "Carriers," § 9.

To persons on or near railroad tracks, see "Railroads," § 8.

To persons on or near street railroad track, see "Street Railroads," § 1.

To traveler on highway, see "Highways," § 4; "Municipal Corporations," § 12.

To traveler on highway crossing railroad, see "Railroads," § 7.

To traveler on toll road, see "Turnpikes and Toll Roads," § 1.

To trespasser, see "Railroads," § 6.

PETITION.

In pleading, see "Pleading," § 1.

To obtain allowance of appeal or writ of error, see "Appeal and Error," § 4.

PHYSICAL EXAMINATION.

Of party, see "Discovery," § 1.

PHYSICIANS AND SURGEONS.

Cost of medical treatment as element of damages, see "Damages," § 2.

Right of physician to recover for time lost in treating injured child, see "Parent and Child."

Sales of liquor by, see "Intoxicating Liquors," § 4.

PLATS.

As evidence in civil actions, see "Evidence," § 8.

PLEA.

In civil actions, see "Pleading," § 2.

PLEADING.

Amendment of pleadings on appeal from justice's court, see "Justices of the Peace," § 2. Applicability of instructions to pleadings, see "Trial," § 7.

Default judgment where pleading remains undisposed of, see "Judgment," § 2.

Effect of amendment of pleadings as to commencement of action, see "Limitation of Actions," § 2.

Effect of errors in as to commencement of action, see "Limitation of Actions," § 2.

Harmless error in rulings on pleadings, see "Appeal and Error," § 17.

In actions by or against particular classes of parties.

See "Carriers," §§ 7, 9; "Master and Servant," §§ 7, 8; "Municipal Corporations," § 12; "Street Railroads," § 1; "Telegraphs and Telephones," § 1.

Foreign corporations, see "Corporations," § 2.

In particular actions or proceedings.

See "Injunction," § 2; "Mandamus," § 3; "Trespass to Try Title," § 1.

Contest of local option election, see "Intoxicating Liquors," § 2.

For breach of contract, see "Contracts," § 5.

Foreclosure, see "Mortgages," § 6.

For enforcement of mechanic's lien, see "Mechanics' Liens," § 4.

For injuries to live stock, see "Carriers," § 7.

For personal injuries, see "Carriers," § 9;

"Electricity"; "Master and Servant," § 7;

"Municipal Corporations," § 12; "Street Railroads," § 1.

For possession of leased premises, see "Landlord and Tenant," § 6.

For sale of land for local assessments, see "Municipal Corporations," § 9.

For torts of employés, see "Master and Servant," § 8.

For wrongful attachment, see "Attachment," § 1.

Indictment or criminal information or complaint, see "Indictment and Information."

On appeal bond, see "Appeal and Error," § 21.

On bail bond, see "Bail," § 1.

On broker's bond, see "Principal and Surety," § 3.

On insurance policy, see "Insurance," §§ 14, 19.

To enforce vendor's lien on lands, see "Vendor and Purchaser," § 3.

§§ 1, 2. Plea or answer, cross complaint, and affidavit of defense.

It is not error to strike out a paragraph of an answer, where under the remaining paragraphs the same defense may be fully availed of.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

Filing of plea of privilege, not in order of pleading as prescribed by rule 7 of Court of Civil Appeals (67 S. W. xiv), under Rev. St. art. 1262, *held* to constitute waiver of plea in abatement of writ.—*Texas & P. Ry. Co. v. Lynch* (Tex. Civ. App.) 65.

§ 3. Demurrer or exception.

Demurrer to the answer should be carried back to the petition, if the petition be defective.—*Hoskins v. Southern Nat. Bank* (Ky.) 786.

§ 4. Signature and verification.

A petition not alleging the signing of a written contract by defendants, but merely an agency between them, *held* not to require a denial under oath.—*Texas & P. Ry. Co. v. Byers Bros.* (Tex. Civ. App.) 427.

§ 5. Motions.

A complaint in a suit for unlawful detainer *held* to state two sets of facts not necessarily inconsistent, so as to require plaintiff to elect on which he would rely.—*Gossett v. Devorss* (Mo. App.) 731.

§ 6. Issues, proof, and variance.

A defense of ultra vires must be pleaded, in order to make it available.—*Williams v. Verity* (Mo. App.) 732.

The petition alleging one ground for recovery of a penalty against a surety company under Acts 1897, p. 247, c. 165, § 10, recovery cannot be had on proof of another ground.—*Robinson v. National Surety Co.* (Tex. Civ. App.) 26.

§ 7. Defects and objections, waiver, and aid by verdict or judgment.

One who does not avail himself of the provision of Rev. St. 1899, § 655, will be deemed to have waived a variance between the pleadings and proof.—*Kansas City v. Ferd Heim Brewing Co.* (Mo. App.) 302.

Where a party replies, after his motion to strike out new matter, stated in an answer as both a defense and a counterclaim, is overruled, he waives his objection.—*Dwyer v. Rohan* (Mo. App.) 384.

PLEDGES.

Of principal's credit by agent, see "Principal and Agent," § 2.

Of property pending bankruptcy proceedings, see "Bankruptcy," § 1.

Mere notice of ownership adverse to pledgor held insufficient to invalidate sale of pledge by pledgee.—*May v. Martin* (Tex. Civ. App.) 840.

Real owner of note held estopped to question his bailee's pledge thereof.—*May v. Martin* (Tex. Civ. App.) 840.

POISONS.

Well-poisoning, see "Homicide," § 4.

Under Rev. St. 1899, §§ 3040, 3044, a registered pharmacist held not entitled to dispense morphine or other poisonous medicines, except on physicians' prescriptions.—*Fowler v. Randall* (Mo. App.) 931.

Plaintiff's wife held guilty of contributory negligence as a matter of law in taking an entire package of morphine which she had purchased from a druggist.—*Fowler v. Randall* (Mo. App.) 931.

Plaintiff's wife held charged with knowledge of the poisonous character of a drug, which was purchased for her by her agent, who warned the wife thereof.—*Fowler v. Randall* (Mo. App.) 931.

POLICE.

See "Municipal Corporations," § 3.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 10.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 6.

POWERS.

Of attorney, see "Principal and Agent."

Of executor under will, see "Executors and Administrators," § 2.

Of sale in mortgage, see "Mortgages," § 5.

PRACTICE.

Procedure of particular courts, see "Courts."

Prosecution of actions in general, see "Action," § 2.

In particular civil actions or proceedings.

See "Account," § 1; "Ejectment"; "Mandamus," § 3.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Abatement and Revival"; "Affidavits"; "Continuance"; "Costs"; "Damages," § 7; "Depositions"; "Dismissal and Nonsuit"; "Divorce," § 2; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Verdict, see "Trial," § 11.

Particular remedies in or incident to actions.

See "Attachment"; "Discovery"; "Garnishment"; "Injunction"; "Receivers"; "Superseas."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

Violation of liquor laws, see "Intoxicating Liquors," §§ 5, 6.

Procedure in exercise of special jurisdictions.

In bankruptcy, see "Bankruptcy," § 1.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Justices of the Peace," § 2; "New Trial."

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 17.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 9.

PREMIUMS.

For insurance, see "Insurance," § 9.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

On appeal or error, see "Appeal and Error," § 14.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Admissions by agent, see "Evidence," § 5.

Appointment of agent by infant, see "Infants," § 2.

Insurance agents, see "Insurance," § 2.

Taking goods by agent as larceny, see "Larceny," § 1.

§ 1. The relation.

Evidence held to fall to establish an agency by ratification.—*Chicago Cottage Organ Co. v. Stone* (Ark.) 392.

Evidence held to show that defendant had not contracted with plaintiff to act as its agent.—*Chicago Cottage Organ Co. v. Stone* (Ark.) 392.

The fact of agency must be proved otherwise than by the declarations of the one charged as being the agent.—*Dieckman v. Weirich* (Ky.) 1119.

One's agency cannot be proved by his own declarations or admissions.—*Waters-Pierce Oil Co. v. Jackson Junior Zinc Co.* (Mo. App.) 272.

Agency cannot be proved by the acts or declarations of the agent, which are not shown to

have been known by the principal.—*M. A. Cooper & Co. v. Sawyer* (Tex. Civ. App.) 992.

§ 2. Rights and liabilities as to third persons.

Merely showing that one was authorized to collect rent for a landlord is not evidence of authority to make contracts for renting respecting the landlord's property.—*Dieckman v. Weirich* (Ky.) 1119.

A commercial agency is responsible in libel for acts of its agents done in the course of its business.—*Minter v. Bradstreet Co.* (Mo. Sup.) 668.

Where a person had been defendant's agent in buying goods from plaintiff, plaintiff was entitled to recover for subsequent sales in case he had no notice of the revocation of the agency.—*Waters-Pierce Oil Co. v. Jackson Junior Zinc Co.* (Mo. App.) 272.

Defendant is not liable for the value of goods sold to another, who was at no time his agent, and who did not assume to act as such with his knowledge.—*Waters-Pierce Oil Co. v. Jackson Junior Zinc Co.* (Mo. App.) 272.

Defendant held bound by the admissions and promises of its agents, irrespective of the actual authority vested in them.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

Plaintiff held not entitled to recover for threshing wheat mortgaged to defendant, on promises of defendant's agent, whose agency plaintiff knew had expired, to pay for the same.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

A principal is bound by the knowledge of an agent only when such agent acquires his knowledge in the transaction of his principal's business.—*Merrill v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 422.

An agent for the sale of goods having apparent authority to agree that they may be returned, if unsatisfactory, and the buyer having no notice that the agent was disregarding instructions in doing so, the fact that he may have acted contrary to instructions is immaterial.—*Eastern Mfg. Co. v. Brenk* (Tex. Civ. App.) 538.

An agent for the sale of goods having apparent authority to agree that they may be returned, if unsatisfactory, it is immaterial that the seller is not apprised of such agreement.—*Eastern Mfg. Co. v. Brenk* (Tex. Civ. App.) 538.

It is within the apparent scope of an agency for the sale of goods to stipulate that, if the property sold is unsatisfactory to the purchaser, it may be returned for credit.—*Eastern Mfg. Co. v. Brenk* (Tex. Civ. App.) 538.

PRINCIPAL AND SURETY.

See "Bail."

Liabilities of sureties on bonds for performance of duties of trust or office, see "Sheriffs and Constables," § 2.

Liabilities of sureties on bonds in legal proceedings, see "Appeal and Error," § 21.

Liabilities of sureties on liquor dealer's bond, see "Intoxicating Liquors," § 3.

§ 1. Creation and existence of relation.

Surety on note in blank held not relieved because it was filled up to exceed amount agreed on.—*Dow-Hayden Grocery Co. v. Muncy* (Ky.) 1030.

Forbearance to sue on past-due account, and extension of time, held sufficient consideration for note, both as to maker and surety.—*Dow-Hayden Grocery Co. v. Muncy* (Ky.) 1030.

The surrender of stock pledged to secure the payment of a note is sufficient consideration to support the signature of a surety.—*Zuendt v. Doerner* (Mo. App.) 878.

§ 2. Discharge of surety.

Husband's execution of notes sooner maturing held not to release wife's property incumbered to secure his note.—*Johnson v. Franklin Bank* (Mo. Sup.) 191.

Acceptance of husband's note, overdue by its terms, held an extension of time to him, releasing wife's property incumbered to secure his note.—*Johnson v. Franklin Bank* (Mo. Sup.) 191.

A stipulation in a note waiving notice of extension of time held binding on the sureties.—*First Nat. Bank v. Wells* (Mo. App.) 293.

§ 3. Remedies of creditors.

In an action on a broker's bond, petition held to sufficiently aver that the goods were sent to the broker to sell and remit the proceeds to plaintiffs.—*W. E. Merkley & Son v. United States Fidelity & Guaranty Co.* (Ky.) 1126.

PRIORITIES.

Of mortgages, see "Mortgages," § 1.

Of vendor's lien, see "Vendor and Purchaser," § 8.

PRISONS.

Ky. St. § 3748, only punishes jailer for willful misconduct.—*Lynch v. Commonwealth* (Ky.) 745.

In prosecution of jailer for misconduct, held, that jury should have been instructed under Ky. St. § 1339, as well as under section 3748.—*Lynch v. Commonwealth* (Ky.) 745.

Ky. St. § 1339, punishes jailer for negligently permitting prisoner to escape.—*Lynch v. Commonwealth* (Ky.) 745.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1.

PROBATE.

Of will, see "Wills," § 3.

PROCEEDS.

Of homestead, see "Homestead," § 1.

PROCESS.

Harmless error, see "Appeal and Error," § 17.

In actions against insane persons, see "Insane Persons," § 2.

In actions for sale of land for taxes, see "Taxation," § 4.

In actions in justices' courts, see "Justices of the Peace," § 1.

To sustain judgment, see "Judgment," § 1.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus."

§ 1. Service.

Return on service of summons, made by leaving with member of defendant's family, need not show name of such member.—*Box v. Equitable Securities Co.* (Ark.) 100.

Under Rev. St. 1899, § 562, service of process held insufficient to confer jurisdiction over defendants, so that default judgment against them is void.—*Roberts v. Stone* (Mo. App.) 388.

§ 2. Defects, objections, and amendment.

Evidence on an application to amend the sheriff's return on a summons after judgment examined, and held, that the refusal of the application was not an abuse of discretion.—*Feurt v. Caster* (Mo. Sup.) 576.

Under Rev. St. 1890, §§ 657, 660, the court, after judgment, may, in its discretion, amend or refuse to amend the sheriff's return on the summons.—Feurt v. Caster (Mo. Sup.) 578.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISE OF MARRIAGE.

See "Breach of Marriage Promise."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of death, see "Death," § 1.

Of loss insured against, see "Insurance," § 12.

PROPERTY.

See "Animals"; "Exchange of Property"; "Fixtures."

Adverse possession, see "Adverse Possession." Constitutional guaranties of rights of property, see "Constitutional Law," §§ 2, 6.

Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 11.

PROVISO.

In statute, see "Statutes," § 3.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 2.

Of death, see "Insurance," § 11.

Of injury, see "Negligence," § 1.

PUBLIC DEBT.

See "Municipal Corporations," § 13.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," §§ 4-10.

PUBLIC LANDS.

§ 1. Survey and disposal of lands of United States.

Act Cong. Sept. 28, 1850 (9 Stat. 519), *held* to constitute a grant of public swamp lands to the several states in present, without the necessity of a formal conveyance.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

Under Act Nov. 4, 1857 (Gen. St. 1865, c. 48, § 1), Act March 27, 1868, and Act March 10, 1869, the county court *held* entitled to sell swamp lands patented to the county at private sale for less than \$1.25 per acre.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

The trust imposed on counties to use the proceeds of swamp lands for the benefit of the school funds, under Act March 27, 1868, § 8, *held* to attach to the proceeds only, and not to run with the land.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

Laws 1901, p. 202, validating patents to swamp lands, *held* not to impair any vested rights of the counties which had conveyed such lands, but was a valid exercise of the state's power to cure defects therein.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

A county *held* barred by laches from claiming title to swamp lands irregularly conveyed to bona fide purchasers, who had occupied the land for more than 30 years and paid taxes thereon.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

Where a county court had authority to convey swamp lands, and the commissioner's patent was regular on its face, a subsequent bona fide purchaser *held* not charged with notice of irregularities in the order appointing the commissioner.—Simpson v. Stoddard County (Mo. Sup.) 700; I. & J. H. Himmelberger v. Same, *Id.*

§ 2. Disposal of lands of the states.

Evidence *held* insufficient to overcome presumption that person named in patent was person who had the survey made and obtained a patent for the land.—Huff v. Minlard (Ky.) 1036.

The commissioner of the general land office has a right to cancel an award of public domain not authorized by law.—Moore v. Rogan (Tex. Sup.) 1.

The forfeiture prescribed by Batts' Ann. Civ. St. art. 4218ff, in case of sale of additional school lands bought thereunder, *held* not to apply to school lands bought under article 4218ff.—Roberson v. Sterrett (Tex. Sup.) 2.

A land commissioner *held* to have no power to cancel an existing lease of school lands and execute another lease to the holder of the lease so canceled.—Blevins v. Terrell (Tex. Sup.) 515.

Where a valid lease of school lands was illegally canceled and an intervening lease executed, and after the expiration of the first lease the intervening lease was canceled and a third lease executed, the latter lease *held* valid.—Blevins v. Terrell (Tex. Sup.) 515.

Laws 1897, p. 186, c. 129, *held* not to prevent a sale of leased public lands during the term of the lease; the lessee waiving his rights.—Tolleson v. Rogan (Tex. Sup.) 520.

Under Laws 1897, p. 184, c. 129, and Rev. St. 1895, arts. 4218e, 4218f, 4218i, et seq., Commissioner of General Land Office *held* to have no authority to cancel sale of school lands for mistake in classification.—Harper v. Terrell (Tex. Sup.) 949.

Act April 4, 1881 (Gen. Laws 1881, p. 105, c. 92), validating decrees confirming titles to land, *held* not to have validated a judgment setting aside a judgment rendered under Act Feb. 11, 1860 (Gen. Laws 1860, p. 109, c. 78), providing for suits against the state to determine land titles.—State v. O'Connor (Tex. Sup.) 1041.

Certificate of clerk that no lease of school lands "then in force" was of record *held* not a compliance with Rev. St. art. 4218a.—Irwin & Sanders v. Mayes (Tex. Civ. App.) 33.

Acts 1897, p. 186, c. 129 (Rev. St. art. 4218e), recognized and thus far validated leases of school lands, void for failure to record the same under Acts 1895, p. 69, c. 47 (Rev. St. art. 4218r).—Irwin & Sanders v. Mayes (Tex. Civ. App.) 33.

Commissioner has no power to disregard an existing lease of school land, and award a new one, on any other evidence than the certificate of the clerk that the lease was not of record, required by Rev. St. art. 4218e.—Irwin & Sanders v. Mayes (Tex. Civ. App.) 33.

One who seeks to establish a forfeiture of a school land lease under Rev. St. art. 4218e,

must prove the certificate of the clerk stating that the lease was not recorded as required by the act.—*Irwin & Sanders v. Mayes* (Tex. Civ. App.) 33.

The privilege of a lessee of state lands to purchase the land within 60 days after the expiration of the lease in preference to other purchasers is a personal privilege, destroyed by his transferring the lease to another.—*Adkinson v. Porter* (Tex. Civ. App.) 43.

Rev. St. art. 3250, prohibiting subleasing without the landlord's consent, *held* applicable to tenancies of public lands.—*Adkinson v. Porter* (Tex. Civ. App.) 43.

The privilege of a lessee of state lands to purchase the land within 60 days after the expiration of the lease, destroyed by the transfer of the lease, *held* not revived by the transferee quitclaiming his interest in the lands to lessee.—*Adkinson v. Porter* (Tex. Civ. App.) 43.

Wife of applicant for school lands *held* to have made settlement for both, and not for herself alone.—*Willingham v. Floyd* (Tex. Civ. App.) 831.

Under Rev. St. art. 4218j, *held*, that where rights of purchaser of school lands have not been forfeited for abandonment, and a certificate of occupancy has been issued, a subsequent applicant cannot show abandonment.—*Lamkin v. Matsler* (Tex. Civ. App.) 970.

Applicant for school lands *held*, as against a certificate of settlement issued under Rev. St. art. 4218j, to another, entitled to show that the other had not made an actual settlement as required by statute.—*Lamkin v. Matsler* (Tex. Civ. App.) 970.

A bounty land certificate *held* a grant based on the consideration of the soldier's service.—*Halsted v. Allen* (Tex. Civ. App.) 1068.

The pay of soldiers under Joint Resolution Nov. 24, 1836, *held* not limited to money, but to include land grants for service, including the time between the soldier's leaving home and his mustering into the service.—*Halstead v. Allen* (Tex. Civ. App.) 1068.

In an action to recover school lands, plaintiff must show that award to prior applicant was unauthorized.—*Landers v. Boliver* (Tex. Civ. App.) 1075.

Variance between application for purchase of school lands and the purchaser's obligation *held* immaterial.—*Hamilton v. Votaw* (Tex. Civ. App.) 1091.

Certain state lands *held* detached lands at the time of their sale.—*Hamilton v. Votaw* (Tex. Civ. App.) 1091.

If an applicant to purchase school lands undertakes to describe the lands in the obligation filed by him, *held* that it is void if it describes a different tract from that described in the application (Rev. St. art. 4218j).—*Hamilton v. Votaw* (Tex. Civ. App.) 1091.

An adverse claimant cannot assail the title of a purchaser of school lands on the ground that, in making his purchase, he acted in collusion with some other person.—*Hamilton v. Votaw* (Tex. Civ. App.) 1091.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 3.

PUNISHMENT.

Fines, see "Fines."

For violation of injunction, see "Injunction," § 8.

PUNITIVE DAMAGES.

See "Damages," § 4.

QUASHING.

Indictment or information, see "Indictment and Information," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 8.

In criminal prosecutions, see "Criminal Law," § 11.

RAILROADS.

See "Fixtures"; "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Error in instructions in action against railroad company as on weight of evidence, see "Trial," § 4.

Taxation, see "Taxation," § 2.

§ 1. Railroad companies.

An amendment to a railroad charter, defective because acknowledged before a notary public, *held* validated by Acts 1901, p. 179, c. 118, amending Acts Ex. Sess. 1890, p. 43, c. 17.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 112; *Same v. Murphy Land Co., Id.*

§ 2. Location of road, termini, and stations.

Discretion to locate line of railroad *held* to vest in the company; the location not being definitely fixed by the charter.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 112; *Same v. Murphy Land Co., Id.*

A proposed line of railroad *held* not a belt line, in proceedings to condemn land for such line.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 112; *Same v. Murphy Land Co., Id.*

In proceedings to condemn land for a proposed line of railroad, *held*, that it was not indispensable to the validity of the location of such line that the directors of the road make the location.—*Tennessee Cent. R. Co. v. Campbell* (Tenn.) 112; *Same v. Murphy Land Co., Id.*

§ 3. Right of way and other interests in land.

Evidence as to the condition of a highway long before it was appropriated by a railroad, and of a new road long after it was built to replace the old one, *held* inadmissible in an action by a county for damages for such appropriation.—*St. Louis, S. F. & T. Ry. Co. v. Grayson County* (Tex. Civ. App.) 64.

In an action by a county against a railroad for damages caused by defendant's appropriation of a highway, *held* error to refuse a certain charge.—*St. Louis, S. F. & T. Ry. Co. v. Grayson County* (Tex. Civ. App.) 64.

Measure of damages to be recovered by a county, where a railroad constructed a new road parallel to an old road appropriated by it, defined.—*St. Louis, S. F. & T. Ry. Co. v. Grayson County* (Tex. Civ. App.) 64.

A county may maintain an action for damages for the appropriation of a highway taken by a railway company, under the provisions of Rev. St. 1895, art. 4428.—*St. Louis, S. F. & T. Ry. Co. v. Grayson County* (Tex. Civ. App.) 64.

§ 4. Construction, maintenance, and equipment.

Report of commissioners, under Rev. St. 1890, §§ 1035, 1208, relative to the crossing of one railroad by another, *held* not absolutely conclusive as to point and manner of crossing, but open to review by the court.—*State ex rel. Mississippi River & B. T. Ry. v. Dearing* (Mo. Sup.) 485.

§ 5. Operation — Statutory, municipal, and official regulations.

City ordinance, limiting speed of trains to six miles an hour, *held* unreasonable as to an unpopulous part of the city.—City of Plattsburg v. Hagenbush (Mo. App.) 725.

City ordinance, limiting speed of trains to six miles an hour, *held* reasonable as to a populous part of the city.—City of Plattsburg v. Hagenbush (Mo. App.) 725.

Where the indictment charges willfully and maliciously placing obstructions on the track of a particular railroad company, naming it, the description of the track must be proved as alleged.—Blocker v. State (Tex. Cr. App.) 955.

§ 6. — Injuries to licensees or trespassers in general.

A railroad, having knowledge of the usual presence of trespassers on its tracks, owes them the duty of using ordinary care to avoid injury to them.—Ollis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 30.

§ 7. — Accidents at crossings.

Question whether failure to give warning of approach of train to a trestle, over a highway, is negligence, is for the jury.—Chesapeake & N. Ry. Co. v. Ogles (Ky.) 751.

Where a railroad trestle crossed a highway, it is the duty of those in charge of a train approaching the trestle to give warning of its approach.—Chesapeake & N. Ry. Co. v. Ogles (Ky.) 751.

Plaintiff, in action against railroad for negligence in failing to give signal of approach of train, *held* not guilty of contributory negligence in jumping from buggy, while in sudden fear of horse frightened by the train.—Chesapeake & N. Ry. Co. v. Ogles (Ky.) 751.

In an action for injuries at a railroad crossing, an instruction on discovered peril *held* not justified by the evidence.—Guyer v. Missouri Pac. Ry. Co. (Mo. Sup.) 584.

Evidence in an action for injuries at a railroad crossing *held* to show plaintiff guilty of contributory negligence as a matter of law.—St. Louis S. W. Ry. Co. v. Branom (Tex. Civ. App.) 1064.

Where plaintiff's evidence in an action for injuries at a railroad crossing showed that he was guilty of contributory negligence as a matter of law, it was not necessary that such issue should be submitted to the jury.—St. Louis S. W. Ry. Co. v. Branom (Tex. Civ. App.) 1064.

§ 8. — Injuries to persons on or near tracks.

A railroad company *held* not liable to a traveler on a near-by parallel highway for failure to give statutory crossing signals.—Melton v. St. Louis & S. F. R. Co. (Mo. App.) 231.

A railroad *held* not required to warn a traveler on a near-by parallel highway of the approach of a train.—Melton v. St. Louis & S. F. R. Co. (Mo. App.) 231.

Railroad *held* to owe no duty to a trespasser on one of its bridges to keep lookout for him.—McCowen v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 46.

Instruction in action for injuries to trespasser on railroad bridge *held* not to be on the weight of evidence.—McCowen v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 46.

Error in instruction in action for injuries to trespasser on railroad bridge *held* not cured by a subsequent correct charge.—McCowen v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 46.

Evidence *held* to show that one run over by a railroad train was lying on the track when struck.—Gulf, C. & S. F. Ry. Co. v. Matthews (Tex. Civ. App.) 413.

A person lying on a railroad track is guilty of contributory negligence as a matter of law.—Gulf, C. & S. F. Ry. Co. v. Matthews (Tex. Civ. App.) 413.

A boy, otherwise a licensee, is not a trespasser because he had gone to the place to see a fight.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

One crossing a railroad track at a pathway when struck by an engine *held* a licensee, not a trespasser.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

A boy 11 years old may, through undeveloped judgment, not appreciate the danger of attempting to cross in front of an approaching engine, and so not be guilty of contributory negligence.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

A father is not guilty of contributory negligence in permitting his boy to frequently cross a railroad track without warning of the danger.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

Evidence *held* sufficient to authorize submission of issues as to the operatives of an engine, discovering a boy on the track in time to avoid the accident, failing to use proper care to do so, and running at a dangerous speed, preventing avoidance of the accident.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

Whether a boy was negligent in attempting to cross a railroad track without looking to see if it was clear *held* a question for the jury.—Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 420.

Evidence *held* to require instructions submitting the issue of contributory negligence, where one was killed by a train while crossing a track.—Lumsden v. Chicago, R. I. & T. Ry. Co. (Tex. Civ. App.) 428.

In an action against a railroad for injuries sustained by one struck by a car while crossing a path, *held* error to instruct that the employees of the railroad should have knowledge that the path was used by the public.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

Where one turns aside from a path at a point where it crosses a railroad, and loiters there on the tracks, the railroad's required measure of care stated.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action against a railroad for injuries to minor from his being struck by a railroad train, *held* error to admit testimony of a witness as to what the minor's parents had told him, when he told them they should keep the minor from jumping on trains.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action against a railroad company for injuries to minor, owing to his having been struck by a railroad train, certain declaration of his mother *held* inadmissible.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action for injuries to one owing to his having been struck by a railroad train, *held* proper to admit testimony that witness, who had made a plat of the place, had been shown the place by those who were present, and to permit them to testify that they had shown the place.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action for injuries to minor from being struck by a railroad train, *held* error to permit defendant to introduce testimony as to minor's connection with the theft of certain property.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action against a railroad for injuries, an instruction *held* to withdraw from the jury the charge that there was negligence in not ringing a bell or blowing a whistle.—Over v.

Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

In an action against a railroad for injuries, *held*, that the question whether plaintiff was guilty of negligence in stopping to tie his shoe on the track was for the jury.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

The question whether it is negligence for a railroad to run cars across a path without giving a signal, and whether a lookout kept on the cars is a sufficient precaution, *held* one for the jury.—Over v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 535.

Evidence *held* to warrant submitting issue of discovery by engineer of train of the peril of person on track in time to avoid the injury.—Texas & P. Ry. Co. v. Yarbrough (Tex. Civ. App.) 844.

Burden of proving discovery of plaintiff on track by defendant's employes in time to have avoided the injury *held* to be on plaintiff.—Luna v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 1061.

§ 9. — Injuries to animals on or near tracks.

Evidence in an action against a railroad company for cattle killed on its track *held* to sustain a verdict for plaintiff.—St. Louis, I. M. & S. Ry. Co. v. Norton (Ark.) 1095.

Under Sand. & H. Dig. § 6352, bailee of stock killed by a railroad train *held* entitled to recover full value, and not limited to amount expended in their care.—St. Louis, I. M. & S. Ry. Co. v. Norton (Ark.) 1095.

The burden is on a railroad company to show that it used due care to avoid killing stock on its track.—St. Louis, I. M. & S. Ry. Co. v. Norton (Ark.) 1095.

In action for value of animal killed in railroad yards, brought under Rev. St. 1890, p. 730, § 2867, *held* error, under evidence, not to peremptorily instruct for defendant.—Hilleman v. Gray's Point Terminal Ry. Co. (Mo. App.) 220.

In an action against a railroad company for killing plaintiff's cow, whether she was struck on defendant's right of way or on a highway, where she was found, *held* a question for the jury.—Kimball v. St. Louis & S. F. R. Co. (Mo. App.) 224.

In an action against a railroad company for killing plaintiff's cow, evidence *held* to rebut a presumption that she went on the track where she was found.—Kimball v. St. Louis & S. F. R. Co. (Mo. App.) 224.

A railroad company *held* liable for double damages in killing a cow which escaped through a defective right of way fence, though she passed from the right of way to a public road, and thence onto the railroad crossing.—Kimball v. St. Louis & S. F. R. Co. (Mo. App.) 224.

Judgment for plaintiff on one count and for defendant on the others *held* proper.—Buckman v. Missouri, K. & T. Ry. Co. (Mo. App.) 270.

Evidence *held* sufficient to show negligence in not stopping a train before it struck a horse on the track.—Buckman v. Missouri, K. & T. Ry. Co. (Mo. App.) 270.

Where it was charged that horses killed by defendant railway company were struck at a public crossing, an instruction for plaintiff, omitting any reference to where the horses were killed, was erroneous.—Morris v. Missouri, K. & T. Ry. Co. (Mo. App.) 1004.

Evidence *held* insufficient to show that plaintiff's jack was killed by defendant's railroad.—Galveston, H. & N. Ry. Co. v. Blau (Tex. Civ. App.) 1074.

§ 10. — Fires.

Evidence examined, and *held* not to show that a fire in hay ricks was caused by an engine passing over a nearby railroad track.—Bates County Bank v. Missouri Pac. Ry. Co. (Mo. App.) 286.

The inference that a locomotive did not communicate a fire to hay ricks being as strong as the inference that it did, the owner is not entitled to recover.—Bates County Bank v. Missouri Pac. Ry. Co. (Mo. App.) 286.

In an action for loss of a building by sparks from defendant's engine, evidence *held* to rebut the prima facie case made.—Smith v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 22.

In an action for the burning of plaintiff's building by sparks from defendant's engine, after proof that the engines had been properly equipped and handled, plaintiff could not recover without further proof of negligence.—Smith v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 22.

In action against railroad for damages from fire, evidence that the fire was communicated by sparks *held* to raise presumption of negligence in equipment and management.—Texas Southern Ry. Co. v. Hart (Tex. Civ. App.) 833.

In action against railroad for damages from fire communicated by sparks, evidence that equipment was proper *held* not to relieve defendant from burden of proving no negligence in management.—Texas Southern Ry. Co. v. Hart (Tex. Civ. App.) 833.

In action against railroad for destruction of cotton set on fire by defendant's locomotive, testimony of witnesses as to certain locomotive having set other fires that day in the neighborhood *held* properly admitted.—Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co. (Tex. Civ. App.) 1088.

In action against railroad for destruction of cotton by sparks from defendant's locomotive, a showing that the cotton was burned by sparks constituted a prima facie case.—Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co. (Tex. Civ. App.) 1088.

In action against railroad for destruction of cotton by sparks from defendant's locomotive, a requested instruction that, when the owners placed the cotton on the compress platform, they assumed all risks from fire, *held* properly refused.—Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co. (Tex. Civ. App.) 1088.

RAPE.

Admissibility of documentary evidence as to age of prosecutrix, see "Criminal Law," § 3; "Evidence," § 6.

§ 1. Offenses and responsibility therefor.

An instruction that, to constitute the crime of rape, it was necessary that defendant had the criminal intent to violate the law and to commit the crime, *held* properly refused.—Smith v. State (Tex. Cr. App.) 401.

It is no defense to a prosecution for rape on a child under the age of consent that defendant believed her to be over such age.—Smith v. State (Tex. Cr. App.) 401.

It is no defense to the charge of rape that accused intended to procure a divorce from his wife and marry prosecutrix.—Smith v. State (Tex. Cr. App.) 401.

§ 2. Prosecution and punishment.

Evidence *held* to support a conviction for an assault with intent to rape a girl under 15.—Wilson v. State (Tex. Cr. App.) 16.

In a prosecution for rape, evidence of acts of intercourse with the prosecutrix subsequent to the offense alleged in the indictment *held* in-

admissible.—*Smith v. State* (Tex. Cr. App.) 401.

In a prosecution for rape, it was error to admit a conversation had between prosecutrix and defendant after the commission of the alleged crime.—*Smith v. State* (Tex. Cr. App.) 401.

In a prosecution for rape, evidence that prosecutrix's mother kept in the house with her an unchaste woman *held* inadmissible.—*Smith v. State* (Tex. Cr. App.) 401.

In a prosecution for rape, *held*, that the jury should have been restricted to a consideration of the one act on which the state elected to rely.—*Stone v. State* (Tex. Cr. App.) 956.

RATIFICATION.

Of act of guardian, see "Guardian and Ward," § 1.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REBUTTAL.

Evidence, see "Trial," § 1.

RECEIVERS.

§ 1. Nature and grounds of receivership.

Receiver to collect and sell waste oil *held* improperly appointed in suit to enforce by injunction regulations for the protection of a petroleum field from fire.—*Hardy v. Abbott* (Tex. Civ. App.) 1079.

§ 2. Appointment, qualification, and tenure.

Where defendant appeared and contested an application for a receiver, an order appointing a receiver was not erroneous for want of notice to defendant.—*Troughber v. Akin* (Tenn.) 118.

Where a subsequent suit was brought for the appointment of a receiver of land, an order appointing such receiver was not erroneous because entered under the style of the dependent cause, rather than under that of the original.—*Troughber v. Akin* (Tenn.) 118.

The appointment of a receiver of land in a litigation over the title may be reviewed by the Supreme Court on an application for supersedeas, or on a motion to discharge a supersedeas granted.—*Troughber v. Akin* (Tenn.) 118.

Where a court had power to appoint a receiver under the facts stated, defects of form cannot be reviewed on an application for supersedeas.—*Troughber v. Akin* (Tenn.) 118.

RECEIVING STOLEN GOODS.

In a prosecution for receiving stolen goods, evidence of the receipt by the defendant of certain other stolen goods *held* not admissible.—*Bismarck v. State* (Tex. Cr. App.) 965.

On a prosecution for receiving stolen goods, where the testimony is conflicting as to the amount of goods, and some of it tended to show an amount not sufficient to constitute a felony, the court should charge on misdemeanor.—*Bismarck v. State* (Tex. Cr. App.) 965.

RECITALS.

In bail bonds, see "Bail," § 1.

RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 5-7; "Criminal Law," § 18.

REDEMPTION.

From mortgage, see "Mortgages," § 7.

REFERENCE.

See "Arbitration and Award."

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Proceedings and relief.

Vendee in land contract *held* not to have shown certain provision was omitted from contract by mutual mistake.—*Jackson v. Martin* (Tex. Civ. App.) 932.

REFRESHING MEMORY.

See "Witnesses," § 3.

REHEARING.

See "New Trial."

RELEASE.

See "Compromise and Settlement"; "Payment."

Of dower, see "Dower," § 1.

Of mortgage, see "Mortgages," § 4.

§ 1. Requisites and validity.

A petition in an action against a carrier for injuries *held* to state a sufficient cause of action to set aside a release for fraud.—*Jones v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1082.

Allegations of a petition against a carrier to set aside a release of liability for injuries to a passenger *held* to estop defendant to allege that plaintiff should not have relied on the statements of defendant's physicians.—*Jones v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 1082.

§ 2. Construction and operation.

Rev. St. 1899, § 897, *held* to apply, and not to prevent acceptance of satisfaction from some of several tort-feasors from operating as bar to suit against any of the others.—*Dulaney v. Buffum* (Mo. Sup.) 125.

Attempted reservation of a right of action against defendants, not mentioned in a receipt acknowledging satisfaction as against part of defendant joint tort-feasors, *held* not to prevent the acknowledgment of satisfaction from operating as bar to further prosecution of the suit against the other defendants.—*Dulaney v. Buffum* (Mo. Sup.) 125.

Where, pending an action against several joint tort-feasors, plaintiffs accepted a sum of money in satisfaction of the liability of two of defendants, such satisfaction operated as a bar to the action against all the others.—*Dulaney v. Buffum* (Mo. Sup.) 125.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 3.

Of evidence in criminal prosecutions, see "Criminal Law," § 3.

RELIGIOUS SOCIETIES.

Defendant *held* not a trustee of money donated to a church.—*Rector, etc., of Mt. Calvary Church v. Albers* (Mo. Sup.) 508.

—Rector, etc., of Mt. Calvary Church v. Albers (Mo. Sup.) 508.

A guaranty, attached to a treasurer's report and accepted by the vestry of a church, *held* not to constitute a contract that defendant was to have use of money loaned him by the church for a certain time.—Rector, etc., of Mt. Calvary Church v. Albers (Mo. Sup.) 508.

Evidence *held* not to establish defendant's claim that he was to have use of money loaned him for a certain time.—Rector, etc., of Mt. Calvary Church v. Albers (Mo. Sup.) 508.

Where the fellowship of an independent religious society has been withdrawn from a member at a regular meeting of the church conference, he is no longer a member, and has no vote at a subsequent meeting.—Gipson v. Morris (Tex. Civ. App.) 85.

Where a voluntary society becomes separated into two bodies as a result of a vote at a meeting, the rights of each body will depend on which had a majority of the members at that time.—Gipson v. Morris (Tex. Civ. App.) 85.

The will of the numerical majority *held* to control the actions of an independent religious society.—Gipson v. Morris (Tex. Civ. App.) 85.

REMAINDERS.

Creation by deed, see "Deeds," § 1.
Execution against, see "Execution," § 1.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 20.

REMOVAL.

Of trustee, see "Trusts," § 2.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 1.

§ 1. **Citizenship or alienage of parties.**

Under Act Aug. 13, 1888, § 2, 25 Stat. 435 [U. S. Comp. St. 1901, p. 509], a suit between citizens of different states may be removed to the federal court, though neither party is a resident of the state where the suit is brought.—Illinois Cent. R. Co. v. Whitworth (Ky.) 766.

RENEWAL.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

RENT.

See "Landlord and Tenant," § 5.
On mortgaged property, see "Mortgages," § 2.

REPEAL.

Of ordinances, see "Municipal Corporations," § 2.

REPUTATION.

Evidence as to reputation in civil actions, see "Evidence," § 3.

REQUESTS.

For instructions in civil actions, see "Trial," § 8.

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REMISSION.

Cancellation of written instruments, see "Cancellation of Instruments."

Of contract, see "Contracts," § 3.

Of insurance policy, see "Insurance," § 7.

RES GESTÆ.

In civil actions, see "Evidence," § 3.

In criminal prosecutions, see "Criminal Law," § 3.

RESIDENCE.

As affecting right to exemptions, see "Exemptions," § 1.

RES JUDICATA.

See "Judgment," §§ 6, 7.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

RETURN.

Of execution, see "Execution," § 6.

Of garnishment process, see "Garnishment," § 3.

Of process in general, see "Process," § 1.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 17, 18; "Justices of the Peace," § 2.

REVISION.

Of statute, see "Statutes," § 2.

REWARDS.

An officer who made an arrest, having been discharged, and afterwards had a promise of reward for arrest and conviction renewed, entitled to it, having thereafter secured a conviction.—Cornwell v. St. Louis Transit (Mo. App.) 305.

RIGHT OF WAY.

Of railroads, see "Railroads," § 3.

RIPARIAN RIGHTS.

See "Waters and Water Courses."

RISKS.

Assumed by employé, see "Master and Servant," § 6.

Within insurance policy, see "Insurance," § 7.

ROADS

See "Highways"; "Turnpike Roads."

Streets in cities, see "Municipal Corporations," §§ 11, 12.

SALES.

See "Vendor and Purchaser."

By agents, see "Principal and Agent," § 2.

By co-tenants, see "Tenancy in Common," § 1.

Combinations to regulate prices, see "Monopolies," § 1.

Of intoxicating liquors, see "Intoxicating Liquors."

Of land for local assessments, see "Municipal Corporations," § 9.

Of land for municipal taxes, see "Municipal Corporations," § 13.

Of liquors, see "Intoxicating Liquors," § 4.

Of property of decedent, see "Executors and Administrators," § 2.

On execution, see "Execution," § 5.

On foreclosure of mortgage, see "Chattel Mortgages," § 3; "Mortgages," §§ 5, 6.

On order or judgment of court, see "Judicial Sales."

Tax sales, see "Taxation," § 4.

§ 1. Requisites and validity of contract.

Evidence held to show that a delivery of wheat to a warehouseman constituted a sale, not a bailment.—*Potter v. Mt. Vernon Roller Mill Co.* (Mo. App.) 1005.

§ 2. Performance of contract.

A request by the agent of the seller of a machine that the buyer should house the same for the seller held a waiver of the buyer's obligation to return the machine on refusing it as defective.—*McCormick Harvesting Mach. Co. v. Dodkins* (Ky.) 1129.

Evidence held to justify a finding that the buyer of a corn shredder was not liable for the price, under a provision of the contract that certain use thereof and failure to return should constitute an acceptance.—*McCormick Harvesting Mach. Co. v. Dodkins* (Ky.) 1129.

§ 3. Warranties.

Representation as to material to be used in monument held complied with.—*Monumental Bronze Co. v. Doty* (Mo. App.) 234.

Parties may by express terms agree, if the article does not conform to the warranty, it may be returned and another substituted in its place.—*J. I. Case Threshing Mach. Co. v. Hall* (Tex. Civ. App.) 835.

Warranty on sale of a chattel held not waived by the seller.—*J. I. Case Threshing Mach. Co. v. Hall* (Tex. Civ. App.) 835.

Where a contract for the sale of a machine provides that a retention without complaint, or a failure to give a stipulated notice of defects, shall amount to a satisfaction of warranty of the machine, such failure satisfies the warranty.—*J. I. Case Threshing Mach. Co. v. Hall* (Tex. Civ. App.) 835.

§ 4. Remedies of seller.

Word in inscription on monument held presumed to have been used in obedience to purchaser's order.—*Monumental Bronze Co. v. Doty* (Mo. App.) 234.

§ 5. Remedies of buyer.

Defendant in action on notes given for machinery held not entitled to recover for partial breach of warranty without showing particular items of damages sustained.—*Gilbert v. Gossard* (Tex. Civ. App.) 989.

§ 6. Conditional sales.

Evidence held to show an absolute, and not a conditional, sale.—*A. A. Cooper Wagon & Buggy Co. v. Bailey & George's Estate* (Mo. App.) 724.

SATISFACTION.

See "Compromise and Settlement"; "Payment"; "Release."

Of judgment, see "Judgment," § 10.

Of mortgage, see "Mortgages," § 4.

SCHOOLS AND SCHOOL DISTRICTS.

School lands, see "Public Lands," § 2.

SCIRE FACIAS.

On bail bond, see "Bail," § 1.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 8.

SECRETARY OF STATE.

Mandamus, see "Mandamus," § 2.

SELF-DEFENSE.

See "Homicide," §§ 1, 5.

SELF-SERVING DECLARATIONS.

See "Evidence," § 8.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 8.

SERVICE.

Of process, see "Process," § 1.

SERVITUDES.

See "Easements."

SETTLEMENT.

See "Compromise and Settlement"; "Payment"; "Release."

By guardian of infant, see "Guardian and Ward," § 2.

Marriage settlements, see "Husband and Wife," § 2.

SHERIFFS AND CONSTABLES.

Mandamus to compel service of writ by constable, see "Mandamus," § 2.

§ 1. Powers, duties, and liabilities.

Evidence in a suit against a sheriff, who served an attachment, for having taken insolvent sureties on a forthcoming bond, examined, and held to sustain a finding that the sheriff used reasonable care.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

Under Civ. Code Prac. §§ 214, 263, 264, judgment sustaining attachment held necessary to charge sheriff for having taken insolvent sureties on forthcoming bond.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

The liability of a sheriff, serving an attachment, for taking insolvent sureties on a forthcoming bond, cannot exceed that of the sureties.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

A sheriff serving an attachment is not, in the absence of statute, a guarantor of the solvency of a surety taken by him on a forthcoming bond.—*Edwards-Barnard Co. v. Pfanz* (Ky.) 1018.

In an action against a constable for failure to execute a writ, whether the writ was returned unexecuted at the direction of plaintiff's attor-

stable were regular and valid, the constable was not justified in refusing to execute the same for irregularities in the judgment or proceedings anterior thereto.—*State ex rel. Clement v. Rainey* (Mo. App.) 250.

Where relator's attorney directed a constable to return execution without service, relator *held* not entitled to sue the constable for failure to execute the writ.—*State ex rel. Clement v. Rainey* (Mo. App.) 250.

A constable, in whose hands an alias execution had been placed, *held* not entitled to refuse to serve the same on the ground that prior executions issued were invalid.—*State ex rel. Clement v. Stokes* (Mo. App.) 254.

A constable *held* not entitled to urge as a defense to his refusal to execute a writ that the cause was settled, and that thereafter plaintiff took judgment in violation of the settlement.—*State ex rel. Clement v. Stokes* (Mo. App.) 254.

Taxation of costs against a constable, incurred by reason of other parties being made defendants in a suit for damages for the sale of exempt property, *held* error.—*Baughn v. Allen* (Tex. Civ. App.) 1063.

A constable *held* personally liable for the value of an exempt mule sold under a chattel mortgage, where the proceeds of the sale of two nonexempt mules were sufficient to satisfy the debt.—*Baughn v. Allen* (Tex. Civ. App.) 1063.

§ 2. Liabilities on official bonds.

Under Ky. St. § 4134, the sureties on revenue bonds of a sheriff for two separate years *held* each liable for one-half of the sheriff's default.—*Baker v. Fidelity & Deposit Co.* (Ky.) 1025.

A constable's sureties *held* not liable for his sale of exempt property, where he acted under a chattel mortgage and not in his official capacity.—*Baughn v. Allen* (Tex. Civ. App.) 1063.

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To bail bonds, see "Bail," § 1.

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See "Libel and Slander."

SODOMY.

In a prosecution for sodomy, *held* not error to fail to charge as to assault and battery.—*White v. Commonwealth* (Ky.) 1120.

An emission is not necessary to the consummation of the offense of sodomy.—*White v. Commonwealth* (Ky.) 1120.

In a prosecution for sodomy, refusal to charge on circumstantial evidence, there being no direct proof of penetration, *held* error.—*Almendaris v. State* (Tex. Cr. App.) 1055.

In a prosecution for sodomy penetration must be proved.—*Almendaris v. State* (Tex. Cr. App.) 1055.

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Of railroad trains, see "Railroads," § 5.

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§ 1. Enactment, requisites, and validity in general.

That part of Acts 1899, p. 248, c. 146, § 8 (anti-trust act), is unconstitutional, on the ground that it compels a party to give evidence against himself, does not render the act invalid as a whole.—*State v. Laredo Ice Co.* (Tex. Sup.) 951.

§ 2. Amendment, revision, and codification.

Under Const. art. 4, § 41, and Sess. Laws May 15, 1889, the mere appearance of a section in the Revised Statutes is sufficient authority for treating it as the law on the subject.—*Langston v. Canterbury* (Mo. Sup.) 151.

§ 3. Construction and operation.

The proviso, "except by ordinance," etc., to St. Louis Charter 1876, art. 3, § 30, *held* to apply to all its subdivisions, and not merely to the one immediately preceding it.—*State ex rel. Crow v. City of St. Louis* (Mo. Sup.) 623.

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STIPULATIONS.

For introduction of hearsay evidence in lieu of deposition, see "Depositions."

A stipulation for the admission of hearsay testimony, in consideration of the abandonment of proceedings to perpetuate testimony, *held* enforceable, though not in writing.—Thompson v. Ft. Worth & R. G. Ry. Co. (Tex. Civ. App.) 29.

Stipulation, in action by licensee at railroad depot for assault by railway policeman, *held* not to constitute proof on issue of fact as to what capacity the assailant acted in.—Texas & N. O. R. Co. v. Taylor (Tex. Civ. App.) 1081.

STOCK.

Corporate stock, see "Corporations," § 1.
In building and loan associations, see "Building and Loan Associations."

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STREET RAILROADS.

As employers, see "Master and Servant."
Carriage of passengers, see "Carriers."

§ 1. Regulation and operation.

Street railroad *held* liable for motorman's negligence, if trespasser's peril was known, though he was guilty of contributory negligence.—Floyd v. Paducah Ry. & Light Co. (Ky.) 1122.

Street railroad *held* liable for negligence of motorman in discovering trespasser's peril, unless the injury would not have been caused but for latter's own negligence.—Floyd v. Paducah Ry. & Light Co. (Ky.) 1122.

Question whether a street railway was negligent in not ringing a bell on approaching a crossing *held* for the jury.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 637.

Petition *held* not to present issue that street railway was negligent in failing to see, when by exercise of reasonable care it might have seen, the person injured.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 637.

Where negligence of a street railway company consists in failure to signal on approaching a crossing, or to keep a proper lookout, petition need not allege negligence of company after becoming aware of injured person's danger.—*Koenig v. Union Depot Ry. Co.* (Mo. Sup.) 637.

Degree of care required of motorman of an electric car in keeping lookout for persons at a crossing defined.—*Koenig v. Union Depot Ry. Co.* (Mo. Sup.) 637.

There is no absolute duty incumbent on one who is about to cross a street railway track to stop, as well as to look and listen.—*Frank v. St. Louis Transit Co.* (Mo. App.) 239.

In an action against a street railway company for injuries to a teamster, plaintiff's testimony that he stopped to look and listen *held* entitled to credit.—*Frank v. St. Louis Transit Co.* (Mo. App.) 239.

In an action against a street railway company for injuries to a teamster, issues of negligence *held* properly submitted to the jury.—*Frank v. St. Louis Transit Co.* (Mo. App.) 239.

A vigilant watch ordinance, as applied to street railways, *held* a valid police regulation, and binding on such railways without acceptance.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

The running of a street car, at the time of a collision with a vehicle, at a rate of speed prohibited by a city ordinance, *held* negligence per se.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

Where a motorman made no effort to stop a street car after seeing plaintiff's perilous position on the track, he was guilty of common-law negligence and a violation of a vigilant watch ordinance.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

In an action for injuries to a vehicle and driver by being struck by a street car, the motorman *held* to have had the last clear chance of avoiding the accident, and hence plaintiff's contributory negligence, if any, was no defense.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

In an action against a street railway company for injuries to a person on the track, plaintiff *held* entitled to join in the same count common-law and statutory negligence.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

In an action for injuries to the driver of a vehicle by being struck by a street car, whether he was guilty of contributory negligence in not jumping from his wagon *held* a question for the jury.—*Meyers v. St. Louis Transit Co.* (Mo. App.) 379.

Admissions of plaintiff *held* to show want of ordinary care in keeping lookout for street car.—*Cogan v. Cass Ave. & F. G. Ry. Co.* (Mo. App.) 738.

Driving team, which was struck by street car, along car track, *held* not necessarily contributory negligence.—*Noll v. St. Louis Transit Co.* (Mo. App.) 907.

In an action for injuries to a street railway motorman by collision, instructions *held* not erroneous as rendering a mere violation of a city ordinance by defendant negligence per se.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

In an action for injuries to a street railway motorman by collision with a car of another company, instructions *held* not misleading.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

In an action for injuries to a street railway motorman by collision with a car of another company, omission of the court to charge in relation to defendant's acceptance of a city ordinance giving plaintiff's car the right of way

held not error.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

Evidence, in an action for injuries to motorman by a collision with a car of another company at a crossing, *held* to require submission of the case to the jury.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

One injured by a street car at a crossing had no right to rely on assumption that speed of car was within the limits prescribed by ordinance, when he knew the contrary to be the fact.—*Ledwidge v. St. Louis Transit Co.* (Mo. App.) 1008.

Plaintiff *held* guilty of contributory negligence in attempting to cross street car track in front of approaching car.—*Ledwidge v. St. Louis Transit Co.* (Mo. App.) 1008.

In an action against a street railway for killing a dog, *held*, that the court should have submitted the issue of contributory negligence without any instruction as to burden of proof thereof.—*Marshall v. Dallas Consolidated Electric St. Ry. Co.* (Tex. Civ. App.) 63.

In an action against a street car company for killing a dog, a charge on the issue of discovered peril *held* required.—*Marshall v. Dallas Consolidated Electric St. Ry. Co.* (Tex. Civ. App.) 63.

In an action against a street railway for killing a dog, a charge *held* erroneous as placing the burden of proving absence of contributory negligence on plaintiff.—*Marshall v. Dallas Consolidated Electric St. Ry. Co.* (Tex. Civ. App.) 63.

In an action against a street railway company for damages from collision, evidence *held* not to show contributory negligence proximately contributing to the injury.—*Dallas Consol. Electric St. Ry. Co. v. Illo* (Tex. Civ. App.) 1076.

In an action against a street railway company for damages from collision, evidence *held* to show negligence on the part of defendant.—*Dallas Consol. Electric St. Ry. Co. v. Illo* (Tex. Civ. App.) 1076.

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See "Highways"; "Municipal Corporations," §§ 11, 12.

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See "Landlord and Tenant," § 8.
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To arbitration, see "Arbitration and Award," § 1.

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SUBROGATION.

Where a sheriff's sureties paid a defalcation of taxes collected by the sheriff, they were subrogated to the county's lien on the sheriff's real estate therefor, under Ky. St. § 4130.—*Baker v. Fidelity & Deposit Co. (Ky.)* 1025.

Where one pays or advances money to pay a mortgage debt, with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation.—*Powers v. McKnight* (Tex. Civ. App.) 549.

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Transportation of a threshing machine on Sunday held not a work of "necessity," so as to exempt defendant from liability for violation of the Sunday law.—*State v. Stuckey* (Mo. App.) 735.

SUPERSEDEAS.

Facts held insufficient to justify the granting of a supersedeas to restrain the execution of an order appointing a receiver of land in litigation.—*Trougher v. Akin* (Tenn.) 118.

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Of policemen, see "Municipal Corporations," § 8.

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Liability of sheriff's homestead for payment of taxes collected, see "Homestead," § 1.
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See "Intoxicating Liquors," § 3; "Licenses," § 1.

§ 1. Liability of persons and property.

The franchises of a corporation, exercised by it in a city, are property, within the provision of a city's charter, requiring a tax on all property in it.—*Southwestern Telegraph & Telephone Co. v. City of San Antonio* (Tex. Civ. App.) 859.

§ 2. Levy and assessment.

Gen. St. c. 92, art. 3, §§ 1, 3, 4, considered, and held that the method pursued by the railroad commissioners in fixing the valuation of certain railroad property for purposes of taxation was proper.—*Owensboro, E. of R. & G. R. R. Co. v. Commonwealth* (Ky.) 744.

An information in a proceeding by the auditor's agent to assess omitted property held to sufficiently describe the property.—*Commonwealth v. Sweigart's Adm'r* (Ky.) 758.

The proper way to reach an information failing to sufficiently describe property omitted to be listed for taxation is by motion to make the information more specific.—*Commonwealth v. Sweigart's Adm'r* (Ky.) 758.

The description on the assessment roll of a city, "The * * * Company franchise," is not sufficient.—*Southwestern Telegraph & Telephone Co. v. City of San Antonio* (Tex. Civ. App.) 859.

§ 3. Collection and enforcement against persons or personal property.

Evidence to rebut proof of payment held admissible in action by city for taxes paid by property owner to defaulting collector.—*City of Georgetown v. Jones* (Tex. Civ. App.) 22.

§ 4. Sale of land for nonpayment of tax.

Under Sess. Acts 1877, p. 386, § 6, and Rev. St. 1899, § 575, an order for publication in a tax suit held valid, though no affidavit as to the defendant's nonresidence had been made.—*Warren v. Manwaring* (Mo. Sup.) 447.

Under Laws 1877, p. 387, § 10, a judgment in a tax suit held unauthorized, and the tax deed consequently invalid.—*Warren v. Manwaring* (Mo. Sup.) 447.

The validity of a tax judgment cannot be collaterally attacked by a showing that the assessment was erroneous.—*Warren v. Manwaring* (Mo. Sup.) 447.

Failure to enter a tax judgment in the precise method pointed out by the statute is an irregularity not available on collateral attack.—*Warren v. Manwaring* (Mo. Sup.) 447.

The fact that an affidavit of nonresidence had not been made in a tax suit held not available in a collateral attack on the tax judgment. Sess. Acts 1877, p. 386, § 6; Rev. St. 1899, § 575.—*Warren v. Manwaring* (Mo. Sup.) 447.

A tax deed held void on its face, showing noncompliance with Act March 30, 1872, § 189 (2 Wag. St. p. 1198), requiring each tract to be offered for sale separately.—*Smith v. H. D. Williams Cooperage Co.* (Mo. App.) 315.

§ 5. Tax titles.

A tax deed, based on an assessment to one not the owner of the land, and not containing recitals showing compliance with the statutory requirements, held void on its face.—*Brown v. Hartford* (Mo. Sup.) 140.

Except in ejectment for land in possession of one under a tax deed, Act March 30, 1872, § 219 (2 Wag. St. p. 1206), relative to holding of land till the purchaser is remunerated for taxes, held not to apply.—*Smith v. H. D. Williams Cooperage Co.* (Mo. App.) 315.

A tax deed void on its face will not set in motion limitations of three years (Act March 30, 1872, § 221; 2 Wag. St. p. 1207) for recovering land of a tax purchaser.—*Smith v. H. D. Williams Cooperage Co.* (Mo. App.) 315.

A purchaser of a void tax deed *held* not entitled to recover of the successful party what he paid for it and subsequent taxes paid by him, either under Acts 1897, p. 74, or any other law.—*Rowe v. Current River Land & Cattle Co. (Mo. App.) 362.*

Under Acts 1893, p. 107 (Rev. St. 1889, § 9297), a purchaser of land for state and county taxes *held* to take subject to the lien of subsequent taxes.—*City of Excelsior Springs, to Use of McCormick, v. Henry (Mo. App.) 944.*

TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

Failure of telegraph company to deliver telegram *held* not to entitle senders to damages for mental anguish.—*Western Union Telegraph Co. v. Arnold (Tex. Sup.) 1043.*

A pleading of contributory negligence because the telegram was not sent in care of the person for whom the addressee worked, will not support a finding of contributory negligence because the sender failed to inform the operator that the addressee lived near a certain building.—*Western Union Tel. Co. v. James (Tex. Civ. App.) 79.*

Evidence as to the addressee of a telegram being well known *held* admissible on the issue of negligence in failing to deliver it.—*Western Union Tel. Co. v. James (Tex. Civ. App.) 79.*

A verdict of \$1,995.25, for negligent failure to deliver a telegram informing a mother of the sickness of her son till after his death and burial, is not excessive.—*Western Union Tel. Co. v. James (Tex. Civ. App.) 79.*

TENANCY IN COMMON.

Divorced parties as tenants in common, see "Divorce," § 3.

Homestead in interest of co-tenant, see "Homestead," § 1.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

A tenant in common *held* to have ratified a sale of the land by his co-tenant, by bringing suit against such co-tenant for part of the purchase money paid the latter.—*Nalle v. Parks (Mo. Sup.) 596.*

A tenant in common *held* by lapse of time to have abandoned benefits of a transaction whereby his co-tenant acquired an outstanding title to the land.—*Nalle v. Parks (Mo. Sup.) 596.*

Though the holder of an undivided half interest in the equity to certain land acquires in his own name the outstanding legal title, such title does not thereby vest in his co-owner of the equity.—*Nalle v. Thompson (Mo. Sup.) 599.*

The holder of a part of the equitable title to certain land *held* not able to maintain a suit for a decree for this share against the bona fide grantee of one having the legal title.—*Nalle v. Thompson (Mo. Sup.) 599.*

Plaintiff in ejectment *held* to have ratified a sale of the premises to defendant.—*Nalle v. Thompson (Mo. Sup.) 599.*

TERMS.

Of leases, see "Landlord and Tenant," § 3.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 1.

THEFT.

See "Larceny."

TICKETS.

For carriage of passengers, see "Carriers," § 8.

TIMBER.

Requirements of statute of frauds as to sales of, see "Frauds, Statute of," § 2.

TIME.

For intervention, see "Parties," § 1.

TITLE.

Abstracts of title, see "Abstracts of Title."

Color of title, see "Adverse Possession."

Estoppel to assert title, see "Estoppel," § 1.

Tax titles, see "Taxation," § 5.

To support ejectment, see "Ejectment," § 1.

TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TORTS.

Causing death, see "Death," § 2.

Measure of damages, see "Damages," § 5.

By particular classes of parties.

See "Municipal Corporations," § 12.

Agents, see "Principal and Agent," § 2.

Employés, see "Master and Servant," § 8.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 1.

Particular torts.

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass"; "Trove and Conversion."

For persons to knowingly induce one to break his contract with another gives the latter a cause of action against them for any damages from the breach.—*Raymond v. Yarrington (Tex. Sup.) 800.*

TOWNS.

See "Counties"; "Municipal Corporations."

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 13.

On change of venue, see "Criminal Law," § 2.

TRESPASS.

Ejection of trespasser, see "Carriers," § 11.

Injuries to trespassers, see "Railroads," § 6.

Right to waive trespass and sue on implied promise to pay rent, see "Action," § 1.

To the person, see "Assault and Battery," § 1; "False Imprisonment."

§ 1. Actions.

Measure of damages for innocent purchase of timber cut by trespassers *held* the value of the timber as standing, and for that purchased after notice its value as prepared for market.—*Holt & Johnson v. Hayes (Tenn.) 111.*

TRESPASS TO TRY TITLE.

See "Ejectment."

Error in instructions in trespass to try title as on weight of evidence, see "Trial," § 4.

§ 1. Proceedings.

Disputes as to boundaries may be determined in trespass to try title.—*Rountree v. Haynes* (Tex. Civ. App.) 435.

A suit, originally one to remove cloud on title, *held*, in view of a cross-plea of certain defendants, one in trespass to try title, as between them and plaintiffs, requiring them to show better right than plaintiffs.—*Lynch v. Pittman* (Tex. Civ. App.) 862.

Evidence *held* sufficient to support a finding as to identity of the individual in whose right a headright certificate was issued.—*Lynch v. Pittman* (Tex. Civ. App.) 862.

In support of a judgment, *held*, that it would be presumed on appeal that a certain league of land was located and surveyed by virtue of a certain certificate.—*Lynch v. Pittman* (Tex. Civ. App.) 862.

TRIAL.

See "New Trial"; "Witnesses."

Amount of damages as question for jury, see "Damages," § 7.

Harmless error, see "Appeal and Error," §§ 17, 19.

Instructions as to gifts, see "Gifts," § 1.

Trial de novo on appeal, see "Appeal and Error," § 13; "Justices of the Peace," § 2.

Trial of right to property levied on, see "Execution," § 4.

Proceedings incident to trials.

See "Continuance."

Conformity of judgment to verdict or findings, see "Judgment," § 3.

Entry of judgment after trial of issues, see "Judgment," § 3.

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "False Imprisonment," § 1; "Fraud," § 2; "Libel and Slander," § 3; "Negligence," § 3; "Trove and Conversion," § 1.

Against constables, see "Sheriffs and Constables," § 1.

By trustee in bankruptcy, see "Bankruptcy," § 2.

Disputed claims against estate of decedent, see "Executors and Administrators," § 3.

For breach of contract, see "Contracts," § 5.

For causing death, see "Death," § 2.

For compensation of brokers, see "Brokers," § 2.

For fires caused by operation of railroad, see "Railroads," § 10.

For injuries to animals on or near railroad tracks, see "Railroads," § 9.

For injuries to live stock, see "Carriers," § 7.

For loss of passengers' baggage, see "Carriers," § 12.

For negligence of abstractor of title, see "Abstracts of Title."

For personal injuries, see "Carriers," § 9; "Electricity"; "Master and Servant," § 7; "Municipal Corporations," § 12; "Railroads," §§ 7, 8; "Street Railroads," § 1.

For rent, see "Landlord and Tenant," § 5.

For sale of land for local assessments, see "Municipal Corporations," § 9.

For torts of employes, see "Master and Servant," § 8.

On insurance policy, see "Insurance," § 14.

On subscriptions to corporate stock, see "Corporations," § 1.

Probate proceedings, see "Wills," § 3.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

To recover mortgaged goods, see "Chattel Mortgages," § 2.

Trial of criminal prosecutions.

See "Assault and Battery," § 2; "Criminal Law," §§ 10, 11; "Homicide," § 5; "Rape," § 2; "Receiving Stolen Goods"; "Sodomy."

§ 1. Reception of evidence.

Refusal to allow testimony in chief to be introduced on surrebuttal *held* in sound discretion of the trial court.—*Beyer v. Hermann* (Mo. Sup.) 164.

Where witnesses have been placed under the rule, and the same is violated, the court should withdraw the case from the jury.—*St. Louis & S. F. R. Co. v. Akers* (Tex. Civ. App.) 848.

Failure to enforce rule excluding witnesses, as to certain witness, *held* not an abuse of discretion.—*M. A. Cooper & Co. v. Sawyer* (Tex. Civ. App.) 992.

§ 2. Arguments and conduct of counsel.

In action against commercial agency for circulating report that plaintiffs were not in sound financial condition, the reading to jury by counsel for plaintiffs of an article in a magazine *held* not prejudicial error.—*Minter v. Bradstreet Co.* (Mo. Sup.) 663.

§ 3. Taking case or question from jury.

If there is any evidence conducing to show a right of recovery in the plaintiff, it is improper for the court to give a peremptory instruction to the defendant.—*Chesapeake & N. Ry. Co. v. Ogles* (Ky.) 751.

The court, in passing on a demurrer to evidence, *held* required to draw every inference in favor of the party offering it which a jury might draw.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Where plaintiff's evidence, standing alone, established a prima facie case, while, when considered with the whole evidence, reasonable persons might differ on it, the case should be submitted to the jury.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Where there is any evidence to establish a complaint from which a jury may reasonably infer the essential fact, the court should not take the case from the jury.—*Morrow v. Pullman Palace Car Co.* (Mo. App.) 281.

Where evidence does not support plaintiff's contention in some material and essential feature of his case, court may properly instruct for defendant.—*Cogan v. Cass Ave. & F. G. Ry. Co.* (Mo. App.) 738.

Rule for determining whether or not plaintiff has a case for triors defined.—*Cogan v. Cass Ave. & F. G. Ry. Co.* (Mo. App.) 738.

§ 4. Instructions to jury—Province of court and jury in general.

Defendant is not entitled to an instruction that the jury must be guided solely by the evidence, and should not be governed by sympathy for plaintiff; nothing having transpired to indicate that the jurors were unmindful of their sworn duty.—*Johnson v. St. Louis & S. Ry. Co.* (Mo. Sup.) 173.

Facts put in issue by the pleadings cannot be assumed in the instructions, even when evidenced by uncontradicted testimony.—*Dodd v. Guiseff* (Mo. App.) 304.

In trespass, an instruction that the defendant owned the land on one side of a certain hedge and plaintiff that on the other *held* proper.—*Brown v. Johnson* (Tex. Civ. App.) 49.

Requested instruction in an action against a railroad company for an assault by its employes *held* properly refused as on the weight of evidence.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

Charge *held* not objectionable, as assuming that plaintiff's eyes were injured by sparks that escaped from defendant's engine.—*St. Lou-*

is *S. W. Ry. Co. v. Parks* (Tex. Civ. App.) 439.

In trespass to try title, instructions *held* erroneous as being on weight of evidence.—*White v. Epperson* (Tex. Civ. App.) 851.

In an action against a master for personal injuries, charge *held* not erroneous as on the weight of the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. McDowell* (Tex. Civ. App.) 974.

§ 5. — Necessity and subject-matter.

In an action against a street railway company for injuries to a teamster, instruction discrediting plaintiff's testimony *held* properly refused.—*Frank v. St. Louis Transit Co.* (Mo. App.) 239.

Instruction as to conflicting evidence *held* not erroneous.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

§ 6. — Form, requisites, and sufficiency.

An instruction referring the jury to the petition to ascertain the acts of negligence charged was not error, in the absence of a request for a more specific charge.—*St. Louis Southwestern Ry. Co. v. Harrison* (Tex. Civ. App.) 38.

The defining by an instruction of the term "preponderance of evidence" as meaning the greater weight of evidence is proper.—*Western Union Tel. Co. v. James* (Tex. Civ. App.) 79.

In a personal injury action, it was error to unnecessarily and repeatedly call the attention of the jury to the defense of contributory negligence.—*Pelfrey v. Texas Cent. Ry. Co.* (Tex. Civ. App.) 411.

The court's attention having been called to an omission in its main charge, a correct charge should have been given.—*City of Sherman v. Greening* (Tex. Civ. App.) 424.

For the court to give a new instruction on contributory negligence, on the jury asking for an additional instruction on the subject, is not giving undue prominence to the subject.—*Lumsden v. Chicago, R. I. & T. Ry. Co.* (Tex. Civ. App.) 428.

§ 7. — Applicability to pleadings and evidence.

Requested instructions on theory of death by suicide *held* properly refused, in suit on mutual benefit certificate.—*Winter v. Supreme Lodge K. P.* (Mo. App.) 877.

Where it was not contended that notice of the cancellation of a policy was required to be given to a trustee, a requested instruction on such subject was properly refused.—*Edwards v. Sun Ins. Co.* (Mo. App.) 886.

Error cannot be predicated on an instruction that if there is a conflict in the testimony the jury must reconcile it, if they can, and, if not, may believe or disbelieve any witness, where the evidence has disclosed an irreconcilable conflict.—*Houston & T. C. R. Co. v. Bell* (Tex. Civ. App.) 56.

§ 8. — Requests or prayers.

A requested instruction covered by other instructions may be properly refused.—*Curtis v. McNair* (Mo. Sup.) 167; *Buckman v. Missouri, K. & T. Ry. Co.* (Mo. App.) 270; *Hill Bros. v. Bank of Seneca* (Mo. App.) 307; *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Tex. Civ. App.) 540.

Instructions in action against carrier of freight *held* covered in the main charge.—*Texas & P. Ry. Co. v. Smissen* (Tex. Civ. App.) 42.

The refusal of a request to instruct to disregard certain evidence *held* not error, where by the main charge the jury were not authorized to consider the matter to which the evidence related.—*Texas & P. Ry. Co. v. Smissen* (Tex. Civ. App.) 42.

Failure of the court to define the terms "reasonable promptness" and "ordinary care," if error, is not affirmative error, and cannot be complained of; a special instruction defining them not having been requested.—*Western Union Tel. Co. v. James* (Tex. Civ. App.) 79.

Party to an action, desiring a more complete presentation of the law on any controverted issue, should request a special charge.—*Williamson v. Gore* (Tex. Civ. App.) 563.

Where a charge embraced a correct rule of law in general terms, if more particular instructions were desired by a party, he should have requested them.—*St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Tex. Civ. App.) 976.

§ 9. — Objections and exceptions.

In an action against a railroad company for killing cattle, general objection *held* insufficient to raise question of propriety of instruction relative to keeping lookout.—*St. Louis, I. M. & S. Ry. Co. v. Norton* (Ark.) 1095.

§ 10. — Construction and operation.

Any generality in an instruction as to negligence is cured by the other instructions, which limit plaintiff's right to recover to the specific negligence charged in the petition.—*Johnson v. St. Louis & S. Ry. Co.* (Mo. Sup.) 173.

Any vagueness in instruction as to negligence authorizing recovery *held* cured by other instructions.—*Buckman v. Missouri, K. & T. Ry. Co.* (Mo. App.) 270.

Error in an instruction, if any, *held* cured.—*Heagy v. Irondale Lead Co.* (Mo. App.) 1006.

§ 11. Verdict.

When the jury returned a verdict without an assessment of damages, the court properly directed the jury to assess the damages without further instructions.—*Hill Bros. v. Bank of Seneca* (Mo. App.) 307.

Verdict specifying rate of interest, but leaving computation for clerk, *held* erroneous.—*Calkins v. Farmers' & Mechanics' Bank* (Mo. App.) 1098.

In an action by joint plaintiffs, verdict in favor of one plaintiff *held* sufficient to support a judgment in favor of both.—*Chicago, R. I. & T. Ry. Co. v. Henderson* (Tex. Civ. App.) 36.

In trespass to try title, *held*, that the charge of the court could be consulted to render a general verdict for defendant certain.—*Rountree v. Haynes* (Tex. Civ. App.) 435.

Where the trial judge considers that certain special findings are not sustained by the evidence, it is his duty to set them aside.—*Casey-Swasey Co. v. Manchester Fire Assur. Co.* (Tex. Civ. App.) 864.

§ 12. Waiver and correction of irregularities and errors.

A demurrer to the evidence at the close of plaintiff's testimony is waived by the subsequent introduction of evidence on defendant's behalf.—*McLain v. St. Louis & S. Ry. Co.* (Mo. App.) 900.

TRIAL OF RIGHT OF PROPERTY.

See "Execution," § 4.

TROVER AND CONVERSION.

§ 1. Actions.

Whether coal converted by a railroad company had been delivered to it in such a manner as to constitute it the property of the consignee *held* a question for the jury.—*Blackmer v. Cleveland, C., C. & St. L. Ry. Co.* (Mo. App.) 913.

Where coal consigned to plaintiffs was willfully converted by a railroad, plaintiffs *held* enti-

tled to recover punitive damages.—*Blackmer v. Cleveland, C., C. & St. L. Ry. Co.* (Mo. App.) 913.

Where there was no evidence that a consignee was liable for freight on coal shipped which was converted by the carrier, the latter was not entitled to deduct freight from the consignee's damages.—*Blackmer v. Cleveland, C., C. & St. L. Ry. Co.* (Mo. App.) 913.

Where a railroad converted coal consigned to another, the measure of damages was the value of the coal at destination.—*Blackmer v. Cleveland, C., C. & St. L. Ry. Co.* (Mo. App.) 913.

The measure of damages for the conversion of a house is the value of the material therein at the time of the appropriation.—*Lynch v. White* (Tex. Civ. App.) 834.

Damages for conversion of cattle *held* to be their value at the time of conversion, with interest.—*Daugherty v. Lady* (Tex. Civ. App.) 837.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Parol evidence is not admissible to establish an express trust, required by Rev. St. 1899, § 3416, to be in writing.—*Rector, etc., of Mt. Calvary Church v. Albers* (Mo. Sup.) 508.

No agreements made, and no payments made before or after a title is taken, can create a resulting trust, unless a trust results from the transaction itself, when title passes.—*Williamson v. Gore* (Tex. Civ. App.) 563.

Where land is sold under execution, and conveyed by the purchaser to the daughter of the execution debtor, there is no such relation between the parties as to create a trust in favor of the execution debtor.—*Williamson v. Gore* (Tex. Civ. App.) 563.

Unexpressed intention of grantee to take land as trustee for another cannot control terms of the deed.—*Williamson v. Gore* (Tex. Civ. App.) 563.

§ 2. Appointment, qualification, and tenure of trustee.

The intermingling of trust funds with the individual funds of a trustee, and mutual hostility between the trustee and fathers of minor cestuis que trustent, *held* to authorize the trustee's removal.—*Gaston v. Hayden* (Mo. App.) 938.

§ 3. Establishment and enforcement of trust.

Money of a deceased wife, contributed to a loan secured by a deed of trust, *held* sufficiently identified and followed into the land, which was subsequently purchased by the husband.—*Johnston v. Johnston* (Mo. Sup.) 202.

An innocent purchaser from one holding land on a secret trust is protected against it.—*Magnolia Park Co. v. Tinsley* (Tex. Sup.) 5.

TURNPIKES AND TOLL ROADS.

§ 1. Regulation and use for travel.

The failure of a gravel road corporation to maintain a road of the width of 20 feet, as required by Rev. St. 1889, § 2696, constitutes negligence.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

A private corporation, operating a road for toll, must keep in reasonably safe repair whatever parts it keeps open for travel.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

It is not negligence in a turnpike corporation to allow cows to occasionally stray on the road from intersecting crossroads.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

Turnpike company *held* liable for injury resulting from a defective condition of its road, although there be other contributing causes.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

Under Rev. St. 1889, § 2692, a gravel road company is obliged to maintain a safe road for travel of the width of 20 feet.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

It is not negligence for one knowing the defective condition of a road to travel over it to her house.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

Evidence in an action against a turnpike company for injuries *held* to show that injury was proximately caused by defective condition of the road.—*Ashby v. Elsberry & N. H. Gravel Road Co.* (Mo. App.) 229.

ULTRA VIRES.

Necessity of pleading, see "Pleading," § 6.

UNITED STATES.

Courts, see "Removal of Causes."

Public lands, see "Public Lands," § 1.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

Loans by building and loan associations, see "Building and Loan Associations."

§ 1. Usurious contracts and transactions.

Conditions imposed on insured, borrowing amount of premium, *held* unlawful forfeiture for use or forbearance of money.—*Mutual Ben. Life Ins. Co. v. Davis* (Ky.) 1020.

Under the Kansas statute providing that any rate of interest contracted for, not exceeding 10 per cent., may be charged, all interest above such rate is usurious.—*Cowgill v. Jones* (Mo. App.) 995.

A custom of a live stock exchange to charge a buying commission, in addition to interest, on loaning money for the purchase of cattle, *held* not to justify such charge, where it rendered the loan usurious.—*Cowgill v. Jones* (Mo. App.) 995.

Where usury charged in a note had been eliminated by a rebate on agreement of the parties, plaintiff was entitled to recover the balance due.—*Cowgill v. Jones* (Mo. App.) 995.

VACATION.

Of entry of satisfaction of mortgage, see "Mortgages," § 10.

Of nonsuit, see "Dismissal and Nonsuit," § 1.

VARIANCE.

Between pleading and proof in civil action, see "Pleading," § 6.

VEHICLES.

Collision with street car, see "Street Railroads," § 1.

VENDOR AND PURCHASER.

See "Exchange of Property"; "Sales."
 Purchaser at foreclosure sale, see "Mortgages," §§ 5, 6.
 Purchasers at sale on execution, see "Execution," § 5.
 Purchasers at tax sale, see "Taxation," § 5.
 Requirements of statute of frauds, see "Frauds, Statute of," § 2.
 Sale of county property, see "Counties," § 1.

§ 1. Performance of contract.

A purchaser of mortgaged realty *held* not entitled to credit on notes assumed by him for sums paid for taxes, improvements, etc.; on land covered by a trust deed securing a debt also secured by mortgage on the land purchased.—*Heard v. Thrasher* (Tex. Sup.) 393.

§ 2. Rights and liabilities of parties.

Where a deed recited that the grantor had previously executed a deed to the land in controversy, which he was informed was lost, but did not recite to whom such deed was executed, the grantee in such subsequent deed, and his privies, were charged with notice that the grantor had no title at the time of executing it.—*Waggoner v. Dodson* (Tex. Sup.) 517.

§ 3. Remedies of vendor.

A building association's lien, under a mortgage on land the record title to which appeared to be in plaintiff's intestate, *held* inferior to intestate's vendor's lien under an unrecorded deed to the mortgagor.—*Hall's Adm'r v. Hall's Adm'r* (Ky.) 1120.

In an action to enforce a vendor's lien against a subsequent purchaser of the land, defendant *held* entitled to plead partial failure of consideration by reason of a breach of warranty of title.—*Williams v. Baker* (Mo. App.) 339.

An assignee of a note given for part of the purchase price of land *held* entitled to enforce the vendor's lien to the extent of the note by suit in his own name.—*Williams v. Baker* (Mo. App.) 339.

In an action to foreclose vendor's lien, fatal variance *held* to exist between description of land in petition and citation and that in agreed statement of facts.—*Wagley v. Western Union Land Co.* (Tex. Civ. App.) 1065.

VENUE.

Change of venue from justice's court, see "Justices of the Peace," § 1.
 Motion for change of venue as affected by defects in affidavit, see "Affidavits."
 Of actions for fraud, see "Fraud," § 2.
 Of criminal prosecutions, see "Criminal Law," § 2.

§ 1. Change of venue or place of trial.

Where cause has been transferred from county court in probate to district court, parties *held* entitled to change of venue.—*Stone v. Byars* (Tex. Civ. App.) 1086.

The district court of one county cannot resume jurisdiction of a cause, by setting aside an order granting a change of venue, after such order has been executed and the jurisdiction of the district court of another county has attached.—*Stone v. Byars* (Tex. Civ. App.) 1086.

VERDICT.

Directing verdict in civil actions, see "Trial," § 3.
 In civil actions, see "Trial," § 11.
 Necessity of conformity of judgment, see "Judgment," § 3.
 Review on appeal or writ of error, see "Appeal and Error," § 17; "Criminal Law," § 19.

VERIFICATION.

Of pleading, see "Pleading," § 4.

VESTED REMAINDERS.

Creation, see "Wills," § 4.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 2.

VILLAGES.

See "Municipal Corporations."

VINDICTIVE DAMAGES.

See "Damages," § 4.

VOTERS.

See "Elections."

WAGERS.

See "Gaming," § 1.

WAIVER.

See "Estoppel."

Of objections to particular acts or proceedings.

See "Pleading," § 7; "Trial," § 12.
 Competency of witness, see "Witnesses," § 2.
 Error in general, see "Appeal and Error," § 12.

Of rights or remedies.

See "Insurance," § 10.
 Breach of warranty, see "Sales," § 3.
 Exemption of homestead, see "Homestead," § 2.
 Forfeiture of insurance policy, see "Insurance," § 17.
 Liens for rent, see "Landlord and Tenant," § 5.
 Notice to surety of extension of time for payment, see "Principal and Surety," § 2.
 Proof of loss insured against, see "Insurance," § 12.
 Right to appeal, see "Appeal and Error," § 3.
 Right to object to assignment of lease, see "Landlord and Tenant," § 3.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

Carrier as warehouseman, see "Carriers," § 6.

A warehouseman, who had insured its property and that of a bailor for enough to cover the goods destroyed, *held* liable to him, having settled for less.—*Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Tex. Civ. App.) 545.

WARRANTY.

By insured, see "Insurance," § 8.
 On sale of goods, see "Sales," §§ 3, 5.

WATERS AND WATER COURSES.

§ 1. Natural water courses.

Land added by accretion *held* to be the property of the riparian owner, and not of a subsequent patentee.—*Widdecombe v. Chiles* (Mo. Sup.) 444.

The rights of an upper riparian proprietor to use the stream for irrigation purposes are superior to those of a lower proprietor.—*Cornick v. Arthur* (Tex. Civ. App.) 410.

§ 2. Artificial ponds, reservoirs, and channels, dams, and flowage.

Equity will enjoin an owner of land bordering on a stream from filling in the low places on his land, and constructing a levee along the stream on his side, so as to cause the stream to unnaturally overflow the lands of another bordering on the opposite side of the stream.—*Sullivan v. Dooley* (Tex. Civ. App.) 82.

§ 3. Public water supply.

Contract between a city and a water company for the furnishing of water *held* not forfeited by a partial breach of its conditions by the water company.—*Harrodsburg Water Co. v. City of Harrodsburg* (Ky.) 1032; *City of Harrodsburg v. Harrodsburg Water Co., Id.*

WAYS.

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 11, 12.

WELLS.

Well poisoning, see "Homicide," § 4.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Equitable conversion, see "Conversion."

§ 1. Testamentary capacity.

Evidence of imperfect memory, forgetfulness, etc., *held* insufficient to establish want of testamentary capacity.—*Southworth v. Southworth* (Mo. Sup.) 129.

Evidence that testator was of the requisite age, and sane at the time of making his will, *held* to establish a prima facie case, and to shift the burden of proving incompetency to the contestants.—*Southworth v. Southworth* (Mo. Sup.) 129.

Where testamentary capacity was shown by one attesting witness and other evidence, the fact that the other two attesting witnesses testified that testator was not of sound mind at the time did not justify a refusal of probate.—*Southworth v. Southworth* (Mo. Sup.) 129.

In an action to set aside a will, evidence *held* sufficient to show testamentary capacity at the time testator executed the will.—*Southworth v. Southworth* (Mo. Sup.) 129.

§ 2. Requisites and validity.

The insertion of the name of an executor in a will after execution *held* not to invalidate the will.—*Southworth v. Southworth* (Mo. Sup.) 129.

The cancellation of a clause in a will providing that it should not be probated *held* not to invalidate the will.—*Southworth v. Southworth* (Mo. Sup.) 129.

Testatrix's knowledge of the contents of the will from which the one executed was copied *held* enough.—*Beyer v. Hermann* (Mo. Sup.) 164.

§ 3. Probate, establishment, and annulment.

Under Ky. St. §§ 4849, 4850, 4859, the circuit court, on appeal from an order of the county court refusing probate of a will, cannot determine whether certain devises are void for uncertainty.—*Leak's Heirs v. Leak's Ex'r* (Ky.) 789.

Where a case was not permitted to go to the jury, and all the evidence was preserved in the appeal record, rulings of the court in exclusion

of evidence would not be reviewed.—*Southworth v. Southworth* (Mo. Sup.) 129.

Testimony *held* not tending to prove the allegations of petition contesting the will that testatrix was insane, or that the will was not executed according to law, or was procured by undue influence.—*Beyer v. Hermann* (Mo. Sup.) 164.

Instruction to jury after retirement, without allowing opportunity for reargument, *held* proper.—*Beyer v. Hermann* (Mo. Sup.) 164.

The finding of the jury on conflicting evidence that testatrix was of sound mind will not be disturbed on appeal.—*Beyer v. Hermann* (Mo. Sup.) 164.

§ 4. Construction.

Will construed, and *held* that, on the death of one of the two legatees without children, testator's brothers and sisters took her share.—*Truesdell v. Darnall* (Ky.) 755.

A devisee *held* to take a life estate, his children a vested remainder, and his grandchildren a contingent remainder.—*Rudd v. Travelers' Ins. Co.* (Ky.) 759.

Joint devise, with survivorship on death without issue, construed to intend death in testator's lifetime.—*Jackman v. Jackman* (Ky.) 776.

Devise of land construed, and tract of land devised determined.—*Hatfield v. Estep* (Ky.) 789.

Will devising land to one and "her heirs," subject to condition that she support testator's son, *held* to vest fee in devisee.—*Roberts v. Crume* (Mo. Sup.) 662.

An estate in fee created by a will cannot be cut down by a subsequent clause, unless it is as clear as the language of the clause which devises the real estate.—*Roberts v. Crume* (Mo. Sup.) 662.

The word "heirs" in a will *held* a word of limitation, unless clearly shown to have been used to designate new class of beneficiaries.—*Roberts v. Crume* (Mo. Sup.) 662.

Will construed, and *held*, that testator's wife took a fee simple, and that attempted disposition over to blood relations was void.—*Roth v. Rauschenbusch* (Mo. Sup.) 664.

Will construed, and *held*, that only those children or descendants of children living at the death of the life tenant would take in remainder.—*Nichols v. Guthrie* (Tenn.) 107.

Under a will, remainder *held* to vest in a class, and not in the individual members, until after death of life tenant.—*Nichols v. Guthrie* (Tenn.) 107.

§ 5. Rights and liabilities of devisees and legatees.

Under Ky. St. §§ 1681, 2355, title of devisee may be subjected by his creditors, though alienation by him was prohibited until he arrived at a certain age.—*Smith v. Smith* (Ky.) 1028; *S. Kahn's Sons v. Same, Id.*

Will construed, and *held*, that defendant was entitled to occupy a house devised to his children at a specified rental only so long as he occupied the same during testator's lifetime.—*Hedges v. Hedges* (Ky.) 1112.

A note given by defendant to testator *held* not an advancement to defendant's wife.—*Hedges v. Hedges* (Ky.) 1112.

Will construed, and *held*, that specific legacies bequeathed bore interest from the date of testatrix's death.—*Gaston v. Hayden* (Mo. App.) 938.

WITHDRAWAL

Of stockholder from building and loan association, see "Building and Loan Associations."

WITNESSES.

See "Depositions"; "Evidence."

Absence of as ground for continuance of criminal prosecution, see "Criminal Law," § 10.

Experts, see "Evidence," §§ 10, 11.

Opinions, see "Evidence," §§ 10, 11.

Perjury, see "Perjury."
Separation and exclusion at trial, see "Trial," § 1.

Testimony of accomplices, see "Criminal Law," § 8.

§ 1. Attendance, production of documents, and compensation.

In criminal prosecution, *held* not error to refuse to issue a subpoena for a certain witness.—*Godwin v. State* (Tex. Cr. App.) 804.

§ 2. Competency.

In action by wife, husband *held* competent to testify as to any matters she might have testified to.—*Swinebroad v. Bright* (Ky.) 1031.

Executor and his surety *held* not incompetent, under Civ. Code Prac. § 606, to testify as to declarations of testator as to purpose of gift, claimed to have adeemed legacy.—*Swinebroad v. Bright* (Ky.) 1031.

Devises *held* not incompetent, under Civ. Code Prac. § 606, to testify as to declarations of testator as to purpose of gift, claimed to have adeemed legacy.—*Swinebroad v. Bright* (Ky.) 1031.

Incompetency of son to testify as to declarations of his deceased father regarding the latter's intention concerning certain land *held* not affected by son's conveyance of his alleged interest therein to plaintiffs.—*Huff v. Miniard* (Ky.) 1036.

In an action by heirs of a deceased wife to enforce a resulting trust against her husband from an investment of her separate estate, the husband *held* incompetent to testify, under Rev. St. 1899, § 4652.—*Johnston v. Johnston* (Mo. Sup.) 202.

Cross-examination of an incompetent witness, objected to, *held* not to constitute a waiver of the objection.—*Johnston v. Johnston* (Mo. Sup.) 202.

Under Rev. St. 1899, §§ 4652, 4656, a wife *held* not a competent witness in an action against her husband, to which she was not a party, where her interest in the subject of the action was merely collateral.—*Layson v. Cooper* (Mo. Sup.) 472.

Under Rev. St. 1899, § 4652, a claimant against decedent's estate *held* incompetent to testify with reference to conversations testified to by other witnesses concerning the claim which occurred prior to the probate of decedent's will.—*Kersey v. O'Day* (Mo. Sup.) 481.

One who makes a contract as agent is not a party in interest, so as to be disqualified as a witness, after the death of the other party.—*Clark v. Thias* (Mo. Sup.) 616.

Refusal to require attorney, testifying for his client, to state his financial interest in the case, *held* error, under Rev. St. 1899, § 4652.—*Koenig v. Union Depot Ry. Co.* (Mo. Sup.) 637.

A party to a suit against an administrator is not competent to testify to admissions by the deceased.—*Reed v. Morgan* (Mo. App.) 381.

Witness *held* incompetent to testify to contract with decedent showing that what was apparently decedent's property was in fact his own.—*Cleveland v. Coulson* (Mo. App.) 1105.

§ 3. Examination.

In a prosecution of a distillery for creating a nuisance, it was not error to permit witness to modify his statement as to the own-

ership of the distillery.—*Kentucky Distilleries & Warehouse Co. v. Commonwealth* (Ky.) 746.

A witness who wrote down a dying declaration may refresh his memory by a reference to the memorandum made.—*Fiqua v. Commonwealth* (Ky.) 782.

The court *held* not to have erred in refusing to permit defendant, on trial for homicide, to go into particulars about decedent's character.—*Bearden v. State* (Tex. Cr. App.) 17.

In an action for injuries, it is proper not to allow defendant to show, on cross-examination of plaintiff, that he had refused to submit to an examination by physicians to be appointed by the court.—*Austin & N. W. R. Co. v. Cluck* (Tex. Civ. App.) 569.

In an action for servant's injuries, evidence that plaintiff refused to submit to examination by defendant's physician *held* properly excluded.—*Gulf, C. & S. F. Ry. Co. v. Brooks* (Tex. Civ. App.) 571.

In action against railroad for damages from fire communicated by spark, *held*, that a question to a witness was not improper as leading.—*Texas Southern Ry. Co. v. Hart* (Tex. Civ. App.) 833.

§ 4. Credibility, impeachment, contradiction, and corroboration.

A witness cannot be required to say whether he can point out any testimony of his on a former trial as to a certain matter.—*Buckman v. Missouri, K. & T. Ry. Co.* (Mo. App.) 270.

The credibility of a defendant who takes the stand in his own behalf may be attacked by showing that he has been convicted of cattle stealing.—*Bearden v. State* (Tex. Cr. App.) 17.

Indictment against state's witness *held* admissible for purpose of attacking his credibility.—*Lee v. State* (Tex. Cr. App.) 407.

Under Code Cr. Proc. 1895, § 795, where prosecutrix at the trial admitted that she testified differently before the grand jury, the state *held* entitled to introduce her testimony before that body.—*Barnard v. State* (Tex. Cr. App.) 957.

In an action against a railroad for injuries, statements made by plaintiff to a witness several hours after the accident *held* inadmissible to support plaintiff's testimony.—*McCowen v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 46.

In trespass to try title, a letter *held* admissible as tending to contradict a statement made by plaintiff.—*White v. Epperson* (Tex. Civ. App.) 851.

That plaintiffs, in trespass to try title, had been contradicted on material issues, did not authorize introduction of evidence in support of their reputation for truth and veracity.—*White v. Epperson* (Tex. Civ. App.) 851.

It was error to admit testimony contradicting immaterial evidence of a witness, elicited on cross-examination.—*Smye v. Groesbeck* (Tex. Civ. App.) 972.

Defendant by cross-interrogatory may show that plaintiff's witness had made a written statement contrary to what he had testified for plaintiff.—*St. Louis Southwestern Ry. Co. of Texas v. Patterson* (Tex. Civ. App.) 987.

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

WRITS.

See "Process."

Particular writs.

See "Certiorari"; "Execution"; "Garnishment," § 3; "Habeas Corpus"; "Injunction"; "Mandamus"; "Supersedeas."

Certiorari to justice of the peace, see "Justices of the Peace," § 2.
Writ of error, see "Appeal and Error."

WRONGFUL EXECUTION.

See "Execution," § 7.

WRONGFUL FORECLOSURE.

See "Mortgages," § 5.

WRONGFUL SEIZURE.

See "Attachment," § 1.

WRONGS.

See "Torts."

YEAR.

Estates for years, see "Landlord and Tenant."

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